No. A-22-865

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

ANGELINA M. CLARK,

Appellant.

APPEAL FROM THE DISTRICT COURT OF

LANCASTER COUNTY, NEBRASKA

The Honorable Darla Ideus, District Judge

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Statement of the Case

A. Nature of the Case

This is Appellant Angelina Clark's direct appeal of her conviction for terroristic threats and third degree sexual assault following a jury trial.

B. Issues Before the District Court

As relevant to this appeal, the issue before the district court was whether the evidence was sufficient to accept the jury's guilty verdict. Neither Clark's ineffective assistance of counsel claims nor the constitutional issue regarding an all-male jury were presented to the district court.

C. How the Issues Were Decided in the District Court

The district court accepted the jury's verdict of guilty on both counts of the information and sentenced Clark to 1 year imprisonment for the terroristic threats conviction and 6 months for the third degree sexual assault conviction, to be served consecutively.

D. Scope of Review

In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Miller*, 312 Neb. 17, 978 N.W.2d 19 (2022). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. *State v.*

Warner, 312 Neb. 116, 977 N.W.2d 904 (2022). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance. *Id*.

Propositions of Law

I.

Generally, a party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. *State v. Huff*, 298 Neb. 522, 905 N.W.2d 59 (2017).

II.

A defendant is constitutionally guaranteed a jury that is fair and impartial, but a defendant is not guaranteed a jury comprising only particular jurors. *State v. Bedford*, 31 Neb. App. 339, 980 N.W.2d 451 (2022).

III.

Where two or more offenses are properly joined, a trial court does not err in limiting the defendant to a number of peremptory challenges statutorily available for the most serious of the offenses. *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992).

IV.

In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Miller*, 312 Neb. 17, 978 N.W.2d 19 (2022).

V.

The intent to terrorize another, for purposes of the crime of terroristic threats, is an intent to produce intense fear or anxiety in another and § 28-311.01 does not require that the recipient of the threat be actually terrorized, nor does it require an intent to execute the threats made. *State v. Bryant*, 311 Neb. 206, 971 N.W.2d 146 (2022).

VI.

The threat for purposes of § 28-311.01 may be written, oral, physical, or any combination thereof. *State v. Bryant*, 311 Neb. 206, 971 N.W.2d 146 (2022).

VII.

Whether the defendant threatens a crime of violence need not be determined solely based upon the literal meaning of the defendant's words alone. Instead, where particular conduct constitutes a threat depends on the context of the interaction between the people involved. *State v. Bryant*, 311 Neb. 206, 971 N.W.2d 146 (2022).

VIII.

When a defendant's trial counsel is different from his counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. *State v. Warner*, 312 Neb. 116, 977 N.W.2d 904 (2022).

IX.

An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court. *State v. John*, 310 Neb. 958, 969 N.W.2d 894 (2022).

X.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. John*, 310 Neb. 958, 969 N.W.2d 894 (2022); *State v. Warner*, 312 Neb. 116, 977 N.W.2d 904 (2022).

XI.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show that a probability sufficient to undermine confidence in the outcome. *State v. John*, 310 Neb. 958, 969 N.W.2d 894 (2022).

XII.

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. However, by definition, an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted. Thus, statements are not hearsay to the extent that they are offered for context and

coherence of other admissible statements, and not for the truth of the matter asserted. Similarly, statements are not hearsay if the proponent offers them to show their impact on the listener, and the listener's knowledge, belief, response, or statement of mind after hearing the statement is relevant to an issue in the case. *State v. Vaughn*, 314 Neb. 167, __ N.W.2d __ (2023).

Statement of Facts

On December 31, 2020, Clark was charged by information with terroristic threats, a class IIIA felony, and third degree sexual assault, a class I misdemeanor. (T40-41)

A jury trial was held on October 11 and 12, 2022. Shauna Parker and her son, A.L., 15 years old at the time of the offenses, testified that in the early morning hours of January 14, 2020, Clark showed up at their apartment unannounced and clearly intoxicated. (198:12-18; 200:10-14; 210:6-10; 277:4-20) Parker testified that she was familiar with Clark because she was the girlfriend of a friend of hers. (197:19-198:2) Parker testified that around 4 a.m. on January 14 she heard loud talking in the living room and came out of her bedroom to see Clark there. (199:1-6) Clark asked Parker "do you know anything," which Parker interpreted as Clark asking if she knew anything about having any drugs, Parker told her "no I don't." Parker asked why she was there, and Clark responded "Oh I just come over to visit [A.L.]" then hugged A.L. who had come out into the living room. (200:14-201:21) Parker testified that Clark followed A.L. into his bedroom, sat on his bed and gave him another hug, then A.L.'s bedroom door got shut, so Parker told Clark she needed to leave. (201:23-202:7) Clark was resistant and refused to comply with Parker's request that she leave until Parker offered to give her a ride somewhere and A.L. agreed to go with. (202:9-205:4; 278:4-279:8)

Parker gave Clark a ride in her dad's Ford Ranger. (205:10-21) Parker testified that Clark sat in the middle and A.L. sat on the passenger side. (209:1-11; 280:1-5; 281:25-282:3) Clark first had them drive to a place on 53rd and Walker. (206:2-3; 210:11-13) On the way there, Clark and Parker were arguing about how Clark behaved in the apartment and how she disrespected Parker and the older gentleman

who stayed there. (240:8-21; 281:3-7) While Clark and Parker were arguing, A.L. testified that Clark also had her hand on A.L.'s thigh, groping him, but Parker did not see it in the dark and past the backpack and bottle of liquor Clark was holding on her lap. (209:16-210:5; 281:1-3; 281:16-18) A.L. testified Clark touched his thigh 3-5 times, at one point he moved her hand off his thigh and she put it back, and then she touched his private area over his pants, slightly squeezing. (283:1-21; 284:8-285:2) Parker noticed A.L. looked uncomfortable and asked him what was wrong and A.L. said he would tell her once they dropped Clark off. (206:12-207:19; 281:14-16; 285:22-286:9) Nobody answered the door at 53rd and Walker, so Clark got back in the pickup and asked Parker to take her somewhere else. (210:19-211:15) In the meantime, Parker asked A.L. what was wrong several times and he finally told Parker that he did not like Clark touching him and that she made him uncomfortable. (207:21-22; 211:16-212:12) Parker testified that she had A.L. repeat that once Clark got back into the pickup and Clark told Parker that A.L. was a "whole ass man." (212:1-6; 212:24-213:14)

Parker then pulled over at the Kwik Shop on 48th Street and told Clark to get out of her truck. (212:13-23; 213:10-14) Clark refused, so Parker told A.L. to get out of the truck, which he did, leaving the door open. (214:19-215:2; E1) A.L. came around to the driver's side and he told Parker that he felt violated because "she touched my dick," then he went inside the Kwik Shop and Parker and Clark both got out of the pickup, Clark from the passenger side and Parker from the driver's side. (215:4-216:8; 286:10-20; 287:3-16; E1)

Parker testified that Clark looked like she was going to follow A.L. into the Kwik Shop and was calling his name, so Parker intervened and prevented her from doing so. (216:10-19) Parker testified that Clark said, "I don't fuck [ ] your son, you do," so Parker lost her temper and initiated a physical confrontation with Clark. (216:20-217:2; 229:4-7; 229:12-17; 230:1-3; E1) They got into an altercation then and Parker testified that she tried to get back into the pickup three or four times, but Clark kept slamming the door to prevent Parker from doing so. (217:5-11; E1) A.L. came back out and Parker told him to get in the truck so they could leave, but then Parker

testified that Clark tried to climb back into the pickup after A.L, so she told him to go back in the Kwik Shop. (217:12-20; E1) Parker testified that Clark was kicking at her and threatening her that she was going to have her daughter and her friends beat Parker up and throwing stuff out of the truck. (217:21-218:9; E1) Clark then grabbed a box cutter from the glove box and told Parker "bitch I'm going to kill you," so Parker slammed the door and held it shut so Clark could not get out and Clark kicked at the glass and scratched it with the box cutter. (218:9-220:5; E1; E11) Parker testified that while she was holding the door shut, A.L. and the Kwik Shop clerk came out and Parker asked them to call the cops and the clerk indicated he already had. (220:12-19) Parker testified that she was concerned for her safety based on the threats Clark was making with the box cutter in her hand. (220:6-11)

Shortly after Parker's exchange with the clerk about calling the police, Clark got out of the pickup on the passenger side, grabbed her backpack and liquor bottle off the ground, asked the clerk for a ride who declined, and then started walking off down the street. (221:2-13; E1) Clark was apprehended down the street from the Kwik Shop and she was transported to the hospital to get a head wound treated that she received during the altercation with Parker before being booked at the jail. (248:18-21; 325:4-16; 326:11-16; 358:18-360:6; 360:24-362:13; 384:1-386:6; E4; E5; E10) Clark's bag, the bottle of liquor, and the knife she took from Parker's pickup, were photographed, collected, and logged into property. (326:17-329:16; 365:16-367:2; E2; E3; E10; E11)

The jury returned a guilty verdict on both counts of the Information. (452:9-453:6; T114) The court accepted that verdict, found Clark guilty of terroristic threats and third degree sexual assault, ordered a presentence investigation (PSI) and set the matter for sentencing to take place at the same time as sentencing in Clark's other case that she pled guilty in, CR 20-1254. (453:13-454:9; T115) Sentencing was held on November 15, 2022. The district court sentenced Clark to 1 year imprisonment and 9 months' post-release supervision for the terroristic threats conviction and 6 months' imprisonment for the third degree sexual assault conviction, ordered to be served consecutively with credit given for 51 days' already served. (T119-120; T121-122) Clark now appeals.

Argument

I. Assignments of Error #1 and #4: Appellant waived any challenge to the members of the jury and counsel was not ineffective for failing to object to the make-up of the jury.

Clark asserts that the all-male jury for her trial denied her the right to a jury of her peers made up of a representative body of the community. (Brief of Appellant, pp. 9-12)

Clark does not assert that the State discriminatorily excluded all females from the jury in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) extended to discrimination on the basis of gender by *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419 (1994). Clark concedes that the all-male jury could have occurred from no purposeful exclusion by one side but argues that simply the fact that her trial involved an all-male jury, as opposed to a "jury of her peers made up of a representative body of the community" is per se reversible error. (Brief of Appellant, p. 10) Clark notes that women were included in the full venire list called to serve, none were ultimately left on the jury, and the record is unclear as to whether females were purposefully removed from the jury in a discriminatory manner in violation of the Equal Protection Clause. She simply asserts that "lack of any females within the final jurors chosen for trial is enough evidence to support an assertion that something did not happen as it should have during trial – whether the calling of a disproportionate jury pool or discrimination in jury selection." (Brief of Appellant, pp. 11-12) The State disagrees. First, the State submits that any objection to the jury was waived once the jury was passed for cause, which Clark also seems to concede in her ineffective assistance of counsel claim. (Brief of Appellant, p. 16) Generally, a party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. *State v. Huff*, 298 Neb. 522, 905 N.W.2d 59 (2017).

Further, even if it was not waived, there was no constitutional violation to Clark's right to an impartial jury simply because it was made up of all males absent any showing of discrimination in the

State's exercise of peremptory challenges. A defendant is constitutionally guaranteed a jury that is fair and impartial, but a defendant is not guaranteed a jury comprising only particular jurors. *State v. Bedford*, 31 Neb. App. 339, 980 N.W.2d 451 (2022). Clark made no assertions that any one particular juror failed to be fair and impartial, thus her constitutional right to a fair and impartial jury was not violated.

Accordingly, since Clark waived any objection to the jury when counsel failed to raise the objection at jury selection, Clark also asserts that trial counsel was ineffective for failing to object to the final, all-male jury that was selected because she acknowledges that by failing to object, trial counsel waived any objection Clark had to the jury. (Brief of Appellant, p. 16) She asserts that any lawyer with ordinary training and skill would have objected to the all-male jury and to peremptory challenges made to at least preserve the issue for appellate purposes and that it was prejudicial for her to receive an all-male jury. (Brief of Appellant, p. 16)

The State combed through the record created for voir dire and jury selection and believes that the record indicates 8 women were in the venire. (61:7-174:6) Neb. Rev. Stat. § 29-2005 provides that: (2) every person arraigned for any offense that may be punishable by imprisonment for a term exceeding eighteen months and less than life, shall be admitted to a peremptory challenge of six jurors and (3) in all other criminal trials, the defendant shall be allowed a peremptory challenge of three jurors. Where two or more offenses are properly joined, a trial court does not err in limiting the defendant to a number of peremptory challenges statutorily available for the most serious of the offenses. *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992). Therefore, here, each side would have had six peremptory challenges each.

Even though the record does not reflect which counsel challenged which jurors, the State submits that defense counsel could not be deficient for failing to object to the all-male jury or peremptory challenges used against women in an exclusionary manner that resulted in an all-male jury because, since each side was only allowed at most 6 challenges, Clark's trial counsel would have likely had to

challenge some of the women himself to result in an all-male jury. Thus, trial counsel had a role in the resulting all-male jury and further, unless trial counsel could establish a prima facie case of purposeful discrimination by showing that the State exercised its peremptory challenges to remove jurors based on their gender, the objection would not have been successful. Further, the State submits any objection to an all-male jury as per se unconstitutional also would have been meritless since, as the State argued above, Clark is not entitled to a jury of a certain make-up but only to a fair and impartial jury. Therefore, the State submits that counsel's failure to object to the all-male jury was not deficient performance nor can Clark establish she was prejudiced by counsel's failure to object because she does not assert that any one juror in the jury was not fair and impartial and it was not a constitutional violation for her to have an all-male jury.

Alternatively, the State submits that the record is insufficient to decide this claim on direct appeal since the record does not specifically reflect which counsel challenged which jurors in selecting the final jury to determine whether any objection trial counsel made would have had merit.

II. Assignment of Error #2: The evidence presented at trial was sufficient to convict Appellant of terroristic threats.

Clark asserts that the evidence was insufficient to support her conviction for terroristic threats because "there was a lack of any evidence submitted to show she intended to terrorize Ms. Parker, and even if the court feels sufficient evidence was submitted of her intent, it was negated by [her] intoxication level." (Brief of Appellant, pp. 12-13) Clark does not challenge on appeal her conviction for third degree sexual assault.

In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Miller*, 312 Neb. 17, 978 N.W.2d 19 (2022). The relevant question for

an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id.

Under Neb. Rev. Stat. § 28-311.01 (Reissue 2016), a person commits terroristic threats if he or she threatens to commit any crime of violence: (1) with the intent to terrorize another; (b) with the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or (c) in reckless disregard of the risk of causing such terror or evacuation.

The intent to terrorize another, for purposes of the crime of terroristic threats, is an intent to produce intense fear or anxiety in another and § 28-311.01 does not require that the recipient of the threat be actually terrorized, nor does it require an intent to execute the threats made. *State v. Bryant*, 311 Neb. 206, 971 N.W.2d 146 (2022). The threat for purposes of § 28-311.01 may be written, oral, physical, or any combination thereof. *Id.* Whether the defendant threatens a crime of violence need not be determined solely based upon the literal meaning of the defendant's words alone. *Id.* Instead, where particular conduct constitutes a threat depends on the context of the interaction between the people involved. *Id.*

Here, Clark and Parker were engaged in a physical altercation prior to the threat. Clark had an opportunity to retreat but instead prevented Parker from getting into her vehicle, got back in the vehicle herself instead of leaving, was kicking out at Parker, and then grabbed a box cutter from Parker's vehicle and threatened Parker stating, "bitch I'm going to kill you." Parker testified that she was concerned for her safety due to Clark making this threat with the box cutter in her hand. The State submits that, viewing this evidence in the light most favorable to the State, a reasonable jury could infer from Clark's actions and words and within the context of the situation where the two had been engaged in a physical altercation that she intended to cause Parker terror when she said "bitch I'm going to kill you" with a box cutter in her hand.

Clark asserts that her intoxication level should negate any intent that may have been inferred by her actions. She relies on *State v. Saltzman*, 235 Neb. 964 (1990) in support of this notion. However, in 2011 the Legislature passed Neb. Rev. Stat. § 29-122 (Reissue 2016) which provides:

> A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

Further, in light of this statute, this Court discussed and found no merit in the argument that voluntary intoxication may be considered to negate the specific intent of a crime. *See State v.Cheloha*, 25 Neb. App. 403, 907 N.W.2d 317 (2018). Clark does not assert that she was involuntarily intoxicated when she committed the offenses. Thus, the State submits that there was sufficient evidence to find her guilty of terroristic threats and her voluntary intoxication does not negate any element of the offense.

III. Assignments of Error #3 and #5: Trial counsel was not ineffective.

Clark asserts trial counsel was ineffective for failing to object to hearsay statements by Ms. Parker regarding what A.L. told her involving Clark touching his penis and for failing to file a motion in limine to keep out any statements regarding her alleged request for drugs. (Brief of Appellant, pp. 13-18)

Standards Applicable to Ineffective Assistance of Counsel Claims

When a defendant's trial counsel is different from his counsel on direct appeal, the defendant must raise on direct appeal any issue of

trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. *State v. Warner*, *supra*. An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court. *State v. John*, 310 Neb. 958, 969 N.W.2d 894 (2022).

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. *State v. Warner*, *supra*. The determining factor is whether the record is sufficient to adequately review the question. *State v. John*, *supra*. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. *State v. Warner*, *supra*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id*.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. John*, *supra*. To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *Id*. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *Id*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id*.

Claim 1: Trial counsel failed to object to Parker's testimony on hearsay

Regarding the hearsay objection, Clark notes that A.L. testified himself and described what happened but argues that allowing Ms. Parker to discuss it as well was prejudicial because "the jurors were not able to draw their own conclusion about what had occurred and whether [A.L.] was being truthful because they were repeatedly told the information, which would cause them to believe it must be true." (Brief of Appellant, pp. 15-16) Clark asserts that "had the jury only heard the information from [A.L.], then they would have been left to [j]udge the veracity of his statements and the allegation through his testimony alone." (Brief of Appellant, p. 16) The State submits that counsel was not deficient in failing to object as this objection would have been unsuccessful because the statements were not offered for the truth of the matter asserted and Clark cannot establish prejudice as the testimony was cumulative.

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. *State v. Vaughn*, 314 Neb. 167, __ N.W.2d __ (2023). However, by definition, an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted. *Id*. Thus, statements are not hearsay to the extent that they are offered for context and coherence of other admissible statements, and not for the truth of the matter asserted. *Id*. Similarly, statements are not hearsay if the proponent offers them to show their impact on the listener, and the listener's knowledge, belief, response, or statement of mind after hearing the statement is relevant to an issue in the case. *Id*.

Here, the State offered Parker's testimony about what A.L. told her for context and coherence and to show the statement's impact on Parker. A.L.'s statement to Parker showed why Parker was extremely upset and why she ultimately started a physical altercation with Clark. Thus, the State submits that counsel was not deficient for failing to object to the testimony as it would not have been a successful objection since Parker's testimony as to what A.L. told her was not offered for the truth of the matter asserted but was offered for the effect on the hearer.

Further, the State submits that Clark cannot establish prejudice by counsel's failure to object because the jury heard the same statement from A.L. and there was no objection to his testimony, nor was an ineffective assistance of counsel claim raised on appeal regarding any failure to object to A.L.'s testimony. Thus, A.L.'s testimony was valid, and the jury could have believed him alone and found him credible, so any testimony offered beyond that was cumulative.

Claim 2: Trial counsel failed to file a motion in limine to keep out statements related to her alleged request for drugs

Regarding the failure to file a motion in limine, Clark argues that her case did not involve drugs and "there was no reason that the mention of drugs was necessary for trial." (Brief of Appellant, pp. 16-18) She argued that "any mention of Clark attempting to purchase drugs could only be seen as prejudicial" because "drugs are by nature considered bad things and associated with criminals." (Brief of Appellant, p. 17) She argues that the mention of the conversation between her and Ms. Parker had "absolutely no probative value" to her charges, these statements were prejudicial and should not have been admitted at trial, and she received ineffective assistance of counsel when those statements were allowed in, "especially when they were allowed in without any objection by [t]rial [c]ounsel." (Brief of Appellant, p. 17)

The State submits that Clark waived any objection she had to counsel failing to file a motion in limine when counsel also failed to object to that testimony at trial and this is barred from appellate review as Clark has not raised an ineffective assistance of counsel claim in regard to a failure to object to the testimony at trial. Further, even if this Court disagrees that this argument has not been waived, Clark has not demonstrated that such a motion or objection to the testimony at trial would have successful.

Conclusion

For the reasons noted above, the Appellee respectfully requests that this Court affirm the judgment of the district court.

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 5,754 words, excluding this certificate. This brief was created using Word Microsoft 365.

s/Teryn Blessin
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Certificate of Service

I hereby certify that on Wednesday, May 24, 2023 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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