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before converting disability benefit payments from temporary total disability to permanent partial disability. As asserted in appellees' cross-appeal, the district court erred when it failed to grant appellees' motion to dismiss on the ground that appellees had complied with all the terms of the 1993 award. Although our reasoning differs from that of the district court, we affirm its order dismissing Weber's summons and order of garnishment and interrogatories with prejudice.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JOSE SANDOVAL, APPELLANT.
788 N.W.2d 172

Filed July 30, 2010. No. S-05-142.

1. **Criminal Law: Aggravating and Mitigating Circumstances.** Aggravating circumstances are not to be considered elements of the underlying crimes.
2. **Trial: Jury Instructions.** The giving of a cautionary instruction generally rests within the judicial discretion of the trial court.
3. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
4. **Trial: Juries: Appeal and Error.** A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
6. **Juries: Words and Phrases.** Generally, an "anonymous jury" describes a situation where juror identification information is withheld from the public and the parties themselves.
7. **Juries: Appeal and Error.** To reduce the dangers associated with anonymous or numbers juries, a court should not impanel such a jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected. Within the scope of this two-part test, the decision is left to the discretion of the lower court and is subject to a review for abuse of discretion.

8. **Constitutional Law: Juries.** The impaneling of an anonymous jury and its potential impact on the constitutionality of a trial must receive close judicial scrutiny and be evaluated in the light of reason, principle, and common sense.
9. **Effectiveness of Counsel: Words and Phrases.** Counsel's performance is deficient if counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
10. **Juries.** Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.
11. **Juror Qualifications: Parties: Appeal and Error.** The extent to which the parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice resulted.
12. **Juror Qualifications: Death Penalty.** It is well established that Neb. Rev. Stat. § 29-2006(3) (Reissue 2008) allows courts to question jurors about their beliefs regarding the death penalty.
13. **Statutes: Legislature: Intent.** Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
14. **Trial: Witnesses: Indictments and Informations.** Whether to permit the names of additional witnesses to be endorsed upon an information after the information has been filed is within the discretion of the trial court.
15. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
16. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
17. **Trial: Proof: Appeal and Error.** A defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
18. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
19. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial.
20. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
21. **Motions for Mistrial: Appeal and Error.** In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence.

22. **Prosecuting Attorneys: Appeal and Error.** Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
23. **Right to Counsel: Conflict of Interest: Appeal and Error.** Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision.
24. **Constitutional Law: Right to Counsel: Conflict of Interest.** A conflict of interest which adversely affects a lawyer's performance violates the client's Sixth Amendment right to effective assistance of counsel.
25. **Effectiveness of Counsel: Conflict of Interest.** In Nebraska, the right to effective assistance of counsel has been interpreted to entitle the accused to the undivided loyalty of an attorney, free from any conflict of interest.
26. ____: ____. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
27. **Right to Counsel: Waiver: Effectiveness of Counsel.** Appointed counsel must remain with an indigent accused unless one of three conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.
28. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
29. **Constitutional Law: Jury Instructions.** The proper inquiry is not whether a jury instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury applied it in that manner.
30. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** When an appellate court reviewing a death penalty invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that the sentencing panel did not consider in its balancing, the appellate court may, consistent with the U.S. Constitution, conduct a harmless error analysis or remand the cause to the district court for a new sentencing hearing.
31. **Constitutional Law: Convictions: Appeal and Error.** Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction.
32. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof: Appeal and Error.** Harmless error review in a capital sentencing case looks to whether it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance on an invalid aggravator.
33. **Criminal Law: Jury Instructions: Words and Phrases.** "Mental anguish," although included in Nebraska's pattern jury instructions, defined as a victim's uncertainty as to his or her ultimate fate, does not have any basis in Nebraska

law. Neither the courts nor the Legislature has used the term "mental anguish" as a part of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008).

34. **Jury Instructions.** A jury instruction should correctly state the Nebraska law applicable to the issues in the case.
35. **Sentences: Death Penalty.** Whenever a State seeks to impose the death penalty, the discretion of the sentencing body must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.
36. ____: ____. A sentencing authority's discretion must be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty.
37. **Homicide: Aggravating and Mitigating Circumstances: Proof.** "Exceptional depravity" pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
38. **Death Penalty: Aggravating and Mitigating Circumstances.** The balancing of aggravating circumstances against mitigating circumstances in deciding whether to impose the death penalty is not merely a matter of number counting, but, rather, requires a careful weighing and examination of the various factors.
39. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
40. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
41. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by the evidence in the record.
42. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
43. **Judges: Evidence: Presumptions.** It is presumed that judges disregard evidence which should not have been admitted.
44. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief.
45. **Trial: Rebuttal Evidence: Appeal and Error.** The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony.
46. **Courts: Sentences.** A sentencing panel has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed.
47. **Courts: Sentences: Evidence.** Neb. Rev. Stat. § 29-2521 (Reissue 2008) permits a sentencing panel to receive any evidence which the presiding judge deems to have probative value.
48. **Death Penalty.** Execution by electrocution is cruel and unusual punishment.

49. **Constitutional Law: Death Penalty.** The death penalty, when properly imposed by a State, does not violate either the 8th or the 14th Amendment to the U.S. Constitution or Neb. Const. art. I, § 9.
50. **Criminal Law: Prosecuting Attorneys.** The State retains broad discretion as to whom to prosecute and what charges to file. This discretion is limited only to constitutional constraints, that is, a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.
51. **Criminal Law: Courts: Prosecuting Attorneys: Presumptions: Evidence.** The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary.
52. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
53. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
54. **Sentences: Death Penalty: Appeal and Error.** Under Neb. Rev. Stat. § 29-2521.03 (Reissue 2008), the Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires the court to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. The purpose of this review is to ensure that the sentences imposed in a case are no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

Ronald E. Temple, of Fitzgerald, Vetter & Temple, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

WRIGHT, J.

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I. NATURE OF CASE

Jose Sandoval was convicted in Madison County District Court of five counts of first degree murder and five counts of use of a deadly weapon to commit a felony. He was sentenced to death for each count of murder, 48 to 50 years' imprisonment on three of the weapon counts, and 50 to 50 years' imprisonment on the remaining two weapon counts. Sandoval appeals.

II. BACKGROUND

1. Crimes

On the morning of September 26, 2002, Sandoval, Erick Vela, and Jorge Galindo entered a bank located in Norfolk, Nebraska. In less than a minute, they shot and fatally wounded four bank employees and one customer: Lola Elwood, Samuel Sun, Lisa Bryant, Jo Mausbach, and Evonne Tuttle.

Before the shootings occurred, witnesses observed three Hispanic males dressed in dark, baggy clothing on the streets near the bank and in the alley behind the bank. One of the males was identified as Vela, and another was identified as Sandoval.

At 8:44 a.m., the bank's surveillance video shows Sandoval, Vela, and Galindo entering the bank wearing dark clothing. Galindo turns to his left and enters Elwood's office, and Vela turns to his right and enters Bryant's office. Sandoval, wearing a backpack, walks up to the teller counter and stands next to Tuttle. He points a semiautomatic gun at the employees behind the teller counter and begins shooting. He then turns and shoots Tuttle. The video shows Sandoval jumping over the teller counter and then jumping back to the lobby. In doing so, he left a footprint on the counter, which matched the shoe he was wearing when he was apprehended.

A customer waiting at the drive-through window closest to the bank observed Sandoval approach the teller counter with a gun. She saw him point the gun at Sun and then motion for Mausbach to come around the corner. She saw Sandoval shoot to the right and to the left.

Meanwhile, customer Micki Koepke heard two shots as she approached the bank on foot from the parking lot. Upon entering, she saw Sandoval behind the teller counter, holding a gun and smiling at her. Realizing a robbery was in progress, she turned to run out of the bank. She heard two more shots on her way out, one of which shattered the glass window around her. Another bullet impacted the drive-through window of a fast-food restaurant across the street.

When the robbery began, Elwood was meeting with bank employees Susan Staehr and Cheryl Cahoy. Staehr and Cahoy watched Galindo enter the doorway of Elwood's office, pull out a gun, and shoot Elwood several times in the chest. At the same time, Vela entered Bryant's office and shot her in the leg and in the neck, while Sandoval shot Mausbach in the head, Sun in the face and neck, and Tuttle in the back of the head. All five victims died from injuries sustained from the gunshot wounds.

After the robbery, several witnesses saw Sandoval, Vela, and Galindo run from the bank and down the alley. One man was wearing a backpack. Noticing the men and believing their behavior to be suspicious, one witness followed them in her car for several blocks and watched them enter a house.

Inside the house, Galindo woke one of the residents. He pointed a gun at her and demanded her car keys, which she gave him. He took the keys, and the three men stole her car. When the police arrived, they recovered a backpack lying in the next-door neighbor's yard. The backpack contained spray paint, gun ammunition, and some "smoke distraction devices." Police also discovered Sandoval's fingerprint on a doorframe of the house.

Using the car's OnStar navigation feature, the Nebraska State Patrol found the vehicle abandoned in a wet, marshy area along a minimum maintenance road near Meadow Grove, Nebraska. Nearby, a green and brown Ford pickup with Madison County plates and a golf cart in the back was stolen from a residence.

At 11:29 a.m., the O'Neill, Nebraska, police chief received a call about a suspicious vehicle driving westbound on Highway 275 near O'Neill. The chief located the vehicle, which was the stolen pickup. Three Hispanic males were slouched low in the seat. The pickup turned into a parking lot, and the chief saw Sandoval get out of the pickup and walk into a discount store.

After the pickup reentered Highway 275, the chief pulled it over. The two remaining occupants were identified as Vela and Galindo and were arrested. Both men's pants were wet up to the knees and had mud on the bottom cuffs. Sandoval was apprehended at a fast-food restaurant next to the discount store a short time later. He also had mud on the cuffs of his pants.

After his arrest, Galindo guided officers to the location of the weapons used in the murders. Officers recovered a Glock model 17, a Ruger model P89, and a Heckler & Koch USP several miles from Ewing, Nebraska, on Highway 275. The bullet casings recovered from the scene established these guns were used in the murders. The Ruger pistol was sold to Sandoval in January or February 2002. The Glock and Heckler & Koch pistols were stolen from a sporting goods store in Norfolk on September 5, 2002. Galindo's girlfriend testified that Galindo told her he and Sandoval had robbed a gunshop.

2. Trial and Aggravation

On November 24, 2003, a jury convicted Sandoval of five counts of first degree murder and five counts of use of a deadly weapon to commit a felony. Following the guilty verdicts, the district court conducted the aggravation phase of the trial in which the jury was asked to determine the existence of any aggravating circumstances. The State alleged five aggravators: (1) that Sandoval has a substantial prior history of serious assaultive or terrorizing criminal activity; (2) that Sandoval committed the murder in an effort to conceal the identity of the perpetrator of such crime other than the murder of that particular victim; (3) that the murder committed by Sandoval (a) was especially heinous, atrocious, cruel, or (b) manifested exceptional depravity by ordinary standards of morality and intelligence; (4) that at the time the murder was committed, Sandoval also committed another murder; and (5) that Sandoval, at the time this murder was committed, knowingly created a great risk of death to at least several persons.

On December 2, 2003, the jury returned a verdict concluding that aggravators (2), (3), (4), and (5) existed with respect to each of the five murders. The judge ordered a presentence investigation report.

3. Mitigation and Sentencing

After the jury determined the existence of four aggravating factors, the court proceeded with the mitigation and sentencing phase of the trial. Hearings began on December 13, 2004. The three-judge panel received evidence of mitigation and sentence excessiveness or disproportionality. It concluded that none of the statutory mitigating circumstances existed, but found that one nonstatutory mitigating circumstance existed—that Sandoval suffered from a bad childhood as a result of a dysfunctional family setting. On January 14, 2005, the three-judge panel sentenced Sandoval to death for each of the five counts of first degree murder. Sandoval received 48 to 50 years' imprisonment for three counts of use of a deadly weapon and 50 to 50 years' imprisonment for two counts of use of a deadly weapon. All sentences were to be served consecutively.

III. ASSIGNMENTS OF ERROR

Sandoval alleges, consolidated and restated, that the trial court erred in

(1) failing to find 2002 Neb. Laws, L.B. 1, was unconstitutional, ex post facto legislation, and in violation of the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution;

(2) failing to conduct a preliminary examination as to the aggravating circumstances;

(3) failing to give the jurors a cautionary instruction as to why they were transported from Grand Island, Nebraska, to Aurora, Nebraska, and in failing to give a curative instruction regarding the potential jurors' discussion of the case during voir dire;

(4) impaneling an anonymous jury and failing to give a curative instruction;

(5) permitting the jury to believe that the responsibility for determining the appropriateness of the death penalty belonged to the three-judge sentencing panel;

(6) disclosing the notice of aggravation to the jury before the verdict was rendered on the issue of Sandoval's guilt;

(7) permitting the State to endorse over 500 witnesses;

(8) permitting improper statements by the prosecutor and improperly commenting on the evidence;

(9) failing to require the jury to determine whether Sandoval was a major participant in the crime and exhibited reckless disregard for human life;

(10) overruling trial counsel's motions to withdraw and Sandoval's motion for substitute counsel, and failing to discharge trial counsel;

(11) failing to give a limiting instruction regarding what constituted "the murder" in four of the five aggravators;

(12) instructing the jury on aggravator (1)(d);

(13) instructing the jury on aggravator (1)(f);

(14) overruling Sandoval's motions for acquittal;

(15) receiving evidence, denying rebuttal, and denying a jury at the mitigation and sentencing phase of the trial; and

(16) not finding that the death penalty is unconstitutional.

Sandoval alleges ineffective assistance of counsel with respect to many of the assignments of error listed above.

(17) He also claims his trial counsel provided ineffective assistance by allowing a court-appointed psychiatrist to examine Sandoval, eliciting speculative testimony from a witness, failing to call a forensic pathologist as a rebuttal witness, and failing to adduce evidence of prior consistent statements regarding his drug use.

IV. ANALYSIS

1. L.B. 1

Three of Sandoval's assignments of error relate to the retroactive application of L.B. 1. He claims that L.B. 1 is unconstitutional because it discourages a capital defendant from exercising his right to a jury trial as to the aggravating circumstances, that L.B. 1 is ex post facto legislation, and that L.B. 1 violates his right to due process.

Prior to the passage of L.B. 1, Nebraska law provided that after a defendant was found guilty of first degree murder, a trial judge or a three-judge panel determined whether statutory aggravating circumstances existed. Neb. Rev. Stat. §§ 29-2520 to 29-2524 (Reissue 1995). If aggravators applied, the defendant faced a maximum penalty of death. Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2002) and 28-303 (Reissue 1995). If aggravators did not exist, the defendant faced a maximum penalty of life imprisonment. This procedure was invalidated by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

In *Ring*, the U.S. Supreme Court held that capital defendants are entitled to a jury determination of any fact that would increase the possible maximum punishment. Because defendants convicted of first degree murder in Nebraska face an increased maximum punishment if aggravating circumstances exist, *Ring* entitles defendants to have a jury determine the existence of the aggravating circumstances. To bring Nebraska statutes in compliance with *Ring*, the Nebraska Legislature enacted L.B. 1 on November 22, 2002, effective the following day.

Based on the fact that *Ring* invalidated Nebraska's procedure for imposing the death penalty before Sandoval committed the crimes and that L.B. 1 did not become law until after he committed the crimes, Sandoval claims several errors relating to the application of L.B. 1 to his case. First, he claims that L.B. 1 is ex post facto legislation and in violation of article I, § 10, of the U.S. Constitution and article I, § 16, of the Nebraska Constitution. Second, he alleges that L.B. 1 is unconstitutional facially and as applied to the extent that it discourages a capital defendant from exercising his or her right to a jury trial as to the aggravating circumstances. Finally, he claims that the application of L.B. 1 violates the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. We recently addressed all of these issues in *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). In accordance with our opinion in *Galindo*, we find that these assignments of error do not have merit.

2. Preliminary Examination as to Aggravating Circumstances

Sandoval argues that the trial court erred by not conducting a second preliminary examination regarding the aggravating circumstances alleged in the second amended information. Nebraska law requires that a criminal defendant receive a preliminary hearing before an information is filed against the defendant for any offense. Neb. Rev. Stat. § 29-1607 (Reissue 2008). This requirement does not extend to amended informations that do not change the nature or identity of the offense charged and do not include additional elements. See *State v. Ferree*, 207 Neb. 593, 299 N.W.2d 777 (1980).

[1] Further, Neb. Rev. Stat. § 29-2519(2)(d) (Reissue 2008), enacted to comply with *Ring*, specifies that aggravating circumstances are not to be considered elements of the underlying crimes. Construing § 29-2519 in *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008), we stated that the Sixth Amendment to the U.S. Constitution requires only that defendants have notice such that they can defend against charges made against them.

Aggravating circumstances are not essential elements of first degree murder. *Mata, supra.*

It is undisputed that Sandoval received a preliminary examination as to the five charges of first degree murder and five charges of use of a deadly weapon to commit a felony. After the preliminary hearing, the State filed an information on November 1, 2002. It filed an amended information on December 5, which included a notice of aggravation, and a second amended information on March 3, 2003. The amended informations did not include elements different than those alleged at the preliminary hearing. As such, this assignment of error is without merit. Because Sandoval was not entitled to a second preliminary hearing on the amended information, his argument that his counsel provided ineffective assistance of counsel by failing to demand a hearing is without merit as well.

3. Cautionary Instructions

Sandoval alleges that the trial court erred in not giving the jurors a cautionary instruction explaining why they were transported from Grand Island to Aurora and in not giving a curative instruction regarding the potential jurors' discussion of the case during voir dire. He also claims his counsel was ineffective for failing to conduct voir dire of the entire jury panel.

(a) Standard of Review

[2] The giving of a cautionary instruction generally rests within the judicial discretion of the trial court. *Johnson v. Nathan*, 161 Neb. 399, 73 N.W.2d 398 (1955).

(b) Analysis

Sandoval's trial took place in Aurora in Hamilton County; however, the jurors were summoned from Grand Island in Hall County. To alleviate parking concerns, the trial court made arrangements for the jurors to be transported as a group, accompanied by a bailiff, from Grand Island to Aurora and back each day. Sandoval's counsel asked the court to give a cautionary instruction to the jurors advising them that the reason for the group transportation was based on parking and

mileage concerns so that they would not think it was for safety. The court agreed, but did not ultimately give the instruction when informing the jury of the transportation arrangements. Sandoval's counsel did not object at that time.

Sandoval claims that the trial court's failure to advise the jurors of the reason they were transported from Grand Island to Aurora adversely affected his right to a presumption of innocence. There is nothing in the record suggesting to jurors that this practice was for any reason besides logistics. We will not presume prejudice based on mere speculation. See *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

Sandoval also alleges that his attorney provided ineffective assistance of counsel by failing to request voir dire of the entire jury panel after the trial court received information that potential jurors had been discussing the case in the jury room. Potential jurors were sharing information they had read or heard in the news media about the bank robbery, but none had any knowledge of the case outside what was in the news.

At Sandoval's counsel's request, the trial court agreed to give a curative instruction that the jurors disregard any information they heard in the jury room as well as any other information they received. In the court's opening remarks to the jury, it advised the jurors that they were to rely solely on the evidence presented in the trial and disregard anything else they knew about the case, that anything they saw or heard outside of the courtroom was not evidence, and that they were not to discuss the case with anyone before deliberation.

[3] Although Sandoval claims that the trial court did not give a curative instruction, it is clear that the court sufficiently emphasized that the jurors were to set aside any information they heard from sources outside of the courtroom. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). As there is no evidence that the jurors disregarded the court's instructions, this assignment of error is without merit. Because there is no prejudice, Sandoval's ineffective assistance of counsel claim is also without merit.

4. Jury

Sandoval alleges the trial court erred in impaneling an anonymous jury and in failing to give a curative instruction. He claims this action violated his Sixth Amendment right to a public trial by an impartial jury. Sandoval's trial counsel did not object to this procedure at the time it was imposed, and Sandoval argues that the failure to do so was ineffective assistance of counsel.

(a) Standard of Review

[4] A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard. See *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995).

[5] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

(b) Analysis

In a preliminary hearing, the trial court announced that it intended to identify jurors by number rather than by name. The court ordered Sandoval's counsel not to disclose the names of the potential jurors to anyone, including Sandoval. After the change of venue, the court reiterated that it would be using numbers to identify jurors during individual voir dire. As each juror entered the courtroom for voir dire, the court informed the juror that the court and attorneys would be referring to the juror by his or her juror number. No other acknowledgment or explanation of the action was given. We conclude that the court's procedure does not amount to an abuse of discretion under the circumstances of this case.

(i) Types of Anonymous Juries

[6] Although Sandoval characterizes the trial court's actions as impaneling an "anonymous" jury, there is a distinction that must be noted. The term "anonymous jury" encompasses the withholding of a broad spectrum of information. See, *U.S. v. Peoples*, 250 F.3d 630 (8th Cir. 2001); *U.S. v. Honken*, 378 F.

Supp. 2d 880 (N.D. Iowa 2004). Generally, an "anonymous jury" describes a situation where juror identification information is withheld from the public and the parties themselves. See, *State v. Brown*, 280 Kan. 65, 118 P.3d 1273 (2005); *State v. Tucker*, 259 Wis. 2d 484, 657 N.W.2d 374 (2003).

The least secretive form of an anonymous jury is where only the jurors' names are withheld from the parties. *Honken, supra*. This procedure may also be called an innominate jury or, if jurors are referred to by number rather than name, a numbers jury. *Honken, supra*; *Brown, supra*; *Tucker, supra.* For example, in *Tucker*, counsel for both parties had the names of all jurors; however, the court instructed the parties to refer to the jurors by number in court.

In other cases, names and other identification information are withheld, but limited biographical information is made available. In *U.S. v. Edwards*, 303 F.3d 606 (5th Cir. 2002), the court withheld the names and places of employment of the jurors but released their ZIP codes and parishes. Going a step further, the courts in *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), and *U.S. v. Sanchez*, 74 F.3d 562 (5th Cir. 1996), ordered that the names, addresses, and places of employment of the jurors and their family members not be disclosed when it impaneled an anonymous jury. As other courts have noted, "[a]nonymity has long been an important element of our jury system. Jurors are randomly summoned from the community at large to decide the single case before them and, once done, to 'inconspicuously fade back into the community.'" *U.S. v. Branch*, 91 F.3d 699, 723 (5th Cir. 1996) (quoting *U.S. v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988)).

The propriety of withholding personal information or names of potential jurors from the defendant is an issue of first impression for this court; however, other federal and state courts have addressed the issue. See, *Ochoa-Vasquez, supra*; *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995); *U.S. v. Thornton*, 1 F.3d 149 (3d Cir. 1993); *U.S. v. Crockett*, 979 F.2d 1204 (7th Cir. 1992); *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991); *Brown, supra*; *Tucker, supra*. Generally, impaneling an anonymous jury is a drastic measure that should only be undertaken in limited

circumstances, see *Ochoa-Vasquez, supra*, and *Krout, supra*, and there is a danger that the practice could prejudice jurors against the defendants, see *Darden, supra*.

Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence. *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002). During jury selection, a lack of information could prevent the defense from making intelligent decisions regarding peremptory strikes. *Id.* Additionally, there is a risk that potential jurors will interpret the anonymity as an indication that the court believes the defendant is dangerous. *Id.*

(ii) Two-Part Test

[7] To reduce the dangers associated with anonymous or numbers juries, a court should not impanel such a jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected. *Ochoa-Vasquez, supra*; *Darden, supra*; *U.S. v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995); *U.S. v. Ross*, 33 F.3d 1507 (11th Cir. 1994); *Paccione, supra*. See, also, *State v. Samonte*, 83 Haw. 507, 928 P.2d 1 (1996); *Major v. State*, 873 N.E.2d 1120 (Ind. App. 2007); *State v. Brown*, 280 Kan. 65, 118 P.3d 1273 (2005); *People v. Williams*, 241 Mich. App. 519, 616 N.W.2d 710 (2000); *State v. Ford*, 539 N.W.2d 214 (Minn. 1995); *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006); *State v. Ross*, 174 P.3d 628 (Utah 2007); *State v. Tucker*, 259 Wis. 2d 484, 657 N.W.2d 374 (2003). Within the scope of this two-part test, the decision is left to the discretion of the lower court and is subject to a review for abuse of discretion. *Darden, supra*; *Brown, supra*.

The impaneling of an anonymous jury is a relatively recent phenomenon, *Tucker, supra*, and, as noted earlier, is an issue of first impression for this court. There is no statute or rule requiring a trial court to make specific findings of fact regarding its determination to use an anonymous or numbers jury. In *Tucker*, the trial court informed counsel that its practice was to use juror numbers rather than names in drug cases, and the Supreme Court of Wisconsin determined that the trial court

erred by failing to make an individualized determination that the jury needed protection. Such a determination is needed for a proper appellate review. Henceforth, if the court decides to impanel an anonymous or numbers jury, we direct the court to follow the two-part test set forth herein and to articulate its specific findings of fact in support of such decision.

a. Compelling Reason to Believe Jury Needs Protection

The first prong is determining whether the jury needs protection. Courts regularly consider several factors, including (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. See, *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005); *Mansoori, supra*; *U.S. v. Sanchez*, 74 F.3d 562 (5th Cir. 1996); *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995); *Edmond, supra*; *Ross, supra*; *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991); *Samonte, supra*; *Major, supra*; *Ivy, supra*; *Tucker, supra*.

Many cases in which the court utilized anonymous juries were trials of individuals associated with gangs, Mafia families, or organizations involved with drug dealing. See, *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002); *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *Krout, supra*; *U.S. v. Thornton*, 1 F.3d 149 (3d Cir. 1993); *Paccione, supra.* For example, in *Paccione*, the defendants were charged with racketeering and mail fraud in connection with operating an illegal landfill and illegally transporting medical waste. Angelo Paccione was believed to be a member of the "Gambino Crime Family," had been associated with several "'"mob-style" killings,'" had a history of interfering with the judicial process, and had threatened a witness. 949 F.2d at 1192. Furthermore, there was significant publicity surrounding the trial. Taking into account the defendants' Mafia connections and the other surrounding

circumstances, the court ordered that jurors' names, addresses, and places of employment not be disclosed. The U.S. Court of Appeals for the Second Circuit determined that the district court did not abuse its discretion in keeping the jurors' identification information confidential. *Id.*

Involvement in organized crime, however, is not enough to justify juror anonymity; "'something more'" is required. *Mansoori*, 304 F.3d at 651.

> "'[S]omething more' can be a **demonstrable history** or likelihood of obstruction of justice on the part of the defendant or others acting on his behalf or a showing that trial evidence will depict a pattern of violence by the defendant [] and his associates such as would cause a juror to reasonably fear for his own safety."

Id. (emphasis supplied) (quoting *U.S. v. Crockett*, 979 F.2d 1204 (7th Cir. 1992)). See, also, *U.S. v. Vario*, 943 F.2d 236 (2d Cir. 1991). There must be some evidence indicating that intimidation of the jurors is likely, such as a history of threatening witnesses or otherwise obstructing justice. *Mansoori, supra.*

Extensive publicity can also warrant the use of an anonymous jury. *U.S. v. Edwards*, 303 F.3d 606 (5th Cir. 2002); *U.S. v. Branch*, 91 F.3d 699 (5th Cir. 1996). In *Branch*, the defendants were members of the "Branch Davidians" sect and faced murder and weapons charges stemming from the standoff between sect members and law enforcement at Mount Carmel near Waco, Texas. 91 F.3d at 709. At trial, the district court elected to withhold the jurors' names and addresses due to the extensive media attention that the case received. Noting that the potential jurors had answered numerous questions and were subject to voir dire regarding bias, the U.S. Court of Appeals for the Fifth Circuit concluded that withholding the names and addresses of the jurors did not violate the defendants' right to a trial before an impartial jury. *Branch, supra.* See, also, *Edwards, supra*. In *U.S. v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995), the Eighth Circuit concluded an anonymous jury was warranted because "[t]he case was so highly publicized . . . that some defendants filed motions for a change of venue."

The fact that a defendant faces a lengthy prison sentence if convicted is also a consideration. The *Edwards* court noted that one of the defendants faced a maximum of 375 years in prison and a fine of over $7.5 million and found that the district court did not abuse its discretion in impaneling an anonymous jury.

Sandoval, Vela, Galindo, and Rodriguez were members of the Latin Kings gang. For instance, Sandoval commanded a riot while in prison and preyed on other inmates at the Lincoln Correctional Center. However, Sandoval's association with the Latin Kings is not enough to merit an anonymous jury without satisfying the "something more" requirement.

The murders and attempted robbery of the bank in Norfolk generated significant media attention in Nebraska. Venue was changed, the jurors were summoned from Hall County, and the trial occurred in Hamilton County. Also, if convicted of five counts of first degree murder, Sandoval faced life imprisonment or the death penalty. This combination of factors is sufficient evidence for the trial court to conclude that the jury needed protection.

b. Precautions to Prevent Prejudice

Once a court decides to impanel an anonymous jury, it must take reasonable precautions to ensure the defendant will not be prejudiced. A defendant could be prejudiced during voir dire if he or she is unable to conduct a meaningful examination of the jury. See *U.S. v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995). A defendant could also be prejudiced if jurors interpret anonymity to mean that the defendant is guilty or dangerous. *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002).

i. Prejudice During Voir Dire

Prejudice that a defendant may suffer from not having complete juror biographical information during voir dire can be overcome with extensive questioning. Other courts have recognized that a "'defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of "'a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself.'"'" *U.S. v. Crockett*, 979 F.2d 1204, 1216

(7th Cir. 1992) (quoting *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991)). The concern of prejudice can also arise when parties are making peremptory challenges. As the *Mansoori* court noted: "Juror anonymity also deprives the defendant of information that might help him to make appropriate challenges—in particular, peremptory challenges—during jury selection." 304 F.3d at 650.

Similar to the practice employed in this case, the court in *People v. Hanks*, 276 Mich. App. 91, 740 N.W.2d 530 (2007), identified the jurors by number, but still provided the parties with all of the jurors' biographical information and gave the parties the opportunity to conduct extensive voir dire. The Michigan Court of Appeals concluded that the jury in the case was "anonymous only in a literal sense, so none of the dangers of an 'anonymous jury' was implicated." *Id.* at 94, 740 N.W.2d at 533 (citing *People v. Williams*, 241 Mich. App. 519, 616 N.W.2d 710 (2000)). Accord *U.S. v. Branch*, 91 F.3d 699 (5th Cir. 1996).

We conclude that the district court took reasonable precautions to protect Sandoval from prejudice during voir dire. The names of the potential jurors were withheld from Sandoval, but not from his attorney. The trial court permitted extensive individual voir dire of every juror. The scope of voir dire eliminated any prejudice that might have resulted from the numbers procedure used to impanel the jury.

ii. Prejudice to Presumption of Innocence

[8] Sandoval claims that the impaneling of a numbers jury violated his right to a presumption of innocence because the trial court did not provide the jurors with an explanation for their anonymity. Such an instruction might have been beneficial, but the absence of such an instruction does not automatically indicate prejudice. See *Mansoori, supra*. Rather, "the empaneling of an anonymous jury and its potential impact on the constitutionality of a trial must 'receive close judicial scrutiny and be evaluated in the light of reason, principle and common sense.'" *U.S. v. Vario*, 943 F.2d 236, 239 (2d Cir. 1991).

The trial court did not draw attention to the fact that juror numbers were used instead of names, and there is no indication that the jurors understood the practice to be unusual. The trial court did not make any announcement to the panel informing them that their names or information would be confidential. As voir dire was conducted individually, each potential juror was informed by the court that he or she would be referred to by his or her juror number. Aside from this initial notification to the juror, the parties generally referred to the jurors as "Sir" or "Ma'am." Furthermore, once the court impaneled the jury, it instructed the jurors that Sandoval was presumed innocent and that the State must prove the charges beyond a reasonable doubt before the jury could find Sandoval guilty. See, *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002); *U.S. v. Crockett*, 979 F.2d 1204 (7th Cir. 1992); *Vario, supra.* Every juror stated that he or she could be fair and impartial and that he or she was not biased or prejudiced. There is no evidence that Sandoval's presumption of innocence was compromised by the use of a numbers jury.

Because there was evidence that the jury needed protection and the district court took steps to prevent prejudice to Sandoval, the court did not abuse its discretion by impaneling a numbers jury and withholding the jurors' names from Sandoval.

(iii) Ineffective Assistance of Counsel

[9] Sandoval also claims that he received ineffective assistance of counsel due to his trial counsel's failure to object to the numbers jury and failure to request a curative instruction. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009). Counsel's performance is deficient if counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

As noted, the court did not abuse its discretion in impaneling a numbers jury; therefore, we conclude that Sandoval's failure

to object to the trial court's use of a numbers jury and failure to request a curative instruction were not ineffective assistance of counsel. This assignment of error is without merit.

5. Permitting Jurors to Believe Three-Judge Panel Determined Appropriateness of Death Sentence

Sandoval claims that the trial court erred in permitting the jury to believe that the responsibility for determining the appropriateness of a death penalty belonged to the three-judge panel. He also alleges that his trial counsel's failure to correct this error during the trial was ineffective assistance of counsel.

(a) Standard of Review

[10] Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

(b) Analysis

Sandoval argues that statements made and questions asked of the 12 members of his jury minimized the jurors' roles in determining whether Sandoval should receive the death penalty. The trial court advised each juror that "[u]nder Nebraska law if a person is found guilty of first degree murder by a jury the possible penalties that can be imposed by a three-judge panel are either death or life in prison." We find no error in this statement. Similarly, during voir dire, Sandoval's attorney asked several of the jurors whether the fact that a panel of judges made the ultimate decision about the death penalty would make it easier for them to serve on the jury. Sandoval likens these statements and questions to statements found to be unconstitutional in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). We disagree.

We recently addressed this issue in *Galindo* and explained that unlike the sentencing procedure in *Caldwell*, the responsibility for determining the appropriateness of a death sentence *does* reside with the three-judge panel and not with the jury. We decline to revisit this issue and find that this assignment of error is without merit for the reasons discussed in *Galindo*.

6. Disclosure of Aggravating Circumstances to Jury

Sandoval claims that the trial court erred in disclosing the existence and/or contents of the aggravators to the jury before the verdict was rendered on the issue of Sandoval's guilt. He argues that trial counsel was ineffective in failing to object.

(a) Standard of Review

[11] The extent to which the parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice resulted. See *Galindo, supra*.

(b) Analysis

During voir dire, the trial court advised potential jurors that Sandoval was charged with first degree murder and that death was a possible penalty that could be imposed by a three-judge panel. The court did not identify the specific aggravators alleged or provide any details of those aggravators. Sandoval claims this advisement was in violation of Neb. Rev. Stat. § 29-1603(2)(c) (Reissue 2008) because it informed the jury of the fact that the State was seeking the death penalty. Section 29-1603(2)(c) states that "[t]he existence or contents of a notice of aggravation shall not be disclosed to the jury until after the verdict is rendered in the trial of guilt."

[12] However, Neb. Rev. Stat. § 29-2006(3) (Reissue 2008) specifically provides that "in indictments for an offense the punishment whereof is capital, [a juror's statement] that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death" constitutes good cause to challenge the juror. See, also, *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). It is well established that § 29-2006(3) allows courts to question jurors about their beliefs regarding the death penalty. See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[13] Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain

subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). Accordingly, §§ 29-2006 and 29-1603 operate in conjunction with one another. Section 29-2006 ensures that each member of the jury can perform his or her neutral fact-finding function in determining guilt, and § 29-1603 provides that the particular details of the case that are relevant only to the aggravation portion of the trial do not unduly influence jurors' initial finding of guilt.

In this case, the trial court exercised its discretion in questioning potential jurors about whether their opinions of the death penalty would prevent them from following instructions and making a decision based on the evidence. Jurors who stated they would not be able to set aside their feelings on the death penalty were dismissed for cause. Although the jurors were aware that death was a possible penalty if they convicted Sandoval, the jurors were not given details of the aggravating circumstances or any other information that was prejudicial to the guilt phase of the trial. Courts cannot determine whether a juror should be challenged for cause in accordance with § 29-2006(3) without advising the juror of the possible punishments and asking a juror his or her opinion on capital punishment. We find that this assignment of error is without merit. Because Sandoval was not prejudiced by the court's actions in questioning potential jurors about their opinions of the death penalty, Sandoval's claim that his attorney provided ineffective assistance of counsel is also without merit.

7. Excessive Endorsement of Witnesses

Sandoval claims that the trial court erred in permitting the State to endorse over 500 witnesses and that his trial counsel provided ineffective assistance of counsel for failing to object to the number of witnesses.

(a) Standard of Review

[14] Whether to permit the names of additional witnesses to be endorsed upon an information after the information has

been filed is within the discretion of the trial court. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

(b) Analysis

Nebraska law requires a prosecuting attorney to endorse the names of known witnesses at the time the information is filed. Neb. Rev. Stat. § 29-1602 (Reissue 2008). The purpose of this requirement is to give the defendant notice as to witnesses who may testify against him or her and give the defendant an opportunity to investigate them. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997). The State filed several motions to endorse witnesses after it filed the second amended information, and Sandoval did not object to the endorsements. There is no evidence that the trial court abused its discretion in permitting the State's endorsement of witnesses.

As for Sandoval's claim that his trial counsel provided ineffective assistance of counsel, he must show that his trial counsel's performance was deficient and that his trial counsel's performance prejudiced him and the outcome of the case. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, Sandoval has not shown that he was prejudiced by the number of witnesses endorsed by the State. The witnesses were endorsed months ahead of trial, and there is no indication in the record that his counsel was surprised or overwhelmed by the witness list. There is nothing in the record that suggests Sandoval's counsel was unprepared for cross-examination of any witness or that a more extensive investigation of the witnesses would have helped Sandoval's defense in any way. Because there is no evidence that Sandoval suffered prejudice by his trial counsel's failure to object to the number of witnesses endorsed by the State, this assignment of error is without merit.

8. Improper Statements by Prosecutor and Court

Sandoval claims that the trial court erred in allowing prosecutorial misconduct and that the court improperly commented on the evidence.

(a) Standard of Review

[15,16] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe, ante* p. 11, 783 N.W.2d 749 (2010). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *Id*.

[17] Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

(b) Analysis

(i) Prosecutorial Misconduct

[18-20] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). Furthermore, when a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Robinson, supra*.

[21,22] In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991). Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790

(2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). Therefore, Sandoval must show that the prosecutor's remarks at the guilt and aggravation phases of trial were sufficiently misleading, influential, or prejudicial such that neither retraction nor rebuke from the court could correct it and that a substantial miscarriage of justice actually occurred.

Sandoval identifies 27 statements made by the prosecutor during the guilt and aggravation phases that he alleges amounted to prosecutorial misconduct. The statements can be categorized as follows: opinions of a witness' character, opinions regarding the veracity of witnesses, misstatements of fact, veracity and guilt of Sandoval and veracity of his counsel, and general improper statements. None of these statements necessitate a mistrial.

The objectionable statements regarding a witness' character include occasions where the prosecutor referred to a witness or witnesses as a "nice fellow," "nice guy," "very strong witness," "extremely bright fellow," "wonderfully experienced officers," "very good officer," "bright," "a bunch of very good people," "good fellow," "pro," "Doc," "good guy," and "good people." The prosecutor referenced the work done by law enforcement officers as "good police work" and stated that an arresting officer "really did a hell of a good job."

We considered the propriety of similar positive comments regarding witnesses in *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). We stated that "[t]he prosecutor's laudatory remarks about the quality of the investigational work done by the Lincoln Police Department were quite irrelevant, but hardly rise to the level of inflammatory remarks tending to prejudice the jury." *Id.* at 398, 303 N.W.2d at 753. Likewise, in this case, the prosecutor's reference to "wonderfully experienced officers" or "good police work" did not have any effect on the jury's perception of a witness or prejudice the jury. These statements do not reach the threshold necessary to establish a substantial miscarriage of justice as required by this court.

Sandoval also objects to statements made by the prosecutor that he claims improperly referred to the veracity of the

witnesses, including statements that the witnesses were not "mistaken about what they saw," that a witness was a "terribly honest woman" and "terribly sincere," and that the jurors "probably won't see anybody more sincere in [their] entire life." These statements are similar to a statement the defendant objected to in *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981). The prosecutor in *Dandridge* reminded the jury in his closing argument that "[the witness] was not immune from prosecution for perjury." 209 Neb. at 895, 312 N.W.2d at 293. We concluded that a prosecuting attorney's argument based on the evidence and inferences drawn from the evidence do not ordinarily constitute misconduct. Noting that the jury could infer that the witness was telling the truth because she was an eyewitness, we held that the trial court did not err in refusing to grant a new trial on this ground. *Dandridge, supra.* Likewise, the statements Sandoval complains of do not rise to the level of prosecutorial misconduct such that he is entitled to a new trial.

The next category of allegedly objectionable statements involves instances where the prosecutor allegedly misstated the facts during his closing argument of the guilt phase of the trial. After each misstatement, Sandoval's counsel objected and the court corrected the misstatement, or the prosecutor realized his misstatement and corrected himself. It is apparent that the misstatements were not so misleading as to create a substantial miscarriage of justice. Furthermore, in the necessary instances, the trial court clearly instructed the jurors to disregard the misstatements of fact or instructed them to rely on their recollections of the evidence. Curative measures by the court can prevent prejudice. *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). If any of these statements were misleading, they were sufficiently corrected by the admonitions of the court. One of the prosecutor's alleged misstatements involved stating that if Koepke had been killed, there would have been eight victims. However, the prosecutor clarified in the next sentence that he was referring to killing all of the witnesses, which would have resulted in eight victims. These statements do not rise to the level of prosecutorial misconduct.

Sandoval next claims that the prosecutor made statements during the aggravation phase of the trial regarding Sandoval's veracity. Four of these statements related to the State's evidence that Sandoval participated in the murder of Travis Lundell, which was offered in support of the first aggravating circumstance—that Sandoval had a history of violence. Because the jury ultimately found that this aggravator did not exist, the prosecutor's statements were harmless.

Another statement referenced the fact that Sandoval, Vela, and Galindo had killed five times. This statement was made in the aggravation phase of the trial, after the jury had found Sandoval guilty of five counts of first degree murder. Accordingly, this statement was also harmless. Another statement Sandoval identifies as objectionable is a comment by the prosecutor regarding whether witness Koepke saw Sandoval smiling during the robbery. Sandoval attempts to characterize the prosecutor's statements as a suggestion that Sandoval's counsel was untruthful; however, when read in context with the surrounding statements, it is clear that the prosecutor was referring to the statements of various witnesses that they observed Sandoval smiling during and after the killings. The statement was simply a summary of the testimony that the jury heard suggesting that Sandoval was smiling at different points during the crimes and investigation. These statements were not sufficiently misleading, influential, or prejudicial such that a substantial miscarriage of justice actually occurred.

The final allegedly objectionable statements involve the prosecutor's invitation to the jurors, during deliberation, to examine the weapons used in the crimes, noting that they would not shoot each other because they knew it was wrong, and a statement that a lot of people would like to have the opportunity to be on Sandoval's jury. Again, these statements are not prejudicial to the extent that they necessitate a mistrial.

Sandoval's counsel did not make a motion for mistrial based on prosecutorial misconduct at the close of arguments and is precluded from raising the issue at this point. See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe, ante* p. 11, 783 N.W.2d 749 (2010). Nonetheless, the allegations of prosecutorial

misconduct are without merit. To the extent that Sandoval's trial counsel did not object to the prosecutor's statements complained of above and did not move for a mistrial, Sandoval alleges ineffective assistance of counsel. An appellate court reviews ineffective assistance of counsel claims under the two-prong inquiry pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009). Given that the complained-of statements do not constitute prosecutorial misconduct, Sandoval did not establish that counsel was deficient in failing to move for a mistrial based on those statements.

(ii) Improper Comment on Evidence

Sandoval also alleges that the trial court improperly commented to the jury during the closing statements of both the guilt and aggravation stages of the trial. Both of these statements were included in the previous assignment of error. In the first instance, the prosecutor reversed the names of two of the victims during his closing argument at the guilt stage of the trial. The court corrected the prosecutor's statement by clarifying that Sandoval did not shoot a fourth person inside the bank. In the second instance, in response to an objection by Sandoval's attorney, the court clarified the evidence regarding Galindo's involvement in Lundell's death. These remarks by the court did not prejudice or otherwise adversely affect any of Sandoval's substantial rights as required for a mistrial. All of these assignments of error are without merit.

9. *Enmund-Tison*

Sandoval alleges that the court erred in overruling his March 21, 2003, motion to quash. In the motion, Sandoval claimed that the five first degree murder charges in the second amended information were unconstitutionally vague because they alleged premeditated murder, or felony murder in the alternative, and did not require the jury to determine whether Sandoval was a principal or an aider and abettor. The second amended information alleged that Sandoval "did purposely and with deliberate and premeditated malice, or in the perpetration of or attempt to perpetrate any robbery and/or kidnapping, did kill [each victim]."

Sandoval maintains that the separation of the theories was necessary, because if the jury concluded that he was guilty under the theory of felony murder, it would then be necessary for the jury to determine if Sandoval was a major participant in the murders of Bryant and Elwood—the two victims shot by Vela and Galindo—and exhibited a reckless indifference to human life. Sandoval argues that the determination is necessary pursuant to *Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), which held that a defendant who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend a killing take place or that lethal force will be employed" cannot be sentenced to death pursuant to the 8th and 14th Amendments.

The Court clarified that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement" in *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). We thoroughly addressed this issue with respect to these crimes in the case of one of Sandoval's accomplices in *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), and conclude that the same analysis is applicable to Sandoval.

Furthermore, the evidence established that Sandoval planned the bank robbery, recruited participants, obtained weapons, and carried out the plan. Within a minute of entering the bank, Sandoval fatally shot three of the five victims. All of the evidence clearly establishes that Sandoval was a major participant in these murders and not an aider and abettor. Therefore, *Enmund-Tison* considerations were entirely unnecessary and these assignments of error are without merit.

10. Removal of Counsel

Sandoval alleges that the trial court erred in overruling his counsel's motions to withdraw, failing to discharge his counsel, and overruling his motion for substitute counsel.

(a) Standard of Review

[23] Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of

interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

(b) Analysis

The issue is whether the trial court should have replaced Sandoval's trial counsel at several points during the trial. Madison County public defender Harry Moore was appointed to represent Sandoval and did so at each stage of the case. Sandoval identifies several potential conflicts of interest regarding Moore's handling of his case that were disclosed during the course of the trial. The court carefully evaluated each potential conflict as it arose and ultimately concluded that none of the issues rendered Moore incompetent to represent Sandoval. We agree.

[24-26] A conflict of interest which adversely affects a lawyer's performance violates the client's Sixth Amendment right to effective assistance of counsel. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). In Nebraska, this right has been interpreted to entitle the accused to "the undivided loyalty of an attorney, free from any conflict of interest." See *State v. Marchese*, 245 Neb. 975, 977, 515 N.W.2d 670, 672 (1994). A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

(i) Acquaintance With Victims

Sandoval first claims conflict because his attorney conducted business at the bank involved in the crime and therefore knew two of the victims from his bank transactions. Moore disclosed this acquaintance and stated that he did not know them personally and that it would not affect his professional representation of Sandoval. The trial court agreed and found that there was no basis for mandatory withdrawal. We considered a similar potential conflict of interest in *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). In *Hubbard*, the two victims were both attorneys whom the defendant's counsel knew professionally. Counsel had also represented a person whom the defendant

had testified against 12 years earlier. The attorney disclosed both circumstances to the court, and the court did not allow counsel to withdraw. We affirmed the decision, stating that the defendant was not denied effective assistance of counsel when the issues were properly brought before the court.

Likewise, Moore disclosed his association with the bank and the fact that he was acquainted with the victims. He stated that he did not believe the contact rose to a level of conflict of interest. The court properly determined that these contacts did not require mandatory withdrawal.

(ii) External Distractions

Several of the potential conflicts Sandoval identifies involved an ongoing budget dispute between the public defender's office and the Madison County Board of Commissioners (Board). Moore claimed that this conflict with the Board prevented him from being able to retain necessary experts for the mitigation portion of the trial; caused his deputy public defender, Todd Lancaster, to resign when the Board threatened to reduce Lancaster's salary; and caused Moore to delay paying bills. The court concluded that the political dispute with the Board was outside the realm of Sandoval's case and did not permit Moore to withdraw. The court did, however, provide additional time for Moore to prepare, and it appointed Lancaster as outside counsel.

Sandoval also moved for substitute counsel, claiming that Moore's ongoing conflict with the Board rose to a level of a violation of his Sixth Amendment right to effective assistance of counsel. Sandoval asserted he was entitled to two experienced attorneys from two separate offices who worked exclusively on his case. He also challenged Moore's handling of the case at earlier stages, claiming he was denied a psychiatric evaluation, felt threatened by Moore when deciding whether to consolidate burglary cases, and thought Moore should have hired a doctor to refute testimony that being shot was a gruesome way to die.

Later, Sandoval clarified that he did receive a psychological evaluation and that the consolidation of cases issue worked out the way he wanted. The trial court rejected Sandoval's request,

finding that Moore appropriately, professionally, and vigorously represented Sandoval in all proceedings to date and that there was no evidence indicating that Moore had not devoted proper attention to Sandoval's defense.

[27] Appointed counsel must remain with an indigent accused unless one of three conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). At no point did Sandoval request to retain private counsel. Sandoval requested to proceed pro se on February 20, 2003, and was permitted to do so; however, he elected to have Moore reappointed a month later. He did not request to proceed pro se after that time.

Therefore, Moore was required to remain with Sandoval unless Moore was incompetent, that is, unless potential conflicts of interest rendered him incompetent to represent Sandoval. See *id*. Moore may have had problems with the Board and its attitude toward the representation of indigent defendants, but there is no indication that these problems affected the quality of representation Moore provided. He moved to continue the trial when he felt he needed more time to prepare, and the trial court granted these motions. Moore and the public defender's office ceased taking cases for a period of 3 months when Moore determined the caseload was unmanageable. Moore testified that he ultimately received assurances that all of his office's bills would be paid. In fact, all bills he presented to the Board were paid. Additionally, the court appointed Lancaster to assist with the mitigation phase. Moore's ongoing problems with the Board did not render him incompetent to represent Sandoval.

Regarding the issue of a capital defense attorney's workload, the Georgia Supreme Court specifically addressed the question in *Whatley v. Terry*, 284 Ga. 555, 668 S.E.2d 651 (2008). The defendant claimed that during the 2-year period his attorney was representing him on capital murder charges, his attorney also represented approximately 1,000 felony defendants, including

four death penalty defendants. The court determined that the attorney's caseload was irrelevant in an evaluation of his representation, stating that "it is the amount of time *actually* spent by [the attorney] on [the defendant's] case that matters, not the number of other cases he might have had that *potentially* could have taken his time." *Id.* at 562, 668 S.E.2d at 657.

Similar to *Whatley*, Sandoval complains that he did not have the undivided focus of Moore's attention at all times. This is not what is required. The question to consider is whether Moore's caseload at the public defender's office, its financial situation, and distractions with the Board had an adverse effect on Moore's representation of Sandoval. This is not a situation where prejudice would be difficult to prove. Neglect of Sandoval's case would be evident from the record. The deficiencies Sandoval cites include Moore's failure to hire a psychiatrist early in the trial, disagreements regarding plea agreements that were ultimately resolved to Sandoval's satisfaction, and failure to hire a pathologist to testify that the victims did not suffer to the extent alleged by the State's witness. The record is replete with examples of how each of these decisions was part of a valid trial strategy.

It should also be noted that the jury trial was held approximately 14 months after Sandoval was charged with the murders. The mitigation phase of the trial was held a full year after the guilt and aggravation phase. It was continued many times, a few times at the request of Moore. Counsel had ample time to prepare. At no point does the record indicate that Moore was not prepared to proceed. Based on these considerations, Sandoval's claim that the court should have dismissed Moore for conflict of interest is without merit.

(iii) Jen Birmingham

Lastly, Sandoval asserts a conflict of interest regarding attorney Jen Birmingham, who was contracted to handle misdemeanor cases at the public defender's office after Lancaster's departure. Birmingham had served as cocounsel in Gabriel Rodriguez' case, which also arose from the bank shootings; however, the trial court noted that she maintained a separate office and was not involved in the public defender's office's

representation of Sandoval. Further, there was evidence that Moore had discussed the conflict of interest situation with Sandoval. The court ultimately concluded that the contractual arrangement between the public defender's office and Birmingham was not prejudicial to Sandoval. There was no evidence that the arrangement affected Moore's performance in the representation of Sandoval. The arrangement did not create an actual conflict of interest.

In support of his argument, Sandoval cites *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). The court in *Agosto* stated that conflicts of interest involving the successive representation of codefendants could cause problems, because an attorney might be tempted to use confidential information to impeach the former client, or because counsel may fail to rigorously cross-examine for fear of misusing the confidential information. Neither of these concerns is present in the case at bar.

We addressed a situation similar to Sandoval's claim in *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007). In *Harris*, the county attorney's office hired an attorney who had an office-sharing relationship with the defendant's trial counsel. The attorney did not have any confidential information regarding the case, worked in the juvenile division of the county attorney's office, and had no direct contact with the criminal division. We affirmed the postconviction court's determination that the attorney was effectively screened and that there was no actual conflict of interest.

Similarly, Birmingham began taking cases from the public defender's office on a contractual basis nearly a year after the conclusion of the guilt and aggravation portions of the trial. Rodriguez was not a witness in any phase of Sandoval's trial. Furthermore, Birmingham maintained her own personal office in Bloomfield, Nebraska, and worked on her cases at that location. She had no contact, input, or function in the public defender's office's representation of Sandoval.

There is no evidence that Birmingham's arrangement with the public defender's office generated anything more than a speculative or hypothetical conflict of interest or that it affected

Moore's performance in the representation of Sandoval. The arrangement did not rise to the level of an actual conflict of interest, as required by *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

11. Limiting Instruction as to "the murder" in Aggravators

Sandoval next claims the trial court erred during the aggravation phase by failing to give the jury a limiting instruction clarifying that "the murder" referred to the five murders inside the bank and not the murder of Lundell. He claims that this omission created a reasonable probability that the jury improperly used the evidence presented with respect to Lundell's murder to find the existence of aggravators. This argument is without merit.

[28,29] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Fische*r, 272 Neb. 963, 726 N.W.2d 176 (2007). The proper inquiry is not whether the instruction "'could have'" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury applied it in that manner. See *State v. Molina*, 271 Neb. 488, 525, 713 N.W.2d 412, 444 (2006).

At the aggravation phase of Sandoval's case, the jury completed a separate verdict form for each of the five victims. Each verdict form identified the count and the victim's name in bold letters in the first sentence and instructed that for each of the five counts of murder, the jury must determine whether any of the five alleged aggravating circumstances were present. This language clearly indicates to the jury that it was to determine whether each aggravating circumstance applied to the victim named at the top of the page.

The jury was also instructed that in order for it to find the existence of the "substantial prior history of serious assaultive or terrorizing criminal activity" aggravator, it must find that the State proved beyond a reasonable doubt that Sandoval murdered Lundell. For each of the five counts of murder, the jury concluded that this aggravator did not exist. It is not logical to assume that after finding that Sandoval did not murder Lundell,

the jury then applied the remaining aggravators to Lundell's murder five times and found the aggravators to exist.

Sandoval also argues that statements made by the prosecutor during closing arguments of the aggravation phase of the trial were confusing as to which event "the murder" referred. When reviewed in context with the surrounding statements, the prosecutor clearly distinguishes between Lundell's murder and the murders inside the bank. The jury was not misled by these statements as evidenced by its determination that Sandoval did not kill Lundell.

Considering all of the jury instructions as a whole, they clearly directed the jury to determine whether each aggravating circumstance was true or not true with respect to each of the five victims of the bank murders. It is not reasonably likely that the jury applied the aggravating circumstances to Lundell's murder.

Because the trial court clearly and properly instructed the jury regarding the aggravators, Sandoval's counsel did not render ineffective assistance of counsel in failing to request a clarifying instruction. This assignment of error is without merit.

12. "Especially Heinous, Atrocious or Cruel"

(a) Constitutionality

Sandoval claims that the trial court erred in overruling his objection to the "especially heinous, atrocious or cruel" jury instruction because it was unconstitutional as applied to him and that the court erred when it instructed the jury that it could consider that the victims suffered "mental anguish." We conclude the court erred in so instructing the jury. However, the error was harmless.

(i) Standard of Review

[30] When an appellate court reviewing a death penalty invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that the sentencing panel did not consider in its balancing, the appellate court may, consistent with the U.S. Constitution, conduct a harmless error analysis or remand the cause to the

district court for a new sentencing hearing. See, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995) (*Ryan II*), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991) (*Reeves III*), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000) (*Reeves IV*).

In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

[31] Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata, supra*.

[32] Harmless error review in a capital sentencing case looks to whether it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance on an invalid aggravator. See *Ryan II*.

(ii) Analysis

The jury instruction at issue stated the State must prove beyond a reasonable doubt:

> On the especially heinous, atrocious or cruel prong:
>
> 1. The defendant inflicted serious mental anguish or serious physical abuse—meaning torture, sadism, or sexual abuse—on the victim before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.
>
> Or
>
> On the exceptional depravity prong:
>
> 1. The defendant apparently relished the murder.
>
> When this aggravating circumstance is alleged, it may be based on either proof on the especially heinous, atrocious or cruel prong elements, or proof on the exceptional depravity prong elements. It matters not if some jurors believe that this aggravating circumstance has been proven based on proof that the defendant inflicted serious mental anguish or serious physical abuse, meaning torture,

> sadism or sexual abuse on the victim before the victim's death; mental anguish includes a victim's uncertainty as to his or her ultimate fate and some jurors believe that this aggravating circumstance has been proven based on proof that the defendant apparently relished the murder. Each juror need only be convinced beyond a reasonable doubt that this aggravating circumstance has been proven in one of the above ways as defined in these instructions.

This instruction is identical to pattern jury instruction NJI2d Crim. 10.4, adopted by Nebraska after the Legislature enacted § 29-2520 (Reissue 2008) in 2002.

Aggravator (1)(d) is divided into two prongs. See, *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996) (*Moore I*), *disapproved on other grounds, Reeves IV*; *Ryan II*; *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). The first prong is whether the murder was heinous, atrocious, or cruel, and the second prong is whether the murder manifested exceptional depravity. During the aggravation phase in the case at bar, the trial court instructed the jury as to both prongs of this aggravator and included mental anguish as part of the first prong. Sandoval objected to this instruction on the basis that it was unconstitutional because the aggravating circumstance was not suitably directed, limited, and defined in a constitutional fashion, as required by *Ryan II*.

a. Mental Anguish

[33] "Mental anguish," although included in Nebraska's pattern jury instructions, defined as a victim's uncertainty as to his or her ultimate fate, does not have any basis in Nebraska law. Neither the courts nor the Legislature has used the term "mental anguish" as a part of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008). Accordingly, we disapprove the "mental anguish" portion of the instruction. However, because we conclude that the error was harmless, a new sentencing is not necessary.

[34] A jury instruction should correctly state the Nebraska law applicable to the issues in the case. Neb. Ct. R. § 6-801. Beginning with *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), we have held that "especially heinous, atrocious,

or cruel" includes murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering, or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time." *State v. Hunt*, 220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). "'[H]einous, atrocious, or cruel'" was to be directed to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Simants*, 197 Neb. 549, 566, 250 N.W.2d 881, 891 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990) (*Reeves II*).

In the three decades since *Rust*, this court has not strayed from this definition. See, *State v. Gales*, 269 Neb. 443, 481, 694 N.W.2d 124, 159 (2005) (*Gales II*) (murder was "especially heinous, atrocious, or cruel" based on evidence that defendant sexually assaulted his victim before killing her); *State v. Victor*, 235 Neb. 770, 778, 457 N.W.2d 431, 438 (1990) (murder was "'especially heinous, atrocious and cruel'" due to imposition of extreme suffering when evidence was that defendant had severely beaten and stabbed elderly victim to death while she struggled and screamed); *State v. Ryan*, 233 Neb. 74, 142, 444 N.W.2d 610, 652 (1989) (*Ryan I*) ("'especially heinous, atrocious, or cruel'" aggravator applied when facts showed torture, sadism, sexual abuse, and infliction of extreme suffering for prolonged period of time); *State v. Otey*, 205 Neb. 90, 96, 287 N.W.2d 36, 41 (1979) (murder was "'especially heinous, atrocious, [or] cruel'" when defendant sexually assaulted victim).

Before the U.S. Supreme Court issued *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Nebraska did not have pattern jury instructions for aggravating circumstances because the court, rather than juries, determined the existence of aggravators. Pattern jury instructions were drafted in 2002 when the Nebraska Legislature enacted L.B. 1, which entitled defendants convicted of capital crimes to a jury determination of the aggravating circumstances.

In addition to the traditional definition of "especially heinous, atrocious, or cruel," pattern jury instruction NJI2d Crim.

10.4 added "mental anguish" to the first prong of aggravator (1)(d). The comment to this instruction cites *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring, supra*, as the source of this language. However, neither the Nebraska Legislature nor Nebraska courts have adopted "mental anguish" as a part of aggravator (1)(d). Although we acknowledged the addition of "mental anguish" to the definition of the aggravator in *Gales II*, its inclusion was not raised in that appeal and we did not consider its propriety. Now, given the opportunity to review the issue, we conclude that the inclusion of "mental anguish" was improper. Mental anguish is not a component of aggravator (1)(d), and it was error to include it in the instruction.

[35,36] Even if the inclusion of "mental anguish" was supported by Nebraska law, we conclude that mental anguish defined as "a victim's uncertainty as to his or her ultimate fate" is not sufficiently narrow such that it would apply only to a subclass of defendants. See *Moore I* (reconsidered *State v. Moore*, 273 Neb. 495, 730 N.W.2d 563 (2007)). Whenever a State seeks to impose the death penalty, the discretion of the sentencing body "'must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Ryan II*, 248 Neb. at 445, 534 N.W.2d at 792 (quoting *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). The sentencing authority's discretion must be "'guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty.'" See *Ryan II*, 248 Neb. at 445, 534 N.W.2d at 792 (quoting *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976)).

Although the U.S. Supreme Court upheld "'a victim's uncertainty as to his [or her] ultimate fate'" as a constitutional definition in *Walton*, 497 U.S. at 646, most, if not all, victims who are conscious before their death would suffer mental anguish as to the uncertainty of their ultimate fate. All victims threatened by a deadly weapon would have uncertainty as to their ultimate fate. Accordingly, we conclude that "a victim's uncertainty as to his or her ultimate fate" is not a meaningful distinction between cases that warrant the death penalty and those that do

not. Mental anguish as defined is an improper ground for finding the existence of aggravator (1)(d).

b. Exceptional Depravity

[37] The second prong of aggravator (1)(d) focuses on Sandoval's state of mind and considers whether he "manifested exceptional depravity by ordinary standards of morality and intelligence." "Exceptional depravity" pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense. See *Moore I*. This court has identified specific narrowing factors that support a finding of exceptional depravity. These five factors are: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim. *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *Moore I*; *Ryan II*. In Sandoval's case, the jury was instructed on only the first factor—that Sandoval apparently relished the murder. The U.S. Supreme Court recognized this factor as sufficiently narrow in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990).

In support of this factor, the State presented evidence that Sandoval was smiling during the murders and after being apprehended. Witness Koepke, who unknowingly interrupted the robbery and murders in progress, testified that Sandoval smiled at her from behind the counter as he stood amid the bodies of his victims. Later that day, when an investigator photographed Sandoval as he was booked into jail for the murders, Sandoval smiled broadly for the photograph. We question whether this evidence is sufficient to support the jury's finding of this aggravator; however, we do not need to further consider the issue, because we conclude that the jury's finding of aggravator (1)(d) is harmless error.

c. Harmless Error Analysis

In the case at bar, the jury found three valid aggravators in addition to aggravator (1)(d). Therefore, Sandoval's case would

have proceeded to the three-judge panel for consideration of the death penalty regardless of whether the jury had been properly instructed as to aggravator (1)(d). The question is whether the three-judge panel would have imposed the death penalty absent the consideration of aggravator (1)(d). See, *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992); *Ryan II*.

We explained the procedure for handling errors in the sentencing phase of capital cases in *Reeves III*. Because *Reeves III* controls this case, we set forth its history below. All of the *Reeves* opinions were issued before *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); therefore, a three-judge panel determined the existence of aggravating and mitigating factors and then weighed them to determine a sentence. Although the task of finding aggravating circumstances now lies with a jury, our procedure for review remains the same.

In 1981, a jury convicted Randolph K. Reeves of two counts of felony murder in the commission or attempted commission of a first degree sexual assault for the rape and stabbing death of one woman and the stabbing death of a second woman. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984) (*Reeves I*). With respect to both murders, a three-judge panel found two statutory aggravators to exist: aggravator (1)(d), the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity, and aggravator (1)(e), at the time the murder was committed, the offender also committed another murder. The panel found a third aggravator with respect to the second victim—(1)(b), that the murder was committed in an apparent effort to conceal the commission of a crime or to conceal the identity of the perpetrator of the crime. Despite evidence that Reeves had consumed a large quantity of alcohol and ingested peyote before the murders, the panel determined that no mitigating circumstances existed.

On appeal, we concluded in *Reeves I* that the panel improperly considered aggravator (1)(d) with respect to the second victim, as her death appeared to have occurred swiftly when she walked in on Reeves' attack on the first victim. We also found that the panel failed to consider the statutory mitigator

of intoxication. Nonetheless, we determined that Reeves' sentences of death were not disproportionate to the sentences in previous first degree murder cases and affirmed the sentences of the district court.

Reeves sought postconviction relief, and we affirmed the district court's order dismissing the motion in *Reeves II*. Reeves petitioned for certiorari, which the U.S. Supreme Court granted. The Court vacated the decision and remanded the cause for reconsideration in light of *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), which addressed appellate review of death sentences based in part on an invalid or improperly defined aggravator. *Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

On remand, in *Reeves III*, we reconsidered Reeves' postconviction motion. Citing *Clemons*, we noted that in a weighing state, when an appellate court invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that was not considered by the sentencing panel in its balancing, the appellate court may, consistent with the U.S. Constitution, reweigh the remaining circumstances or conduct a harmless error review. *Reeves III*.

We then outlined the process for review for Nebraska appellate courts in death penalty cases where there has been an error concerning the trial court's finding of aggravating and/or mitigating circumstances. First, we determine if the sentencing panel's actions constituted an error harmless beyond a reasonable doubt. *Id*. If the error is harmless, we must affirm the sentence. See *Ryan II*. If the error is not harmless, we must vacate the sentence and remand the cause for resentencing. *Reeves III*.

Evaluating the sentencing panel's failure to consider the mitigator of intoxication, we determined that the error was not harmless beyond a reasonable doubt and concluded that we must independently reweigh all the aggravators and mitigators to determine if the death penalty was an appropriate sentence. We made findings as to the existence of aggravating circumstances, concluded that the aggravating circumstances

outweighed any statutory or nonstatutory mitigators in the case, and affirmed Reeves' sentences of death. *Id.*

After our decision in *Reeves III*, Reeves sought a writ of habeas corpus in the U.S. District Court for the District of Nebraska, challenging this court's action in resentencing him. *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994). The federal district court granted relief on the ground that Nebraska law did not authorize appellate reweighing and resentencing. It noted that the reweighing procedure

> arbitrarily deprived Reeves of two important state-created rights: (a) the right to have a sentencing panel including his trial judge make the initial determination of the appropriateness of the death penalty by *properly* applying aggravating and mitigating factors and thereafter impose the death sentence, and (b) the right to have the decision of the sentencing panel "reviewed" but not supplanted by appellate resentencing.

Id. at 1194. On appeal, the U.S. Court of Appeals for the Eighth Circuit determined the federal district court exceeded its authority when it reviewed our interpretation of Nebraska state law. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996). The Eighth Circuit reversed, and remanded. The federal district court again granted Reeves relief, *Reeves v. Hopkins*, 928 F. Supp. 941 (D. Neb. 1996), and the Eighth Circuit again reversed the ruling, but granted Reeves' petition on other grounds related to jury instructions, *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996). The U.S. Supreme Court granted certiorari and reversed the decision of the Eighth Circuit on the jury instruction issue. See *Hopkins v. Reeves*, 521 U.S. 1151, 118 S. Ct. 30, 138 L. Ed. 2d 1059 (1997), and *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

Following his run in federal court, Reeves filed a second motion for postconviction relief in Lancaster County challenging this court's reweighing and resentencing in *Reeves III*. The district court denied Reeves' request, and he appealed. *Reeves IV*. Although *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), found it constitutionally permissible for a state appellate court to reweigh aggravating and mitigating circumstances or undertake a harmless error

analysis when an aggravating circumstance had been found invalid, there must be authority under state law for an appellate court to do so. *Reeves IV*. We concluded that in *Reeves III*, this court had denied Reeves his right to due process, because we lacked statutory authority to resentence Reeves and acted as an unreviewable sentencing panel in violation of Nebraska law after finding the error was not harmless. *Reeves IV*. We reversed the order of the district court, vacated the death sentences for both counts, and remanded the cause to the trial court for resentencing in accordance with Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1989). *Reeves IV*.

In light of this procedure, we must first review Sandoval's case for harmless error. If the error is harmless beyond a reasonable doubt, we affirm the sentence of the district court. *Ryan II*; *Reeves III*. If the error is not harmless, we cannot reweigh the aggravators and mitigators and resentence Sandoval; rather, we must remand the matter to the district court for resentencing. *Reeves IV*; *Ryan II*.

Harmless error review in a capital sentencing case considers whether it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance on the invalid aggravator. *Ryan II*. See, also, *Stringer v. Black*, 503 U.S. 222, 230-31, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) ("[o]therwise, the defendant is deprived of the precision that individualized consideration demands"). Therefore, in reviewing Sandoval's sentence for harmless error, we consider whether, beyond a reasonable doubt, the death penalty would have been imposed absent the sentencing panel's consideration of aggravator (1)(d).

[38] Section 29-2522 (Reissue 2008) instructs the three-judge sentencing panel to consider (1) whether the aggravating circumstances as determined to exist justify imposition of a sentence of death; (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The balancing of aggravating circumstances against mitigating circumstances in deciding whether to impose the death

penalty is not merely a matter of number counting, but, rather, requires a careful weighing and examination of the various factors. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

In its sentencing order, the three-judge sentencing panel recounted the facts of the case. Sandoval, Vela, and Galindo entered the bank located in Norfolk on the morning of September 26, 2002, for the purpose of committing a robbery. All three carried loaded 9-mm semiautomatic handguns.

Upon entering the bank, Galindo turned to the left and entered the office occupied by Elwood, Staehr, and Cahoy. Vela turned to the right and entered the office occupied by Bryant. Sandoval approached the teller counter at the center of the bank and demanded money. Sun was working behind the teller counter, Mausbach was working at the drive-through window located behind the teller counter, and Tuttle was transacting business in front of the teller counter.

Elwood, Sun, Bryant, Mausbach, and Tuttle were shot and fatally wounded nearly simultaneously. Sandoval shot Sun in the chin and in the chest, then shot Tuttle in the head, jumped across the counter, and shot Mausbach in the head. Vela shot Bryant in the leg and then in the head. Galindo fired three shots into Elwood. There is no evidence of any resistance by any of the victims prior to being shot. After the shootings, Koepke entered the bank and saw Sandoval behind the teller counter. Galindo fired at least two shots at Koepke through a window as she fled the building, injuring her with the shattering glass. Another of Galindo's bullets impacted the drive-through window of the fast-food restaurant across the street. Sandoval, Vela, and Galindo then fled the bank. In less than a minute, no money had been taken, but five victims were either dead or dying.

The sentencing court also noted that the jury determined that four aggravating circumstances existed with regard to each murder: (1) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime; (2) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence; (3) at the

time the murder was committed, the offender also committed another murder; and (4) the offender knowingly created a great risk of death to at least several persons. Regarding the four aggravators, the sentencing panel stated that "[e]ach factor is significant and substantial."

Pursuant to § 29-2522, the sentencing panel next considered whether sufficient mitigating circumstances existed which approached or exceeded the weight given to the aggravating circumstances. The seven statutory mitigating circumstances, as laid out in § 29-2523(2) (Reissue 2008) are as follows: (a) The offender has no significant history of prior criminal activity; (b) the offender acted under unusual pressures or influences or under the domination of another person; (c) the crime was committed while the offender was under the influence of extreme mental or emotional disturbance; (d) the age of the defendant at the time of the crime; (e) the offender was an accomplice in the crime committed by another person and his or her participation was relatively minor; (f) the victim was a participant in the defendant's conduct or consented to the act; or (g) at the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

The panel determined that none of the statutory mitigators existed. Rather, the panel noted that in addition to the murders, Sandoval had a substantial criminal record dating back to when he was a juvenile. In considering mitigator (2)(g), the panel separated it into two parts—whether Sandoval's capacity to appreciate wrongfulness was impaired due to mental illness or mental defect and whether his capacity to appreciate wrongfulness was impaired by intoxication.

Although a psychiatric diagnostic evaluation of Sandoval indicated that he had a personality disorder with antisocial and schizotypal traits, the panel found that there was no evidence that this diagnosis indicated a mental disorder affecting Sandoval's volitional abilities in any way. In fact, the evidence showed that Sandoval had been planning the bank robbery for at least a month. He purchased and stole the guns which were used for the robbery, and he met with Vela and Galindo

to go over the plan. Sandoval testified that he knew that if he was apprehended, he would spend time in the penitentiary. There was no evidence that Sandoval's diagnosis in any way diminished his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

The panel next considered Sandoval's claim that he was intoxicated due to his alleged use of LSD before the murders. Sandoval reported that he ingested approximately four "normal" doses of LSD in the morning before the murders. He testified that the LSD caused hallucinations, including fire appearing in the mirror at his apartment, bright colors from the movement of his hand, rain that turned to blood when it hit his skin, and flashes of lights and shadows as he entered the bank. Sandoval claimed that the black shadows in the bank were saying bad things and "mouthing off" to him and that he saw a blue "Smurf" with glasses behind the counter, whom he shot. Sandoval claims he next remembers being in a car or a house, falling asleep, and being arrested in O'Neill. An expert in the area of substance abuse evaluation testified that based on his review of documents and his interview with Sandoval, Sandoval was intoxicated at the time of the murders due to his ingestion of LSD.

However, the panel noted that there was extensive convincing evidence that Sandoval did not use LSD on the day of the murders. Sandoval did not have any prior history of using drugs other than marijuana, the street gang he belonged to prohibited the use of hard drugs, he repeatedly denied using any illicit drugs, and the police investigator did not find drugs or drug paraphernalia in his search of Sandoval's bedroom after the murders.

His actions also refute claims that he was intoxicated at the time of the murders. On the day of the murders, Sandoval prepared for the attempted robbery with a backpack full of extra ammunition, plastic bags, smoke bombs, and spray paint. The bank's surveillance video showed Sandoval, Vela, and Galindo calmly entering the bank. It shows Sandoval directly approaching the teller counter, motioning Mausbach to come closer to him, and easily jumping over the counter.

The panel noted that Sandoval appears calm in the video; he does not wave his gun in a wild manner. The shootings were very fast paced, and he precisely shot each of his victims in the head. After the murders, Sandoval appeared to calmly hide his gun in the waistband of his pants and walk out of the bank to escape.

The officers who came in contact with Sandoval after he was apprehended indicated that he was calm and cooperative. An expert in drug intoxication recognition gave an opinion that based on all of the facts, he did not believe Sandoval was intoxicated from the ingestion of LSD at the time of the murders. Sandoval did not show signs of withdrawal after he was arrested, and the deputy who booked Sandoval into the Madison County jail following his arrest on the day of the murders also indicated that Sandoval denied using drugs. Accordingly, the sentencing panel concluded that there was nothing in Sandoval's behavior supporting the conclusion that at the time of the crimes, he was intoxicated by the ingestion of LSD and lacked the ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The panel determined that the evidence did not support the existence of the mitigating circumstance of intoxication by drug use and concluded that it did not apply.

Despite its finding that none of the statutory mitigating circumstances existed, the sentencing panel concluded that one nonstatutory mitigating factor existed—that Sandoval suffered from a bad childhood resulting from being raised in a dysfunctional family setting. However, the sentencing panel noted that despite his family problems, it was clear that Sandoval had at least an average, if not above average, IQ; had what was described as a charismatic personality; and had leadership abilities. The panel stated that it gave this nonstatutory mitigating factor little weight in determining the sentences to be imposed.

It is of particular importance that § 29-2522 instructs the sentencing panel to consider whether sufficient mitigating circumstances exist which *approach or exceed* the weight given to the aggravating circumstances. In *Reeves III*, 239 Neb. at 428, 476 N.W.2d at 837, we could not conclude that the district

court's error of failing to consider the statutory mitigator of intoxication was harmless, because "[w]e [did] not know what weight the judges may have given this circumstance if they had found it to exist." Had it considered the mitigator of intoxication, the *Reeves III* court could have determined that the weight of that mitigator approached or exceeded the weight the court gave to the aggravators. Therefore, failure to consider the mitigator was not harmless error.

Unlike *Reeves III*, we know the weight the sentencing panel attributed to the aggravators and mitigators. It stated that each aggravator was "significant and substantial" and that "there are no statutory mitigating circumstances to weigh against the four aggravating circumstances and only one nonstatutory mitigating circumstance to which the panel gives little weight."

Absent consideration of aggravator (1)(d) with respect to each of the five counts of murder, the sentencing panel would have been left with three "significant and substantial" aggravators establishing that Sandoval killed five victims to conceal his identity in the commission of a carefully planned bank robbery and, in doing so, placed three other people at great risk of death. The panel would have weighed these three "significant and substantial" aggravators against no statutory mitigators and only one nonstatutory mitigator—that Sandoval suffered from a bad childhood—to which the panel gave little weight.

Knowing that the sentencing panel gave little weight to the lone nonstatutory mitigator it weighed against the aggravators, we are convinced beyond a reasonable doubt that the sentencing panel would have imposed sentences of death even in the absence of a finding that the murders were exceptionally heinous, atrocious, cruel, or manifested exceptional depravity. Accordingly, the consideration of aggravator (1)(d) was harmless error. It would be futile to vacate the sentences of death and require the sentencing panel to reweigh three "significant and substantial" aggravators against the lone nonstatutory mitigator, to which the panel gave little weight. Because the error is harmless, it is not necessary to vacate the sentences of death and remand the cause, as was required in *Reeves IV*.

We conclude beyond a reasonable doubt that the sentencing panel would have imposed five sentences of death even in the absence of consideration of aggravator (1)(d). Although Sandoval's argument had merit, we conclude the error was harmless.

(b) "Apparently Relished"

Sandoval next claims that the use of the word "apparently" in the "exceptional depravity" instruction during the aggravation phase of the trial was vague, imprecise, and incapable of reasoned and rational application in violation of the 8th and 14th Amendments. As discussed above, we find that the consideration of this entire aggravating circumstance was harmless error; therefore, we do not reach this issue.

13. "Great Risk of Death"

Sandoval alleges three assignments of error relating to aggravator (1)(f), which is that the offender "knowingly created a great risk of death to at least several persons." He claims that the trial court incorrectly instructed the jury on the aggravator, that it failed to give a limiting instruction that the risk of death to at least several other persons could not be found by using evidence of a risk of death to others after the murders occurred, and that the trial court erred in submitting jury instructions concerning accessorial liability regarding aggravator (1)(f). Sandoval also claims that he received ineffective assistance of counsel with regard to all three of these aggravators because his counsel did not raise these issues at trial.

(a) Standard of Review

Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

[39,40] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Welch*, 275

Neb. 517, 747 N.W.2d 613 (2008). Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *Id.*

[41] A trial court is not obligated to instruct the jury on matters which are not supported by the evidence in the record. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

(b) Analysis

(i) Omission of "Great"

Aggravator (1)(f) as laid out in § 29-2523 is that "[t]he offender knowingly created a great risk of death to at least several persons." In the trial court's preliminary jury instruction, the modifier "great" was omitted. Sandoval's trial counsel objected to the omission, and the court acknowledged that the instruction was only a preliminary instruction. The instructions given to the jury at the close of the evidence of the aggravation trial instructed the jury on aggravator (1)(f) several times. In instruction No. 2A, the jury was told that it must find beyond a reasonable doubt that "the offender knowingly created a risk of death to at least several persons." Later on in the same instruction, the jury was informed that the essential elements to prove aggravator (1)(f) were (1) the offender knowingly created a great risk of death and (2) the risk was to more than two persons. Finally, the jury was given five separate verdict forms—one for each victim. The instruction on each verdict form asked, "Do you, the jury, unanimously find that the State has proven beyond a reasonable doubt that the defendant at the time this murder was committed, knowingly created a great risk of death to at least several persons?" The jury indicated "YES" in response to the question on all five verdict forms.

Read as a whole, it is clear that the omission of the modifier "great" in one instance in all of the jury instructions was not prejudicial. The jury was specifically instructed that "great risk of death" was an element of the aggravator and that it must determine whether Sandoval created a great risk of death, and not just a risk of death. The jury was likewise properly instructed on the five verdict forms. The jury instructions

fairly present the law, and the jury could not have been misled. See *Fischer, supra.* Because there was no prejudicial error, Sandoval's trial counsel did not provide ineffective assistance of counsel by failing to object to the jury instructions. This assignment of error is without merit.

(ii) Number of Persons Placed at Risk

Sandoval also claims that the trial court erred because the jury instruction explaining aggravator (1)(f) did not sufficiently limit the individuals who were placed at risk to be considered by the jury in determining whether this aggravator was present. He argues that the jury should have been instructed that it could not consider individuals placed at risk in the aftermath of the murders in the three men's subsequent attempt at escape, such as the woman who was held up at gunpoint and forced to hand over her car keys. Because there was clear evidence in support of aggravator (1)(f) before Sandoval exited the bank, we do not need to consider events occurring after the shootings at the bank.

Sandoval also claims that the jury should have been instructed not to consider individuals who faced a "'great risk of death'" more directly by one of his accomplices. Brief for appellant at 151. Specifically, Sandoval argues that because Staehr and Cahoy were in the office with Elwood and were shot at by Galindo, they were not placed at a "great risk of death" by Sandoval. Sandoval argues that it was only Galindo who placed Koepke at a "great risk of death" by shooting at her as she entered the bank.

Sandoval planned a bank robbery that involved three men with semiautomatic handguns entering a bank full of people. All three of the men fired at the people in the bank, putting eight directly in the crossfire and leaving five dead. Sandoval shot and killed every person near him. Considering the confined area of the bank, the three individuals who survived the incident were within range of Sandoval's weapon at all times and he unquestionably placed them at a great risk of death. These events unquestionably put the three survivors at great risk of death.

(iii) Accessorial Liability

It is also clear that Sandoval personally caused a great risk of death to Staehr, Cahoy, and Koepke in planning and carrying out a bank robbery in which three men with loaded weapons entered a small bank full of people. Accessorial liability does not need to be considered, because the evidence clearly establishes that Sandoval knowingly created a great risk of death by his own actions. A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

In this case, the evidence supported a finding that Sandoval personally killed three people and planned the robbery that caused two more people to be killed and three more people to be in the midst of gunfire. The trial court was not obligated to further instruct the jury on this issue. Because the court did not err in declining to give additional instructions, Sandoval's trial counsel did not err by failing to request such instructions. These assignments of error are without merit.

14. Motions for Acquittal as to Aggravating Circumstances

Sandoval alleges that the trial court erred in overruling his motions for judgment of acquittal as a matter of law with respect to the aggravating circumstances at the close of the State's case and at the close of all the evidence following the aggravation portion of the trial.

(a) Standard of Review

[42] When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt. *Gales II*.

(b) Analysis

Sandoval claims that the State did not present evidence sufficient to prove the alleged aggravating circumstances. In the State's "Notice of Aggravation," it sought to prove six

aggravators: (1) The offender has a substantial prior history of serious assaultive or terrorizing criminal activity; (2) the murder was committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of such crime; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence; (5) at the time the murder was committed, the offender also committed another murder; and (6) the offender knowingly created a great risk of death to at least several persons.

The State did not present evidence in support of the third aggravator, that the murder was committed for pecuniary gain, but the remaining five were submitted to the jury. The jury found that the aggravator alleging that Sandoval had a substantial prior history of serious assaultive or terrorizing criminal activity was not present and found that the other four factors were present. Because the jury found these aggravators to exist, death was a possible penalty. The cause was submitted to a three-judge panel to determine the existence of mitigating circumstances and to weigh any mitigating circumstances against the aggravating circumstances. Sandoval alleges that the evidence was insufficient for the jury to find the existence of aggravators (2), (4), and (6).

Sandoval does not set forth an argument in support of his claim challenging aggravator (3), which aggravator exists if at the time the murder was committed, the offender committed another murder. As the jury found Sandoval guilty of five counts of first degree murder, there was indisputably more than one murder and, therefore, sufficient evidence to submit the aggravator to the jury.

(i) Murder Committed to Conceal Identity of Perpetrator

Sandoval argues that the evidence offered by the State indicated that the murders were committed only for the purpose of concealing the murder of that particular victim, but not any other crime. Indeed, in *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), we noted that any murder renders the

victim unable to identify the perpetrator; therefore, for this aggravator to apply, a defendant must commit the murder in an effort to conceal a crime other than the murder itself.

The State presented evidence that Sandoval planned to commit a bank robbery. Rodriguez entered the bank several minutes before Sandoval, Vela, and Galindo to determine the location of bank employees. The three men were wearing hats and sunglasses, and Sandoval carried a backpack containing distraction devices when they entered the bank. After the five victims were killed, shots were fired at Koepke as she entered the bank. The men began to leave, and Cahoy heard them talk about an alarm and heard someone say, "'Hurry up, Hurry up.'"

From videos, photographs, and testimony offered as evidence during trial, the jury could reasonably infer that the victims were killed in an effort to conceal the identity of Sandoval, Vela, and Galindo as perpetrators of a bank robbery. Accordingly, the trial court did not abuse its discretion in overruling Sandoval's motions for judgment of acquittal as a matter of law.

(ii) Murders Were Especially Heinous, Atrocious, Cruel, or Manifested Exceptional Depravity

Sandoval also asserts that the State did not present sufficient evidence for aggravator (1)(d) to be submitted to the jury. Pursuant to § 29-2523, this aggravator exists with respect to each murder if the murder "was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." As discussed above, the consideration of aggravator (1)(d) was harmless error.

(iii) Offender Knowingly Created Great Risk of Death to at Least Several Persons

This aggravator requires the finding that Sandoval created a great risk of death to more than two persons. During the course of the robbery, Staehr, Cahoy, and Koepke were placed at great risk of death due to their presence in the bank and proximity to the gunfire. This evidence is sufficient to submit to the jury the question of whether Sandoval knowingly created a great risk

of death to more than two persons. This assignment of error is without merit.

15. Mitigation and Sentencing Errors

(a) Presentence Investigation Report

[43] Sandoval claims that the trial court erred in receiving and reviewing the presentence investigation report because it contained prejudicial victim impact evidence and because the sentencing panel was then afforded the opportunity to consider evidence of nonstatutory aggravating circumstances. It is presumed that judges disregard evidence which should not have been admitted. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). Furthermore, the sentencing panel in this case specifically stated that it did not consider the victim impact statements. Because the sentencing panel did not consider the evidence that Sandoval argues is improper, his argument that it resulted in the application of nonstatutory aggravators is without merit.

(b) Denial of Jury at Mitigation Hearing

Sandoval claims that the trial court erred when it denied his motion for a jury at the mitigation hearing and sentencing. He argues that the Sixth and Eighth Amendments to the U.S. Constitution and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), require a jury to determine the existence of mitigating circumstances because the mitigators were factors that could increase his punishment. We rejected that argument in *State v. Gales*, 265 Neb. 598, 628-29, 658 N.W.2d 604, 626-27 (2003) (*Gales I*), stating that

> we understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* [*v. New Jersey*, 530 U.S. 466, 120 S. Ct.

> 2348, 147 L. Ed. 2d 435 (2000),] and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. See § 29-2522; L.B. 1, § 14. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.

Accordingly, a jury is not required to determine the existence of mitigating factors or the sentence. This assignment of error is without merit.

(c) Denial of Rebuttal Evidence

Sandoval claims that the sentencing panel erred in denying him the opportunity to adduce evidence and to testify to rebut the State's case at the mitigation portion of the trial. Alternatively, he alleges that his trial counsel provided ineffective assistance of counsel by failing to make an offer of proof regarding the evidence and testimony that would have been offered in rebuttal.

[44,45] Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). It is limited to that which explains, disproves, or counteracts evidence introduced by the adverse party. See *id.* The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony. *Id.*

Sandoval argues that his constitutional right to present a defense was violated; however, he has not identified any evidence that was not available at the time of his case in chief. Sandoval notes that he has a right to testify and that he has a right to have witnesses testify on his behalf. He availed himself

of both. Accordingly, he was not denied his constitutional right to present a defense.

Nor has he identified any new issues raised by the State in its presentation of evidence that would have made rebuttal proper. The sentencing panel specifically determined that because the State did not develop any new issues in its case, rebuttal would not have probative value as to the issues facing the panel. Had Sandoval been permitted to present rebuttal evidence, he claims that he would have offered evidence of his prior drug use, racial tensions he experienced in high school, the poor conditions he endured throughout his childhood, his experiences while incarcerated, his limited ability to function outside of prison, and his alleged use of LSD on the day of the crimes. All of these issues were addressed in his case in chief. Because rebuttal evidence is limited to matters first introduced by the opposing party and is not to be used to repeat the case in chief, the evidence Sandoval now claims he was erroneously prohibited from offering was not proper rebuttal evidence. See *Molina, supra*. Therefore, the sentencing panel did not abuse its discretion in disallowing rebuttal testimony.

Sandoval was not denied the right to present his defense and was not entitled to present cumulative evidence on rebuttal after the State did not raise new issues. Because the sentencing panel did not err in disallowing the proposed rebuttal testimony, Sandoval's counsel did not err in failing to make an offer of proof. As such, this assignment of error is without merit.

(d) Sentencing Panel's Use of Transcribed Testimony

Sandoval argues that the three-judge sentencing panel erred in receiving into evidence the transcribed testimony from Sandoval's trial and aggravation trial. He claims that Nebraska's sentencing scheme does not authorize the sentencing panel's use of the transcribed testimony and that this use was prejudicial because Sandoval could not meaningfully ascertain how the sentencing panel used the evidence.

[46,47] We considered this issue in *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). We noted that a sentencing panel has broad discretion as to the source and type of

evidence and information which may be used in determining the kind and extent of the punishment to be imposed. See *id*. Furthermore, Neb. Rev. Stat. § 29-2521 (Reissue 2008) permits the panel to receive any evidence which the presiding judge deems to have probative value. We found that receipt of the records of the guilt and aggravation phases is authorized under the discretion given the presiding judge under § 29-2521. *Hessler, supra.*

Logic dictates that for a meaningful sentencing hearing to occur, the sentencing panel must know and understand the facts of the case. Indeed, after a defendant is found guilty of murder in the first degree and at least one aggravating circumstance is found to exist, § 29-2522 instructs the sentencing panel to determine a defendant's sentence based on whether the aggravating circumstances as determined to exist justify imposition of a sentence of death; whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The transcribed testimony from the guilt and aggravation phases of the trial serves this purpose. Accordingly, we conclude that the sentencing panel did not err by receiving evidence of the guilt and aggravation phases of the trial in the sentencing hearing. Likewise, because the court was within its discretion to consider such evidence, Sandoval's trial counsel did not provide ineffective assistance of counsel in failing to object to the receipt and use of the transcribed testimony. This assignment of error is without merit.

16. Death Penalty

(a) Death by Electrocution

[48] Sandoval also alleges two assignments of error challenging his sentence of death by electrocution, claiming it is unconstitutional and is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution. His challenge to death by electrocution was made prior to our opinion in *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). In *Mata*, we concluded that

execution by electrocution is cruel and unusual punishment. Accordingly, we find that this assignment of error has merit; however, we affirm the sentence of death.

(b) Cruel and Unusual Punishment

[49] Sandoval also claims that the death penalty, however carried out and applied, is cruel and unusual punishment. Although he acknowledges that in *Gales II*, this court affirmed that the death penalty is not, per se, cruel and unusual punishment, Sandoval argues that this court has not yet analyzed the propriety of the imposition of the death penalty in cases of felony murder under "'evolving standards of decency.'" Brief for appellant at 188. In *Mata*, 275 Neb. at 31, 745 N.W.2d at 255-56, we reiterated that "'[t]he death penalty, when properly imposed by a state, does not violate either the eighth or [the] fourteenth amendment [to] the United States Constitution or Neb. Const. art. [I], § 9.'" We decline Sandoval's invitation to revisit this issue.

(c) Appropriateness of Sentence

Sandoval next argues that the trial court erred in declining to consider evidence of sentencing orders from all Nebraska first degree murder cases for the purposes of sentence excessiveness and proportionality review. He offered evidence of first degree murder cases in Nebraska in which the death penalty was not imposed, and the David C. Baldus et al., Final Report on the Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis (2002), which Sandoval refers to as "the *Baldus* study." Brief for appellant at 180. The three-judge panel did not consider cases in which the death penalty was not ultimately imposed in its proportionality review during the sentencing phase of the trial. We recently considered this issue in *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), and in accordance with that opinion, we find that this assignment of error is without merit.

(d) Discrimination

Sandoval also claims that the State's decision to seek the death penalty was based on invidious discrimination; was not

guided by rational, relevant, and consistent standards; and was based on irrational and illegal criteria.

[50] Sandoval is apparently arguing that the State abused its prosecutorial discretion in seeking the death penalty in Sandoval's case. However, the State retains broad discretion as to whom to prosecute and what charges to file. See, *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); *Gales II*. This discretion is limited only to constitutional constraints, that is, a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification. See, *Wayte, supra*; *Gales II*. Decisions to prosecute often rely on "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan[, which] are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607.

[51] The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. *Gales II*. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary. *Id*. Such evidence is completely lacking here; thus, Sandoval's claim fails.

17. Ineffective Assistance of Counsel

Sandoval alleges that his trial counsel provided ineffective assistance with respect to several aspects of his case, including seeking a psychiatric evaluation, allowing speculative testimony from a witness, failing to call a forensic pathologist in rebuttal, and failing to adduce prior consistent statements.

(a) Standard of Review

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

[52] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland*, an appellate court reviews such legal determinations independently of the lower court's decision. See *Gales II*.

(b) Analysis

(i) Psychiatric Evaluation

Sandoval alleges that he received ineffective assistance of counsel because his trial counsel recommended to the trial court that Sandoval be examined by a court-appointed psychiatrist to determine if Sandoval was competent to proceed pro se. He claims his attorney's action in asking the court to appoint a psychiatrist to determine Sandoval's competency provided the psychiatrist with the ability to be a damaging witness for the State at the mitigation phase of the trial. Sandoval also claims that the trial court erred in receiving the testimony of the psychiatrist at the mitigation phase of the trial and that his counsel provided ineffective assistance in failing to preserve a proper objection to the testimony. Finally, he alleges ineffective assistance because his counsel did not object to the testimony of the psychiatrist when he testified about Sandoval's propensity for truthfulness.

The facts Sandoval claims support his assertions are contradicted by the record. On February 20, 2003, Sandoval's trial counsel filed a motion to withdraw pursuant to Sandoval's request to proceed pro se. In the motion, Sandoval's counsel advised the court that he felt he had a duty to inform the court that he had a material concern that Sandoval may not be competent. Following his oral advisement to the court regarding this concern, the State, and not Sandoval's counsel, recommended that the court appoint a psychiatrist to evaluate Sandoval's competency. The court asked Sandoval if he had any objection to being examined by a professional, and Sandoval replied that he did not.

During the psychiatrist's testimony in the mitigation phase, Sandoval's counsel objected no fewer than 10 times and the court gave his counsel continuing objections to every subject of the psychiatrist's testimony. When the psychiatrist stepped down from the witness stand, the court sustained Sandoval's counsel's objection to all of the psychiatrist's testimony except for general testimony regarding traits of personality disorders. Sandoval's attorney diligently objected to testimony and succeeded in excluding all of the testimony derived from the court-ordered interview. As such, the record does not reveal any deficiencies in Sandoval's attorney's performance.

Also, there is no evidence that Sandoval suffered any prejudice from the psychiatrist's testimony. In its order, the sentencing panel specifically stated that it did not consider any of the psychiatrist's testimony that was derived from his court-ordered interview of Sandoval. Therefore, we do not consider whether the psychiatrist's testimony was proper, because the sentencing panel did not consider the testimony in reaching its determination. Further, it is presumed that judges disregard evidence which should not have been admitted. *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990). Sandoval did not suffer prejudice from the psychiatrist's testimony.

There is no evidence that Sandoval's counsel's performance was defective or that Sandoval suffered prejudice from the psychiatrist's testimony. The trial court did not err in receiving the testimony, and Sandoval's counsel did not provide ineffective assistance. These assignments of error are without merit.

(ii) Testimony of Todd Uhlir

Sandoval claims that his trial counsel was ineffective because he elicited speculative testimony from Todd Uhlir regarding a bullet's trajectory. During the aggravation phase of the trial, the State called Uhlir, the director of operations for the fast-food restaurant located across the street from the bank. On direct examination, Uhlir testified that a bullet from the robbery hit the glass of the drive-through window. He drew a diagram of the restaurant and indicated where employees are located on a typical morning.

Sandoval's counsel objected on the grounds that Uhlir was not at the restaurant at the time of the shootings, so he did not know where the employees were actually standing. In a sidebar, Sandoval's counsel explained that he was concerned the jurors would be misled by Uhlir's testimony and diagram, because they might think that was where people were actually standing when the bullet hit the window.

On cross-examination, Sandoval's counsel asked Uhlir questions to clarify that he was not at the restaurant during the robbery; that the bullet did not go through the glass; and that due to the angle at which the bullet was fired, it would have likely lodged in a wall and not traveled into the kitchen portion of the restaurant. Taken as a whole, the testimony elicited seems to be part of a deliberate trial strategy of showing the jurors that the likelihood of an employee's being hit by the stray bullet was low.

[53] Trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). As such, when reviewing an ineffective assistance of counsel claim, the court will not second-guess reasonable strategic decisions made by counsel. *Id*. Sandoval's counsel's cross-examination of Uhlir was not deficient and did not prejudice Sandoval. This assignment of error is without merit.

(iii) Failure to Call Forensic Pathologist

Sandoval claims that he received ineffective assistance because his trial counsel did not call a forensic pathologist as a witness to rebut the testimony of Dr. Jerry Jones. Jones testified concerning how long each of the victims had lived after being shot and the manner in which each ultimately had died.

During the guilt portion of the trial, Jones told the jury that Sun died from asphyxiation from bleeding in his air passages and extensive blood loss, Tuttle died from bone fragment disruption in her brain and bleeding around her brain stem, Bryant died from asphyxiation due to bleeding in her air passages, Elwood died from extensive bleeding in both chest cavities,

and Mausbach died from asphyxiation due to blood filling her air passages.

Jones explained that when a person's air passages fill with blood, the person has difficulty breathing. He or she would gasp to breathe, and cough, snort, or spit to try to get the blood out of his or her mouth. As an example, Jones explained that the blood on the wall near Mausbach was from her coughing blood in an attempt to breathe.

At the aggravation phase of the trial, Jones testified that when the victims asphyxiated, they were consciously attempting to expel blood from their airways and were essentially drowning in their own blood. He testified that it could take 1 to 2 minutes before a person became unconscious and 4 to 5 minutes before the person actually suffocated and died. Jones explained that although the person is gasping for air, the person is conscious, alert, and aware that he or she is dying. He characterized it as a "very agonizing" death. Jones also testified that although not as agonizing as asphyxiation, death by exsanguination—or blood loss—is not a pleasant way to die because blood loss leads to anxiety, apprehension, an impending sense of doom, and shortness of breath.

On cross-examination, Sandoval's attorney attempted to clarify the length of time that each victim was conscious after the shooting. He also asked Jones to confirm that it appeared that the gunshot wounds were intended to cause death and not to prolong the suffering. During the cross-examination, Jones also stated that he thought suffocation from blood was one of the worst ways to die. He stated that each second feels like "an eternity until the person dies."

Sandoval's trial counsel did not have an expert witness rebut Jones' testimony. Sandoval raised the issue at a hearing on his motion for substitute counsel, and Sandoval's attorney testified regarding the issue. He testified that in reaching the decision not to call a rebuttal witness, he considered whether arguments over the length of time the victims suffered before death would have a negative influence on the jury, whether additional gruesome testimony would have a favorable effect on the jury, and whether he wanted to give the State the opportunity to have Jones recalled to the stand to reiterate the suffering that the

victims endured before they died. These reasons indicate that the decision not to call a forensic pathologist to rebut Jones' testimony was carefully made and was part of a trial strategy which we will not second-guess. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). Accordingly, Sandoval's trial counsel was not deficient.

Furthermore, there is no evidence that Sandoval suffered any prejudice due to the fact that a doctor did not testify on his behalf. As his counsel noted, it is likely that an argument among experts over the precise number of seconds a victim suffered before he or she expired would not be well received by the jury. This assignment of error is without merit.

(iv) Failure to Adduce Prior Consistent Statements

Sandoval next argues that his trial counsel provided ineffective assistance because he did not adduce evidence of an alleged prior consistent statement made by Sandoval regarding his claim that he used LSD on the day of the murders. Sandoval alleges that during the mitigation phase of the trial, the State mentioned in its closing argument two statements Sandoval made about using LSD. Sandoval argues that his counsel should have offered the statements as mitigating evidence that Sandoval had not changed his story about using LSD. We conclude that Sandoval was not prejudiced by the failure to offer his prior consistent statement regarding his use of LSD on the day of the murders. Therefore, this assignment of error is without merit.

18. Independent Proportionality Review

[54] Under Neb. Rev. Stat. § 29-2521.03 (Reissue 2008), the Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). This review requires us to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. *Id.* The purpose of this review is to ensure that the sentences imposed in this case

are no greater than those imposed in other cases with the same or similar circumstances. *Id.*

In conducting our independent proportionality review, we reviewed our relevant decisions on direct appeal from other cases in which aggravating circumstances were found and the death penalty was imposed. See, *Vela, supra*; *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009); *Mata, supra*; *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007); *Gales I* (and cases noted therein). Particularly, we take note of *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), in which we affirmed a sentence of death for the defendant's convictions of two counts of first degree murder for the murder of two cabdrivers during a robbery.

The cases of Vela and Galindo, Sandoval's coconspirators, are most comparable. *Vela, supra*; *Galindo, supra*. As in *Vela* and *Galindo*, the murders in this case were committed in an effort to conceal the identity of the perpetrator, multiple murders were committed, and there was a great risk of death to more than two persons. Also comparable to *Galindo*, the sentencing panel found that no statutory mitigating circumstances existed and that one nonstatutory mitigating circumstance existed to which it gave little weight. Although the sentencing panel in *Vela* found three nonstatutory mitigating factors, it nevertheless concluded that the death penalty was not disproportionate or excessive.

Sandoval planned an armed bank robbery, recruited participants, and carried out the plan, which resulted in five murders. Based on our independent review, we find that the imposition of the death penalty for each of the five counts of first degree murder is proportional to the sentence imposed in the same or similar circumstances.

V. CONCLUSION

The trial court erred in instructing the jury on aggravator (1)(d); however, the error was harmless. Except for Sandoval's challenge of electrocution as the method of death, Sandoval's other assignments of error do not have merit. We conclude the evidence was sufficient to sustain the convictions and the sentences. Therefore, we affirm the convictions; affirm the panel's

sentences of death for the first degree murders of Elwood, Sun, Bryant, Mausbach, and Tuttle; and affirm the sentences imposed for use of a weapon to commit a felony.

AFFIRMED.

HEAVICAN, C.J., not participating.

CONNOLLY, J., concurring in part, and in part dissenting.

I concur in the majority's opinion that the district court should not have instructed the jury on the "mental anguish" component of the heinous, atrocious, or cruel prong of aggravator (1)(d). But, in concurring, I disagree with the majority's statement that we have not previously recognized mental anguish as a component of the heinousness factor. I write separately to explain why the trial court should not have given the instruction in this case despite our previous recognition of the mental anguish component.

The majority opinion states that in *State v. Gales*,[1] we recognized that "mental anguish" had been included in the pattern jury instructions but that we did not consider its validity. It is true that the defendant failed to raise this issue on appeal, but we clearly preempted a future collateral attack in *Gales*:

> [T]he jury was instructed that in order to find that the murder of [one of the victims] was especially heinous, atrocious, or cruel, it must find that "[t]he defendant inflicted serious mental anguish or serious physical abuse — meaning sexual abuse — on the victim . . . before her death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate." With respect to the phrase "sexual abuse," the court's instruction was constitutionally sound and consistent with Nebraska law as explained in [*State v.*] *Ryan*[, 248 Neb. 405, 534 N.W.2d 766 (1995)]. Neither [the defendant's] objection at trial, nor his appellate brief, take issue with the district court's use of the phrase "serious mental anguish," and whether that phrase is consistent with prior Nebraska law is not before us in this appeal. We note, however, that the phrase "'[m]ental anguish includ[ing] a victim's uncertainty as to

[1] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

his ultimate fate'" has been held not to be unconstitutionally vague.[2]

In *Gales*, we did not know which prong of aggravator (1)(d) the jury believed was proved and could not have concluded that the instruction, as a whole, was constitutionally sound unless both prongs were constitutionally sound. When

> a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories[,] it is possible that the guilty verdict may have had a proper basis, [but] "it is equally likely that the verdict . . . rested on an unconstitutional ground."[3]

So I believe that we did recognize the propriety of the mental anguish component in *Gales*. But even if we had not, we had previously stated in *State v. Palmer*[4] that a victim's uncertainty as to his ultimate fate is a component of the heinousness prong:

> As a meaning for the words "especially heinous, atrocious, cruel" found in circumstance (1)(d) of § 29-2523, this court, in *State v. Simants*[, 197 Neb. 549,] 566, 250 N.W.2d [881,] 891 [(1977)], has adopted the definition utilized by the Florida court in *State v. Dixon*[, 283 So. 2d 1 (Fla. 1973)], that is, especially heinous, atrocious, cruel is "directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." . . .
>
> "Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death." *Phillips v. State*, 250 Ga. 336, 340, 297 S.E.2d

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[2] *Id.* at 483-84, 694 N.W.2d at 161, citing *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[3] *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), quoting *Bachellar v. Maryland*, 397 U.S. 564, 90 S. Ct. 1312, 25 L. Ed. 2d 570 (1970). See, also, *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990) (Marshall, J., concurring); *Leary v. U.S.*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). Compare *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

[4] *State v. Palmer*, 224 Neb. 282, 315, 399 N.W.2d 706, 729 (1986).

> 217, 221 (1982). "A victim's uncertainty as to the ultimate fate can be significant in indicating mental suffering." *State v. Correll*, [148 Ariz. 468,] 480, 715 P.2d [721,] 733 [(1986)].

As the facts in *Gales* and *Walton v. Arizona*[5] illustrate, the mental anguish instruction is not unconstitutionally vague when the evidence would support two different findings: (1) The victim would have been uncertain whether the defendant intended to kill him and had time to agonize over whether the defendant would decide to kill him; or (2) the victim would have been certain of the defendant's intent to kill him and had time to agonize over his imminent doom before the defendant committed the murder.

In *Walton*, the U.S. Supreme Court affirmed the use of the mental anguish instruction when the victim was forced to lie on the ground while his kidnappers decided what to do with him. The defendant then forced him to walk out into the desert, taking a gun but not a rope, "surely making [the victim] realize that he was not going to be tied up and left unharmed."[6] In *State v. Correll*,[7] the case we cited in *Palmer*, armed assailants bound the victims and then drove them into the desert before killing them. The court in *Correll* stated, "At no time could they be certain what these two armed men intended beyond robbery."[8] Finally, in *Gales*,[9] the defendant killed two children by strangulation in the same house. A fact finder could have reasonably found that the child who was killed last would have been aware that the defendant had murdered the other child and would have feared for his or her own fate.

Although the mental anguish instruction is not unconstitutionally vague in the circumstances described above, I agree that it should not have been given in this case because the victims were all shot immediately. The State did not argue

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[5] *Walton, supra* note 2.

[6] *Walton, supra* note 2, 497 U.S. at 646 n.3.

[7] *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986).

[8] *Id.* at 480, 715 P.2d at 733.

[9] *Gales, supra* note 1.

that the victims would have agonized over whether the defendants intended to kill them or their imminent doom before they were shot. In fact, the State argued that the defendants planned to shoot everyone immediately so there would not be any witnesses. Under these facts, I agree that the mental anguish instruction failed to channel the jury's discretion for determining whether Sandoval was more deserving of the death penalty than any capital defendant whose victim did not die instantaneously.

Furthermore, the majority opinion implicitly assumes, and I agree, that the heinousness instruction was not otherwise warranted under our limiting construction in *Palmer*, quoted above, requiring that the murder be unnecessarily torturous to the victim.

I also concur in the majority's opinion that the court should not have instructed the jury on the "apparent relishing" component of the exceptional depravity prong. Here, the facts were too speculative, and therefore insufficient, to submit this component to the jury. We addressed case law relevant to this issue in *State v. Mata*.[10]

In *Mata*, the defendant argued that it was not clear whether the term "apparently relished" referred to the fact finder's perception of his conduct or his mental state. We rejected that argument. We noted that under an earlier version of aggravator (1)(b), the sentencing panel had to find that the defendant had murdered in an "apparent effort" to conceal a crime. We stated that under the earlier version, we had agreed with a federal court that "'"apparent"' means '"readily perceptible,"'" and that therefore, the provision "'"cannot be applied in speculative situations or where a strained construction is necessary to fulfill it."'"[11] In *State v. Lotter*,[12] we interpreted the term "'readily perceptible'" to mean "'easily capable of being noticed.'" We

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[10] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[11] *Id.* at 27, 745 N.W.2d at 253, quoting *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated and remanded on other grounds* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[12] *State v. Lotter*, 255 Neb. 456, 521-22, 586 N.W.2d 591, 635 (1998). Accord *Mata, supra* note 10.

concluded in *Lotter* that for the sentencing panel to conclude that the defendant murdered in an apparent attempt to conceal the commission of a crime, it must have been obvious to the panel that this was the defendant's purpose.[13]

In *Walton*, the U.S. Supreme Court approved the Arizona Supreme Court's holding that "a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing."[14] This court has similarly noted that "'depraved'" is "'marked by debasement, corruption, perversion, or deterioration.'"[15] But the Arizona court's definition approved in *Walton* did not include the word "apparent." So *Walton* should not control over our own case law regarding the similar phrase, "apparent effort to conceal," in the former version of aggravator (1)(b).

By analogy to our case law on a murder committed in an *apparent* attempt to conceal a crime, a court should not instruct a jury on the apparent relishing component of aggravator (1)(d) in speculative circumstances. A trial court should give the instruction only when the evidence would support a finding that the defendant's relishing of the murder was obvious. I believe the facts of this case were too speculative under a test set forth by the Arizona Supreme Court.

We adopted our exceptional depravity factors from the Arizona Supreme Court.[16] That court has said the following about its relishing component:

> The first factor, that a defendant relishes the murder, "refers to the defendant's actions or words that show debasement or perversion." *State v. Roscoe*, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). To establish relishing, we usually "require that the defendant say or do something, other than the commission of the crime itself,

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[13] See *Lotter, supra* note 12.

[14] *Walton, supra* note 2, 497 U.S. at 655.

[15] See *Palmer, supra* note 4, 224 Neb. at 318, 399 N.W.2d at 731.

[16] See *id.*

> to show he savored the murder." *Id.*; *accord State v. Doerr*, 193 Ariz. 56, 67-68, ¶ 54, 969 P.2d 1168, 1179-80 (1998) (finding that defendant relished murder after defendant bragged to his cellmate about playing with the victim's blood); *State v. Detrich*, 188 Ariz. 57, 68, 932 P.2d 1328, 1339 (1997) (finding that defendant relished murder and demonstrated an "abhorrent lack of regard for human life" based on defendant's statement to his co-defendant, "It's dead, but it's warm. Do you want a shot at it?"); *State v. Jackson*, 186 Ariz. 20, 30, 918 P.2d 1038, 1048 (1996) (describing how defendant sang a rap song both immediately after killing his victim and then after showing a picture of the victim's children to his co-defendant); *see* [*State v.*] *Clark*, 126 Ariz. [428,] 437, 616 P.2d [888,] 897 [(1980)] (finding depravity when defendant kept a souvenir of his crime).[17]

But the Arizona Supreme Court concluded that the factor had not been proved beyond a reasonable doubt when the trial court found that the defendant reveled in the idea of meting out his own justice, enjoyed the spectacle the murder created in front of his friends, and enjoyed the emotional toll caused to the victim by the defendant's locking him in a trunk overnight. The court reasoned that the evidence failed to show the defendant "said or did anything, beyond the commission of the crime itself, that manifests that he savored the murder."[18]

The Arizona Supreme Court's test is obviously intended to narrow a jury's discretion by distinguishing murderers who relish the act of murdering from those who show indifference to human life—a definition that would fail to preclude arbitrary sentencing. Under that test, I do not believe that Sandoval's smiling at another customer who had unexpectedly entered the bank or after he was arrested are affirmative acts or statements sufficient to support a jury's finding that he obviously relished committing the murders, as distinguished from his indifference to human life. Thus, the court improperly instructed the jury to

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[17] *State v. Murdaugh*, 209 Ariz. 19, 31-32, 97 P.3d 844, 856-57 (2004).

[18] *Id.* at 32, 97 P.3d at 857.

determine the existence of the exceptional depravity prong of aggravator (1)(d).

In sum, I concur in the majority's opinion that the court should not have instructed the jury on either the heinousness prong or the exceptional depravity prong of aggravator (1)(d). But I dissent from its conclusion that the instructions were harmless error. I believe that these were substantial errors requiring us to remand the cause to the district court for the sentencing panel to resentence Sandoval.

The first question is, What is the proper test for determining whether the instructions on the heinousness and exceptional depravity prongs were constitutional error? Before the U.S. Supreme Court's 2006 decision in *Brown v. Sanders*,[19] Nebraska was a weighing state for determining whether an Eighth Amendment violation occurred because the sentencer considered an invalid aggravator.[20] Weighing states were characterized by sentencing schemes that required the sentencing body to weigh the statutory aggravating circumstances, which made the defendant eligible for the death penalty, against any mitigating circumstances supported by the evidence.[21] The U.S. Supreme Court had held that "there is Eighth Amendment error when the sentencer [in a weighing state] weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence."[22]

In contrast, in nonweighing states, after a jury found at least one aggravator, the sentencer determined whether to impose the death penalty by considering all the circumstances from both the guilt phase and the sentencing phase. Aggravating factors played no specific role in the sentencer's decision; the

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[19] *Brown v. Sanders*, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

[20] See, *Williams, supra* note 3; *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991).

[21] See, *Brown, supra* note 19; *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). See, also, Neb. Rev. Stat. § 29-2522 (Reissue 2008).

[22] *Sochor v. Florida*, 504 U.S. 527, 532, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).

jury's finding of an aggravating factor only made the defendant death eligible.[23]

Before *Brown*, the Court considered the distinction between weighing and nonweighing states "of critical importance" in how an appellate court must review the effect of an aggravating circumstance that is later declared invalid.[24] The critical difference was the emphasis placed on statutory aggravating circumstances in weighing states.[25] So, in weighing states, a state appellate court could not just assume that because other aggravators supported the sentence, the absence of the invalid aggravator would have made no difference. The weighing process was considered skewed, and "only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."[26]

In contrast, in nonweighing states, constitutional error presumptively occurred in only two circumstances: (1) if the invalid factor permitted the sentencer to draw adverse inferences from conduct that is constitutionally protected or irrelevant to sentencing, or that actually militates for a lesser penalty; or (2) if the invalid eligibility factor allowed the jury to hear evidence that otherwise would not have been before it.[27] And a state appellate court could determine that the invalid factor would not have made a difference to the jury's determination without engaging in reweighing or harmless error analysis.[28]

But in *Brown*, the Court emphasized what evidence the sentencer could have considered without the invalid aggravator in weighing and nonweighing states. It stated that in weighing states, the sentencer could not consider the evidence supporting that aggravator under a different factor, "[s]ince the eligibility

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[23] See *Stringer, supra* note 21.

[24] *Id.*, 503 U.S. at 232.

[25] See, *Brown, supra* note 19 (Breyer, J., dissenting; Ginsburg, J., joins); *id.* (Stevens, J., dissenting; Souter, J., joins); *Stringer, supra* note 21.

[26] *Stringer, supra* note 21, 503 U.S. at 232.

[27] *Brown, supra* note 19.

[28] See *Stringer, supra* note 21.

factors by definition identified distinct and particular aggravating features . . . .”[29] Conversely, it stated that in nonweighing states, the sentencer could consider this evidence under a different sentencing factor.

But the Court concluded, “This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations.”[30] It concluded that the distinction failed to account for the same type of skewing occurring in a nonweighing state if one of the separate sentencing factors was later declared invalid. But it reasoned that prima facie claims of skewing in the sentencing factors would be illusory if “[o]ne of the *other* aggravating factors, usually an omnibus factor but conceivably another one, made it entirely proper for the jury to consider as aggravating the facts and circumstances underlying the invalidated factor.”[31] The Court concluded:

> We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing States . . . if we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.[32]

It explained that its new rule meant “skewing will occur, and give rise to constitutional error, only where the [sentencer] could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.”[33]

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[29] *Brown, supra* note 19, 546 U.S. at 217.

[30] *Id.*, 546 at at 219.

[31] *Id.*, 546 U.S. at 220 (emphasis in original).

[32] *Id.* (emphasis in original).

[33] *Id.*, 546 U.S. at 221.

As the 11th Circuit has noted, many courts and commentators that have considered this issue have read *Brown* as announcing a uniform rule for weighing and nonweighing states alike.[34] Although the Sixth Circuit has concluded that *Brown* only announced a new rule for nonweighing states, it appears there is an inherent problem in that conclusion. *Brown* clearly discarded the previous terminology it had used to distinguish weighing and nonweighing states. But discarding the distinguishing terminology is inconsistent with announcing a new rule only for states formerly known as nonweighing states. Moreover, it seems to me that limiting the *Brown* rule to nonweighing states is refuted by the Court's analysis of California's statutes, which were at issue in *Brown*.

The Ninth Circuit had held that California is a weighing state because if a jury found the existence of eligibility factors, the court instructed it to consider a separate list of sentencing factors and to weigh only those factors against mitigating evidence. The *Brown* majority rejected this conclusion and classified California as a nonweighing state because one of the sentencing factors was an omnibus factor that permitted the jury to consider the "'circumstances of the crime.'"[35] The *Brown* majority then rejected the distinction between weighing and nonweighing jurisdictions altogether:

> *But leaving aside the weighing/non-weighing dichotomy and proceeding to the more direct analysis set forth earlier in this opinion*: All of the aggravating facts and

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[34] See, *Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007), citing *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), *vacated on other grounds sub nom. Hudson v. Spisak*, 552 U.S. 945, 128 S. Ct. 373, 169 L. Ed. 2d 257 (2007); *Slagle v. Bagley*, 457 F.3d 501 (6th Cir. 2006); 1 Wayne R. LaFave, Substantive Criminal Law § 3.5 (2d ed. 2003 & Supp. 2009-10); and *The Supreme Court, 2005 Term—Leading Cases*, 120 Harv. L. Rev. 125 (2006). See, also, *Clayton v. Roper*, 515 F.3d 784 (8th Cir. 2008); *Mitchell v. Epps*, No. 1:04CV865(LG), 2010 WL 1141126 (S.D. Miss. Mar. 19, 2010); 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, Substance and Procedure § 17.3(c) (4th ed. 2008); Charles H. Whitebread, *The 2005-2006 Term of the United States Supreme Court: A Court in Transition*, 28 Whittier L. Rev. 3 (2006).

[35] *Brown, supra* note 19, 546 U.S. at 222.

> circumstances that the invalidated factor permitted the jury to consider were also open to their proper consideration under one of the other factors. The erroneous factor could not have "skewed" the sentence, and no constitutional violation occurred.[36]

So I believe that *Brown* clearly intended to focus the inquiry—under any type of capital sentencing scheme—on whether the sentencer could consider the same facts and circumstances under a different aggravating factor.

Since 2002, under Nebraska's capital sentencing scheme, a jury, if not waived, only determines the existence of aggravating circumstances.[37] A three-judge panel determines the existence of mitigating circumstances, weighs aggravating and mitigating circumstances, conducts a proportionality review, and determines the sentence.[38] We have stated, "'[T]he death penalty statutes read as a whole make clear that the sentencing panel needs to consider evidence of the crime and of aggravating circumstances in order to properly perform its balancing and proportionality sentencing functions.'"[39] And as the U.S. Supreme Court in *Brown* noted, one of the reasons that the weighing/nonweighing distinction has been misleading is because the Court has held that the sentencer in capital cases must be allowed to weigh the facts and circumstances of the crime against the defendant's mitigating evidence.[40]

But under the Court's decision in *Ring v. Arizona*,[41] other than the finding of a prior conviction, the determination of aggravating circumstances must be made by a jury unless waived by the defendant.[42] The sentencing panel cannot give aggravating weight to any circumstance the jury did not find

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[36] *Id.*, 546 U.S. at 222-23 (emphasis supplied).

[37] See *Mata, supra* note 10.

[38] *Id.*; *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[39] *State v. Galindo*, 278 Neb. 599, 626-27, 774 N.W.2d 190, 218 (2009), quoting *Hessler, supra* note 38.

[40] See *Brown, supra* note 19.

[41] *Ring, supra* note 2.

[42] See, e.g., *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

to exist. So under *Brown*, when we determine that the court invalidly instructed the jury on an aggravating circumstance, the weighing process is unconstitutionally skewed unless the sentencing panel could have given aggravating weight to the same evidence under a different aggravating circumstance that the jury found to exist.

I believe that the evidence before the sentencing panel supporting the mental anguish component of the heinousness prong and the relishing component of the depravity prong could not have been considered under any of the remaining aggravating circumstances found by the jury: i.e., (1) the defendant committed the murder to conceal the identity of the perpetrator; (2) the defendant committed another murder at the time of the murder; (3) the defendant created a great risk of death to at least several persons. Thus, the weighing process was unconstitutionally skewed.

But *Brown* "deals only with the threshold matter of deciding when constitutional error has resulted from reliance on invalid aggravators, not with how appellate courts can remedy the error short of resentencing."[43] It "does not bar courts from engaging in harmless error review."[44] The U.S. Supreme Court has held that when an Eighth Amendment violation occurs, federal law does not require a state appellate court to remand for resentencing, but if it does not, it must "either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error."[45]

But as the majority opinion notes, we have held that appellate reweighing violates a defendant's due process rights under Nebraska's capital sentencing scheme.[46] We can only conduct harmless error review or remand the cause to the district court for resentencing.[47] But it appears to me that the majority's analysis is a reweighing rather than harmless error review.

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[43] *Jennings, supra* note 34, 490 F.3d at 1256.

[44] *Id.*

[45] *Sochor, supra* note 22, 504 U.S. at 532.

[46] See *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[47] See *id.*

In *State v. Ryan*,[48] we explained that *Chapman v. California*[49] governs harmless error analysis of constitutional error. *Chapman* requires the State to prove beyond a reasonable doubt that the error did not contribute to the death sentence: The question under *Chapman* "is not whether the legally admitted evidence was sufficient to support the death sentence, . . . but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained.'"[50]

In *Ryan*, we adopted the Eighth Circuit's harmless error standard:

> "[T]he issue under *Chapman* is whether the sentencer actually rested its decision to impose the death penalty on the valid evidence and the constitutional aggravating factors, independently of the vague factor considered; in other words, whether what was actually and properly considered in the decision-making process was 'so overwhelming' that the decision would have been the same even absent the invalid factor."[51]

In *Ryan*, we noted that the sentencing judge's order indicated that the judge had found facts "to support the application of *either* the first or second prong of [aggravator] (1)(d) beyond a reasonable doubt."[52] We therefore rejected the defendant's argument that the sentence was heavily based on the judge's finding of exceptional depravity because the same facts overwhelmingly supported the heinousness prong.[53]

As discussed, I do not believe that we can reach that conclusion here because the jury did not find any other aggravating circumstance for which the mental anguish and relishing

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[48] *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, Mata, supra* note 10.

[49] *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[50] See *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988), quoting *Chapman, supra* note 49.

[51] *Ryan, supra* note 48, 248 Neb. at 452, 534 N.W.2d at 796.

[52] *Id.* at 451, 534 N.W.2d at 795 (emphasis in original).

[53] See *Ryan, supra* note 48.

facts were relevant. So the error is not harmless unless we can say beyond a reasonable doubt that the sentencer was not substantially swayed by the error[54] because the evidence was "unimportant in relation to everything else the [sentencer] considered."[55] In *Chapman*, the Court stated, "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless."[56] I do not believe that a substantial error, which resulted in a sentencing panel's weighing evidence prejudicial to the defendant but not validly considered under any aggravator found by the jury, can be considered harmless.

Here, the evidence supporting the mental anguish and relishing components was highly prejudicial. The State's expert witness testified extensively about the agonizing deaths that each victim would have experienced. And four witnesses testified to facts relevant to Sandoval's purported relishing of the murders. The State also emphasized facts supporting the relishing component in its closing argument. The sentencing panel would have incorrectly relied on this emphasized evidence as validly supporting the heinousness and depravity prongs of aggravator (1)(d), and therefore supporting the death penalty.

Under these circumstances, I believe it is insufficient for the majority opinion to conclude that the evidence supported the remaining aggravating circumstances and that the sentencing panel gave little weight to the only mitigating circumstance it found to exist. I believe that this analysis clearly consists of reweighing the aggravators and mitigators, instead of concluding that this evidence did not contribute to the sentence beyond a reasonable doubt.[57]

The State has a heavy burden to show harmless error beyond a reasonable doubt. And the sentencing order provides no

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[54] See *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

[55] *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled on other grounds, Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

[56] *Chapman, supra* note 49, 386 U.S. at 23-24.

[57] Compare *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

insight that allows us to determine what weight the sentencing panel gave to this evidence relative to evidence supporting the other factors. But the majority concedes that the sentencing panel found each aggravating factor to be "'significant and substantial.'" Because of the emphases the State placed on the impermissible evidence and the sentencing panel's own statements, I do not believe we can assume the sentencing panel's reliance on both prongs of aggravator (1)(d) did not exert a decisive influence on its sentencing determination and was therefore harmless beyond a reasonable doubt. I would remand the cause for resentencing based on the evidence supporting the remaining aggravating circumstances and the mitigating circumstance.

PATRICIA RICHARDSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF COREY RICHARDSON, DECEASED, AND PATRICIA RICHARDSON, INDIVIDUALLY, APPELLEES, V. CHILDREN'S HOSPITAL AND DR. SCOTT JAMES, APPELLANTS.

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1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Rules of Evidence: Expert Witnesses.** Neb. Rev. Stat. § 27-702 (Reissue 2008) allows the admission of expert testimony if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
3. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
4. **Trial: Expert Witnesses.** An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance.
5. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.