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the order of the district court which affirmed the sentence, and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RODNEY L. BAKER, APPELLANT.
789 N.W.2d 702

Filed October 29, 2010. No. S-09-1312.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
5. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
6. **Trial: Testimony: Appeal and Error.** Determinations regarding cross-examination of a witness on specific instances of conduct are specifically entrusted to the discretion of the trial court.
7. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.

8. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
9. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
10. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
11. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
12. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
13. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
14. **Trial: Hearsay: Proof.** When overruling a hearsay objection on the ground that testimony about an out-of-court statement is received not for its truth but only to prove that the statement was made, a trial court should identify the specific nonhearsay purpose for which the making of the statement is relevant and probative.
15. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

James R. Mowbray and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Following a jury trial in the district court for Lancaster County, Rodney L. Baker was convicted and sentenced on one count of first degree sexual assault, a Class II felony, and one count of third degree sexual assault of a child, a Class IIIA felony.[1] In this direct appeal, Baker contends that certain testimony from the victim and her mother was erroneously admitted. We conclude that the district court did not err in receiving the testimony, and we therefore affirm.

I. BACKGROUND

From the summer of 2003 until December 21, 2005, K.B. and her younger sister lived with their mother in a single-family residence in Lincoln, Nebraska. Baker, the mother's boyfriend at the time, also lived at the residence. K.B. was between 11 and 13 years old during this time period.

K.B. wanted to be a massage therapist, and from an early age, she gave back and foot massages to her mother. During the time she lived with Baker, K.B. would usually give these massages to her mother in the evenings, while the family was gathered in the living room. On one of these occasions, Baker was sitting in a chair approximately 5 feet away, outside of K.B.'s line of vision. K.B.'s mother could see Baker and noticed that he was masturbating. The mother testified that this was the first time that she noticed Baker becoming aroused while K.B. was massaging her.

K.B.'s mother testified that sometime after this incident, Baker began instructing her to call K.B. into their bedroom late at night in order to give the mother a massage. This occurred on various occasions for approximately 2 years. Usually, Baker would masturbate while K.B. massaged her mother on the bed. Baker sometimes fondled K.B. and instructed her on how to touch herself in order to receive sexual pleasure. K.B. testified that Baker digitally penetrated her on one occasion and that on more than one occasion, he made her touch his penis, once ejaculating on her hand.

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[1] See Neb. Rev. Stat. §§ 28-319 (Reissue 1995) and 28-320.01 (Cum. Supp. 2004).

On December 21, 2005, through juvenile court proceedings, K.B. and her sister were removed from the home they shared with their mother and Baker. The girls were then placed in various foster care settings. K.B.'s contact with Baker after her removal from the home was limited, especially after February 2008, when her foster parents became her legal guardians. K.B. first reported the sexual assaults by Baker in October 2008.

Both K.B. and her mother testified at trial about their delay in reporting the assaults. In general, both testified that Baker had threatened them with harm if they reported his actions to authorities and that they believed he would carry out the threats, based upon prior acts of domestic violence. This testimony was the subject of a pretrial proceeding pursuant to the Nebraska Evidence Rules, as set forth in greater detail below.

When Baker was initially questioned by police in this matter, he admitted that K.B. had been sexually abused. Baker contended, however, that K.B.'s mother was the actual perpetrator of the abuse and that he was just a bystander. He was convicted after a jury trial and filed this timely direct appeal.

II. ASSIGNMENTS OF ERROR

Baker assigns, restated, that the district court erred in (1) allowing the State to introduce evidence of other crimes, wrongs, or acts which he contends were inadmissible; (2) receiving hearsay testimony from K.B. regarding threats and domestic violence directed at her mother; and (3) permitting the State to utilize extrinsic evidence of the conduct of a witness for the purpose of supporting or impeaching credibility.

III. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[2] Where the Nebraska Evidence Rules commit

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[2] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[3]

[3] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.[4]

[4] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.[5]

[5,6] When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.[6] Determinations regarding cross-examination of a witness on specific instances of conduct are specifically entrusted to the discretion of the trial court.[7]

IV. ANALYSIS

1. Rule 404(2) Issues

(a) Additional Background

Shortly after Baker was arraigned, his counsel filed a motion seeking access to K.B.'s juvenile court records. In a hearing on the motion, counsel argued that he needed the confidential

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[3] *Id.*; *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[4] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Floyd, supra* note 2.

[5] *State v. Epp, supra* note 4; *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[6] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[7] Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008); *State v. Schreiner, supra* note 6. See, also, *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

records in order to confirm his belief that K.B. had not reported sexual abuse by Baker during counseling which she received in 2005 and 2006 and that she had assured counselors that she would report such abuse if it had occurred. Baker's counsel argued that he needed this information in order to effectively cross-examine K.B. and her mother at trial. After an in camera review of the juvenile court records, the court determined that portions thereof should be disclosed to the defense and provided copies of those records to Baker's counsel.

After that ruling but prior to trial, the State filed notice that pursuant to rule 404(2), it intended to offer evidence of Baker's physical abuse of and threats of harm directed at K.B. and her mother for the purpose of (1) showing that K.B. and her mother feared Baker, (2) showing that such fear was real and not imagined, and (3) explaining the failure of K.B. and her mother to promptly report the conduct which formed the bases of the charges against Baker. Baker filed an objection. The district court conducted a pretrial hearing and ultimately determined (1) that the mother's testimony about what she did and why she did it on the nights of the alleged assaults was not rule 404 evidence and (2) that the remainder of this evidence was admissible for the purposes proposed by the State.

During the trial, K.B. testified that Baker told her he would kill her and her mother if she reported the assaults. K.B. testified over Baker's continuing rule 404 objection that she believed Baker would carry out the threats because she had observed her mother with body bruises and black eyes at various times while they lived with Baker. K.B. believed these injuries were inflicted by Baker because she had seen her mother enter a room with Baker and come out with a black eye. K.B. also testified that she was afraid of Baker because he once grabbed her when she wanted to run away and squeezed her arms so hard he left indentations. Immediately prior to this testimony, the court instructed the jury that the testimony regarding Baker's physically assaulting K.B. and her mother was being received

> for the limited purpose of helping you evaluate [K.B.'s] testimony regarding the delay in reporting the allegations of sexual abuse that are the subject of this case and

> [K.B.'s mother's] testimony regarding her failure to report or take other steps to stop the alleged sexual abuse. You may consider this evidence for that limited purpose only and for no other purpose.

K.B.'s mother also testified that Baker threatened to kill her or tell police she was responsible for everything if she reported the assaults. The mother testified that if she refused to bring K.B. into the bedroom after Baker told her to do so, Baker would beat or choke her, and at times threatened her with a knife. On one occasion when the mother confronted Baker about the sexual abuse of K.B., he choked her until she lost consciousness. The mother further testified that Baker was physically abusive to her throughout the time they lived together. The abuse included choking and striking her with his fist, resulting in black eyes on multiple occasions. Prior to this testimony, the district court gave a limiting instruction similar to the one given during K.B.'s testimony, as quoted above.

After both K.B. and her mother testified that K.B. often gave her mother evening massages in the living room, the State sought to elicit testimony from the mother regarding the first time she noticed Baker becoming sexually aroused while K.B. was massaging her. Baker asserted a rule 404 objection and argued that the evidence was inadmissible as a prior bad act. The court overruled Baker's objection, reasoning that the evidence was not rule 404 evidence and was admissible because it was "part of the whole story" of the charged crimes. The court specifically directed the State to connect the evidence regarding the living room incident with the subsequent events that occurred in the bedroom. In the prosecutor's summation, he argued from this evidence that Baker was sexually aroused by watching K.B. administer massages to her mother, thus making it more likely that the sexual abuse was committed by Baker and not K.B.'s mother, as Baker claimed in his statement to police.

In addition to the limiting instructions given during the testimony of K.B. and her mother, the court's final instructions to the jury included a statement that the evidence of physical violence perpetrated upon K.B. or her mother was received

"for the limited purpose of helping you evaluate [K.B.'s] testimony regarding her delay in reporting the allegations of sexual abuse" and the mother's "testimony regarding her failure to report or take other steps to stop the alleged sexual abuse." The jury was again instructed that it could consider such evidence "for that limited purpose and for no other."

(b) Disposition

[7-10] Baker contends that the evidence summarized above was inadmissible under rule 404(2), which governs the admissibility of what has been characterized as "other crimes" or "similar acts" evidence.[8] Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[9] But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[10] Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[11] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury

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[8] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[9] *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. Sanchez, supra* note 8.

[10] *State v. McPherson, supra* note 9; *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

[11] *State v. Aguilar, supra* note 10; *State v. Sanchez, supra* note 8.

to consider the evidence only for the limited purpose for which it was admitted.[12]

[11] Our first task is to determine what portion of the challenged evidence is governed by rule 404(2). Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under rule 404(2).[13] For example, in *State v. McPherson*,[14] the defendant was convicted on two counts of child abuse and two counts of first degree sexual assault on a child. The victims were his minor daughters, who testified regarding sexual activity occurring in their home. On appeal, the defendant argued that evidence about sexual devices and sexually explicit videos in the home was inadmissible under rule 404(2). We concluded that the evidence was "so closely intertwined with both crimes charged that it cannot be considered extrinsic" and therefore was not governed by rule 404(2) and was properly received.[15]

Here, K.B.'s testimony that Baker threatened her with harm if she reported his conduct is inextricably intertwined with the charged offenses and therefore is not subject to rule 404(2). The same is true with regard to the mother's testimony that Baker threatened and physically assaulted her if she did not bring K.B. to the bedroom when he instructed her to do so. And, likewise, the mother's testimony regarding the first time she observed Baker become sexually aroused while watching K.B. administer a massage is "part of the whole story" of the charged offenses and not governed by rule 404(2). All of this evidence was within the "coherent picture of the facts of the crimes charged"[16] which the State was entitled to present. It was not offered to prove that Baker had the propensity or character to act in a certain way. The district court did not abuse its discretion in receiving this evidence.

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[12] *State v. Epp, supra* note 4; *State v. Floyd, supra* note 2.

[13] *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[14] *State v. McPherson, supra* note 9.

[15] *Id.* at 744, 668 N.W.2d at 513.

[16] *Id.* at 743, 668 N.W.2d at 513.

But all of the remaining testimony of K.B. and her mother regarding threats and domestic violence does constitute rule 404(2) evidence. As required by *State v. Sanchez*,[17] the State identified the specific purposes for which this evidence was being offered: to show that K.B. and her mother feared Baker, to establish that their fear was "real and not imaginary," and to explain the failure of K.B. and her mother to make a prompt complaint. Likewise, the district court ruled that the evidence would be received solely for explaining the delay in reporting the crimes, and so instructed the jury.

This court has upheld the admissibility of rule 404(2) evidence on similar grounds. In *State v. Hitt*,[18] an appeal from a sexual assault conviction where the victim was the defendant's minor child, we held that evidence that the defendant had struck the victim with a paddle and had hit a younger sibling on the knees with a hammer was properly received to establish that the children were genuinely afraid of the defendant, thereby explaining their failure to make a prompt complaint. In *State v. Wilson*,[19] we held that evidence of the defendant's conversations with a witness about his connections with persons involved in criminal activity was properly received to corroborate the witness' testimony that she did not immediately come forward to report the defendant's involvement in a fatal shooting because she feared retaliation by the defendant.

Applying evidence rules similar to rule 404(2), other courts have admitted "other crimes" evidence for the limited purpose of explaining the failure of a victim or other witness to promptly report a crime. In *Brock v. State*,[20] a Georgia appellate court held that a child's testimony that she had seen her stepfather strike and point a gun at her mother was properly received to explain why the child did not immediately report the fact that she had been sexually molested by her stepfather.

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[17] *State v. Sanchez, supra* note 8.

[18] *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

[19] *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

[20] *Brock v. State*, 183 Ga. App. 277, 358 S.E.2d 613 (1987).

A federal appeals court held in *U.S. v. Davidson*[21] that the trial court had not abused its discretion in receiving witnesses' testimony regarding prior criminal activity by the defendant for the limited purpose of showing that the witnesses were afraid of the defendant and therefore did not come forward sooner to report the charged offense. And in *U.S. v. Powers*,[22] another federal appeals court held that evidence of the defendant's violent conduct directed at the victim and her family was properly received in the government's case in chief under the federal counterpart of rule 404(2) to explain the child victim's submission to sexual abuse by her father and her delay in reporting it.

In arguing that the rule 404(2) evidence was erroneously received at his trial, Baker relies upon our opinions in *State v. Sanchez*[23] and *State v. Trotter*[24] and the Nebraska Court of Appeals' opinion in *State v. Sutton*.[25] In *Sanchez*, a prosecution for sexual assault upon a 13-year-old girl, we held that evidence of uncharged sexual assaults upon other females under the age of 16 lacked independent relevance on the issues of intent, opportunity, motive, and identity, which were the only purposes for which the evidence was offered. In *Trotter*, an appeal from convictions for child abuse, child abuse resulting in death, and manslaughter, we held that evidence that the defendant had physically abused two former spouses offered by the prosecutor to prove the defendant's "'violent tendencies towards the people living in his household'" was improperly admitted to prove the defendant's propensity to commit the crimes charged.[26] Similarly, in *Sutton*, the Court of Appeals held that evidence that the defendant had been previously convicted for assaulting the alleged victim of the offenses for which he was

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[21] *U.S. v. Davidson*, 122 F.3d 531 (8th Cir. 1997).

[22] *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. 1995).

[23] *State v. Sanchez, supra* note 8.

[24] *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[25] *State v. Sutton*, 16 Neb. App. 185, 741 N.W.2d 713 (2007), *modified on denial of rehearing* 16 Neb. App. 287, 741 N.W.2d 713.

[26] *State v. Trotter, supra* note 24, 262 Neb. at 453, 632 N.W.2d at 335.

being tried was erroneously received for purposes of showing motive and intent, in that its only probative value was to show the defendant's propensity to use violence as a means of controlling others. All of these cases are distinguishable from the instant case in that none dealt with evidence of the defendant's prior acts offered and received for the limited purpose of explaining a victim's delay in reporting a crime.

In this case, it was clear from the outset that the credibility of K.B. and her mother would be contested and likely determinative issues at trial. In addressing these issues during its case in chief, the State had a legitimate interest in explaining why the charged offenses were not reported until more than 3 years after they were allegedly committed. The district court did not abuse its discretion in determining that Baker's prior acts of domestic violence had independent relevance to show that K.B. and her mother had a genuine and legitimate basis for believing that Baker would carry out his threats to harm them if they reported the crimes and that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice or other factors enumerated in rule 403. By its limiting instructions, the district court correctly informed the jury of the narrow purpose for which it could consider the evidence. Baker's first assignment of error is without merit.

2. Hearsay Issue

During her direct examination, K.B. testified that she had not observed Baker touch her mother in an aggressive manner. The prosecutor then asked if her mother ever told her that he had done so. Upon Baker's hearsay objection, the court inquired if the prosecutor was offering the mother's statement to prove its truth, and he responded in the negative. The court ruled that it would receive evidence of the mother's statement "only for the fact that it was said, not whether what was said was true." K.B. then testified that her mother told her that Baker had given her a black eye and that she was afraid of him. The prosecutor also asked K.B. if her mother ever told her that Baker had threatened her. Over Baker's hearsay objection, the court again received K.B.'s testimony about her mother's statement for the fact that a statement was made, but not for the truth of

that statement. K.B. then testified that her mother told her that Baker had threatened to hurt both of them if K.B. "said anything." Baker assigns and argues that the mother's statements were inadmissible hearsay erroneously received.

[12] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[27] K.B.'s testimony about the threat made by Baker to her mother and related by her mother to her involves two out-of-court statements, that of Baker to the mother and that of the mother to K.B. A statement is not hearsay if it is "offered against a party and is . . . his own statement."[28] Baker's threatening statement to K.B.'s mother constituted his own statement offered against him and, accordingly, was not hearsay.

[13,14] We therefore focus on the mother's statement relating Baker's threat to K.B. and the mother's statement to K.B. that Baker had given her a black eye. If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.[29] But it does not necessarily follow that such a statement is admissible in a particular case. The admissibility of the statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case.[30] Unless the proponent of the statement identifies the nonhearsay purpose for which it is offered, the opposing party may have an insufficient basis upon which to determine whether to make a relevance objection. And by overruling a hearsay objection and receiving such a statement not for its truth but "only for the fact that it was said," a trial court risks confusing a jury

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[27] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

[28] Rule 801(4)(b)(i). See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[29] *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[30] See, 4 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 24.21 (7th ed. 2000); R. Collin Mangrum, Mangrum on Nebraska Evidence 688-94 (2010).

as to the purpose for which it should consider the statement and depriving an appellate court of a meaningful basis upon which to review the statement's admissibility. As one commentator notes, such a ruling "doesn't really explain why the mere *making* of the statement (regardless of its truth) is relevant."[31] Accordingly, when overruling a hearsay objection on the ground that testimony about an out-of-court statement is received not for its truth but only to prove that the statement was made, a trial court should identify the specific nonhearsay purpose for which the making of the statement is relevant and probative.

[15] In this case, the district court did not identify the nonhearsay purpose for which the making of the statements in question was relevant, but any error in this regard was harmless beyond a reasonable doubt. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the questioned trial was surely unattributable to the error.[32] The statements objected to as hearsay pertained to the same evidence of threats and domestic violence which was properly received under rule 404(2). Just prior to her testimony regarding the statements, K.B. testified that Baker had threatened her with harm if she reported his conduct and that she had observed her mother with a black eye after the mother was alone in a room with Baker. Subsequently, K.B.'s mother testified that Baker had threatened her and that he had punched her, resulting in black eyes and bruises. As noted, the testimony of both K.B. and her mother on the subject of physical abuse was preceded by a limiting instruction informing the jury of the purpose for which it could consider the testimony, and a third limiting instruction was given at the close of the case. Because the subject matter of the statements challenged as hearsay was established by other testimony, properly received and limited as to purpose, we conclude that the guilty verdict was surely

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[31] 4 Fishman, *supra* note 30, § 24.21 at 251.

[32] *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

unattributable to any error in admitting the statements over a hearsay objection.

3. Rule 608 Issue

During cross-examination of K.B., Baker's counsel asked, "Do you have an opinion about the truthfulness of your mother?" When K.B. responded that she did, counsel asked, "Is that opinion that she — that opinion that you have, is it that she is not a truthful person?" K.B. responded, "On occasion, yes." On redirect, the prosecutor asked K.B. what led her to that opinion. Baker objected, and after an unrecorded sidebar conference, the court overruled the objection. The prosecutor then asked K.B., "What was the basis for your opinion?" She responded, "I was basing it on that she broke her promise about him not touching me anymore." K.B. then confirmed that this was the only basis for her opinion regarding her mother's truthfulness.

In his third assignment of error, Baker argues that the admission of this testimony violated rule 608. While the specific grounds of Baker's objection at trial were not stated, we are satisfied from the context that it was based upon rule 608(2), which provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness . . . concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

We find no merit in Baker's argument that K.B.'s explanation of why she considered her mother to be untruthful violated this rule. Rule 608(2) does not prohibit inquiry into specific instances of a witness' conduct; it only prohibits proof of that conduct by extrinsic evidence.[33] Extrinsic evidence is evidence

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[33] See, generally, *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

"[f]rom outside sources."[34] K.B.'s testimony regarding the basis for her opinion about her mother's truthfulness was not from an outside source, and the State was not prohibited by rule 608(2) from conducting this inquiry on redirect examination.[35] The district court did not abuse its discretion in receiving this testimony over Baker's objection.

V. CONCLUSION

For the reasons discussed, we find no merit in any of Baker's assignments of error and therefore affirm the judgment of the district court.

AFFIRMED.

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[34] Black's Law Dictionary 666 (9th ed. 2009).

[35] See, generally, Mangrum, *supra* note 30, 434-35.