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STATE OF NEBRASKA, APPELLEE, V. STEPHEN M. PULLENS, APPELLANT.

800 N.W.2d 202

Filed July 15, 2011. No. S-09-588.

1. **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.
2. ____: ____: ____. Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to hearsay rulings under the residual hearsay exception.
3. ____: ____: ____. An appellate court reviews for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Judgments: Appeal and Error.** Under a clearly erroneous standard of review, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **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.
6. **Trial: Evidence: Appeal and Error.** Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated, and an appellate court reviews a trial court's ruling on authentication for an abuse of discretion.
7. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
8. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.
9. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
10. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.

11. ____: ____. The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.
12. ____: ____. In making a preliminary determination that a shocking or startling event has taken place, a trial judge may consider hearsay evidence which itself fails to satisfy any exception.
13. ____: ____. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
14. **Rules of Evidence: Appeal and Error.** Determinations of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and other considerations described in Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), is a matter within the district court's discretion and will not be reversed on appeal absent an abuse of that discretion.
15. **Rules of Evidence: Other Acts.** The admission of prior bad acts involves three elements: (1) 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) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
16. ____: ____. Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
17. **Criminal Law: Words and Phrases.** Modus operandi is a characteristic method employed by a defendant in the performance of repeated criminal acts, or literally, a "method of working."
18. **Evidence: Other Acts.** A prior bad act cannot be independently relevant for a proper purpose if that purpose was not at issue in the case.
19. **Rules of Evidence: Other Acts.** The rule governing the admissibility of evidence of other crimes, wrongs, or acts is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
20. **Trial: Evidence.** Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party; only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
21. **Rules of Evidence: Words and Phrases.** For the purposes of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
22. **Rules of Evidence: Other Acts: Time.** While remoteness in time may weaken the value of prior bad acts evidence, such remoteness does not, in and of itself, necessarily justify exclusion of that evidence.
23. **Criminal Law.** For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the

leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

24. **Right to Counsel.** Once the right to counsel attaches, the accused is entitled to counsel at every critical stage of the proceeding.
25. ____. A defendant may not use his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.
26. ____. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.
27. **Right to Counsel: Waiver.** A formalistic litany is not required to show that a waiver of the right to counsel was knowingly and intelligently made, and an intelligent waiver of the right to counsel can be inferred from conduct.
28. **Presentence Reports: Waiver: Notice.** A defendant waives his or her qualified right to review the presentence investigation report by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so.
29. **Effectiveness of Counsel.** A defendant who elects to proceed pro se cannot thereafter complain of the quality of his or her own defense.
30. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Stephen M. Pullens, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

A jury found Stephen M. Pullens guilty of killing his mother, Matsolonia Myers (Matsolonia), by throwing her over a balcony. Pullens alleges that the trial court erred by allowing hearsay evidence of a prior attempt by Pullens to throw

Matsolonia off a balcony, admitting into evidence 10 e-mails without proper authentication, and providing a jury instruction on voluntary flight when the evidence was insufficient to support that issue. Pullens also alleges that he was denied effective assistance of counsel at trial, that he was denied his right to counsel at his sentencing hearing after he demanded to proceed pro se, and that the trial court abused its discretion in sentencing him. We affirm.

II. BACKGROUND

Matsolonia died in the early evening hours of December 13, 2004, from injuries sustained after falling four stories off the balcony of her apartment in Omaha, Nebraska. It is undisputed that Pullens was the only witness. He had been staying with Matsolonia for approximately 1 week prior to the incident. It had been 4 years since their last visit, which ended in some acrimony. Pullens claimed that Matsolonia committed suicide.

1. The Fall

Pullens testified that during his visit, he noticed Matsolonia was acting withdrawn and depressed. He described in detail for the jury aspects of Matsolonia's life that might have contributed to her depression, including an alleged gambling problem. Pullens testified that on the night of December 13, 2004, Matsolonia was acting especially odd. Suddenly, she accused Pullens of wanting to hurt her. She then said, "'Well, okay, fine,'" took off her glasses, set them on the table, and inexplicably walked out to the balcony.

Out of concern for Matsolonia's well-being, Pullens followed her. Matsolonia was leaning over the railing, which was about chest high. Pullens testified that when he approached Matsolonia, she unexpectedly stepped on his foot and leaned into his body so as to hoist herself up to a seated position on the railing. She then pushed Pullens away and let herself fall backward.

Pullens testified that he tried to grab onto the lapels of Matsolonia's fleece pullover jacket, but that she slipped

through. He then very briefly tried to hold her by the neck, but he was unable to keep her from falling. According to Pullens, Matsolonia never yelled or screamed as she fell. He testified that she "didn't say a word, like she expected it."

Pullens explained that before going downstairs to where Matsolonia lay on the ground, he may have disturbed some items in Matsolonia's apartment while "running around" looking for his shoes and a key to get back inside. Also, when he was sitting on the sofa putting on his shoes, he found part of Matsolonia's necklace in the sleeve of his shirt and left it on the sofa. He called the 911 emergency dispatch service and was near Matsolonia when paramedics arrived.

The State presented a different version of what occurred the night of December 13, 2004. The pathologist who examined Matsolonia's body gave the opinion that Matsolonia had been strangled and rendered unconscious before being thrown over the balcony. This was based on observations of hemorrhaging in Matsolonia's trachea and larynx. Matsolonia also had an abrasion injury on her neck and chin that matched the zipper of the high-necked jacket lapels of the pullover she was wearing that night. This abrasion, the pathologist explained, could only be caused by placing direct pressure to the zipper against the skin—such as in the act of strangulation. The pathologist explained that the abrasion injury and the injuries to Matsolonia's trachea and larynx could not have been caused by the fall and that the injuries could not have been caused by an attempt to hold onto Matsolonia by her jacket lapels. The pathologist did not specifically rebut Pullens' assertion that he had grabbed Matsolonia by the neck in order to keep her from falling.

The State also presented evidence that a struggle had ensued in Matsolonia's apartment before she fell. In the living room area where the balcony was located, the officers discovered that the glass coffee table top was askew and partially off its base. A piece of a necklace was found under a pillow on the couch, the other pieces of which were found on Matsolonia's body. Matsolonia's glasses were lying on the floor directly in front of the sliding glass doors that lead to the balcony. The contents of her purse had been dumped on her bed.

2. Pullens' Prior Threat

Much of the trial focused on the relationship between Pullens and Matsolonia. Seven letters written by Pullens to Matsolonia were found in Matsolonia's apartment and were entered into evidence. In some of the letters, Pullens accused Matsolonia of being abusive and vindictive, and of playing games with people's lives. In others, he expressed his forgiveness and love for her. Pullens made references to Matsolonia's exaggerating events which occurred during his last visit in 2000.

Pullens explained at trial that the last time he had visited Matsolonia in 2000, he had confronted her about her gambling issues. Pullens stated that he told Matsolonia that if she were going to throw her life away, she might as well "just jump over the balcony." Pullens explained that Matsolonia used that statement "as an excuse to make a big deal out of it." He denied ever yelling or having any physical altercation with her. Pullens explained that Matsolonia was a "very strong woman" and that if he "would have even touched her at any point she would have had the police there . . . immediately." He noted that they had grown closer recently and that he did not think much of the incident.

Prior to this testimony, defense counsel had sought to exclude the State's witness to Matsolonia's alleged excited utterance, in which she reported that Pullens had threatened to kill her during the visit in 2000. The court overruled defense counsel's objections, which were based on hearsay and prior bad acts. Defense counsel did not take issue with the adequacy of the State's notice on these issues. The trial court found that the hearsay fell under the residual hearsay exception, because it was an excited utterance, and it found that, although it was a prior bad act, the 2000 incident was admissible for the proper purposes of intent, identity, modus operandi, and absence of mistake or accident.

Matsolonia's ex-husband, Lawrence Kenneth Myers (Kenneth), testified that one morning during Pullens' 2000 visit, he came home to find Matsolonia extremely upset. Kenneth testified that, while choked with emotion and hardly coherent, Matsolonia explained that Pullens had lifted her up onto the balcony and had threatened to throw her over. He had

eventually dropped her to the floor and left. The State adduced evidence that Matsolonia obtained a protection order against Pullens soon after the incident.

3. Flight, E-Mails, and Confession

The State also sought to show Pullens' voluntary flight from the police. When the police and rescue personnel arrived on December 13, 2004, Pullens had refused to give a detailed statement because he said he was drunk and did not "'want to say anything wrong.'" He was taken directly to the police station for blood and DNA sampling, but he was not placed under arrest at that time. Instead, Officer Ken Kanger agreed to transport Pullens from the police station to a motel. Kanger told Pullens that he would be back early the next morning in order to discuss the facts surrounding Matsolonia's death. When Kanger returned at approximately 10:45 a.m., Pullens had checked out and was gone.

Pullens testified that he knew he was a suspect and had no intention of speaking to Kanger until he found a lawyer. He purchased a car and slept in it until leaving town 3 days later. Pullens stated that during the 3-day period he was in town, he tried, unsuccessfully, to obtain a lawyer and locate his sister. Pullens claimed he had also attempted to call and send e-mails to Kanger because he wanted to get his passport and other belongings from Matsolonia's apartment. He had been living in Switzerland on a short-term assignment before visiting Matsolonia, and he was looking for another job. There is some evidence that he may have still maintained an apartment in Switzerland.

Kanger had no record of Pullens' alleged attempts to contact him while in Omaha. Kanger testified that he did not hear from Pullens until receiving an e-mail from California on December 21, 2004. In the 7-page e-mail, Pullens apologized for not getting back to Kanger sooner. This was the beginning of an e-mail correspondence between Kanger and Pullens that lasted more than a year. Pullens testified that he sent approximately 47 e-mails to Kanger during this time. Most of the e-mails were sent from Switzerland, where Pullens returned in January 2005, as soon as he was able to obtain a replacement passport.

According to evidence submitted by the State, Pullens procured the passport fraudulently after two attempts in which he lied about how the passport had been lost.

Ten e-mails sent from Pullens to Kanger, consisting of 56 pages in total, were entered into evidence by the State. Through the e-mails, the State sought to demonstrate Pullens' conscious flight from the Omaha police, as well as inconsistencies between the multitude of stories recounted by Pullens describing the night of December 13, 2004. In one e-mail, Pullens stated that a stranger had killed Matsolonia and threatened to kill Pullens if he told anyone. In another, Pullens admitted it was he who killed Matsolonia. The e-mails also provided numerous details concerning Matsolonia and Pullens' relationship. The court overruled defense counsel's objection that the State had failed to lay sufficient foundation to show that the e-mails were authored by Pullens. The State presented expert testimony, described in more detail in our analysis section below, which verified Pullens' usage of the e-mail accounts and the personal facts described in the e-mails.

In one of his e-mails written from Switzerland, Pullens explained: "I am . . . aware that you don[']t have a Prima Facia [sic] case or enough to extridite [sic] me to the US from Switzerland or ANY EU country. I am aware that their [sic] is a difference between Switzerland and the EU countries in this matter." In the e-mail, Pullens described Matsolonia as abusive, controlling, and manipulative. He wrote that she had once previously lied about his threatening to throw her over a balcony—simply to deflect criticism of her gambling. Pullens indicated in his e-mails that Matsolonia may have committed suicide. He wrote: "[I]s it not a little too neat to have someone bogus-ly [sic] say that I threatened [Matsolonia] and then have her die in the Exact manner she said she was threatened?"

In later e-mails, Pullens wrote that he suspected the Omaha police had a warrant for his arrest. In an e-mail dated September 3, 2005, Pullens wrote, "I am so tired of running from you and I just want all of this to end." It is in this e-mail that he confessed to throwing Matsolonia off the balcony. At trial, Pullens explained that this e-mail was meant to be read as "scornfully ironic."

In an e-mail dated September 19, 2005, Pullens writes, "I am coming back and know that you are going to arrest me." It appears that by this time, the foreign consulate had confiscated Pullens' passport. Pullens eventually returned to Omaha, where he was arrested.

4. Jury Instructions, Verdict, and Sentencing

Pullens was charged with second degree murder. At trial, the jury was instructed, over Pullens' objection, that it could consider "voluntary flight of a person immediately or soon after the occurrence of a crime" as a "circumstance, not sufficient of itself, to establish guilt." The jury was also instructed that it could consider Kenneth's testimony about the prior threat to Matsolonia only for the limited purpose of establishing Pullens' intent, absence of mistake, identity, and modus operandi, and that it could not consider this testimony to prove Pullens' character and that he acted in conformity therewith. Pullens did not object to the form of the prior bad act instruction. The jury found him guilty.

After the verdict, Pullens became dissatisfied with his privately retained counsel. The facts pertaining to the sentencing hearings will be discussed in further detail below. In summary, Pullens requested that the court appoint him a public defender or that he be granted a continuance to find new, privately retained counsel. The court refused both requests, and Pullens elected to represent himself pro se, with counsel present as standby. There is no record of the court's conducting a specific colloquy with Pullens to determine that his decision to represent himself was made knowingly and intelligently, nor were there explicit findings to that effect. The court sentenced Pullens to a term of imprisonment from 80 years to life. He was appointed new counsel for this appeal.

III. ASSIGNMENTS OF ERROR

Pullens alleges that the trial court erred (1) in allowing Kenneth to testify that in November 2000, Matsolonia told him that she and Pullens had a confrontation and that he tried to throw her off the balcony; (2) in allowing into evidence e-mails without proper authentication as required under Neb. Evid. R.

901, Neb. Rev. Stat. § 27-901 (Reissue 2008); (3) in giving jury instruction No. 14 regarding voluntary flight; (4) in denying Pullens the right to counsel at his sentencing hearing; (5) in abusing its discretion in sentencing Pullens; and (6) in denying him effective assistance of counsel at trial.

IV. STANDARD OF REVIEW

[1] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.[1]

[2] Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to hearsay rulings under the residual hearsay exception.[2]

[3] We review for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3]

[4] Under a clearly erroneous standard of review, we do not reweigh the evidence but consider the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[4]

[5] 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.[5]

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[1] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

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

[3] See, *State v. Draganescu, supra* note 1; *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[4] See *Henriksen v. Gleason, supra* note 3.

[5] See *State v. Epp, supra* note 2.

[6] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated, and an appellate court reviews a trial court's ruling on authentication for an abuse of discretion.[6]

[7] In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.[7]

[8] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.[8]

[9] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.[9]

V. ANALYSIS

1. Prior Threat

We first address Pullens' argument that the trial court should have excluded testimony that during the 2000 visit, Pullens had threatened to throw Matsolonia off a balcony. It has been said to be "a universally established rule" that in prosecutions for murder, prior threats by the defendant against the life of the deceased are competent evidence to demonstrate the defendant's state of mind.[10] Common sense, experience, and logic dictate that evidence of prior quarrels between the same parties is relevant on the issue whether the accused committed the charged acts.[11] Nevertheless, for

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[6] See *id.*

[7] See *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[8] *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[9] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[10] 40A Am. Jur. 2d *Homicide* § 301 at 161 (2008). See, also, e.g., *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

[11] See *People v. Zack*, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317 (1986).

such evidence to be admissible, it must satisfy all applicable evidentiary rules.[12] The prior threat in this case crosses paths with two exclusionary rules: the rule against hearsay[13] and the rule against the admission of prior bad acts.[14] We first address hearsay.

(a) Hearsay

The State offered Kenneth's testimony under the residual hearsay exception.[15] We note at the outset, however, that in allowing the testimony, the trial court spent considerable analysis concluding that Matsolonia's hearsay statement satisfied the criteria for the excited utterance hearsay exception found in Neb. Evid. R. 803(1), Neb. Rev. Stat. § 27-803(1) (Reissue 2008). In determining admissibility under the residual hearsay exception, a court may compare the declaration to the "closest" hearsay exception as well as consider a variety of other factors affecting trustworthiness.[16]

Given that the trial court ultimately found that the statement was an excited utterance, we find it unnecessary and redundant to analyze the additional factors of trustworthiness which the court concluded bolstered the statement's admissibility. We agree that the statement was an excited utterance and that it was, for that reason, properly admitted over Pullens' hearsay objection. In so concluding, we review for clear error the trial court's factual findings underpinning the exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[17]

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[12] See *Slakman v. State*, 272 Ga. 662, 533 S.E.2d 383 (2000). See, also, *State v. Watts*, 85 S.D. 638, 188 N.W.2d 913 (1971).

[13] Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008).

[14] § 27-404.

[15] Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2008).

[16] *State v. Epp, supra* note 2, 278 Neb. at 695, 773 N.W.2d at 370. See, also, *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

[17] See, *State v. Draganescu, supra* note 1; *Henriksen v. Gleason, supra* note 3.

Viewing Kenneth's testimony at trial and in the pretrial hearing as a whole, he made the following account: Kenneth testified that sometime in 2000, Pullens spent several days visiting Matsolonia and Kenneth at their home in Omaha. One evening, Kenneth decided to spend the night in a motel. Kenneth explained that he left home around 10 p.m. because he "didn't want to converse any more with . . . the present people that were there." Kenneth stated that to the best of his recollection, it was around 9 a.m. when he arrived back home the next day. He was not completely certain of the time, but explained that he was an early riser and had returned home soon after waking up.

When Kenneth opened the door, Matsolonia immediately came to meet him. She was visibly upset. Kenneth observed that Matsolonia was fully dressed, and he surmised that she had not yet changed from being out all night at the casinos. She had a small "nick" on the side of her eye. Kenneth testified that in the 7 years of their marriage, he had never seen her so emotional.

Unsolicited, Matsolonia began to give Kenneth a "teary-eyed and incoherent, raggedy, choked-up kind of explanation" of what had occurred. Matsolonia indicated that she and Pullens had argued. The argument escalated into a physical tussle, and Pullens physically took Matsolonia out onto the balcony. Matsolonia stated that Pullens then picked her up and threatened to throw her over. But instead, he dropped her onto the cement floor of the balcony and left.

[10,11] For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.[18] The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.[19]

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[18] *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[19] *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

(i) Bootstrapping

Pullens first argues that the statement was improperly admitted, because there was only Matsolonia's hearsay statement to establish the startling event. Pullens asserts that we should not allow hearsay to thus lift itself into admissibility by its own bootstraps.[20] We have never before directly addressed this question. Rule 104 of the Nebraska Evidence Rules,[21] adopted in 1975, generally states that preliminary questions of admissibility shall be addressed to the trial judge and that they shall be addressed outside the presence of the jury in the case of confessions or where the interests of justice so require. But the rules are silent on whether the rules of evidence apply to such determinations or whether so-called bootstrapping is permitted.

Rule 104 omitted the following statement from the corresponding federal rule: "In making its determination [the judge] is not bound by the rules of evidence except those with respect to privileges."[22] The Nebraska Supreme Court Committee on Practice and Procedure, in its comments to the proposed rule 104, explained that the omission was merely intended to avoid "unduly encourag[ing] the trial judge to depart from the usual rules."[23] Because the resolution of this question depends in part on a determination of the "usual rules" as the drafters of rule 104 understood it, we find a historical analysis of preliminary determinations of admissibility to be instructive.

As is the case in determinations of whether evidence satisfies the excited utterance hearsay exception, admissibility of evidence frequently depends on resolution of difficult preliminary questions of fact.[24] Since early common law, those questions were resolved by the trial judge and were not the

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[20] See 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.04[2][a] (Joseph M. McLaughlin ed., 2d ed. 2009).

[21] Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 2008).

[22] Fed. R. Evid. 104(a).

[23] Proposed Nebraska Rules of Evidence, rule 104, comment at 17 (1973).

[24] 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 104.02[1] (Joseph M. McLaughlin ed., 2d ed. 2010).

province of the jury.[25] While actual practice was unclear, the earliest published opinions appeared to generally impose evidentiary rules upon the court's determination of these preliminary questions.[26] However, several exceptions were noted, especially in allowing consideration of inadmissible hearsay for the sake of convenience, and by 1923, Professor Wigmore set forth the general proposition that in preliminary rulings by a judge on the admissibility of evidence, the ordinary rules of evidence simply do not apply.[27]

Around the same time, courts and commentators began to respond to criticism that certain preliminary fact questions closely related to the merits of the case should be given to the jury instead of the judge.[28] A "modern rule" emerged which distinguished between preliminary facts conditioning the logical relevance of other evidence before the trier of fact and preliminary facts conditioning the application of technical evidentiary rules, such as the hearsay doctrine.[29] By the mid-20th century, it seemed well established, at least in academic circles, that preliminary facts conditioning logical relevance were generally matters for the jury and were, accordingly, restricted to the rules of evidence.[30] But facts conditioning whether relevant evidence is excludable under one of the "technical" exclusionary rules were normally to be determined outside the jury's presence by the judge. And the judge was not considered to be constrained to those preliminary

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[25] See, John MacArthur Maguire & Charles S.S. Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L.J. 1101 (1927); 45 Am. Jur. *Trials* 1, § 6 (1992).

[26] See Maguire & Epstein, *supra* note 25.

[27] See *id.*, citing 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1385 (2d ed. 1923).

[28] See 45 Am. Jur. *Trials* 1, *supra* note 25, § 7.

[29] See *id.*, § 8. See, also, Edmund M. Morgan, *Functions of Judge and Jury in the Determinations of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929).

[30] See, 1 McCormick on Evidence § 53 (John William Strong et al. eds., 4th ed. 1992); 45 Am. Jur. *Trials* 1, *supra* note 25, § 61.

facts which themselves would be admissible under the rules of evidence.[31]

In *United States v. Matlock*,[32] the U.S. Supreme Court summarized: "[I]t should be recalled that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence." The Court went on to state:

> There is . . . much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings . . . .[33]

Other authorities have explained that traditional exclusionary rules of evidence, such as hearsay, are "'"the child of the jury system"'"[34]; they evolved "because the judges feared that unsophisticated lay jurors would attach undue weight to such evidence."[35] There is no logical necessity to apply such rules at the foundational stage to the judge's determinations.[36] To the contrary, the trial judge's experience and legal training can be relied on to inform crucial distinctions and to reveal the inherent weakness of evidence by affidavit or hearsay.[37]

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[31] See *id.*

[32] *United States v. Matlock*, 415 U.S. 164, 172-73, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974) (citing *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), and *Bridges v. Wixon*, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945)).

[33] *Id.*, 415 U.S. at 175.

[34] Fed. R. Evid. 104(a), advisory committee's note.

[35] 45 Am. Jur. *Trials* 1, *supra* note 25, § 61 at 94.

[36] Edward J. Imwinkelried, *Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by* Kumho Tire Co. v. Carmichael, 52 Me. L. Rev. 19 (2000).

[37] 1 Weinstein & Berger, *supra* note 24, § 104.11[1][a].

In fact, in certain situations, a suspension of the rules of evidence is a practical necessity, such as where the content of the asserted declaration against interest must be considered in ruling whether it is in fact against interest, or where the testimony of a witness must be considered in determining competency.[38] More generally, elimination of the rules of evidence for preliminary determinations of facts conditioning technical exclusionary rules is desirable because it expedites the preliminary hearing and, therefore, the trial itself.[39]

Pullens recognizes that under these principles, the majority of other state and federal jurisdictions have explicitly held that independent corroborative proof of the startling event is not required in order to admit excited utterance evidence.[40] Furthermore, in *Bourjaily v. United States*,[41] the U.S. Supreme Court held that under the federal rules of evidence, there is no prohibition against so-called bootstrapping in making preliminary determinations. Nevertheless, Pullens argues that in Nebraska, rule 104 mandates a different approach.

As the U.S. Supreme Court in *Matlock* explained, federal rule of evidence 104(a), including the phrase, "[i]n making its determination [the judge] is not bound by the rules of evidence except those with respect to privileges," was transmitted to Congress based on the Court's aforementioned view of common law at that time.[42] While there are no cases squarely addressing this question in Nebraska, it is clear from the Nebraska

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[38] Annot., 39 A.L.R. Fed. 720 (1978 & Supp. 2010-11).

[39] 1 Weinstein & Berger, *supra* note 24, § 104.11[1][a].

[40] See, e.g., *U.S. v. Arnold*, 486 F.3d 177 (6th Cir. 2007); *U.S. v. Brown*, 254 F.3d 454 (3d Cir. 2001); *United States v. Moore*, 791 F.2d 566 (7th Cir. 1986); *Wetherbee v. Safety Casualty Company*, 219 F.2d 274 (5th Cir. 1955); *Wheeler v. United States*, 211 F.2d 19 (D.C. Cir. 1953); *People v. Franklin*, 683 P.2d 775 (Colo. 1984); *Com. v. Alvarado*, 36 Mass. App. 604, 634 N.E.2d 132 (1994); *Johnston v. W. S. Nott Co.*, 183 Minn. 309, 236 N.W. 466 (1931); *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987). See, also, 2 McCormick on Evidence § 272 (John William Strong et al. eds., 4th ed. 1992); 5 Weinstein & Berger, *supra* note 20.

[41] *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

[42] *United States v. Matlock, supra* note 32.

Supreme Court committee's comments that it believed our "usual rules" largely coincided with those articulated by the U.S. Supreme Court and by the federal rules. The Nebraska Supreme Court committee quoted at length the federal advisory committee's notes to its corresponding rule 104,[43] including the following:

> "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase,[44] be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."[45]

The Nebraska Supreme Court committee's quotation of the federal advisory committee then ends with a summation of a tentative California rule, which was never adopted, and a New Jersey evidence rule, both of which stated in summary that the rules of evidence, other than claims of privilege, are inapplicable to preliminary determinations made by a judge. Directly after this extensive quote, the Nebraska Supreme Court committee concluded: "This rule has always been applied in Nebraska."[46]

[12] Thus, we reject Pullens' contention that Nebraska, by case law or statute, has adopted a position distinct from federal law and the majority of other states.[47] We accordingly find no support for Pullens' argument that in determining a startling event occurred, the trial court clearly erred because a substantial piece of the evidence of such event was Matsolonia's hearsay statement describing what had startled her. As early as 1869, published cases have demonstrated that a trial judge may consider hearsay evidence which itself fails to satisfy any

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[43] Proposed Nebraska Rules of Evidence, *supra* note 23.

[44] James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 266 (1898).

[45] Proposed Nebraska Rules of Evidence, *supra* note 23, comment at 18. See, also, *United States v. Matlock, supra* note 32.

[46] Proposed Nebraska Rules of Evidence, *supra* note 23, comment at 19.

[47] See 2 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 11:21 (7th ed. 1994 & Cum. Supp. 2001).

exception, in making a preliminary determination that a shocking or startling event has taken place.[48] In *State v. Jacob*,[49] we upheld the admission of the victim's declaration, as an excited utterance, that the defendant had come to her house and threatened her, even though there was no independent physical evidence of the visit and threat.

In fact, some commentators have argued that many excited utterance cases do not truly present the hearsay bootstrapping issue that, at first blush, they appear to present.[50] Even in the minority of jurisdictions which prohibit "bootstrapping," courts recognize a fundamental distinction between the statement itself and the outward manifestations of distress observable by the witness to the statement.[51] The witnesses' observations of the declarant's emotional state are independent evidence sufficient to show a startling event.[52] And it is logical to infer that a visibly upset individual was startled by the events he or she described while upset.[53] The question of whether further corroborating evidence is needed in a given case is committed to the discretion of the trial judge.[54]

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[48] See, e.g., *Insurance Company v. Mosley*, 75 U.S. (8 Wall.) 397, 19 L. Ed. 437 (1869); *Stewart v. Baltimore & O. R. Co.*, 137 F.2d 527 (2d Cir. 1943); *Preferred Accident Ins. Co. of New York v. Combs*, 76 F.2d 775 (8th Cir. 1935); *Industrial Com. v. Diveley*, 88 Colo. 190, 294 P. 532 (1930); *National Life & Accident Ins. Company v. Hedges*, 233 Ky. 840, 27 S.W.2d 422 (1930); *Johnston v. W. S. Nott Co., supra* note 40; *Collins v. Ins. Co.*, 122 W. Va. 171, 8 S.E.2d 825 (1940).

[49] *State v. Jacob, supra* note 19.

[50] See, Maguire & Epstein, *supra* note 25; Charles T. McCormick, *The Procedure of Admitting and Excluding Evidence*, 31 Tex. L. Rev. 128 (1952). See, also, 2 McCormick on Evidence, *supra* note 40.

[51] See, *People v. Barrett*, 480 Mich. 125, 747 N.W.2d 797 (2008); *State v. Young*, 160 Wash. 2d 799, 161 P.3d 967 (2007). See, also, *U.S. v. Hadley*, 431 F.3d 484 (6th Cir. 2005). But see *State v. Post*, 901 S.W.2d 231 (Mo. App. 1995).

[52] See *id.* See, also, *Wetherbee v. Safety Casualty Company, supra* note 40; *Wheeler v. United States, supra* note 40; *Stewart v. Baltimore & O. R. Co., supra* note 48.

[53] See, e.g., *U.S. v. Brown, supra* note 40.

[54] See *id.*

We noted in *Jacob* that when the victim made her declaration, she appeared flushed, fidgety, and visibly upset. Similarly in this case, Kenneth described visible manifestations of Matsolonia's excitement. Moreover, Kenneth observed an injury, albeit minor, to Matsolonia's face. The State also introduced evidence that a restraining order was issued around the time of the alleged threat to keep Pullens away from Matsolonia. In concluding that a startling event had occurred, the trial court utilized this evidence in conjunction with Matsolonia's hearsay description of what had occurred. The trial court also specifically found that the hearsay description was "reliable" insofar as Kenneth had no cause to fabricate what he heard Matsolonia say. While Pullens asserts reasons why Matsolonia might have been lying to Kenneth when she made her statements, the trial court did not abuse its discretion in finding those arguments unconvincing. Moreover, Matsolonia's alleged unreliability and the theory that she had lied about Pullens' prior threat was fully explored by the defense at trial, and the jury could consider this in determining what weight to give to the excited utterance.[55]

(ii) Time Between Event and Declaration

Pullens next argues that the declaration fails to satisfy the spontaneity criteria for an excited utterance. He argues there was insufficient evidence that the incident occurred near the time of the declaration.

[13] We have explained that the time interval between the startling event and the statement in question is not, of itself, dispositive of the spontaneity issue.[56] The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.[57]

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[55] See, e.g., *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983).

[56] *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

[57] *State v. Jacob, supra* note 19.

We have never held, as Pullens seems to argue, that there must be definitive and direct evidence of the time of the startling event. Rather, we have upheld the admission of statements as excited utterances despite the fact that the record did not precisely reflect the passage of time between the startling event and the declaration, so long as there was a plausible inference from the totality of the circumstances that the declarant did not have time to calmly reflect upon the event.[58] We have found it to be particularly persuasive evidence that a declarant was still under the stress of the event when he or she was visibly upset at the time of the statement.[59]

Despite the fact that Kenneth did not witness what occurred during the time of his departure the night before the startling event and his arrival the next morning, his testimony supports the inference that it occurred shortly before Kenneth returned home. The trial court did not clearly err in concluding that at the time of her declaration to Kenneth, Matsolonia was still under the stress of nervous excitement and shock produced by her son's picking her up on the balcony and threatening to throw her over. Pullens makes no other argument pertaining to his hearsay objection, and we conclude that it was properly overruled.

(b) Prior Bad Act

[14] We next address Pullens' argument that the evidence of his prior threat to Matsolonia was inadmissible because it did not satisfy the criteria for admission of prior bad acts under rule 404(2) or the overarching protections of rule 403. It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[60] Likewise, determinations of whether the probative value of the evidence is

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[58] *Id.*; *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), *overruled on other grounds, State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[59] See *id.* See, also, 2 McCormick on Evidence, *supra* note 40.

[60] See *State v. Epp, supra* note 2.

substantially outweighed by the danger of unfair prejudice and other considerations described in rule 403 is a matter within the district court's discretion and will not be reversed on appeal absent an abuse of that discretion.[61]

[15] The admission of prior bad acts involves three elements: (1) 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) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[62] The trial court gave a limiting instruction as requested by Pullens, and Pullens does not contest the adequacy of that instruction to focus the jury's attention away from prohibited inferences if the prior bad act had otherwise been admissible. We hold that the prior bad act was properly admitted into evidence.

(i) Was There Clear and Convincing Evidence of Prior Bad Act?

Pullens first argues that the trial court erred in finding that the State had made an adequate showing that a prior bad act occurred. Even if admissible under the three factors listed above, as a preliminary matter, rule 404(2) requires that the State prove the prior bad act by clear and convincing evidence.

The trial court based its finding largely on its assessment that Kenneth was credible and truthful in his report of Matsolonia's condition and as to what she had declared. Pullens questions Matsolonia's credibility and states that there is "no evidence to back up her story."[63] Pullens' argument largely overlaps the "bootstrapping" issue already discussed in our analysis of the hearsay question. Pullens fails to cite any authority for the proposition that a victim's excited utterance is insufficient to prove a prior bad act and must be independently verified.

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[61] *State v. Clark*, 8 Neb. App. 936, 605 N.W.2d 145 (2000).

[62] See *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[63] Brief for appellant at 26.

In fact, other courts have expressly held that a prior bad act, admitted for a proper purpose, may be established through hearsay testimony, so long as the testimony comes within one of the exceptions to the hearsay rules.[64] We have already determined that the testimony came within the excited utterance hearsay exception. Despite Pullens' view of Matsolonia's character, it was within the court's discretion to consider whether Matsolonia was credible. We conclude that the trial court did not abuse its discretion in determining that a prior bad act had been shown.

(ii) Was Prior Bad Act Admitted for Proper Purpose?

Pullens also argues that there was no proper purpose for the bad act evidence. The general rule concerning prior bad acts is that if the proffered evidence invites the jury to focus its attention on the character of the defendant rather than determining what actually happened, it is impermissible character evidence and should be excluded.[65] However, evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[66]

It is commonly held that prior threats or attacks by the defendant upon the victim may be relevant not to show a general propensity toward violence, but, rather, to demonstrate the nature of the relationship between the victim and the defendant and the defendant's feelings toward the victim.[67] This, in turn, may demonstrate proper purposes of intent, motive, and absence of mistake or accident.[68] Identity or modus operandi is also shown where the prior threat makes reference to a

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[64] See *State v. Charo*, 156 Ariz. 561, 754 P.2d 288 (1988).

[65] 1 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 4:26 (15th ed. 1997).

[66] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[67] See, *Ross v. State*, 676 N.E.2d 339 (Ind. 1996); *State v. Reyes*, 744 N.W.2d 95 (Iowa 2008); *Com. v. Jackson*, 900 A.2d 936 (Pa. Super. 2006).

[68] See *id.* See, also, *State v. Jeffers, supra* note 55; *State v. Parton*, 694 S.W.2d 299 (Tenn. 1985).

peculiar method of violence that in the end is carried out.[69] Furthermore, prior bad act evidence may rebut evidence by the defendant that he or she would never wish to cause the victim harm.[70]

Accordingly, in several cases, we have upheld the admission of prior attacks or threats by the defendant against the victim. For instance, in *State v. Harper*,[71] the defendant was charged with attempted murder of his ex-girlfriend and the murder and attempted murder of her family members by poisoning drinks in the ex-girlfriend's home. On appeal from his conviction, the defendant argued that the trial court had erred in admitting evidence of the prior bad act, committed 3 years before, of driving by the ex-girlfriend's residence and firing a shotgun at the ex-girlfriend and members of her family who were sitting outside. We disagreed. We held that the prior attack was admissible for proper purposes and that its relevancy did not depend on prohibited character inferences.[72]

Nevertheless, Pullens believes that this case is distinguishable from other cases admitting evidence of prior threats or attacks. Pullens' central premise seems to be that because the theory of defense in Pullens' trial was that Matsolonia had committed suicide, there was no proper purpose for which his prior bad act could be admitted into evidence which was not substantially outweighed by the risk of unfair prejudice. We disagree and find that the prior bad act was properly admitted for the purposes of identity, modus operandi, and intent.

a. Identity and Modus Operandi

[16] We first address the trial court's admission of the prior threat to Matsolonia for the purposes of identity and modus operandi. We have stated that other acts evidence may have probative value as to identity where there are overwhelming

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[69] See *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993).

[70] See, e.g., *State v. Jeffers, supra* note 55.

[71] *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981). See, also, *State v. Canbaz, supra* note 10; *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992).

[72] *Id.*

similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.[73] An absolute identity in every detail cannot, however, be expected.[74] Where there are an overwhelming number of significant similarities, the evidence may be admitted, and any dissimilarities merely go to the weight of the evidence.[75]

[17] Modus operandi is a characteristic method employed by a defendant in the performance of repeated criminal acts, or literally, a "'"method of working."'"[76] Although we have said that the evidentiary function of modus operandi is not restricted to establishing identity,[77] it appears that was its purpose in Pullens' trial. That is how we will address it here.

[18] Pullens does not seem to dispute that the prior act was sufficiently similar to be at least somewhat probative of identity. His principal argument is that identity and modus operandi were not issues at trial, because he never claimed anyone besides himself and Matsolonia were present when she fell to her death. In other words, Pullens believes that identity and modus operandi can only be at issue if the theory of the defense is that some third party, other than the defendant or the victim, perpetrated the crime. We agree that a prior bad act cannot be independently relevant for a proper purpose if that purpose was not at issue in the case.[78] But we find no abuse of discretion in the trial court's determination that identity was at issue, because the jury had to determine *who* was responsible for Matsolonia's death.

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[73] *State v. Epp, supra* note 2.

[74] *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[75] See *id.*

[76] *State v. Craig*, 219 Neb. 70, 77, 361 N.W.2d 206, 213 (1985).

[77] *Id.*

[78] See, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez, supra* note 66; *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991).

A similar question was addressed by the Court of Appeals of Ohio in *State v. Griffin*,[79] which upheld the admission of prior threats by the defendant to kill his wife before she was ultimately killed by what the defendant claimed was a self-inflicted gunshot wound. In his defense, the defendant presented evidence that his wife had become suicidal due to the deteriorating, turbulent nature of their marriage. The State, in contrast, presented forensic evidence demonstrating that the wound could not have been self-inflicted. But the State also presented prior acts of abuse and threats by the defendant against his wife.

The court held that the prior bad acts were admissible for the proper purpose of identity. The court explained: "[The defendant's] defense was that he was misidentified as the killer—in essence, that someone else did the shooting, not he. By interposing such a defense (as opposed, for example, to accident or self-defense), he put in issue his identity as the killer."[80] The court rejected any argument that the issue was whether a murder was committed, and not who committed the crime. The fact of "the crime—the shooting death of [the wife]—was open and evident."[81] There were two suspects, the defendant and the victim, for this crime. "While it is true that only one of the suspects, the defendant, can be found guilty of murder, evidence of suicide creates a genuine issue concerning the identity of the person who pulled the trigger."[82]

We agree with the reasoning of the court in *Griffin*. Pullens' trial did not present a case where his involvement was undisputed and where his defense instead rested on the question of whether he had acted with legal justification or excuse for his actions. The central issue was the identity of the person who caused Matsolonia to fall to her death. Pullens spent considerable time in his defense pointing the finger at Matsolonia. He described the reasons she might

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[79] *State v. Griffin*, 142 Ohio App. 3d 65, 753 N.E.2d 967 (2001).

[80] *Id.* at 73, 753 N.E.2d at 973.

[81] See *id.*

[82] *Id.* at 74, 753 N.E.2d at 973-74.

have had for killing herself. There was even evidence of Matsolonia's possible motivation for killing herself purposefully in a way to implicate Pullens. While the Legislature has elected not to punish those who have made attempts at their own life,[83] we have described suicide as "self-murder."[84] Assisting a suicide is also designated as a crime.[85] Whatever the act is called, under Pullens' theory of defense, someone intentionally caused Matsolonia's untimely and unjustified death. In that sense, the corpus delicti was not in issue at this trial.[86] The jury had to determine only who the agent was of this unfortunate event. In other words, the jury had to determine identity. Therefore, identity was a proper purpose for the prior bad act evidence.

Pullens also makes oblique reference to rule 404 evidence as being in actuality propensity evidence and of its being more prejudicial than probative. We therefore examine the probative value of the prior threat to the issue of identity and whether that value was substantially outweighed by the danger of unfair prejudice.

[19-21] The rule governing the admissibility of evidence of other crimes, wrongs, or acts is subject to the overriding protection of rule 403, allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[87] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party; only evidence tending to suggest a decision

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[83] See *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979), *modified* 204 Neb. 196, 281 N.W.2d 749.

[84] *Sampson v. Ladies of the Maccabees of the World*, 89 Neb. 641, 646, 131 N.W. 1022, 1024 (1911).

[85] Neb. Rev. Stat. § 28-307 (Reissue 2008).

[86] See Black's Law Dictionary 395 (9th ed. 2009).

[87] See, *State v. McManus, supra* note 66; *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006).

on an improper basis is unfairly prejudicial.[88] Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[89]

The question of whether other conduct is sufficiently similar to the offense charged is a matter left to the sound discretion of the trial court.[90] In both the prior bad act and the crime charged, Pullens lifted Matsolonia up toward the edge of a balcony of a multi-level condominium building in an attempt to throw her over. Whether the first time Pullens intended to follow through or merely scare Matsolonia is unknown. But from all outward appearances, the two incidents are identical in every respect except (1) they were different balconies and (2) the second time, Pullens completed the task.

[22] We are cognizant that these two incidents were separated by a period of 4 years. However, while remoteness in time may weaken the value of prior bad acts evidence, such remoteness does not, in and of itself, necessarily justify exclusion of that evidence.[91] In this case, the years do little to weaken the probative value of the prior act. Indeed, Pullens does not argue that it does.

The prior attempt at lifting Matsolonia over a balcony occurred the very last time Pullens saw her before the visit that ended in her death by the same method. The correspondence from Pullens to Matsolonia indicates that their estrangement between the time of these two events was caused by the prior attempt, or, from Pullens' point of view, Matsolonia's false claims as to this attempt. This was not the case of otherwise random signature crimes separated by a great length of time, but was the prior abuse by the same perpetrator toward the same victim, occurring in the background of a continuing tumultuous familial relationship. Instances of past abuse between the same parties are often given special consideration insofar as the strictures of modus operandi or signature crimes

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[88] See *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994).

[89] See *State v. Canbaz, supra* note 10.

[90] *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

[91] See *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

are loosened.[92] But, in this case, the method of lifting someone up over a balcony is also in itself sufficiently unique.

Thus, there was a clear connection between the two alleged acts. That connection independently demonstrated identity of the agent of Matsolonia's death in a way that did not depend upon the prohibited inference that because Pullens was a violent or bad character, he was more likely to have committed the crime. The danger of unfair prejudice was no greater here than in any other admission of a prior bad act. But its probative value was substantial.

We find that the trial court did not abuse its discretion in determining that the probative value of the prior threat on the issues of identity and modus operandi was not substantially outweighed by the danger of unfair prejudice. We find no error in the trial court's admission of the prior bad act for those purposes.

b. Intent

We also conclude that the prior bad act was properly admitted to show intent. Intent is the state of mind operative at the time of an action.[93] As early as 1842, the U.S. Supreme Court stated:

> [W]here the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act, directly in judgment.[94]

Pullens concedes that intent was in issue in this case because it is an element of second degree murder, the crime for which Pullens was charged and convicted. Pullens' general denial of guilt put at issue all the necessary elements of the charged

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[92] See, *Rufo v. Simpson*, 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (2001); *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004). See, also, Annot., 24 A.L.R.5th 465 (1994).

[93] See *State v. Craig, supra* note 76.

[94] *Wood v. United States*, 41 U.S. (16 Pet.) 342, 360, 10 L. Ed. 987 (1842).

offense.[95] In order to obtain a conviction of second degree murder, the State was thus required to show beyond a reasonable doubt that Pullens committed the murder with a specific intent to kill.[96] This is distinguishable, for instance, from voluntary manslaughter, which requires only a killing without malice upon a sudden quarrel.[97]

Pullens' argument is that the probative value of the prior bad act for the purpose of intent was greatly outweighed by its prejudicial effect. He states this is so because, "[T]here could be little argument that if Pullens pushed [Matsolonia] off the balcony, he would not have intended to kill her."[98] We find this unpersuasive.

It seems well established that previous discord between two parties in a close and sustained relationship is relevant to the issue of intent.[99] And, as mentioned, the similarities in this case between the previous bad act and the act for which Pullens was charged were substantial. Also, as already discussed, while Pullens does not specifically raise any issue concerning the remoteness of time between the prior bad act and the crime charged, we conclude that the trial court did not abuse its discretion in determining that the probative value of the prior threat was not markedly reduced by the time between it and the crime charged.

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[95] See, *People v VanderVliet*, 444 Mich. 52, 508 N.W.2d 114 (1993). See, also, e.g., *U.S. v. Walker*, 470 F.3d 1271 (8th Cir. 2006); *U.S. v. Chesney*, 86 F.3d 564 (6th Cir. 1996); *People v. Gillard*, 57 Cal. App. 4th 136, 66 Cal. Rptr. 2d 790 (1997).

[96] See, Neb. Rev. Stat. § 28-304 (Reissue 2008); *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992).

[97] See Neb. Rev. Stat. § 28-305 (Reissue 2008).

[98] Brief for appellant at 28.

[99] See, *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Kern, supra* note 90; *Gattis v. State*, 637 A.2d 808 (Del. 1994); *Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (2004); *Phillips v. State*, 719 N.E.2d 809 (Ind. 1999); *State v. Buenaventura*, 660 N.W.2d 38 (Iowa 2003); *State v. Mills*, 562 N.W.2d 276 (Minn. 1997); *Boykins v. State*, 116 Nev. 171, 995 P.2d 474 (2000); *State v. Powell*, 126 Wash. 2d 244, 893 P.2d 615 (1995).

Pullens cites no case law to support what really appears to be his argument: that certain means of killing someone are ipso facto sufficiently indicative of specific intent, thereby rendering any additional evidence of intent through prior bad acts cumulative and unfairly prejudicial. We certainly find no reason to conclude that being strangled and thrown off a balcony represents such means. In this case, for instance, there was evidence from which a jury could have found there was a sudden quarrel. Matsolonia's glasses were lying on the floor and there were various other disturbed items in her living room. Pullens described Matsolonia as a strong and sometimes antagonistic woman. It was conceivable that Pullens could have committed all the acts leading to Matsolonia's death while provoked to such a degree that he had lost normal self-control. The failure of the State to convince the jury, beyond a reasonable doubt, that Pullens did not act in such a capacity would have resulted in an acquittal.

Pullens' specific intent to kill Matsolonia was a central issue in the case. The probative value of the evidence involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of the fact from the ultimate issue of the case.[100] Furthermore, in prosecuting specific intent crimes, prior acts evidence may often be the only method of proving this critical issue.[101] In addressing similar questions under the federal rules, the U.S. Supreme Court has stated that it is proper for trial courts to consider the availability of evidentiary alternatives in balancing unfair prejudice against probative value.[102] We find no reason why that was not a proper consideration by the trial court here. The fact that Pullens physically threatened to throw

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[100] *State v. Sanchez, supra* note 66.

[101] See *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994).

[102] See, *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). See, also, *U.S. v. Jenkins*, 593 F.3d 480 (6th Cir. 2010); *U.S. v. Davis*, 449 F.3d 842 (8th Cir. 2006); *U.S. v. Awadallah*, 436 F.3d 125 (2d Cir. 2006); *United States v. Layton*, 767 F.2d 549 (9th Cir. 1985).

Matsolonia off a balcony during their last visit and the effect that had on their relationship were the best evidence the State adduced of a specific intent to kill. Otherwise, the only means of ascertaining Pullens' mental state was by drawing inferences from the conduct itself.[103] That conduct was subject to more than one inference. The trial court did not abuse its discretion in determining that the probative value of the prior bad act to show intent was not substantially outweighed by the danger of unfair prejudice.

In sum, the trial court did not abuse its discretion in finding that the prior threat against Matsolonia was relevant to the proper purposes of identity, modus operandi, and intent. Further, it did not abuse its discretion in finding that such probative value was not substantially outweighed by the risk of unfair prejudice. The court further mitigated the risk of unfair prejudice by instructing the jurors that they were prohibited from considering this prior act as evidence of Pullens' character or as evidence that he acted in conformity with such character. We find no merit to Pullens' argument that the evidence that he had threatened Matsolonia was inadmissible. We turn now to Pullens' assignment of error challenging the authentication of the e-mails.

2. Authentication of E-Mails

Pullens next challenges the admission of the e-mail correspondence with Kanger. According to Pullens, under rule 901,[104] there was insufficient evidence to authenticate the e-mails as being written by him.

Rule 901 does not impose a high hurdle for authentication or identification.[105] The proponent is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[106] Instead, if the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, then the proponent has

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[103] See *Huddleston v. United States, supra* note 102.

[104] § 27-901.

[105] *State v. Draganescu, supra* note 1.

[106] See *id.*

satisfied the requirement of rule 901(1).[107] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated, and an appellate court reviews a trial court's ruling on authentication for an abuse of discretion.[108]

There are several ways that the authorship of an e-mail may be shown. E-mails may be authenticated by use of the e-mail address, which many times contains the name of the sender.[109] The signature or name of the sender or recipient in the body of the e-mail is also relevant to authentication.[110] Evidence that an e-mail is a timely response to an earlier message addressed to the purported sender is proper foundation analogous to the reply letter doctrine.[111] Finally, the contents of the e-mail and other circumstances may be utilized to show its authorship.[112] The possibility of an alteration or misuse by another of the e-mail address generally goes to weight, not admissibility.[113]

The first e-mail sent by Pullens is from the account "stephenpullens@yahoo.com" and is signed "Stephen Pullens." The next e-mail is from the account "pullens_stephen@yahoo.com" and is signed "Stephen Pullens." This e-mail also contains Pullens' Social Security and telephone numbers under the signature line. Four additional e-mails are sent from this account, most of which contain variations on the signature, "Stephen Pullens or friends thereof."

Three e-mails are from the account "grid_works@ureach.com," and two of these e-mails contain no signature. However, one e-mail from this account begins "This is Stephen" and is later signed by "Stepen [sic] Pullens." One e-mail is sent from "mr_san_man2u@yahoo.com." This e-mail contains two

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[107] See *id.*

[108] See *id.*

[109] R. Collin Mangrum, Mangrum on Nebraska Evidence 852 (2011).

[110] 2 McCormick on Evidence, *supra* note 40, § 227.

[111] *Id.* See, also, *Helwig v. Aulabaugh*, 83 Neb. 542, 120 N.W. 162 (1909).

[112] 2 McCormick on Evidence, *supra* note 40, § 227.

[113] Mangrum, *supra* note 109.

letters, the first of which is signed "[t]he above letter is not from Stephen" but the second of which is signed, "Stephen."

A Nebraska State Patrol investigator and computer forensics expert testified that he was able to determine what e-mail addresses were being used from the computer in Matsolonia's apartment during the time that Pullens was staying there immediately before her death. The investigator prepared a report for the police detailing the e-mail addresses found. He specifically recalled "stephenpullens@yahoo.com" and "grid_works@ureach.com" as e-mail addresses used at that computer at that time.

An Omaha police detective testified that he was assigned the tasks of compiling all the information concerning the e-mails and of verifying that each of the e-mails Kanger received was actually sent by Pullens. He testified that there were numerous references to personal facts in the e-mails and that he verified that each of these facts was accurate. He detailed these verifications at trial. They included descriptions of the layout and contents of Matsolonia's apartment, Pullens' previous travel, prior residences, prior employment, schooling, sports activities, and girlfriends. Based on our review of the record, we conclude that the trial court did not abuse its discretion in finding that the State had made a showing that the e-mails were what the State purported them to be—e-mails written by Pullens to Kanger.

3. Jury Instruction on Flight

Pullens next asserts that the trial court erred in giving the jury an instruction on flight. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.[114] Jury instruction No. 14 stated:

> You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with

[114] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

> which the person so fleeing has been charged, is a circumstance, not sufficient of itself, to establish guilt, but a circumstance never the less which you may consider in connection with all other evidence in the case to aid you in determining the question of the guilt or innocence of such person.

Pullens does not dispute that instruction No. 14 is a correct statement of the law, but he argues that it was inapplicable to the facts of this case because he did not commit flight. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.[115]

[23] We have said that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.[116] Pullens testified that he departed merely in order to discuss the matter with a lawyer before speaking further with the police, and he argues that there was no evidence to the contrary.

A similar argument was presented by the defendant in *State v. Jacob*,[117] who asserted that there was no evidence that he made any deliberate attempt to conceal his whereabouts or identity and that he was unaware there was a warrant for his arrest. We explained that it was for the jury to decide whether a defendant's departure constituted flight.[118] We held that the State need not prove by clear and convincing evidence that the defendant had consciousness of guilt during his or her departure.[119] Instead, if the evidence is sufficient to support a jury's determination that the departure constituted flight, it is proper to submit such evidence.[120]

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[115] *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

[116] *State v. Lincoln*, 183 Neb. 770, 164 N.W.2d 470 (1969).

[117] *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[118] *Id.* See, also, *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980).

[119] *Id.*

[120] *Id.*

Pullens admitted that he deliberately left the motel before Kanger arrived and that he understood Kanger considered him a suspect. He then slept in a car, in locations unknown to the police, until leaving town. As soon as Pullens could obtain a passport, he went to Switzerland. In e-mails from Switzerland, Pullens describes how Kanger is unable to extradite him, and Pullens later admits to "running" from the police. It is not necessary for there to be a warrant for the defendant's arrest at the time of the departure in order to constitute flight.[121] We conclude that there was sufficient evidence from which the jury could infer flight and that the trial court did not err in instructing the jury on that issue.

4. Right to Counsel at Sentencing Hearing

(a) Denial of Right to Counsel

We turn now to Pullens' assignments of error pertaining to the sentencing hearing. His first argument is that he was denied the right to counsel at sentencing. The record shows that before trial, Pullens had requested that he be appointed counsel from the public defender's office. Pullens was subsequently able to procure private counsel, however, and he withdrew the request. There is no evidence in the record that Pullens was dissatisfied with his private counsel until after the verdict. Between the time of the verdict and the sentencing hearing, Pullens sent several letters to the trial judge asking that he be allowed to dismiss his privately retained attorneys and that a public defender be appointed in their stead.

The trial court held hearings on April 9 and 10, 2009, to address Pullens' requests. At the hearings, Pullens stated that he believed there were irregularities at trial and that he thought his attorneys should have gone to see him sooner to discuss pertinent issues. When the attorneys finally visited Pullens in prison, Pullens explained that he had determined that it was too late and had refused to see them.

The court denied Pullens' request to be appointed new counsel and explained that if, after sentencing, Pullens was able to

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[121] See *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

show indigency, he would appoint an attorney for purposes of his appeal. As for the sentencing hearing, the court advised Pullens that he had a right to represent himself or proceed with his current attorneys.

Pullens stated that he wished to represent himself, and he discussed with the court whether he would be able to file a motion based on what he considered newly discovered evidence and prosecutorial misconduct. The court responded that he was free to do so and that the court would require the attorneys to remain and provide assistance to Pullens as technical advisers. Pullens seemed agreeable to this as his best alternative, given the court's refusal to appoint him counsel before sentencing.

On May 26, 2009, the date of the sentencing hearing, Pullens indicated to the court that he had some sort of an arrangement with another private attorney and that he had the funds to hire this person. The trial court noted that the aforementioned attorney was not present. Pullens asked for a continuance in order to procure the attorney for the sentencing hearing. The court denied his request, explaining that sentencing had been scheduled since March 23. Pullens affirmed that, given the court's ruling, he still preferred to represent himself rather than be represented by his standby counsel.

[24,25] Once the right to counsel attaches, the accused is entitled to counsel at every critical stage of the proceeding.[122] But a defendant may not use his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.[123] And the decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.[124] Certainly, we find no abuse of discretion in the trial court's refusal to grant Pullens' last-minute request for a continuance on the day of the sentencing hearing.

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[122] See *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[123] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[124] See *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[26] We also find no error in the trial court's refusal to appoint a public defender for the sentencing hearing. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.[125] Fundamentally, because Pullens had shown himself capable of hiring counsel—who was still available to him—and because Pullens failed to give timely notice of any alleged indigency,[126] there was no entitlement to the provision of counsel at public expense.

Even if Pullens had demonstrated indigency and his trial counsel had been appointed, a defendant is not entitled to appointed counsel of his or her choice.[127] Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel, and unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so.[128]

Pullens also asserts that he was deprived of his right to counsel because "[n]owhere did the trial court establish on the record that Pullens[']s decision to go forward by himself was a knowing and intelligent waiver of his right to counsel at sentencing."[129] Pullens does not elaborate on this argument further, but it appears that he is challenging the trial court's failure to conduct a specified colloquy or make specific findings on the record.

[27] An effective waiver of an accused's Fifth Amendment right to counsel has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; second, the waiver must have been made with full awareness of both the nature of

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[125] *State v. Golden*, 8 Neb. App. 601, 599 N.W.2d 224 (1999).

[126] See *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

[127] 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).

[128] *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007); *State v. Dunster, supra* note 123.

[129] Brief for appellant at 35.

the right being abandoned and the consequences of the decision to abandon it.[130] But a formalistic litany is not required to show that such a waiver was knowingly and intelligently made.[131] Instead, a knowing and intelligent waiver of the right to counsel can be inferred from conduct.[132] The fact that a defendant has had the advice of counsel throughout his or her prosecution is an indication that the defendant's waiver of counsel and election to represent himself or herself was knowing and voluntary.[133] We find no merit to Pullens' assignment of error that he was deprived of his right to counsel at sentencing.

(b) Presentence Investigation Report

Pullens asserts that the trial court abused its discretion by not affording Pullens an opportunity to review his presentence investigation report (PSI) and by considering a letter written by someone not involved in the case. The PSI consisted of six volumes. At the hearing, the court stated that it "had occasion to review the [PSI] in this matter, and I will include all the letters that the defendant has written to me personally as well as a recent statement from a lady in Santa Monica, California." The woman's statement alleged that Pullens had once attempted to throw her out a window and that she urged the court to sentence Pullens to the maximum. Pullens made no objections during the sentencing hearing regarding the PSI or consideration of the letter. Nor is there any indication in the record that Pullens requested to review the PSI or whether he actually reviewed it.

The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of the sentence.[134]

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[130] *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[131] *State v. Figeroa, supra* note 8.

[132] *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[133] *State v. Gunther, supra* note 132.

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

The sentencing court 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, and evidence may be presented as to any matter that the court deems relevant to the sentence.[135] We find no error in the trial court's inclusion of the letter, which, in any event, did not appear to play a particularly important role in the trial court's decision.

[28,29] As for the review of the PSI, we have previously held that a defendant waives his or her qualified right to review the PSI by not notifying the trial court that he or she has not personally reviewed the PSI and that he or she wishes to do so.[136] While Pullens argues that he did not know he had such a right, a defendant who elects to proceed pro se cannot thereafter complain of the quality of his or her own defense.[137] Thus, we conclude that Pullens' arguments that the trial court abused its discretion at sentencing are without merit.

5. Ineffective Assistance of Counsel

[30] Finally, Pullens raises several issues with regard to his claims of ineffectiveness of trial counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[138] The determining factor is whether the record is sufficient to adequately review the question.[139] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[140]

Pullens argues that counsel was ineffective for failing to object to parts of the e-mail correspondence admitted into evidence on the ground that portions of the e-mails demonstrated prior bad acts. The record reflects that defense counsel did initially object to the e-mails on this basis. However, the State and defense counsel quickly reached an agreement not to

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[135] *Id.*

[136] See *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

[137] See *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[138] *State v. Young, supra* note 114.

[139] *Id.*

[140] See *State v. Wabashaw, supra* note 128.

publish to the jury any portion of the objectionable prior bad acts. Witnesses at trial either summarized or read out loud specific portions of the e-mails to the jury, and, in that testimony, inadmissible prior bad acts were not mentioned.

Pullens is correct, however, that the exhibits themselves, as found in the record, show only one word blacked out. The e-mails contain several vague references to prior arrests and some other questionable behavior that may or may not be considered prior bad acts or otherwise be objectionable. The State believes that these exhibits were never given to the jury, and the record before us is unclear on this point. The resolution of this question would require an evidentiary hearing, and we thus determine that it is not appropriate for review on direct appeal.

Pullens' remaining arguments concerning ineffective assistance are likewise not appropriate for review without an evidentiary hearing. Pullens argues that his trial counsel failed to adequately cross-examine the pathologist. He claims that the pathologist had never before opined that Matsolonia's injuries were consistent only with manual strangulation, and he claims there would be expert testimony to rebut the pathologist's conclusion. But there is no evidence in the record to show this. Pullens asserts that trial counsel was ineffective for failing to make a motion for new trial based on the State's failure to disclose a report allegedly inconsistent with the theory that Matsolonia was thrown off the balcony. Likewise, this report is not in the record. Pullens is free to raise these issues of ineffective assistance of counsel in a motion for postconviction relief.

VI. CONCLUSION

We find the issues raised regarding ineffective assistance of counsel are premature, and we find no merit to Pullens' other assignments of error. We affirm the judgment of the trial court.

AFFIRMED.

CONNOLLY, J., dissenting.

I dissent. I disagree with the majority opinion's standard for admitting evidence of a defendant's extrinsic acts.

I also disagree with its conclusion that Pullens' assault on Matsolonia 4 years before her murder was admissible for proving Pullens' identity as the murderer, his modus operandi, or his intent to kill. The evidence was also inadmissible to show Pullens' absence of mistake in killing her. Moreover, the trial court erred in finding that the evidence was relevant to prove Pullens' identity, modus operandi, and intent because its relevancy depended upon an inference that he had acted in conformity with his previous bad conduct. So the admission of this evidence was not harmless error because the court improperly instructed the jury that it could consider the evidence for these purposes.

Before examining these issues, I pause to express my disagreement with the majority opinion's retreat from the specificity of purpose requirements that we set out in *State v. Sanchez*.[1] There, we held that upon objection, a proponent who offers evidence under rule 404(2)[2] must "state on the record the specific purpose or purposes for which the evidence is being offered"; the trial court must "similarly state the purpose or purposes for which such evidence is received."[3] We reasoned that "'the line between what is permitted and what is prohibited under Rule 404[(2)] is sometimes quite subtle. [It also] sometimes carries a substantial danger of unfair prejudice and thus raises serious questions under [rule] 403.'"[4] The *Sanchez* requirements are intended to ensure that rule 404(2) rulings "'are made with care'" and to "'assist the process of appellate review.'"[5]

So I disagree with the majority opinion's sweeping statement that a defendant's previous attacks against a victim are generally admissible to show intent, motive, and absence of mistake.

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

[2] See Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).

[3] *Sanchez, supra* note 1, 257 Neb. at 308, 597 N.W.2d at 374.

[4] *Id.* at 307, 597 N.W.2d at 374, quoting *U.S. v. Murray*, 103 F.3d 310 (3d Cir. 1997). See, also, Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[5] *Id.*

In *Sanchez*, we rejected this smorgasbord approach[6] to admitting extrinsic bad acts evidence or analyzing its admission on appeal. Under *Sanchez*, it is irrelevant that evidence may serve a permissible purpose under some circumstances. The question is whether the stated purpose for offering the evidence is a permissible purpose given the facts at hand.

Further, we have recognized that a proper limiting instruction in a jury trial is a crucial safeguard against the admission of unduly prejudicial extrinsic acts.[7] Thus, when a defendant claims on appeal that the trial court improperly admitted extrinsic acts evidence, it is necessary to consider whether the court both admitted the evidence for proper purposes *and* limited the jury's consideration of the evidence to those proper purposes.[8]

Evidence admitted under rule 404(2) is "one of the most frequently litigated issues on appeal, 'and the erroneous admission of such evidence is the largest cause of reversal.'"[9] And because Sanchez provides the analytical framework for analyzing rule 404(2) issues, I decline to join the majority's reliance on a pre-*Sanchez* decision[10] to again muddy the waters. A return to catchall statements regarding admissibility will only foster less clarity and more appeals.

Standard of Admissibility for Extrinsic Acts

Initially, I point out that a distinction exists between a defendant's previous verbal threats and physical assaults. I agree with the majority that a defendant's statements to the effect that he desires or intends to kill the victim can be admissible to prove

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[6] See, also, *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991) (Shanahan, J., dissenting), quoting 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5240 (1978).

[7] See *Sanchez, supra* note 1.

[8] See, e.g., *U.S. v. Bell*, 516 F.3d 432 (6th Cir. 2008).

[9] *State v. McManus*, 257 Neb. 1, 5, 594 N.W.2d 623, 627 (1999), quoting 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1:04 (rev. ed. 1999).

[10] See *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981).

intent. In *State v. Canbaz*,[11] we held that evidence of such statements "is not evidence of prior unrelated bad acts under [rule] 404(2)." But this type of evidence is distinguishable from the evidence admitted here. Here, the issue is whether the court properly admitted evidence that 4 years earlier, Pullens physically assaulted Matsolonia in a manner that threatened her life—an uncharged extrinsic act.

The majority opinion states that extrinsic acts evidence should be excluded if it invites the jury to focus its attention on the defendant's character instead of whether the defendant committed the crime. This standard conflicts with our previous policy statements explaining why such evidence is excluded and when it may be admitted. It is true that extrinsic acts evidence can invite the jury to focus its attention on the defendant's character instead of whether the defendant committed the charged crime. But that statement explains why admitting evidence on a theory of relevancy that depends on a propensity inference is prejudicial.[12] It is not the standard for admitting extrinsic acts evidence to avoid that prejudice. Except for a passing mention, the majority opinion fails to discuss or apply the admissibility standard that we have articulated several times: independent relevance that does not depend on a tendency to show propensity.[13]

As we have previously explained, evidence of the defendant's extrinsic bad acts is not excluded because it is irrelevant. It is excluded because its admission creates a risk that the trier of fact will decide guilt on an improper basis.[14] Its admission can tempt the fact finder to condemn the defendant for his or her extrinsic (and often unpunished) bad acts and create "a

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[11] See *State v. Canbaz*, 259 Neb. 583, 594, 611 N.W.2d 395, 404 (2000).

[12] See 1 Imwinkelried, *supra* note 9, § 2:19.

[13] See, *State v. Chavez, ante* p. 99, 793 N.W.2d 347 (2011); *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *Sanchez, supra* note 1; *McManus, supra* note 9.

[14] See *Sanchez, supra* note 1.

danger that the trier of fact will overestimate [its] probative value."[15] "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[16] The exclusion of extrinsic acts when offered to show a defendant's propensity to act in conformity with them protects the presumption of innocence and is deeply rooted in our jurisprudence.[17]

I agree with the majority that under rule 404(2), the defendant's extrinsic acts must be relevant for a purpose other than to show his or her propensity.[18] But to be admitted for a proper purpose, a defendant's extrinsic acts must be relevant to the stated purpose *independent of* its tendency to show propensity.[19] We have refused to uphold the admission of extrinsic acts when its relevance involved classic propensity reasoning about the defendant's character.[20] So the test under rule 404(2) for admitting evidence of the defendant's extrinsic acts is this: Does the chain of reasoning necessary to find the evidence relevant to the fact sought to be proved depend on an inference that the defendant acted in conformity with a propensity reflected by the extrinsic acts?[21] And as the majority acknowledges, evidence of a defendant's extrinsic acts is not admissible

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[15] *McManus, supra* note 9, 257 Neb. at 7, 594 N.W.2d at 628.

[16] *Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

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

[18] See *Sanchez, supra* note 1.

[19] See *id.*

[20] See, *Trotter, supra* note 17; *McManus, supra* note 9.

[21] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010); *U.S. v. Commanche*, 577 F.3d 1261 (10th Cir. 2009); *U.S. v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *Masters v. People*, 58 P.3d 979 (Colo. 2002); *State v. Clifford*, 328 Mont. 300, 121 P.3d 489 (2005); *State v. Cassavaugh*, 161 N.H. 90, 12 A.3d 1277 (2010); *State v. Johnson*, 340 Or. 319, 131 P.3d 173 (2006); 1 Imwinkelried, *supra* note 9, § 2:19; 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:28 (3d ed. 2007); 22 Wright & Graham, *supra* note 6, § 5239.

for the proponent's stated purpose unless that purpose was genuinely at issue.[22]

As applied here, rule 404(2) required the trial court to exclude evidence that Pullens had previously assaulted Matsolonia if its relevance to the stated purpose depended upon an inference that he had acted in conformity with a propensity to behave violently toward her. I do not believe that the admission of Pullens' 2000 assault on Matsolonia met that standard when offered to prove his identity, modus operandi, or intent. Nor do I believe that Pullens' identity as the perpetrator or his absence or mistake in committing the crime was at issue.

Proving Identity Was Not a Proper Purpose for Admitting the Evidence

The main issue was conduct, not identity.[23] That is, the issue was whether a murder was committed, not who committed the murder if proved. Pullens did not deny being the only person with Matsolonia at her death and did not claim that someone else must have killed her. If the jury believed his suicide defense, then Pullens was innocent because no murder occurred.[24] But a suicide defense should not be confused with a claim that another possible perpetrator committed the crime.[25] If the State proved that a murder was committed, then Pullens was the only possible perpetrator. We have previously held that if the jury believes the State's evidence that a crime was committed and the defendant is the only possible perpetrator, then evidence of the defendant's extrinsic bad acts is not admissible to prove the defendant's identity as the perpetrator.

We applied that principle in *Sanchez*.[26] There, the victim identified the defendant as the person who sexually assaulted her, and he denied the charge. The State introduced extrinsic acts evidence that he had previously sexually assaulted

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[22] See, *Trotter, supra* note 17; *Sanchez, supra* note 1.

[23] See 3 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 17:39 (7th ed. 1998).

[24] See *Sutter v. State*, 102 Neb. 321, 167 N.W. 66 (1918).

[25] Compare *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[26] *Sanchez, supra* note 1.

his two daughters. We distinguished earlier cases in which a defendant's extrinsic acts were admissible to prove identity because there were no eyewitnesses to the crime. We held in *Sanchez* that because identity was not at issue, the evidence was not admissible to prove the defendant's identity as the perpetrator:

> There is no evidence upon which the jury could have concluded that the assault occurred but that someone other than [the defendant] committed it. . . . If the jury believed the testimony of [the victim] that the acts which constitute first degree sexual assault occurred, it would have no basis for identifying anyone other than [the defendant] as the assailant and his prior conduct would prove nothing necessary for conviction. On the other hand, if the jury did not believe the testimony of [the victim] regarding the occurrence of the assault, it would be left with no evidence that a crime had been committed and thus no assailant to identify. [The defendant's] prior acts could not fill this evidentiary void.[27]

The Ohio Court of Appeals applied the same reasoning to a homicide case in which the defendant called the police to say that his girlfriend had just committed suicide. She had been shot in the chest. The trial court admitted extrinsic acts evidence that the defendant had injured her in the past to prove his identity as her murderer. The appellate court reversed, concluding that the defendant's identity was not genuinely at issue under the same reasoning we used in *Sanchez*:

> According to the theory of the state's case and the evidence it presented, if the alleged crime took place at all, no person other than [the defendant] could have committed it. Further, [the defendant] did not claim that another person had murdered [the victim]. Instead, he denied that she was murdered at all. The only genuine issue, therefore, was whether [the victim] was murdered or whether she committed suicide. Because the identity of the perpetrator of the state's murder alternative was not in issue,

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[27] *Id.* at 311, 597 N.W.2d at 376.

> evidence of [the defendant's] prior acts extrinsic to the operative facts of the crime alleged was not admissible . . . to prove *identity*.[28]

Sanchez and the Ohio case are connected by two common factors: (1) The defendant denied that a crime was committed; and (2) if the State proved that a crime was committed, the defendant's identity as the perpetrator was certain. "Where a defendant admits that he is the person the complainant or witness means to accuse, but asserts, in essence, that the alleged crime never occurred . . . the key issue is not *identity*, but *conduct*—what some commentators have refer to as the 'corpus delicti issue.'"[29]

"The corpus delicti is the body or substance of the crime—the fact that a crime has been committed, without regard to the identity of the person committing it."[30] "In the attempt to prove the corpus delicti by the use of other crimes it is very difficult to disguise the forbidden inference [of propensity] by casting it in some alternative form."[31]

The majority opinion's statement that the corpus delicti was not at issue is misguided. The State has the burden to prove beyond a reasonable doubt the corpus delicti of homicide in a murder prosecution, and that is certainly true when the defendant claims that no murder occurred.[32] The corpus delicti is composed of two elements: the fact or result forming the basis of a charge and the existence of a criminal agency as the cause thereof.[33] "In a homicide case, corpus delicti is not established until it is proved that a human being is dead and that the death occurred as a result of the criminal agency *of another*."[34]

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[28] *State v. Hawn*, 138 Ohio App. 3d 449, 463, 741 N.E.2d 594, 604 (2000) (emphasis in original).

[29] 3 Fishman, *supra* note 23, § 17:47 at 443-44 (emphasis in original).

[30] *State v. Edwards*, 278 Neb. 55, 65, 767 N.W.2d 784, 795 (2009).

[31] See 22 Wright & Graham, *supra* note 6, § 5239 at 461.

[32] See *Edwards, supra* note 30.

[33] *Id.*

[34] *Id.* at 65-66, 278 N.W.2d at 796 (emphasis supplied).

The majority, relying on a different Court of Appeals' case from Ohio, *State v. Griffin*,[35] attempts to paint Matsolonia as the possible criminal agency. In that case, the Ohio court reasoned that in a murder-or-suicide case, both the defendant and the victim are suspects: "While it is true that only one of the suspects, the defendant, can be found guilty of murder, evidence of suicide creates a genuine issue concerning the identity of the person who pulled the trigger."[36] I do not believe that the *Griffin* court's veiled-in-mist reasoning is persuasive.

The concurrence in *Griffin* got it right. It concluded that this reasoning "confuses identity with culpability," and "a plea of not guilty with a genuine issue of identity."[37] In a murder prosecution, the victim cannot be "another" suspected of the criminal act. And a defendant's claim that the victim committed suicide is refuted if the State meets it burden to prove that the victim died "as a result of the criminal agency of another."[38] So to determine whether the defendant's identity as the perpetrator is genuinely at issue in a homicide case, the trial court need only ask this question: If the State meets its burden to prove that the victim died at the hands of another, is there any claim, or does the evidence leave open the possibility that the victim died at the hands "of another" who is not the defendant? Here, the answer is obviously no.

Pullens did not claim, and the evidence did not suggest, that anyone else could have killed Matsolonia. Here, Pullens' identity as the perpetrator was not genuinely at issue and the State was more interested in putting Pullens' propensity to attack Matsolonia before the jury. In some circumstances, I might agree with the majority's statement that "where the prior threat makes reference to a peculiar method of violence that in the end is carried out," it may be evidence of identity. But this reasoning does not apply here, which is obvious from examining the facts of the case that the majority relies on. In *Brenk v.*

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[35] *State v. Griffin*, 142 Ohio App. 3d 65, 753 N.E.2d 967 (2001).

[36] *Id.* at 74, 753 N.E.2d at 973-74.

[37] See *id.* at 87, 753 N.E.2d at 984 (Painter, J., concurring).

[38] *Edwards, supra* note 30, 278 Neb. at 65-66, 767 N.W.2d at 796.

State,[39] the victim's cut-up remains were found floating in an ice cooler on a lake. The murderer's identity was obviously at issue, so the court affirmed the admission of evidence that the defendant had previously threatened to kill his former wife and scatter her cut-up body.

In sum, I believe the majority has mistakenly concluded that Pullens' identity as the murderer was at issue. But even if identity had been at issue, the majority opinion fails to recognize that the logic needed to find this evidence relevant to proving identity depends upon a propensity inference. Courts must exercise caution in admitting evidence of extrinsic acts to prove identity. In general, using extrinsic acts evidence to prove identity has caused confusion because the "use of such evidence to prove 'identity' most directly raises the forbidden propensity inference."[40] The close relationship between proving identity and conduct requires courts to scrutinize identity evidence:

> Where other crimes evidence is offered to prove identity, it necessarily requires an inference to the conduct of the defendant; therefore, great care must be taken to [e]nsure that the theory of admissibility does not involve any inference as to the defendant's character. It is for this reason that courts are much stricter when assessing the admissibility of evidence offered to prove identity than they are when it is directed at some mental state that is in issue.[41]

One protection against the convergence of identity and conduct is the requirement that the defendant's extrinsic acts for proving identity have overwhelming similarities to the charged crime—"such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature."[42] The high degree of similarity is necessary to support a permissible inference that the "'same' person"

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[39] *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993).

[40] 3 Fishman, *supra* note 23, § 17:40 at 414.

[41] 22 Wright & Graham, *supra* note 6, § 5246 at 512-13.

[42] See *Epp, supra* note 25, 278 Neb. at 700, 773 N.W.2d at 373.

committed the acts, independent of a propensity inference about the defendant's character.[43]

But even when the extrinsic acts involve a unique criminal behavior, admitting evidence of the defendant's extrinsic acts against the same victim undercuts the rationale for requiring heightened similarity. It is primarily because the evidence shows the defendant has a propensity for domestic violence against the victim that it is highly persuasive in showing that the defendant must have committed the charged crime. Notably, some states have enacted exceptions to their rule 404 counterparts to admit past acts of domestic violence in prosecutions for domestic violence offenses.[44]

This case illustrates the problem. Here, the propensity inference was unavoidable when offered to prove Pullens' identity as the murderer. As explained, the State could refute Pullens' claim that Matsolonia committed suicide by proving that her death occurred as a result of the criminal agency of another. But it could not refute Pullens' suicide claim by showing that because he had behaved similarly in the past, his suicide claim was false. That proof is exactly what rule 404(2) prohibits. Reasoning that Pullens' previous assault on Matsolonia is relevant to show that he was her killer necessarily includes a propensity inference in the chain of reasoning. The conclusion cannot be separated from an inference that Pullens acted in conformity with his previous bad conduct or his propensity to behave violently toward Matsolonia. I would hold that the court erred in admitting evidence of the previous assault to prove Pullens' identity.

Proving Modus Operandi Was Not a Proper Purpose

Because proving Pullens' identity as the murderer was not a proper purpose for admitting the evidence, it follows that

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[43] See, 1 Imwinkelried, *supra* note 9, § 3:11 at 52. Accord 3 Fishman, *supra* note 23, § 17:41.

[44] See 1 McCormick on Evidence § 190 at 759 n.35 (Kenneth S. Broun et al. eds., 6th ed. 2006), citing Alaska R. Evid. 404(b)(4) and Cal. Evid. Code § 1109 (2005).

admitting the evidence to prove Pullens' modus operandi was also an improper purpose. Proving a defendant's modus operandi in committing an extrinsic crime that shares a unique characteristic with the charged crime supports an inference of identity: the same person committed each crime.[45] So using extrinsic acts evidence to prove the defendant's modus operandi is only relevant when the defendant's identity as the perpetrator is at issue.[46] As explained, identity was not at issue here, so proving Pullens' modus operandi was not a proper purpose for admitting the evidence.

Proving Absence of Mistake Was Not a Proper Purpose

Although the majority opinion has failed to discuss this issue, the trial court improperly instructed the jury that it could consider the evidence for proving Pullens' absence of mistake in killing Matsolonia. Absence of mistake was not at issue because Pullens did not claim to have unintentionally killed Matsolonia.[47] He claimed that he did not kill her. The absence of mistake exception is a "special form of the exception that permits the use of other crimes to prove intent."[48]

Normally, absence of mistake is not at issue unless the defendant claims that his or her conduct in committing the charged crime was an accident or mistake, or the defendant's act could be criminal or innocent depending on the defendant's state of mind.[49] Courts often admit evidence of a defendant's prior assaults against a victim to show absence of

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[45] See 3 Fishman, *supra* note 23, § 17:42.

[46] *U.S. v. Fraser*, 448 F.3d 833 (6th Cir. 2006); *Chavez v. City of Albuquerque*, 402 F.3d 1039 (10th Cir. 2005); *U.S. v. Williams*, 985 F.2d 634 (1st Cir. 1993).

[47] See *Trotter, supra* note 17.

[48] See 22 Wright & Graham, *supra* note 6, § 5247 at 517-18.

[49] See, *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007), citing *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973); *Trotter, supra* note 17. See, also, *Bell, supra* note 8; *Chavez, supra* note 46; *Hynes v. Coughlin*, 79 F.3d 285 (2d Cir. 1996); *U.S. v. Johnson*, 879 F.2d 331 (8th Cir. 1989); *United States v. Naranjo*, 710 F.2d 1465 (10th Cir. 1983).

mistake, or intent, in child abuse cases.[50] These cases often present a circumstance in which the defendant's act could be innocent depending upon his or her state of mind. But Pullens could not have accidentally or mistakenly strangled and then thrown Matsolonia off the balcony. It is true that he claimed to have briefly grabbed her neck to prevent her from falling from the balcony. But this was not an admission that he killed her but did so unintentionally. Absence of mistake was not at issue because it was not a plausible defense or inference under the facts presented.

Proving Intent Was Not a Proper Purpose

The State may not use extrinsic acts evidence to prove intent if the theory of relevance requires the trier of fact to infer "the defendant's state of mind on the charged occasion from the defendant's subjective, personal character, disposition, or propensity."[51]

It is true that courts have frequently admitted evidence of a defendant's extrinsic acts of domestic violence against a victim to show the relationship between the victim and the defendant and the defendant's feelings toward the victim. And it is true that many courts, including this court,[52] have frequently concluded that such evidence is relevant to prove the defendant's motive or intent. We have stated that any motive for the crime charged is relevant to intent.[53]

But logical relevance does not mean that the chain of reasoning to make the evidence relevant for the proponent's stated purpose is free of a propensity inference.[54] If the theory of relevance to prove motive depends upon an inference about

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[50] See, *Chavez, supra* note 13, quoting *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Kuehn, supra* note 49.

[51] *McManus, supra* note 9, 257 Neb. at 11, 594 N.W.2d at 630. Accord *Trotter, supra* note 17.

[52] See *Sharp v. State*, 115 Neb. 737, 214 N.W. 643 (1927).

[53] See, e.g., *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010), citing *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[54] See *McManus, supra* note 9.

the defendant's character, then the same inference will necessarily be present if motive is used to show intent. General propositions are not a substitute for examining the proponent's chain of reasoning. The majority opinion fails to perform this examination.

Intent is the defendant's state of mind at the time of the criminal act.[55] In contrast, motive is "'the moving course, the impulse, the desire that induces criminal action on the part of the accused'"[56] or that which leads or tempts the mind to indulge in a criminal act.[57] Motive is normally used as an intermediate inference to prove identity: "The fact that the defendant had a motive for that particular crime increases the inference of the defendant's identity."[58] When "motive is particular to the defendant and is not shared with the general public, it is . . . circumstantial proof that the defendant, and not someone else, is the perpetrator."[59] But despite the commentators' argument that motive and intent are not synonymous,[60] courts have frequently treated them as though they were and indiscriminately upheld the use of evidence relevant to motive to show intent.[61]

Using an extrinsic act to show motive will not always depend on a propensity inference. "For example, an uncharged theft may supply the motive to murder an eyewitness to the theft."[62] In contrast, using a defendant's previous attacks on a victim to show that the defendant's hostility toward the victim motivated the defendant to commit the charged crime does require propensity reasoning. To reach the conclusion that the

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[55] See *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985).

[56] *State v. Bronson*, 242 Neb. 931, 940, 496 N.W.2d 882, 890 (1993), quoting Black's Law Dictionary (6th ed. 1990).

[57] *Id.* Accord *McBride, supra* note 53.

[58] 1 Imwinkelried, *supra* note 9, § 3:15 at 79. See, also, 1 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 4:45 (15th ed. 1997).

[59] *Schroeder, supra* note 53, 279 Neb. at 214, 777 N.W.2d at 806.

[60] See, e.g., 1 Bergman & Hollander, *supra* note 58.

[61] 22 Wright & Graham, *supra* note 6, § 5240.

[62] 1 Imwinkelried, *supra* note 9, § 3:16 at 82.

defendant had a motivating animus toward the victim based on prior attacks, the trier of fact must make an intermediate inference that the defendant had a propensity for attacking the victim. The fact finder infers the defendant's animosity toward the victim from this propensity evidence.[63]

Here, Pullens' hostile feelings toward Matsolonia were logically relevant to why he would have killed her, i.e., his motivation. Showing that the same motivation was present in both the extrinsic act and the charged act could not be free of propensity reasoning because the trier of fact must infer his hostile feelings from his assaults on Matsolonia. So when this motivation evidence was used to show intent, the propensity inference was also present: Pullens must have intended to kill Matsolonia because he hated her enough to have intentionally assaulted her previously.

Using a defendant's unlawful intent in a previous crime to show the defendant's unlawful intent in committing the charged crime will usually depend on propensity reasoning. "Evidence of unlawful intent in a prior offense is directly relevant to unlawful intent in the present offense only on the assumption that once a person has shown an ability to harbor an evil intent, that person is more likely to entertain the same evil intent on another occasion."[64] "A state of mind that continues over time and governs otherwise unconnected acts is generally called a person's character trait or propensity."[65]

In *State v. McManus*,[66] however, we stated that the "'only theory of logic under which evidence of other misconduct

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[63] See *id.*, § 3:18, citing Richard Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 226 (2d ed. 1982). See, also, *Varoudakis, supra* note 21.

[64] Eric D. Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1232 (1986).

[65] Lee E. Teitelbaum & Nancy Augustus Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. Rev. 423, 430 (1983).

[66] See *McManus, supra* note 9, 257 Neb. at 10, 594 N.W.2d at 630, quoting Lansverk, *supra* note 64.

is directly relevant to prove intent . . . without relying on character inferences, is the doctrine of chances.'" Under this doctrine, the trier of fact is asked to infer that the defendant acted intentionally by making an intermediate inference about the objective improbability of an innocent act instead of an inference about the defendant's character.[67] This theory of relevance is used when the State seeks to prove the defendant's absence of mistake or accident. In *State v. Chavez*,[68] we implicitly adopted the doctrine to hold that evidence of a child's repeated, previous injuries is admissible when offered to show they are the product of child abuse and not accidents. In that circumstance, the evidence is relevant to someone's absence of mistake, and thus intent, without directly linking the acts to the defendant.

But in *McManus*, we did not adopt the doctrine of chances for directly proving intent through extrinsic acts that can only be attributed to the defendant. We recognized that critics had argued that the improbability of the defendant's acting innocently depends on his or her propensity to repeat the same crime, i.e., depends on an unchanging character.[69] We pointed out, however, that courts that have adopted the doctrine to directly prove *intent* will apply it "only when each of the other bad acts is similar to the charged offense and the defendant has been involved in such incidents more frequently than the typical person."[70]

We further stated that the number of similar events that are necessary to satisfy the doctrine of chances depends upon the complexity, degree of similarity, and relative frequency

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[67] See *McManus, supra* note 9.

[68] See *Chavez, supra* note 13. See, also, 1 Imwinkelried, *supra* note 9, § 5:06.

[69] See *McManus, supra* note 9, citing Andrew J. Morris, *Federal Rule of Evidence 404(B): The Fictitious Ban on Character Reasoning From Other Crime Evidence*, 17 Rev. Litig. 181 (1998), and Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259 (1995).

[70] *Id.* at 13, 594 N.W.2d at 632, citing *People v Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998).

of the event rather than on the total number of occurrences.[71] Generally, the doctrine of chances should not rest upon a single, previous uncharged act unless it is a complex act, like forgery requiring separate steps, as distinguished from "a spontaneous response to external stimuli,"[72] like spontaneous assaults.[73]

Here, the extrinsic act involved a spontaneous response to the victim, not a complex act like forgery. And it did not clearly show an intent to kill.[74] Neither did the evidence show several instances of domestic violence between the defendant and the victim continuing up to the occasion of the charged crime.[75] So even if we had adopted the doctrine of chances to directly prove intent, Pullens' single previous assault against Matsolonia could not be used to support an intermediate inference that an innocent act was improbable and that he therefore intended to kill her.

Of course, it was unnecessary to use this evidence to show the improbability of an innocent act because Pullens' act could not have been innocent. Even when the extrinsic acts are sufficiently similar and numerous to apply the doctrine of chances, showing the improbability of the defendant's innocent conduct is unnecessary when the defendant's conduct, if proved, could not have been done with an innocent intent. In that circumstance, no reason exists to ask the trier of fact to infer from extrinsic acts that the defendant's conduct in the charged crime was probably not innocent.

The absence of any need for the prejudicial evidence explains in part why many courts have held that when a defendant's conduct conclusively establishes intent, the defendant must actively contest the issue before extrinsic acts evidence is

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[71] *Id.*

[72] Lansverk, *supra* note 64, 61 Wash. L. Rev. at 1228. Accord 1 Imwinkelried, *supra* note 9, § 5:07.

[73] See 1 Imwinkelried, *supra* note 9, § 5:10.

[74] Compare *U.S. v. Hernandez*, 896 F.2d 513 (11th Cir. 1990).

[75] See, *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958); *Wever v. State*, 121 Neb. 816, 238 N.W. 736 (1931).

admissible.[76] Rule 403 explicitly gives a court discretion to exclude relevant evidence because it is a needless presentation of cumulative evidence.

The majority opinion attempts to circumvent the propensity reasoning necessary to find the extrinsic acts relevant and the cumulative nature of the evidence. The opinion posits in hindsight that Pullens' conduct was subject to more than one inference regarding his state of mind and that the State needed this evidence to rebut any inference that Pullens killed Matsolonia while acting under a provocation. But Pullens did not claim to have acted innocently in causing Matsolonia's death or claim to have killed her with a legal excuse, justification, or mitigation. He claimed that he did not kill Matsolonia.

Although the majority opinion states that the jury could have found that Pullens acted under a sudden provocation, its conclusion is inconsistent with Pullens' suicide defense and the evidence presented. It's a real stretch to affirm the admission of prejudicial character evidence based on an improbable defense that was not even presented.

More important, the State did not offer the evidence to refute any inference that Pullens had acted under a provocation or to consider whether an innocent act was improbable. Instead, the State offered the evidence to show that Pullens intended to kill Matsolonia because on one occasion 4 years earlier he had intentionally assaulted her in a similar manner after an argument. Offering the evidence to prove he intended to kill her required the jurors to use classic propensity reasoning that Pullens is the type of person "'who acts with violent intent when he is angry.'"[77]

I would conclude that the extrinsic acts evidence was inadmissible for any purposes for which the court instructed the jury to consider it. But even if the evidence had been

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[76] *U.S. v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992); *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975); 3 Fishman, *supra* note 23, § 17:63 (citing cases).

[77] See *State v. Sutton*, 16 Neb. App. 185, 194, 741 N.W.2d 713, 721 (2007), quoting *McManus, supra* note 9.

admissible to prove intent, I do not believe that the trial court properly performed its weighing function under rule 403.

Prejudicial Effect Outweighed Probative Value When State Had Other Substantial Evidence of Intent

As the majority states, the second requirement for admitting evidence of the defendant's extrinsic acts is weighing the evidence's probative value against the danger of unfair prejudice under rule 403.[78] Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[79]

As explained, extrinsic acts evidence creates a risk that the trier of fact will find guilt based on the defendant's character or disposition and overestimate the value of that evidence.[80] Balancing unfair prejudice against the probative value of extrinsic acts evidence under rule 403 is a critical safeguard. It ensures that the court does not admit unduly prejudicial evidence under rule 404.[81] Unfair prejudice in a criminal case refers to evidence that has a tendency to suggest a decision on an improper basis,[82] such as by relying on propensity reasoning.[83]

The majority correctly states that the U.S. Supreme Court has held that federal trial courts may consider the availability of evidentiary alternatives in balancing unfair prejudice against probative value under the federal counterpart to our rule 403.[84]

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[78] See *McManus, supra* note 9.

[79] § 27-403.

[80] See *McManus, supra* note 9.

[81] See *Sanchez, supra* note 1, citing *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

[82] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[83] See *Sanchez, supra* note 1.

[84] See *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

But it appears that the Court intended to clarify that under rule 403, a trial court has discretion to *exclude* the prosecution's proffered evidence of prior bad acts to avoid the risk of a verdict tainted by improper considerations if evidentiary alternatives are available.

Specifically, the Court held that the trial court abused its discretion when it rejected the defendant's offer to admit to a previous conviction and instead it admitted the full record of the previous judgment.[85] The Court explained that the advisory committee's notes showed that considerations under rule 403 should include "'waste of time and undue prejudice.'"[86] It concluded that when the proffered evidence has

> the dual nature of legitimate evidence of an element and illegitimate evidence of character[,] . . . . Rule 403 confers discretion by providing that evidence "may" be excluded, [and] the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.[87]

So I am puzzled by the majority's use of the Court's statement to support the admission of character evidence *despite* less prejudicial and equally persuasive evidentiary alternatives.

Moreover, intent is an element of almost every crime. And courts have recognized that in criminal cases, admitting extrinsic acts evidence to show intent has the potential of eviscerating rule 404.[88] Thus, many courts have held that when a defendant's conduct conclusively establishes intent, the defendant must actively contest the issue before extrinsic acts evidence is admissible for that purpose.[89] And a defendant does not actively contest intent by claiming that he did not commit the

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[85] See *id.*

[86] *Id.*, 519 U.S. at 184.

[87] *Id.* (citations omitted).

[88] *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994); *United States v. Miller*, 508 F.2d 444 (7th Cir. 1974). See, also, 22 Wright & Graham, *supra* note 6, § 5242.

[89] See sources cited *supra* note 76.

charged crime.[90] Other courts have held that the availability of alternative proofs is a factor to be considered in balancing unfair prejudice against probative value.[91]

However, by claiming suicide, Pullens did not contest intent. And his conduct, if proved, conclusively established that he intended to kill her. We have stated that independent evidence of specific intent is not required. Instead, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.[92]

The State introduced evidence that Matsolonia had struggled against her attacker before she died and that she had injuries consistent with strangulation. Her purse was dumped. Her glasses were found on the floor by the balcony door. The coffee table was partially off its base. Her necklace pieces were found on the couch and on her person. More important, this court has held that the length of time that it takes to kill a person by strangulation is significant evidence of the defendant's intent to kill.[93] If the jury found from the State's evidence that Pullens had killed Matsolonia, there was ample evidence for it to also find that Pullens intended to kill her. In closing argument, the prosecutor specifically argued that if the jury found Pullens had strangled Matsolonia and thrown her over the balcony, then as

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[90] See, *U.S. v. Sumner*, 119 F.3d 658 (8th Cir. 1997); *U.S. v. Ortiz*, 857 F.2d 900 (2d Cir. 1988).

[91] See, *U.S. v. Jenkins*, 593 F.3d 480 (6th Cir. 2010); *U.S. v. Awadallah*, 436 F.3d 125 (2d Cir 2006); *U.S. v. Lynn*, 856 F.2d 430 (1st Cir. 1988); *United States v. Layton*, 767 F.2d 549 (9th Cir. 1985); *Ex parte Vaughn*, 869 So. 2d 1090 (Ala. 2002); *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002); *Masters, supra* note 21; *State v. Bunker*, 89 Conn. App. 605, 874 A.2d 301 (2005); *People v. Walker*, 211 Ill. 2d 317, 812 N.E.2d 339, 285 Ill. Dec. 519 (2004); *State v. Henderson*, 696 N.W.2d 5 (Iowa 2005); *Norris v. Com.*, 89 S.W.3d 411 (Ky. 2002); *State v. Long*, 173 N.J. 138, 801 A.2d 221 (2002); *Hayden v. State*, 155 S.W.3d 640 (Tex. App. 2005); *State v. Ortega*, 134 Wash. App. 617, 142 P.3d 175 (2006).

[92] E.g., *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008); *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[93] See, *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989); *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

a matter of common sense, the evidence showed beyond a reasonable doubt that he intended to kill her.

Like other courts, we have also recognized that trial courts should consider the availability of other evidence in balancing probative value against the potential for prejudice. In *State v. Williams*,[94] we concluded that the prejudicial effect of admitting the defendant's extrinsic acts was outweighed by its probative value. In commenting on balancing probative value versus prejudice, we stated:

> Recent cases recognize that the problem cannot generally be solved by virtue of a mechanical rule of relevancy but, instead, is one of balance. McCormick on Evidence (2d Ed.), § 190, p. 447, at p. 453 states: "(T)he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues *and the other evidence available to the prosecution*, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility."[95]

So even if extrinsic acts evidence is admissible under rule 404(2), a trial court has discretion under rule 403 to exclude it to prevent unfair prejudice, confusion of the issues, or misleading the jury, and to avoid needless presentation of cumulative evidence.

Here, even if the court had properly admitted extrinsic evidence to show Pullens' intent, its probative value was weak. Generally, the more isolated and remote the extrinsic act is without any intervening incidents, the less probative it is of the defendant's intent to commit the charged crime independent of a propensity inference.[96] Further, even if it

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[94] *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

[95] *Id.* at 64-65, 287 N.W.2d at 24 (emphasis supplied).

[96] See, *Bell, supra* note 8; *Brown v. State*, 109 Ga. App. 212, 135 S.E.2d 480 (1964); *Barnes v. Com.*, 794 S.W.2d 165 (Ky. 1990). Compare *Commonwealth v. Gil*, 393 Mass. 204, 471 N.E.2d 30 (1984).

had been admissible to show the improbability of an innocent act, it would have been cumulative for that purpose. Finally, the exclusion of the extrinsic acts in Pullens' case would not have hindered the prosecutor's ability to present a picture of what happened.

Here, the extrinsic evidence was weak, and stronger evidentiary alternatives were available to the State that conclusively established Pullens' intent. The State did not need to introduce evidence of Pullens' previous assault on Matsolonia. So even if the evidence's relevancy had not depended upon a propensity inference, I would conclude that the court erred in admitting highly prejudicial evidence to show Pullens' intent to kill. I believe that the probative value of the evidence was substantially outweighed by its prejudicial effect.

Admission of Extrinsic Acts Evidence Was Not Harmless

I do not believe that the court's admission of this evidence is harmless. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[97] Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right.[98]

We have explained that a proper limiting instruction is another critical safeguard in protecting the defendant against the admission of unduly prejudicial extrinsic acts evidence.[99] But here, the court instructed the jury that it could consider evidence of the defendant's extrinsic acts for four improper purposes. Three of these purposes—proving identity, modus operandi, and intent—required the jurors to use propensity reasoning to find the evidence relevant.

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[97] *Sanchez, supra* note 1.

[98] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[99] See, *Sanchez, supra* note 1, citing *Huddleston, supra* note 81; *McManus, supra* note 9.

In *State v. McManus*,[100] we concluded that the State had cast grave doubt on the defendant's credibility by presenting evidence that he was the kind of person prone to use his pistol and make threats. Because the defendant was the only witness to the crime to testify and the State's evidence was circumstantial, his credibility was crucial. So the error was not harmless: "Faced with such evidence, the jury could be tempted to infer bad character and action taken in conformity with that character and could thus reach a verdict on an improper basis."[101]

> "When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person . . . and that if he 'did it before he probably did it again.'"[102]

Other courts have reached similar conclusions.[103]

We must presume the jury followed the court's instructions and considered evidence for the stated purposes as instructed. Those purposes permitted the jury to confuse proof of Pullens' identity and intent with his propensity to attack Matsolonia. And as in *McManus*, Pullens' credibility was a critical factor. After the jury heard evidence of Pullens' propensity to attack Matsolonia, he had a dead cat hanging around his neck, and the lingering odor would have permeated the jury room.

Because Pullens' credibility was crucial to his defense, permitting the State to attack his character with unnecessary extrinsic acts should not be considered harmless error. As the majority states, much of the trial focused on the relationship between Pullens and Matsolonia. We cannot say the jury did not rely on the extrinsic acts evidence to discredit Pullens' version

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[100] *McManus, supra* note 9.

[101] *Id.* at 15, 594 N.W.2d at 633.

[102] *Id.* at 9, 594 N.W.2d at 629, quoting *Crawford, supra* note 70.

[103] See, e.g., *Bell, supra* note 8; *U.S. v. Morley*, 199 F.3d 129 (3d Cir. 1999); *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997); *U.S. v. Mothershed*, 859 F.2d 585 (8th Cir. 1988); *Hardin v. State*, 611 N.E.2d 123 (Ind. 1993); *State v. Reddish*, 181 N.J. 553, 859 A.2d 1173 (2004).

of events and conclude that he killed Matsolonia because he hated her enough to have attacked her before. I would reverse the judgment and remand the cause for a new trial.

In closing, a trial court can avoid a retrial by requiring the proponent of extrinsic acts evidence to show that its theory of relevance does not depend on a propensity inference. A trial court should not be hypnotized by the prosecutor's sweeping incantations of identity, intent, modus operandi, motive, and absence of mistake. A trial court should adhere to rules we set out in *Sanchez* and not assume that the evidence is relevant to a catchall list of purposes. When the relevance is not clear, the court should insist that the proponent explain why the evidence will be necessary and set forth its chain of reasoning.

STATE OF NEBRASKA, APPELLEE, V.
DAVID M. KASS, APPELLANT.
799 N.W.2d 680

Filed July 15, 2011. No. S-10-315.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional presents a question of law, which an appellate court resolves without regard to how the issue was decided below.
2. **Jury Instructions.** Whether jury instructions are correct presents a question of law.
3. **Constitutional Law: Criminal Law.** The First Amendment limits a state's ability to prosecute certain criminal offenses.
4. **Constitutional Law: Presumptions.** Except for a few well-recognized categories of unprotected speech, a content-based restriction on speech is presumptively invalid and subject to strict scrutiny.
5. **Constitutional Law: Statutes: Proof.** When a party does not claim that a challenged law has no valid application, a facial challenge must establish that a substantial number of the law's applications are unconstitutional in relation to its legitimate sweep.
6. **Constitutional Law: Statutes.** If a statute is substantially overbroad, it invalidates all enforcement of the law.
7. **Constitutional Law: Statutes: Standing.** A party has standing to challenge a statute as overbroad, even if unaffected by the part that punishes protected speech, when the party claims that the statute will significantly compromise the free speech rights of others not before the court.
8. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct