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testifying psychiatrist had not been asked to give an opinion as to what other treatment options might be available.[17]

But in this case, O'Neill stated that "it [sic] would be hard pressed to find an outpatient provider wanting to work with [D.I.] when he's not in a stage of change." O'Neill also stated that to be considered as a candidate for outpatient treatment, D.I. would need to be "farther [sic] into the . . . change mode." He also stated that there was not a less restrictive treatment option that would meet D.I.'s needs. The mental health board found that secure inpatient treatment was the least restrictive alternative, although the board also invited D.I. and the Norfolk Regional Center to consider and present other treatment options. We therefore find that the State presented clear and convincing evidence that secure inpatient treatment remains the least restrictive treatment alternative and that D.I. presented no evidence beyond mere assertions to rebut the State's expert witness.

VI. CONCLUSION

Because the denial of a motion for reconsideration is a final, appealable order under § 25-1902, we have jurisdiction to hear D.I.'s appeal. We find, however, that the State presented clear and convincing evidence that D.I. remains a dangerous sex offender and that secure inpatient treatment remains the least restrictive treatment alternative.

AFFIRMED.

WRIGHT, J., not participating.

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[17] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
THUNDER COLLINS, APPELLANT.
799 N.W.2d 693

Filed July 22, 2011. No. S-09-1151.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence,

or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

2. **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. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Indictments and Informations.** A trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, 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.
6. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat § 27-404(2) (Reissue 2008), provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
7. ____: ____. Neb Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).
8. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
9. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
10. **Rules of Evidence: Other Acts.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), shall, upon

objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.

11. **Evidence: Other Acts: Jury Instructions.** Any limiting instruction given upon receipt of other crimes evidence should identify only those specific purposes for which the evidence was received.
12. **Indictments and Informations.** Objections to the form or content of an information should be raised by a motion to quash.
13. **Motions for Continuance: Evidence.** When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.
14. **Motions for New Trial: Evidence.** Neb. Rev. Stat. § 29-2101(5) (Reissue 2008) provides that a new trial may be granted for newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial.
15. **Criminal Law: Juries.** Neb. Rev. Stat. § 29-2022 (Reissue 2008) provides that when a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court.
16. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
17. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
18. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Remanded for further proceedings.

Steve Lefler, of Lefler & Kuehl Law, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

PER CURIAM.

INTRODUCTION

Thunder Collins was convicted of first degree murder, attempted second degree murder, first degree assault, and two counts of use of a weapon to commit a felony. He was

sentenced to a combined sentence of life plus at least 90 years' imprisonment. Collins appeals to this court pursuant to our statutory obligation to hear all appeals in which the sentence of life imprisonment is imposed.[1] We remand for further proceedings.

FACTUAL BACKGROUND

Early Summer 2008: Initial Visits to Nebraska to Deliver, Manufacture, and Distribute Crack Cocaine.

Collins met one of the victims in this case, Marshall "Flower" Turner, through Collins' brother. Turner was a drug dealer based in Los Angeles (LA), California, and on two occasions while in LA, Collins attempted to purchase marijuana from Turner. After meeting Collins, Turner and his cousin, Timothy "Twin" Thomas, became interested in the possibility of selling crack cocaine in Omaha, Nebraska. Turner contacted Collins, who, in turn, did some "research" into the market for crack cocaine in Omaha. At the time Turner contacted Collins, Turner could sell an ounce of crack cocaine for $400 in LA; Collins determined that the same ounce could sell for upward of $700 to $800 in Omaha. At this point, it was agreed that Turner and Thomas would come to Omaha with cocaine and have Collins sell it for them.

Thereafter, on two separate occasions in July 2008, Turner, Thomas, and their "worker," Darryl Reed, traveled to Omaha from LA in vehicles purchased at automobile auctions. Those vehicles were registered in California using fake identification in the name of an alias belonging to Reed. This identification was also used to check into Omaha motels for the duration of their stays. The record is in dispute over Reed's compensation for his work. Turner indicated that Reed was paid a few hundred dollars and allowed all the crack cocaine he could smoke, while Reed indicated that he was paid anywhere from $1,000 to $3,000 per trip and that he was not a drug user. What is not in dispute is the fact that Reed was unaware of the location of the drugs within the vehicle and was not privy to any details regarding the trips to Omaha.

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[1] Neb. Rev. Stat. § 24-1106 (Reissue 2008).

On their first trip, Turner, Thomas, and Reed arrived in Omaha on July 13, 2008. The three met Collins in the parking lot of a gas station located on 72d Street in Omaha. Collins had already procured a room for the three at a nearby motel. There is some dispute in the record as to why, but in any event, the three switched motels the next day and stayed at another motel for the remainder of their trip. Turner and Thomas needed a private place to remove the two packages of cocaine—weighing ½ kilogram and 4½ ounces respectively—they had brought from LA, and Collins found such a location for them. On this trip, the cocaine packages were hidden in the outside rear wheel area of the passenger side of their sport utility vehicle.

The three men went to a local Wal-Mart to buy supplies for cooking the cocaine into crack cocaine. Over the course of the next week or so, Collins would stop by the motel at least once a day and Turner and Thomas would "front" him crack cocaine to sell. After selling the crack cocaine, Collins would return with Turner's and Thomas' share of the payment. On approximately July 20, 2008, Turner, Thomas, and Reed returned to LA, having made about $33,000 while in Omaha.

Upon reaching LA, the three procured another vehicle and more cocaine and again left for Omaha, this time arriving on July 25, 2008, in a minivan. The three checked into the former Baymont Inn on 72d Street. The drugs secreted in the vehicle were more accessible on this trip, and Turner and Thomas were able to retrieve the drugs while in the parking lot of the motel. This time, Turner and Thomas brought one package of cocaine weighing 27 ounces and another package weighing 4½ ounces. Again supplies were purchased at a local Wal-Mart, allowing the men to process the cocaine into crack cocaine.

Similar to the previous trip, Collins stopped by the motel a few times a day and was fronted crack cocaine to sell. Motel records and testimony indicate that Turner, Thomas, and Reed checked out of the Baymont Inn on July 28, 2008, and returned to LA. On this trip, Turner and Thomas made between $38,000 and $40,000.

Events of Late Summer/Early Fall 2008.

Subsequent to the July visits, Collins again went to LA, where he again met with Turner. Collins told Turner there was

a "drought" in Omaha, so Turner and Thomas agreed to return to Omaha with more cocaine. Thereafter, on September 22, 2008, Turner, Thomas, and Reed returned to Omaha in a white 2002 Ford Expedition. They brought along two packages of powder cocaine weighing 1 kilogram and 4½ ounces, respectively, and one 8-ounce package of crack cocaine. This time, the three men were accompanied by Turner's girlfriend.

The four checked into the Baymont Inn, using Reed's fake identification, and rented two rooms. Afterward, the group went to Wal-Mart to purchase supplies for processing the crack cocaine. Turner had been in contact with Collins and asked Collins to procure some marijuana for the group. Collins did so and met the group at Wal-Mart to deliver the marijuana. Collins arranged to meet with the group the next morning so that Turner and Thomas could retrieve the cocaine from its hiding place in the Expedition.

September 23, 2008: Collins Allegedly Obtains Gun.

The next morning, September 23, 2008, Collins went to a house located on North 70th Circle in Omaha (referred to as the "blue house"). Collins' friend, Ahmad Johnson, resided at this address, and Johnson's father was in the process of purchasing the residence so that a home daycare facility could be opened there. Upon arrival, Collins awoke Johnson and informed him that his "guys from Cali" were in town and that he, Collins, wanted to "get 'em." Collins also informed Johnson that the "guys from Cali" had a "bird," which Johnson understood to be drug related. According to Johnson's testimony, he tried to ignore Collins, but ultimately agreed to help Collins find a place for Turner and Thomas to retrieve the cocaine from the Expedition.

Collins and Johnson first went to the mechanic shop where Johnson's friend Karl "Psycho" Patterson worked. Patterson declined to let Collins use the shop, but did take the pair back to his home. While at his home, Patterson gave Collins a weapon, described by Johnson as a black .40-caliber gun. In his testimony, Johnson indicated that Patterson worked near 42d Street and Bedford Avenue in Omaha and lived near 30th and Hamilton Streets in Omaha. Patterson testified at trial that

he had never met Collins or Johnson and had not given a gun to Collins. He did testify, however, that he worked at a mechanic shop at 41st Street and Bedford Avenue and that he owned a home at 28th and Charles Streets. Charles Street is located one block north of Hamilton Street in Omaha.

After leaving Patterson's shop, Collins placed the gun in the center console of his vehicle. At that point, Collins and Johnson attempted to contact another friend, Karnell Burton. After driving to Burton's house and seeing his car parked outside, they tried to call Burton a number of times and knocked on his door but did not reach him. Collins and Johnson then left Burton's home and drove around for a while, stopping at a few locations. Collins and Johnson eventually went to the Baymont Inn so that they could meet with Turner and Thomas. Collins told Turner and Thomas to follow him, then asked Johnson whether Turner and Thomas could use the blue house to retrieve the drugs. Johnson testified that he was reluctant to allow the use of the blue house because his children were coming there soon, but that he agreed. On their way back to the blue house, Burton called Johnson. Collins told Johnson to tell Burton to "bring that thing" to the blue house. Burton responded that he had it and was on his way.

The Shooting at the Blue House.

After arriving at the blue house at approximately 11 a.m., Johnson removed the gun from the center console and placed it on the stove in the house. Turner and Thomas arrived shortly after Collins and Johnson. Because Johnson's father was home on his lunch break, Turner and Thomas had to wait to retrieve the cocaine. At some point, at Collins' direction, Johnson pulled two vehicles out of the garage. Burton arrived about this same time. Turner testified that Burton was wearing a white shirt and black jeans and had his hair in braids, while Collins was wearing a blue shirt, blue shorts or pants, and a pair of black shoes.

About 15 minutes after arriving, Turner backed the Expedition into the garage so that Thomas could extricate the drugs. The garage had two stalls, each with its own door. The door in front of the Expedition was down, and the other door was partially

down. There were two other doors in the garage: a side door that was padlocked, and a back door. At this point, Thomas began to work at retrieving the cocaine, which was hidden in the back passenger wheel well. Turner and Collins were in the garage with Thomas while he worked.

While Turner, Thomas, and Collins were in the garage, Johnson and Burton went into the house. Collins joined them, noting that he "didn't know they had that there . . . right by the seat belt." He then stated that he wanted to "get these guys." Collins asked Burton for his gun, and Burton handed Collins a small chrome gun. Collins then left the house. Johnson testified that he told Burton to "watch [Collins'] back" and make sure nothing happened. Johnson then testified that he went out to his vehicle and turned up his music "[p]retty loud." According to Johnson, the .40-caliber gun was still on the stove when he left the house.

Upon Collins' reentry into the garage, Turner and Thomas asked Collins whether they could open the garage door further in order to obtain more light. Collins said no, because of the neighbors. According to Turner, Collins then walked around to the side door of the garage and wiggled the door handle, then walked out of the back door of the garage. Turner and Thomas continued to work at retrieving the cocaine.

Turner testified that he was shot in the neck as he and Thomas were working. Turner indicated that he had not seen anyone enter the garage, but that he heard a loud "boom" and was hit by a bullet. Turner fell to the ground and crawled underneath the Expedition, making his way to the driver's side. He testified that he saw a flash while under the vehicle, but did not see who fired the shot. Turner indicated that he could tell that Thomas was running around the garage because he saw Thomas' shoes.

Turner testified that he got out from underneath the Expedition and saw that Collins held Thomas by the hair at gunpoint, standing in the corner of the garage by the locked side door. Turner also testified that Burton was standing on the back bumper of the Expedition with a black gun pointed at Turner. Turner indicated that Collins' gun was silver or chrome.

Collins told Thomas to get into the Expedition, while Turner attempted to get in between Thomas and Collins. Turner testified that he and Thomas both told Collins he could just have the cocaine. Collins then told Burton to get Turner off him, so Burton shot Turner in the buttocks. About the same time, Collins, who was still struggling with Thomas, stated, "Fuck this nigger, 'cuz," and shot Thomas. Thomas went limp, and Turner believed that Thomas was dead.

After Thomas was shot, Collins began dragging Thomas' body from the front of the Expedition to the passenger side and requested that Burton help him. At that point, Turner grabbed his cellular telephone and the Expedition's keys and tried to ease into the Expedition. After Collins and Burton were finished dragging Thomas' body, Burton said that they should "make sure this nigger [is] dead." Turner testified he lay down and played dead. Collins told Burton to hurry up. Burton then shot Turner, grazing the right side of his head. Turner heard footsteps walk away and heard Collins and Burton discussing how they needed plastic to wrap the bodies.

Turner's Escape From the Blue House.

Turner heard the pair leave the garage, at which point he jumped up, got into the Expedition, and drove it through the closed garage door. Turner testified that when exiting the garage, he saw Johnson standing in the front yard but did not see Collins or Burton. The Expedition slid as it left the garage and collided with Burton's vehicle. Turner kept going and eventually ended up back at the Baymont Inn.

Johnson testified that after the Expedition drove through the garage door, he turned around and saw Collins and Burton standing behind him. Though Johnson questioned Collins, Collins did not reply. Collins then ran into the house through the front door. Burton also did not reply to Johnson's questions. One of Johnson's neighbors came over to ask Johnson whether he had heard gunshots. Johnson said that he had, and agreed that the neighbor should call the police. At that point, Collins came out of the garage and asked Johnson why he had told the neighbor to call the police. Johnson testified that he

ignored Collins' question, then again asked what had happened. Collins got into his vehicle and drove away.

After Collins drove off, Johnson attempted to reach him by cellular telephone. After Johnson finally contacted him, Collins "[t]ried to play dumb and act like he wasn't even at the house." According to Johnson, Collins then disconnected the call and did not answer when Johnson tried to call him again.

Investigation.

Upon law enforcement's arrival, Thomas' body was found in the garage with a blue T-shirt wrapped around his legs. An autopsy was performed on Thomas. Two entrance wounds were found, one on his upper forehead just to the left of the midline and another on the top of his right shoulder. The cause of death was a gunshot wound to the head with hemorrhage and disruption of the brain tissue. The bullet perforated Thomas' brain and skull, exiting through the back right side of his head, causing marked disruption and laceration of the brain as well as multiple skull fractures. There was no "soot" or "stippling" on the forehead wound, so it appears the gun was fired at a distance of more than 2 feet. However, the pathologist who conducted the autopsy allowed that Thomas' hair might have interfered with the deposit of soot. The bullet that caused the shoulder wound was removed from Thomas at the time of the autopsy and was later revealed to be a .40-caliber bullet. Thomas also had scrape-like abrasions over parts of the right side of his body.

At some point after leaving the blue house, Turner arrived at the Baymont Inn. Due to the shooting, Thomas had not removed the drugs from the vehicle. Because of the presence of the drugs, Turner told Reed to move the vehicle, but Reed was unable to do so because the tire was punctured and rubbed against the damaged bumper. Emergency personnel were notified, and Turner was transported to the University of Nebraska Medical Center.

Upon arrival at the medical center, it was determined that Turner had three entry wounds: one on the left side of his neck, one on his left buttock, and one on his left ear. Turner also had abrasions on the right side of his body. The shot to Turner's

ear was a "through and through," but the bullet that entered Turner's neck was lodged in his shoulder and fractured his right scapula and humerus. That bullet was not removed and was still in Turner's shoulder at the time of trial.

Turner had surgery to repair a hole in his rectum caused by the bullet that entered his left buttock. As part of that surgery, Turner was required to wear a colostomy bag for about 5 months. Turner also suffered a fracture to his pelvis, an injury to his urethra that required use of a catheter, a large hematoma, and multiple areas of active bleeding. The bullet that entered Turner's left buttock was found in his right thigh and removed during surgery. The bullet was later determined to be a .40-caliber bullet.

In addition to Thomas' body, a tarp was found in the back of the garage. That tarp had on it a substance that appeared to be blood. Also found in the garage were two .25-caliber shell casings and two .25-caliber bullets. Testing revealed that these two bullets were fired from the same weapon, and the two shell casings were also fired by the same weapon. In addition, two .40-caliber shell casings were found in the garage. These casings were determined to have been fired from the same weapon. A .40-caliber bullet was recovered from Thomas' right shoulder, while another was recovered from Turner's right thigh. These two bullets were later also determined to have been fired from the same weapon.

Physical evidence tied Collins to the Expedition and to the garage. Collins' prints were found on the Expedition—in particular, his left thumbprint was found on the exterior of the front passenger door and his right palmprint was found on the front driver's-side quarter panel and front hood. And Collins' DNA was found on the blue T-shirt found wrapped around Thomas' legs, with testing unable to exclude Collins as a major contributor of the DNA on the inside of the T-shirt. A pair of black sneakers was also found in the kitchen of the blue house. The shoes were identified by Johnson as the shoes worn by Collins. DNA testing could not exclude Thomas as the source of blood found on the shoes or exclude Collins as the source of DNA from inside the shoes.

Both Johnson and Turner admitted to lying to authorities immediately after these events. Turner lied about the circumstances surrounding his injuries, though he gave an accurate description of Collins' vehicle when speaking to law enforcement after the incident. Turner explained that he had no interest in going to jail, given the large quantities of cocaine hidden in the Expedition. Eventually, Johnson and Turner, as well as Reed, entered into agreements with the State for a reduction in charges and sentencing recommendation in return for truthful testimony.

Also presented at trial was evidence of a telephone call from Collins to the home of Johnson's parents. This call was made from the Douglas County Correctional Center on November 10, 2008. In the call, Collins, speaking to Johnson's girlfriend and later to Johnson's father, indicated that Collins had cleared Johnson from being in the garage at the time of the shooting, but that Johnson needed to stop telling people that a robbery was in progress. Collins then explained the felony murder rule and suggested that Johnson's father speak to Johnson about Johnson's changing his story. Johnson testified that in addition to this telephone call, a message from Collins was relayed to him via the barber at the correctional center and that Johnson was told to keep his mouth shut.

Procedural Background.

Collins was arrested. On November 10, 2008, Collins was charged with first degree murder, attempted second degree murder, and two counts of use of a weapon to commit a felony. An amended information was filed on April 13, 2009, alleging the same charges. On July 13, the State filed a motion for leave to file a second amended information to add the charges of first degree assault and use of a weapon to commit a felony, related to injuries sustained by Turner. Following a hearing, that motion was granted on July 28.

On July 27, 2009, the State filed a notice of its intent to adduce evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), in particular, evidence that Collins had organized and actively participated with Turner and Thomas in drug deals in the Omaha area. The State contended

that such evidence was relevant and material as proof of motive, opportunity, intent, preparation, plan, knowledge, and identity. Following a hearing, the district court concluded that the State had sufficiently proved those prior incidents and granted the State's motion with respect to proof of motive, opportunity, intent, preparation, plan, knowledge, and identity.

Trial was held from August 10 to August 24, 2009. On August 28, Collins was convicted of all charges except for the third count of use of a weapon to commit a felony. Following trial, Collins filed a motion for new trial because of newly discovered evidence and because the jury was allowed to separate before reaching a verdict. That motion was denied. Collins was sentenced to life imprisonment for first degree murder, 30 to 50 years' imprisonment for attempted second degree murder, 20 to 20 years' imprisonment for first degree assault, and 20 to 20 years' imprisonment on each count of use of a weapon to commit a felony. He appeals.

ASSIGNMENTS OF ERROR

On appeal, Collins assigns that the district court erred in (1) denying his motion for a directed verdict; (2) admitting evidence of a prior relationship between Collins and the victims, in violation of rule 404; (3) allowing the State to file a second amended information just 20 days prior to trial; (4) overruling Collins' motion for new trial based on newly discovered evidence; (5) overruling Collins' motion for new trial due to the district court's action in allowing the jury to separate during deliberations; and (6) submitting the felony murder charge to the jury.

STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed,

in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[2]

[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[3]

[3] A trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.[4]

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[5]

ANALYSIS

Directed Verdict/Felony Murder Submission.

In his first assignment of error, Collins assigns that the district court erred by not granting his motion for a directed verdict. Collins argues that there was insufficient evidence to support his convictions for first degree murder, attempted second degree murder, and first degree assault. And in a related argument, in his sixth assignment of error, Collins argues that the State did not meet its burden, i.e., there was insufficient evidence to submit the felony murder charge to the jury. These assignments of error will be addressed together.

Collins' arguments are largely based on his contention that Turner's testimony is simply not to be believed. But, of course, in reviewing criminal convictions, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. The question of Turner's credibility was for the jury, and the jury obviously believed that Collins was responsible for Thomas' death.

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[2] *State v. Fuller*, 279 Neb. 568, 779 N.W.2d 112 (2010).

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

[4] *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

[5] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[5] Collins also suggests that the State did not present any direct evidence that he had the intent to kill Thomas or to rob Turner and Thomas. But when the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, 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.[6] Thus, the State was not required to present any such direct evidence.

Collins also notes the record shows that he had a .25-caliber weapon in his possession during the purported attempted robbery, while Burton was in possession of a .40-caliber weapon. Collins argues that no .25-caliber bullets were found at the scene or were recovered from Turner or Thomas. Collins acknowledges that the shot that killed Thomas was not recovered and that a bullet remains lodged in Turner's shoulder, but insists that those wounds were more characteristic of a .40-caliber weapon. However, Collins simply makes this assertion and does not direct us to any evidence in the record supporting that conclusion.

In sum, viewed in a light most favorable to the State, the evidence shows that Collins was aware of the cocaine secreted in the vehicle and knew the amount of money sale of the cocaine would bring and how much money he would have to pay Turner and Thomas. Johnson testified that Collins told him that he wanted to "get" Turner and Thomas. Collins had Patterson and Burton provide him with two weapons, then lured Turner and Thomas into a closed garage with just one exit. In addition, Turner testified that Collins shot Thomas. Finally, physical evidence presented at trial showed Collins shot Turner and killed Thomas.

Collins' first and sixth assignments of error are without merit.

Rule 404(2) Evidence.

[6-9] In his second assignment of error, Collins assigns that evidence of the prior relationship between Collins and Turner

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[6] *State v. Lewis*, 280 Neb. 246, 785 N.W.2d 834 (2010).

and Thomas was inadmissible under rule 404(2), which governs the admissibility of "other crimes" evidence. Rule 404(2) provides:

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

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[7] But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[8] Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[9] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[10]

[10,11] The proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.[11] And any limiting instruction given upon receipt of

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[7] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[8] *Id.*

[9] *Id.*

[10] *Id.*

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

such evidence should likewise identify only those specific purposes for which the evidence was received.[12]

Prior to trial, the State filed a notice of intent to adduce rule 404(2) evidence, specifically Collins' participation in prior drug deals with Turner and Thomas. The State alleged that these prior deals were "relevant and material as to proof of motive, opportunity, intent, preparation, plan, knowledge, and identity."

A hearing on the State's notice was held. At that hearing, the State again argued that Collins' motive for murdering Thomas and attempting to murder Turner was robbery and that evidence regarding the prior relationship between Collins and Turner and Thomas was relevant to showing Collins' motive, opportunity, intent, preparation, plan, knowledge, and identity.

Following the hearing, the district court found that the State had met its burden of showing by clear and convincing evidence that these prior acts were committed by Collins. The district court entered an order allowing the State to adduce such evidence, finding that it was relevant and material for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, and identity. The jury was instructed as to all seven of these reasons for independent relevancy.

We conclude that the evidence of the prior relationship between Collins and Turner and Thomas was independently relevant as to Collins' motive, intent, and knowledge, but not so with respect to opportunity, preparation, plan, and identity.

Understanding this prior relationship between Collins and Turner and Thomas shows Collins' motive and intent for shooting Turner and Thomas on September 23, 2008. Motive is defined as that which leads or tempts the mind to indulge in a criminal act.[13] Motive, even when not an element of the charged crime, is nevertheless relevant to the State's proof of the intent element.[14] Collins wanted the cocaine for himself. He had been selling the drugs and returning most of the money to Turner

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[12] *Id.*

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

[14] *Id.*

and Thomas, and he was aware of how much profit was to be made if he did not have to share it with Turner and Thomas. This profit was Collins' motive to rob Turner and Thomas, and showed his intent to do so. And this robbery is, of course, key to the State's felony murder theory—that Collins was guilty of first degree murder because Thomas was killed during the commission of the robbery.

This prior relationship also shows Collins' knowledge. Collins was in contact with Turner, was aware that Turner and Thomas were in possession of significant quantities of cocaine, and knew that Turner and Thomas were in Omaha with that cocaine. Because of the prior relationship between himself and Turner and Thomas, Collins was in a position to know the details surrounding the plan to remove the cocaine from the Expedition.

While the challenged evidence was independently relevant with respect to Collins' motive, intent, and knowledge, we find that it was not admissible to show opportunity, preparation, plan, or identity.

We first address opportunity. We have recognized that evidence is relevant to commit a crime if it shows the defendant had the capacity to commit the crime, including access to a weapon necessary to commit the crime.[15] But in this case, the prior relationship is not independently relevant to show Collins' opportunity; rather, it is relevant only to show Collins' knowledge of the pertinent fact: Collins' knowledge does not equate to the capacity, or opportunity, to act on that knowledge.

In addition, we find that evidence of this prior relationship did not show either Collins' preparation or plan to commit the murder; rather, these instances again showed only Collins' knowledge of the facts. In order to be admissible to show a plan, however, both the extrinsic acts and the charged crime must be part of a common scheme or plan.[16] But here, the drug dealing was not committed in furtherance of the murder, and

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

[16] See, 3 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 17.44 (7th ed. 1998); 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5244 (1978).

the murder was not committed to cover up the drug dealing. Nor is there any evidence that Collins participated in the drug dealing so that he would be in a position to kill Turner and Thomas and steal their money.

Finally, we find that this extrinsic acts evidence was not independently relevant to Collins' identity as the perpetrator of the crime. Identity was at issue because of testimony admitted at trial of an unidentified black male observed near the scene of the crime, suggesting that this person, and not Collins, committed the crime. But whether the jury believed that Collins or this unidentified male was the perpetrator was simply a question of which witnesses the jury believed, the State's witnesses or Collins' witnesses. Indeed, at most, this evidence would show Collins' identity as the perpetrator under the reasoning that he had the propensity to commit crimes and had therefore committed this crime. But this type of reasoning, of course, is precisely what rule 404(2) is designed to prevent.

We realize that the admission of other acts evidence is usually prejudicial to the defendant. But in this case, we find that it was not, and instead find that the error in admitting the evidence of this prior relationship was harmless. 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.[17]

We have examined the trial record. Collins' defense against these charges was largely limited to an argument that the State failed to prove his guilt. But the evidence presented at trial shows otherwise. The record includes both scientific evidence and eyewitness testimony showing that Collins was, in fact, the perpetrator of the charges against him. In particular, Collins' fingerprints and palmprints were found on the Expedition and his DNA was found on a T-shirt wrapped around Thomas' legs. Also, DNA that could not be excluded as belonging to Collins and Thomas was found on shoes identified as Collins' shoes and found in the kitchen of the blue house.

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

In addition, Turner testified that it was Collins who shot him. Johnson testified that Collins told him he wanted to "get" Turner and Thomas and that Collins left the kitchen of the blue house with a weapon. And shortly thereafter, the shooting, and Turner's subsequent escape, occurred.

As such, while we find merit to Collins' second assignment of error, namely that the district court erred in admitting evidence of Collins' prior relationship with Turner and Thomas, we conclude that the admission of this evidence was not prejudicial to Collins and thus is not reversible error.

Motion to Amend.

In his third assignment of error, Collins contends that the district court erred in allowing the State to amend the information to add a charge of first degree assault just 20 days before trial.

[12] The State argues that Collins waived any argument he has with respect to the amendment of the information. We noted in *State v. Walker*[18] that "[o]bjections to the form or content of an information should be raised by a motion to quash." Collins filed no motion to quash, and thus has waived any argument he might have that the district court erred in allowing the State to amend the information against him.

[13] And in any case, it cannot be said that the district court abused its discretion in allowing the State to file an amended information. There was sufficient evidence to charge Collins with first degree assault. And Collins has not shown how he was prejudiced by this charge. In particular, this court has noted that when a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.[19] But Collins did not request a continuance. Nor did he request severance of the joined offenses as he is permitted to do under Neb. Rev. Stat. § 29-2002(3) (Reissue 2008).

Collins' third assignment of error is without merit.

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[18] *State v. Walker*, 272 Neb. 725, 735, 724 N.W.2d 552, 562 (2006).

[19] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

Motion for New Trial.

In his fourth assignment of error, Collins argues that the district court erred in denying his motion for new trial on the basis of newly discovered evidence. At the hearing on the motion for new trial, Collins introduced the testimony of Renae Heeley. Heeley resided in an apartment complex on North 70th Circle. According to Heeley's testimony, on the day of the shooting, she heard gunshots, squealing tires, and a crash. Upon looking out of her window, Heeley observed a damaged white sport utility vehicle driving down the street. Heeley indicated that at some point later that day, she left her apartment and observed a black woman in her twenties exit the garage of the blue house and walk up to a neighbor's house. Heeley testified that she overheard the woman, who was crying, tell the neighbor that one of the "Johnson boys" shot somebody in the garage. Heeley testified that the woman entered the neighbor's home and that later, the woman was removed from the home and placed in a police cruiser.

On cross-examination, Heeley admitted that she could not actually see from where the woman in question came and did not actually see the woman exit the garage. Heeley indicated that she did not tell law enforcement what the woman said, because she did not think of it at the time.

Collins heard about Heeley's alleged observation through Collins' counsel's law partner, Joseph Kuehl. Kuehl represented the father of Heeley's child in juvenile proceedings. Kuehl testified that he had a conversation with Heeley shortly after his partner was appointed as Collins' counsel, but that Heeley did not mention the identification of the "Johnson boys" at that time; Heeley mentioned only that she heard and observed the gunshots and the getaway of the sport utility vehicle.

Law enforcement officers who responded to the scene indicated that no one besides Johnson and Burton was transported from the scene. In addition, no officers were aware of a young black woman being placed in a police cruiser. Law enforcement officers also indicated that Heeley was interviewed after the incident and that she was even listed on the State's witness list, but that she never informed anyone of what she allegedly overheard.

The district court did not find Heeley to be credible and denied Collins' motion for new trial. It cannot be said that the district court abused its discretion in reaching this conclusion.

As an initial matter, Heeley's testimony was contradicted by other witnesses. She indicated that she saw a young black woman being placed in a police cruiser, though law enforcement indicated that this did not occur. And Heeley testified that she saw the woman walk from the garage at the blue house, but later admitted that she did not see the woman actually exit the garage. Moreover, Heeley was interviewed by law enforcement on two occasions after the events of that day, but did not tell anyone about what she overheard. Nor did she tell that to Kuehl initially.

[14] This evidence is not newly discovered within the meaning of Neb. Rev. Stat. § 29-2101(5) (Reissue 2008), which provides in part that a new trial may be granted for "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial." But this evidence could have been discovered and produced at trial, because both the State and the defense were aware that Heeley was a witness and had potential information.

And even if the evidence was "newly discovered," it is still not relevant. Nor is it exculpatory of Collins; because one of the "Johnson boys" was allegedly involved does not mean that someone else, i.e. Collins, was not also involved.

Collins' fourth assignment of error is without merit.

Jury Separation.

In his fifth assignment of error, Collins argues that the district court erred in overruling his motion for new trial on the basis that the court allowed the jury to separate during deliberations. Collins' case was submitted to the jury on Friday, August 21, 2009. The jury did not reach a verdict on that day and was permitted to separate and return to deliberate on Monday, August 24, at which point it returned with its verdicts.

On appeal, Collins argues that he was not asked whether it was acceptable for the jury to separate during deliberations. Collins contends that in the absence of his express agreement,

the district court erred by allowing the jury to separate and a rebuttable presumption of prejudice exists, which was not rebutted by the State.

[15] Neb. Rev. Stat. § 29-2022 (Reissue 2008) provides in part that "[w]hen a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court."

At issue is the requirement of this statute and several decades of our case law on the subject. That case law begins with our discussion of jury separation in *Polin v. State*.[20] In *Polin*, we noted that the jury was told to stay together, but that "two or three of the jurors in the court room separated a little from their fellows and engaged in a brief conversation with bystanders."[21] The *Polin* court then held that such

> was known by the [defendant's] counsel, and probably by the [defendant] himself at the time it occurred, yet no complaint was made to the judge, but the trial was permitted to proceed without objection until after verdict.
>
> . . . The objection first appeared in the motion for a new trial, and came too late. If the separation were thought to be at all prejudicial to the [defendant], it ought to have been brought to the notice of the judge at once, upon discovery, so that an investigation could have been made, to the end that without further fruitless expense, if justice required it, the trial could have been stopped, that jury discharged, and a new one impaneled to try the case.
>
> Parties' litigant, even defendants in criminal cases, must deal fairly by the court. They are not permitted to withhold information of matters transpiring in the progress of a trial, whether prejudicial or otherwise, and thus, without objection, permit it to proceed to a conclusion, and then take advantage of them. Generally all objections not jurisdictional as to the subject of the litigation must be made at the first opportunity, or they are deemed to

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[20] *Polin v. State*, 14 Neb. 540, 16 N.W. 898 (1883).

[21] *Id.* at 549, 16 N.W. at 901.

> be waived. The rule in such cases is, that a party shall not be permitted without objection to take the chances of a favorable result, and then, if disappointed, for the first time complain.[22]

We considered *Polin* in *Sedlacek v. State*.[23] In *Sedlacek*, the trial court informed the jury, in the presence of the defendant, that the attorneys had agreed that the jury could separate and return the next day for further deliberations. Citing *Polin*, we concluded that despite the literally mandated language of the statute, the right granted under § 29-2022 was

> within the classification of those rights that can be waived, and that the defendant by the consent of his counsel, which he knew was given, by his silence and acquiescence, and by his failure to raise the question when the court reconvened, waived the right to have the jury kept together.[24]

But we went beyond *Polin* and *Sedlacek* in *State v. Robbins*.[25] We indicated in *Robbins* that our holding in *Sedlacek* was "sound but require[d] clarification."[26] We then went on to hold that

> [t]he trial court may properly permit the separation of the jury in a criminal case after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after final submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation.[27]

We acknowledged in *Robbins* that "[m]any cases treat the defendant's right to have the jury sequestered during deliberations

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[22] *Id.* at 549-50, 16 N.W. at 901-02.

[23] *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946).

[24] *Id*. at 850-51, 25 N.W.2d at 545.

[25] *State v. Robbins*, 205 Neb. 226, 287 N.W.2d 55 (1980).

[26] *Id.* at 231, 287 N.W.2d at 58.

[27] *Id.* at 231-32, 287 N.W.2d at 58.

as procedural only and take the position that the failure of a defendant to make timely objection to jury separation during deliberations results in a loss of the right."[28] But we nonetheless read § 29-2022 as providing a defendant with a fair trial, and therefore "in a category beyond that of a mere procedural right which may be lost by a failure to object."[29] So, we reasoned, even though the defendant in *Robbins* had not objected to the separation of the jury, he was permitted to raise the issue on appeal.

[16-18] But that conclusion was unwarranted by *Polin, Sedlacek*, or the language of § 29-2022, and inconsistent with extremely well-established principles of law. We have often said that failure to make a timely objection waives the right to assert prejudicial error on appeal.[30] When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[31] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[32] For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[33]

And we have applied those principles to find waiver of statutory and even constitutional rights when a defendant fails to raise them. For example, the failure of defendants to raise the unconstitutionality of the charging statute has been held to be waived by the failure to object.[34] This court has also held that alleged violations of procedural due process[35] and

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[28] *Id.* at 230, 287 N.W.2d at 57.

[29] *Id.* at 230-31, 287 N.W.2d at 57.

[30] *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

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

[32] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[33] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[34] See, e.g., *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990).

[35] *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991).

confrontation[36] were waived by the defendants' failure to object. A district court's consideration of lesser-included offenses even after a first degree murder charge was dismissed was waived when the defendant failed to object.[37] We have concluded that a defendant's failure to object to the form or content of an information waived any complaint the defendant might have.[38] We found that a defendant waived his right to notice of the information 24 hours prior to arraignment by failing to object when the case proceeded under the amended information,[39] while in another instance, we concluded that a defendant waived venue of his trial by his failure to object at trial.[40] This court has held that a defendant waived his objection to the voir dire procedure utilized by the trial court by his failure to object to it,[41] and also that defendants who failed to object or use peremptory challenges regarding the selection of their juries have waived their complaints regarding jury selection.[42] The failure of defendants to object to the giving of particular jury instructions has consistently been found by this court to constitute waiver.[43] Defendants have been found, by their failure to object, to have waived any argument regarding the trial court's procedure for handling juror questions after submission[44] and regarding the trial court's trial management.[45] And this court has found that the failure to object waived any right a defendant might have

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

[37] *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[38] See, e.g., *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999); *State v. Wostoupal*, 208 Neb. 555, 304 N.W.2d 393 (1981).

[39] *State v. High*, 225 Neb. 695, 407 N.W.2d 772 (1987).

[40] *State v. Meers, supra* note 38.

[41] *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005).

[42] *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), *overruled on other grounds, State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988).

[43] See, e.g., *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005); *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002); *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[44] *State v. Gutierrez, supra* note 19.

[45] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

to argue that he or she was not granted a preliminary hearing before an independent decisionmaker.[46] Other examples include waiver upon failure to object to the State's violation of a discovery order[47] and to the State's demonstration of the crime at trial.[48]

We also note that in reaching its decision in *Robbins*, this court cited somewhat extensively to an annotation in the American Law Reports entitled "Separation of Jury in Criminal Case After Submission of Cause—Modern Cases."[49] While the *Robbins* court correctly identified certain points made in this annotation, that court failed to relate this annotation noted that most courts have found that the failure of a defendant to object waives the right.[50] The annotation also stated that a majority of jurisdictions have concluded that where the record is silent on the question of jury separation, it is generally assumed that consent was obtained.[51]

This court's decision in *Robbins* articulated no basis for concluding that the statutory right established by § 29-2022 was distinguishable from all of the other circumstances in which a defendant waives his or her rights by not making a timely objection. That decision was, therefore, inconsistent with judicial efficiency, sound policy, and basic, well-established legal principles. We therefore overrule our decision in *Robbins* to the extent that it concludes that express agreement or consent is required by a defendant in order to waive his or her rights under § 29-2022. In doing so, we do not retreat from the principle that the language of § 29-2022 is mandatory and places the duty of sequestration directly upon the trial court. Our opinion should not be read as tacitly approving the notion that trial courts may disregard this mandatory duty—whether

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[46] *State v. Moreno*, 193 Neb. 351, 227 N.W.2d 398 (1975).

[47] See, e.g., *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989).

[48] *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973).

[49] Annot., 72 A.L.R.3d 248 (1976).

[50] *Id.*, § 2[a].

[51] *Id.*, § 2[b].

accidentally or intentionally. Indeed, the better practice would be for the district court to note any explicit consent, or lack thereof, on the record.

But our overruling of *Robbins* is prospective only, and we decline to apply our newly announced rule in this case. At the time of trial, the applicable rule was set forth in *Robbins*:

> In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022 . . . by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted.[52]

Because the district court failed to obtain express agreement or consent for the jury's separation, Collins is entitled to a presumption that he was prejudiced by that separation. The State has a right to rebut that presumption. We therefore remand the cause to the district court for a hearing at which the State has the burden of showing that no injury resulted from the jury's separation.

CONCLUSION

The cause is remanded for further proceedings consistent with this opinion.

REMANDED FOR FURTHER PROCEEDINGS.

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[52] *State v. Robbins, supra* note 25, 205 Neb. at 232, 287 N.W.2d at 58.

HEAVICAN, C.J., concurring.

I concur with the decision of the court affirming Collins' sentence and remanding the cause for hearing on the jury separation issue. I write separately because I disagree with the majority's conclusion that the evidence of Collins' prior relationship with Turner and Thomas was inadmissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).

As noted by the majority's opinion, rule 404(2) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may,

> however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But this court has previously noted some limits to the applicability of rule 404(2): those "[b]ad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under rule 404(2)."[1] We reasoned that

> "'"'[w]here evidence of other crimes is "so blended or connected, with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore not governed by Rule 404 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. . . . The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. . . . A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. . . .'"'"'"[2]

In this case, the prior relationship at issue was part of a larger drug conspiracy involving the same four persons: Collins, Turner, Thomas, and Reed. Many of the details of the trips that largely defined this relationship were similar: The motels where Turner, Thomas, and Reed stayed were often the same; supplies were purchased at the same Omaha-area Wal-Mart location during each visit; Reed's false identification was

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[1] *State v. Robinson*, 271 Neb. 698, 713, 715 N.W.2d 531, 548 (2006).

[2] *Id.* at 714, 715 N.W.2d at 549.

used in each instance; and each visit involved the secreting of progressively increasing quantities of powder cocaine, and eventually also crack cocaine, in the body of a vehicle purchased at an automobile auction.

During each visit, Turner and Thomas would manufacture the crack cocaine from powder cocaine in their motel room using supplies purchased at an area Wal-Mart. At various times during this process, Turner and Thomas would "front" the drugs to Collins, who would pick up the crack cocaine from the motel and sell it in the Omaha area. Then, on Collins' next visit to the motel to pick up more drugs, he would give Turner and Thomas the proceeds and get his share of the profit. And after the drugs were all manufactured and sold, it was Reed's job to clean up the motel room and dispose of all supplies used to manufacture the crack cocaine.

In addition, this prior relationship unfolded over a relatively short period of time. Turner, Thomas, and Reed first visited Omaha on July 13, 2008, and the shooting occurred on September 23, just over 2 months later. And this relationship was ongoing; the record shows that Collins met with Turner in LA between the second and third trips to Omaha.

Understanding the nature of the prior relationship between Collins, Turner, and Thomas is necessary to paint a coherent picture of the facts surrounding the crimes with which Collins was charged. The State introduced evidence of this prior relationship in order to explain why Turner and Thomas were in Omaha and why Collins was with them on September 23, 2008. This evidence explains how Collins came to know that cocaine was hidden in the white Expedition and why Collins might want to rob or murder Turner and Thomas. In examining the record, I find it difficult to determine at what point these alleged "prior bad acts" ended and the events forming the basis for the charges against Collins began.

As such, I would conclude that this prior relationship is "'"'"so blended or connected[] with the one[] on trial . . . that proof of one incidentally involves the other[]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the

immediate context of the crime charged. . . .'"'"'"[3] Because this evidence is relevant, and is not governed by rule 404(2), I would find it admissible.

CASSEL, Judge, joins in this concurrence.

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[3] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EDWARD L. WINTROUB, RESPONDENT.

800 N.W.2d 269

Filed July 22, 2011. No. S-10-187.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. ____. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
6. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
7. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of public reprimand.

John W. Steele, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

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