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V. CONCLUSION

The district court erred in addressing the constitutionality of §§ 77-3442(2)(g) and 79-1073.01, because the issue was not presented by the pleadings. We have jurisdiction and an obligation to decide the constitutional questions presented to us, as they are not merely political questions. The statutory language, the legislative history, and the record as a whole demonstrate that a learning community's common general fund levy under § 77-3442(2)(b) serves a predominantly local purpose, not a state purpose. Because all members of a learning community receive benefits from the taxes levied and the levy is uniform throughout the community, no commutation occurs and there is no violation of the uniformity clause. The judgment of the district court is therefore reversed, and the cause is remanded to that court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WRIGHT, GERRARD, and MILLER-LERMAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
LEROY J. PARMAR, APPELLANT.
808 N.W.2d 623

Filed February 10, 2012. No. S-10-648.

1. **Motions to Vacate: Motions for New Trial: DNA Testing: Appeal and Error.** Under the DNA Testing Act, an appellate court will not reverse a trial court's order determining a motion to vacate a judgment of conviction or grant a new trial absent an abuse of the trial court's discretion.
2. **DNA Testing: Appeal and Error.** Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.
3. **DNA Testing: Legislature: Intent.** In enacting the DNA Testing Act, the Legislature intended to provide (1) an extraordinary remedy—vacation of the judgment—for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy—a new trial—for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.
4. **Motions to Vacate: DNA Testing: Proof.** To warrant an order vacating a judgment of conviction under the DNA Testing Act, the movant must present DNA

testing results that, when considered with the evidence presented at the trial leading to conviction, show a complete lack of evidence to establish an essential element of the crime charged.

5. **Motions for New Trial: DNA Testing: Proof.** To warrant an order for a new trial under the DNA Testing Act, the movant must present DNA testing results that probably would have produced a substantially different result if the evidence had been offered and admitted at the movant's trial.
6. **DNA Testing.** Postconviction DNA evidence that does not falsify or discredit evidence that was necessary to prove an essential element of the crime does not exonerate the movant.
7. **DNA Testing: Witnesses.** Postconviction DNA evidence probably would have produced a substantially different result at trial if the evidence (1) tends to create a reasonable doubt about the defendant's guilt and (2) does not merely impeach or contradict the key eyewitness' testimony, but is probative of a factual situation different from that to which the witness testified.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

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

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

CONNOLLY, J.

I. SUMMARY

The appellant, LeRoy J. Parmar, appeals from the district court's order that overruled his motion to vacate his conviction or receive a new trial. Parmar brought his motion under the DNA Testing Act.[1] He based his motion on DNA testing of blood samples found on a bedsheet at the murder scene. The court determined that the DNA evidence was inconclusive and did not exonerate Parmar or show a complete lack of evidence to establish an essential element of the crime. It also denied a new trial because the evidence would not have produced a substantially different result.

[1] Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008).

We reverse. We agree that the DNA evidence did not exonerate Parmar of guilt. But the DNA evidence excluded Parmar's DNA from a crucial piece of evidence and contradicted eyewitness testimony crucial to the State's conviction. Thus, we conclude that the DNA evidence probably would have produced a substantially different result if it had been available at trial. We remand the cause with directions for the court to grant Parmar a new trial.

II. BACKGROUND

We note that the Legislature amended the DNA Testing Act since Parmar filed his motion for testing. But because none of the amendments are relevant, we refer only to the current statutes for convenience.

1. DNA Testing Act

Under § 29-4120, a convicted person in custody may request DNA testing of biological material that was related to the investigation or prosecution that resulted in the judgment. If the court authorizes testing, then under § 29-4123(2), any party may request a hearing when the DNA testing exonerates or exculpates the person in custody. If the court finds that the testing exonerates or exculpates the person, § 29-4123(2) authorizes the court to vacate the judgment and release the person. If the court does not vacate the judgment and release the person, then § 29-4123(3) permits any party to file a motion for a new trial under Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 2008).

Section 29-2101 permits a defendant to apply for a new trial for specified reasons that materially affect the defendant's substantial rights. Under § 29-2101(6), a defendant may seek a new trial for "newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act."

2. Underlying Facts From Parmar's Direct Appeal

A jury convicted Parmar of first degree murder for the 1987 killing of Frederick Cox, and the court sentenced him to a term of life imprisonment. In 1989, we affirmed his conviction

in *State v. Parmar* (*Parmar I*).[2] He later filed postconviction motions, which involved issues that are unrelated to this proceeding.[3] In deciding Parmar's motion for vacation of judgment or a new trial, the district court relied on the facts in *Parmar I*. Because the trial record is not part of the record for this proceeding, we also summarize the facts from his 1989 direct appeal.

Parmar lived with Lanetta Harrington in the same apartment complex as Cox. Lanetta's sister, Joyce Harrington, also lived in the complex, in an apartment that she shared with Truman Stevenson and Michelle Carrigan.

Cox told several people that he had received a $1,000 property settlement from his ex-wife. The day before he was found dead, Cox was out drinking with friends and returned home around 4:10 p.m. He continued to celebrate his good fortune with people in his apartment. Carrigan and Lanetta were in his apartment between 5 and 6 p.m. After Lanetta left, Carrigan performed a sexual act with Cox. Cox paid her with cash from underneath his mattress, and Carrigan saw that he had a large sum of cash.

Carrigan reported this information to Stevenson, Joyce, and Lanetta. Later that evening, Parmar also learned about the cash. Parmar, Lanetta, and Carrigan devised a plan to rob Cox. Carrigan was to knock on Cox's door, and after he answered, Parmar and Lanetta would push Carrigan into Cox, tie Cox up, and take his money. When Carrigan later went to Parmar and Lanetta's apartment, Carrigan saw them with some extension cord, rope, and pieces of cutoff panty hose. Parmar, Lanetta, and Carrigan carried out their plan at 2 a.m. As Parmar and Lanetta wrestled with Cox, another woman, Valerie Washington, came out of the bedroom. Washington testified that she recognized Parmar and Lanetta despite the panty hose over their faces and that Parmar "'pounded Fred Cox on the coffee table and to the

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[2] *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), *overruled on other grounds, State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999).

[3] See, *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002); *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996).

ground.'"[4] Washington and Carrigan left Cox's apartment, but Carrigan later returned. She testified that she went into the bedroom and saw Lanetta tying Cox's legs and Parmar "'down by the top of Mr. Cox' but the bed obstructed her view."[5]

Cox's friend came the next morning to pick him up for work, but there was no answer when he knocked on Cox's door. Later that day, he and another friend entered Cox's apartment because Cox still had not responded to knocks. They discovered his body by the bed. There was evidence of a struggle, and Cox was face down on the carpet, wedged between the bed and the wall. His arms and ankles were bound. An autopsy revealed that he died of positional asphyxiation; i.e., because he was intoxicated and bound face down in a confined area, he was unable to move so that he could breathe.

At trial, both Carrigan and Washington testified that Parmar had physically assaulted Cox and was the only male present when Cox was robbed and killed. The State also charged Carrigan with first degree murder for Cox's death; Washington was an independent witness.[6]

3. Parmar Obtains Court Order for DNA Testing

In 2005, Parmar moved to have DNA testing performed on evidence used at trial. At the same time, he petitioned for an inventory of the trial evidence. Shortly afterward, a deputy county attorney for Douglas County submitted the Omaha Police Department's property reports as an inventory. One listed item was a sheet from the middle of Cox's bed. The police also found two other sheets inside the bedroom door and a sheet and pillow in the front room. All of these items had probable bloodstains.

In 2008, the court ordered the clerk of the Douglas County District Court to inventory the evidence in its possession and release all the trial exhibits to the University of Nebraska Medical Center for DNA testing. At the hearing on the motion,

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[4] *Parmar I, supra* note 2, 231 Neb. at 690, 437 N.W.2d at 506.

[5] *Id.*

[6] See *Parmar I, supra* note 2.

the court admitted an affidavit from the court reporter stating that although she had diligently searched for the trial evidence, she had found only one of two boxes containing the evidence. The box that the court reporter found contained two sheets.

4. DNA Testing Results

In 2009, the medical center's Human DNA Identification Laboratory issued a report on its DNA testing. The laboratory tested the two sheets that the court reporter had found. Its report referenced the evidence numbers used for these items in the police property reports. Those numbers indicate that the laboratory tested the sheet found in the front room and the sheet found on Cox's bed. Stains on those sheets tested positive for the presence of blood, and the laboratory analyzed them for DNA profiles of any contributors to the samples.

In sum, the laboratory's analysis of the DNA samples from the sheet found in the front room produced a partial DNA profile but was inconclusive about the profile of any contributors to the samples. But its analysis of six bloodstains found on Cox's bedsheet excluded Parmar as a contributor to the DNA found in those samples. Two of the six samples contained mixed DNA from two male contributors, but the analysis excluded Parmar as a contributor. For one of the mixed male samples, the analysis produced a major and minor contributor profile. The major profile matched Cox's profile, so the analysis did not exclude Cox as a contributor. But the analysis excluded Parmar as the minor contributor.

In his motion requesting the court to vacate his conviction or grant him a new trial, Parmar relied on the testing results of the DNA samples found on the sheet from Cox's bed. At the hearing, Parmar also submitted an affidavit from an investigator for the Nebraska Commission on Public Advocacy. The investigator stated that in 2006, a detective from the Omaha Police Department called him with the results of the department's search for evidence from Parmar's case. The detective informed him that a county attorney had checked out some of the evidence and did not return it. The investigator did not state the date that the county attorney had checked out the evidence.

5. Court's Order

In overruling Parmar's motion, the court concluded that Parmar was not entitled to have his conviction vacated because the DNA testing did not conclusively establish his innocence. The court stated that the test results showed only that one sample contained Cox's DNA mixed with the DNA from an unidentified male. Because it was unknown when the unidentified male's DNA was deposited in the sample, the court concluded that it was purely speculative whether the unidentified male was present during the crime and responsible for the murder.

The court also denied Parmar's motion for a new trial. The court noted that two eyewitnesses at the crime scene testified to Parmar's involvement and presence, and that circumstantial evidence connected him to the crime. It concluded that because of the eyewitness testimony and circumstantial evidence, the DNA evidence was not of such a nature that if Parmar had offered it at trial, it probably would not have produced a substantially different result.

Finally, the court noted that Parmar had argued that he was entitled to a new trial because of the missing evidence. The court concluded that Parmar's due process rights had not been violated by the court's loss of the evidence absent a showing of the State's bad faith.

III. ASSIGNMENTS OF ERROR

Parmar assigns that the district court erred as follows:

(1) failing to conclude that the DNA testing exonerated him within the meaning of the DNA Testing Act;

(2) failing to conclude that he was entitled to a new trial under the DNA Testing Act;

(3) concluding that the DNA evidence would not have produced a different result if it had been admitted at trial;

(4) failing to grant a new trial because the court had failed to preserve and make available evidence committed to its custody; and

(5) applying a "bad faith" standard to the court's failure to preserve evidence entrusted to it.

IV. STANDARD OF REVIEW

[1,2] Under the DNA Testing Act, an appellate court will not reverse a trial court's order determining a motion to vacate a judgment of conviction or grant a new trial absent an abuse of the trial court's discretion.[7] Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.[8]

V. ANALYSIS

1. Parties' Contentions

Parmar contends that the DNA evidence discredits and contradicts the eyewitnesses' testimony at his trial. He claims that the State's theory and presentation of the trial evidence cannot be reconciled with DNA evidence that an unidentified male participated in the crime. The State contends that the DNA testing results do not warrant vacation of Parmar's conviction or a new trial because overwhelming non-DNA evidence supported his conviction. It argues that there was not a complete failure of evidence to support his conviction. And the State argues that a jury would have convicted Parmar even if it had known at his trial that an unknown male had donated a DNA specimen at an unknown time.

2. Movant's Burden of Production

[3] In enacting the DNA Testing Act, the Legislature intended to provide (1) an extraordinary remedy—vacation of the judgment—for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy—a new trial—for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.[9]

[4,5] Thus, to warrant an order vacating a judgment of conviction under the DNA Testing Act, the movant must present

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[7] See, *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009); *State v. El-Tabech*, 269 Neb. 810, 696 N.W.2d 445 (2005).

[8] See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[9] See *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

DNA testing results that, when considered with the evidence presented at the trial leading to conviction, show a complete lack of evidence to establish an essential element of the crime charged.[10] But to warrant an order for a new trial under the DNA Testing Act, the movant must present DNA testing results that probably would have produced a substantially different result if the evidence had been offered and admitted at the movant's trial.[11]

3. Analysis

(a) Motion to Vacate Judgment

[6] As noted, the court ruled that Parmar was not entitled to have his judgment vacated because the DNA testing did not conclusively establish his innocence. DNA evidence is usually relevant to a defendant's identity as the perpetrator. For some crimes, DNA testing that was not available at trial could potentially exonerate a person of the crime.[12] But postconviction DNA evidence that does not falsify or discredit evidence that was necessary to prove an essential element of the crime does not exonerate the movant.[13]

For example, in *State v. Buckman*,[14] the police seized some of Herman Buckman's clothing articles with blood samples during the original murder investigation. Before his 1989 trial, a state expert had consumed all or most of the blood samples from these articles. She concluded that the blood could have come from the victim but not Buckman. Later, the postconviction DNA testing failed to detect the presence of blood on the clothing articles or failed to produce a DNA profile. But these results were not inconsistent with other evidence of guilt produced at trial.

Similarly, another trial expert in *Buckman* had tested two cigarette butts found in the victim's car. He testified that Buckman

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[10] See *Pratt, supra* note 7.

[11] See *id.*

[12] See, generally, 6 Wayne R. LaFave et al., Criminal Procedure § 24.11(d) (3d ed. 2007).

[13] See *Buckman, supra* note 9.

[14] *Id.*

could not be excluded as a contributor of the genetic material found in either of the cigarettes. The brands were known, and one cigarette was a brand that Buckman was known to smoke. The expert testified that if only one person smoked Buckman's preferred cigarette, other suspects were excluded as contributors to the genetic material. But the trial evidence was not properly stored. The cigarettes from the victim's car were commingled in the same bag with the control-group cigarettes, and the brand for the cigarettes was no longer recognizable when postconviction testing was performed.

The postconviction DNA testing showed only inconclusive, partial DNA profiles for the material from two cigarette butts and no DNA profiles for the others. One of the profiles contained genetic material from more than one individual. The expert's final determination was that the results were inconclusive whether Buckman had been a contributor to the DNA sample in one of the tested cigarettes. In short, the inconclusive postconviction results did not exonerate Buckman of guilt or require a new trial.

Similarly, in *State v. Pratt*,[15] Juneal Pratt had been convicted of sodomy, rape, and robbery in 1975. Postconviction DNA testing of the victims' clothing articles did not conclusively exclude Pratt as a contributor to the DNA samples found in stains on the victims' shirts. None of the stains were found to be presumptively from semen. An analyst testified that Pratt was excluded as a contributor to one of the stains if it was not a mixture of DNA from more than one individual. But the results were inconclusive whether the sample was mixed. The testing of another stain was inconclusive as to how many males contributed DNA to the sample, but at least one male contributor was not Pratt. The testing did not exclude Pratt as a contributor to other mixed samples on one shirt.

Because the testing did not conclusively exclude Pratt as a contributor to the DNA samples, we held that the results were neither exonerating nor exculpating. We further held that the court was not clearly wrong in finding that the DNA material from another male could have been deposited on the clothing

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[15] *Pratt, supra* note 7.

articles because of improper handling or improper storage of the evidence. In contrast, the victims' trial testimony had strongly identified Pratt as the perpetrator.

These cases illustrate that postconviction DNA testing results that are not incompatible with trial evidence of the movant's guilt fail to exonerate the movant of guilt. In overruling Parmar's motion to vacate the judgment, the court reasoned that because it was unknown when the unidentified male's DNA was deposited in the sample, concluding that another male was present during the crime was too speculative. But we believe that this reasoning is properly directed to whether the evidence was sufficiently exculpatory to warrant a new trial. So we do not address it here. We agree with the court, however, that the DNA testing results did not exonerate Parmar.

It is true that the presence of an unidentified male's DNA commingled with the victim's DNA calls into question the State's evidence that Parmar was the sole assailant. But it does not prove that Parmar did not participate in the crime. Parmar could have participated without leaving DNA evidence at the scene. So we conclude that the trial court did not abuse its discretion in denying Parmar's motion to vacate the judgment and release him.

(b) Motion for New Trial

As explained earlier, to warrant an order for a new trial under the DNA Testing Act, the movant must present DNA testing results that probably would have produced a substantially different result if the evidence had been offered and admitted at the movant's trial. Relying on our decision in *State v. El-Tabech*,[16] the court reasoned that a single DNA specimen that belongs to neither the defendant nor the victim is not exculpatory evidence that would have produced a substantially different result at trial. Parmar argues that *El-Tabech* is distinguishable; the State contends that *El-Tabech* is controlling.

The State convicted Mohamed El-Tabech of murdering his wife by strangling her with a cloth bathrobe belt. A tuft of hair was found in a knot tied in the belt. A state expert testified at

[16] *El-Tabech, supra* note 7.

trial that seven hairs found in the tuft were consistent with the victim's hair. But she testified that another hair that had fallen from the belt did not belong to the victim or El-Tabech. In contrast, the postconviction DNA testing showed that the hair that had fallen from the belt belonged to El-Tabech but that one of the hairs in the knot belonged to neither El-Tabech nor the victim. The district court concluded that because the unidentified hair was bound in the knot, it had been present before the murder and was insignificant evidence of guilt.

On appeal, we stated that although the unidentified hair was a different hair than the one the state expert had testified about at trial, the jury had nonetheless been presented with evidence that a hair belonging to neither the victim nor El-Tabech was found at the scene. Because of other trial evidence of El-Tabech's guilt, we concluded that it could not be said that the testing results probably would have produced a substantially different result.

But the postconviction DNA testing in Parmar's case produced results that are distinguishable from the results in *El-Tabech* and our other cases in two crucial respects. First, the testing results here completely excluded Parmar as a contributor to the DNA samples found on Cox's sheet and established the presence of an unidentified male's DNA. Second, the results were contrary to the testimonies of two key eyewitnesses against Parmar. We have previously addressed the significance of similar DNA evidence in a case deciding whether a district court should have ordered DNA testing. Our reasoning in that case is applicable here.

In *State v. White*,[17] Joseph White had been convicted of first degree murder for his role in a 1985 robbery, rape, and murder of a 68-year-old woman. An alleged accomplice, Thomas Winslow, and four other alleged participants pleaded no contest or guilty to lesser crimes. Three witnesses testified that White and Winslow sexually assaulted the victim. One of these witnesses allegedly suffocated the victim with a pillow. A witness testified that White was present during the crime.

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[17] *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007).

In 2006, the district court denied White's motion for DNA testing, concluding that even if the testing showed that the biological samples did not belong to White, it would not compel the conclusion that White was not present. The court reasoned that White could have been convicted as a participant in the felony robbery even if he had not sexually assaulted the victim. The court determined that evidence showing that the semen samples did not belong to White would not have precluded the jury from finding him guilty of murder based on other evidence.

We reversed the court's denial of White's request for DNA testing.[18]

> The heart of the State's case was the testimony of White's codefendants, . . . who each testified that they saw only White and Winslow sexually assault Wilson. We agree with White that if DNA testing showed that the semen samples belonged to neither White nor Winslow, such evidence would raise questions regarding the identity of the person or persons who actually contributed to the sample and who presumably committed the assault. Such a favorable test result could cause jurors to question the credibility of [the three codefendants.] Evidence that contradicted such witnesses' testimony that White and Winslow carried out the sexual assault could cause jurors to question their testimony regarding other matters. . . .
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> . . . DNA test results that excluded both White and Winslow could raise serious doubts regarding the testimony of the main witnesses against White. Although there was other evidence regarding White's presence at the crime scene and his involvement in planning the crime, the testimonies of [the three codefendants] were critical to the State's case against White resulting in White's conviction for first degree murder.[19]

In *White*, we also rejected the district court's reasoning that even if the testing results would exclude White as a contributor to the DNA samples, the evidence would be cumulative

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[18] See, also, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

[19] *White, supra* note 17, 274 Neb. at 425, 740 N.W.2d at 806.

because the trial evidence failed to show that the semen samples belonged to White. We stated that a difference exists "between forensic evidence that fails to identify a person and DNA evidence that excludes the person."[20] We remanded the cause to the district court to determine whether the biological material had been retained under circumstances likely to safeguard its integrity.

[7] Other courts have similarly reasoned that DNA evidence warrants a new trial when it compromises key evidence that the prosecutor used against the defendant at trial.[21] As relevant here, we hold that postconviction DNA evidence probably would have produced a substantially different result at trial if the evidence (1) tends to create a reasonable doubt about the defendant's guilt and (2) "does not merely impeach or contradict [the key eyewitness'] testimony, but is probative of a factual situation different from that to which [the witness] testified."[22]

Like the conviction in *White*, the State's conviction of Parmar depended heavily upon the testimony of two eyewitnesses, one of whom was an accomplice. And the State's theory of the crime, as presented through these eyewitnesses, was that only Parmar assaulted Cox and that the only other participants in the crime were two women. Carrigan testified to seeing Parmar "'down by the top of Mr. Cox.'"[23] But the postconviction DNA testing results are clearly incompatible with the eyewitnesses' testimonies.

To recap, the testing showed that Cox's bedsheet had blood samples with DNA that matched Cox's DNA profile, indicating that he was on the bed at some point before his death. But the

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[20] *Id.* at 426, 740 N.W.2d at 806.

[21] See, *Arrington v. State*, 411 Md. 524, 983 A.2d 1071 (2009); *People v. Waters*, 328 Ill. App. 3d 117, 764 N.E.2d 1194, 262 Ill. Dec. 77 (2002). Compare, *State v. Peterson*, 364 N.J. Super. 387, 836 A.2d 821 (App. Div. 2003); *People v. Wise*, 194 Misc. 2d 481, 752 N.Y.S.2d 837 (N.Y. Sup. 2002).

[22] *Waters, supra* note 21, 328 Ill. App. 3d at 129, 764 N.E.2d at 1204, 262 Ill. Dec. at 87.

[23] *Parmar I, supra* note 2, 231 Neb. at 690, 437 N.W.2d at 506.

testing conclusively excluded Parmar as one of the male contributors to the mixed DNA found in two of those bloodstains. One of those mixed DNA bloodstains produced major and minor contributor profiles—and Parmar was neither contributor. These results are distinguishable from the test results in *Pratt*, which were inconclusive about the individual contributors' profiles.

So while the results did not exonerate Parmar, unlike our earlier cases, his DNA testing results tend to create a reasonable doubt that he was a participant. It is true that we cannot know with absolute certainty that the unidentified male's DNA was deposited on Cox's bedsheet when Cox was murdered. But the district court erred in reasoning that the presence of another male at the murder was too speculative to warrant a new trial.

Obviously, if the other male was not present at the murder, then his DNA was deposited on Cox's bedsheet before or after the murder. But the evidence at the hearing on Parmar's motion for vacation of judgment or a new trial did not support a finding that the other male's DNA was deposited on the sheet after the murder.

Unlike the facts presented in *Pratt*, the court reporter's affidavit stated that the trial evidence she found in a box was stored in separate bags. And no expert testified that improper handling of the evidence could have accounted for the laboratory's finding enough DNA from an unidentified male contributor to produce a separate minor contributor profile. "As a rule, a minor contributor to a mixture must provide at least 5% of the DNA for the mixture to be recognized."[24] Without expert testimony showing how a handler's DNA could have contaminated the sample to such a high percentage, we must assume that both contributors had left their DNA on the sheet before the evidence was gathered. So we conclude that the evidence at the hearing did not support a finding that

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[24] David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Evidence*, in Reference Manual on Scientific Evidence 485, 508 (Federal Judicial Center 2d ed. 2000).

the other male's DNA was deposited on the sheet because of improper handling.

Conversely, concluding that the other male could have deposited DNA on Cox's bedsheet before the murder in exactly the same spots where Cox's blood would later be found after he was murdered is more speculative than concluding that another male was present during the crime. Such a finding depends upon improbable coincidences. This is particularly true when the police found evidence of a struggle and items with probable bloodstains in both the front room and the bedroom.

In short, the DNA testing results here tend to create a reasonable doubt about Parmar's guilt and were probative of a factual situation different from that testified to by the State's two eyewitnesses against him. Both of these witnesses testified that Parmar was the only male present and the only person who physically assaulted Cox. Had Parmar presented DNA evidence showing that two males contributed their DNA to the bloodstains found on Cox's bedsheet and that neither of those males was Parmar, the jurors certainly would have questioned the factual account presented by the State's eyewitnesses.

Moreover, even if evidence excluding Parmar as a contributor to the bloodstains cannot prove that the witnesses' testimonies were false, it certainly makes their version of the facts less probable.[25] Our standard for evidence warranting a new trial does not require a movant to show that the DNA testing results undoubtedly would have produced an acquittal at trial.

We conclude that because the testimonies of the State's eyewitnesses were the key evidence against Parmar at trial, DNA testing results that were probative of a factual situation contrary to the eyewitnesses' version of the facts and tended to create a reasonable doubt about Parmar's guilt probably would have produced a substantially different result if the results had been available at trial. We therefore reverse the

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[25] See *People v. Dodds*, 344 Ill. App. 3d 513, 801 N.E.2d 63, 279 Ill. Dec. 771 (2003).

district court's order and remand the cause with directions to the district court to grant Parmar a new trial. Because we have instructed the court to grant Parmar a new trial, we do not address his argument that the State's loss of evidence warrants a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

HERITAGE BANK, A STATE BANKING CORPORATION, APPELLEE, V. JEROME J. BRUHA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND PRIME TRADING COMPANY, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

812 N.W.2d 260

Filed February 10, 2012. No. S-10-1219.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Uniform Commercial Code: Interest.** Although the Uniform Commercial Code allows notes to have a variable interest rate, under Neb. U.C.C. § 3-104(a) (Cum. Supp. 2010), the principal amount must be fixed.
4. **Promissory Notes: Negotiable Instruments.** A fixed principal amount is an absolute requisite to negotiability.
5. ____: ____. To meet the fixed principal amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source. If reference to a separate instrument or extrinsic facts is needed to ascertain the principal due, the sum is not "certain" or fixed.
6. ____: ____. A note given to secure a line of credit under which the amount of the obligation varies, depending on the extent to which the line of credit is used, is not negotiable.
7. **Negotiable Instruments.** For a person to be a holder in due course, the instrument must be negotiable.
8. **Contracts: Fraud.** Fraud in the execution goes to the very existence of the contract, such as where a contract is misread to a party or where one paper is