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point and averaged Kevin's income. Those 4 years showed both profits and losses.

VI. CONCLUSION

The judgment of the district court finding that the premarital agreement is enforceable is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. PATRICK B. BAULDWIN, APPELLANT.

811 N.W.2d 267

Filed April 20, 2012. No. S-10-1217.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Miranda Rights: Police Officers and Sheriffs.** When a person is in custody and interrogated by government officials, *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires a now-familiar set of warnings: The police must notify a person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to an attorney, either retained or appointed.
3. **Constitutional Law: Miranda Rights: Self-Incrimination.** The *Miranda* warnings exist to shield individuals from the inherently compelling pressures of custodial interrogation. They also ensure that the Fifth Amendment privilege against compelled self-incrimination is protected.
4. **Self-Incrimination.** A suspect has the right to control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.
5. **Miranda Rights: Police Officers and Sheriffs: Self-Incrimination.** Police officers are not required to guess whether a suspect wishes to end the interrogation; instead, the police must cease questioning the suspect only if the suspect's invocation of the right to remain silent is unambiguous, unequivocal, or clear.

6. **Miranda Rights: Self-Incrimination: Appeal and Error.** In determining whether a suspect clearly invoked his right to remain silent, an appellate court reviews the totality of the circumstances of the alleged invocation to assess the words in context.
7. **Miranda Rights: Police Officers and Sheriffs: Self-Incrimination.** Once a person has invoked his right to remain silent, the police must scrupulously honor that right.
8. ____: ____: ____. *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), requires a three-factor analysis in determining whether the police scrupulously honored the right to remain silent. Those factors are (1) whether the police immediately ceased the interrogation once the defendant invoked his right to remain silent; (2) whether the police resumed the interrogation after a significant time and a renewal of the *Miranda* warnings; and (3) whether the police restricted the renewed interrogation to content not covered by the first interrogation.
9. **Constitutional Law: Police Officers and Sheriffs: Confessions.** The test under *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), focuses on what law enforcement did, and when, and not on the suspect's response or lack thereof. Similar to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *Mosley* imposes obligations on the police, not the suspect, to protect individuals against the inherently coercive nature of custodial interrogation.
10. **Constitutional Law: Convictions: Appeal and Error.** Even constitutional error does not automatically require reversal of a conviction if that error was a trial error and not a structural defect.
11. **Trial: Evidence: Confessions: Appeal and Error.** The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error analysis.
12. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
13. **Miranda Rights.** *Miranda* protections apply only when a person is both in custody and subject to interrogation.
14. **Arrests.** Whether an individual is in custody requires an examination of all the circumstances surrounding the interrogation. In making that determination, the test is whether a reasonable person in the defendant's situation would have felt free to leave, and if not, then a defendant is considered to be in custody.
15. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** "Interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.
16. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.

17. **Rules of Evidence: Expert Witnesses.** A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology may properly be applied to the facts in issue.
18. **Courts: Expert Witnesses.** In evaluating the admissibility of expert scientific testimony, a trial judge considers a number of factors. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in a particular technique, there exists a high known or potential rate of error; whether standards exist for controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding. Different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.
19. **Trial: Evidence.** DNA evidence without the accompanying probability assessment would be inadmissible because it would not aid the trier of fact.
20. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the rules control admissibility of the evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
21. **Trial: Rules of Evidence.** A trial court exercises its discretion in determining whether evidence is relevant and whether its probative value is outweighed by its prejudicial effect.
22. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.
23. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
24. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
25. **Homicide: Photographs.** In a homicide prosecution, a court may receive photographs of a victim into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
26. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And in its review, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.

27. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
28. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
29. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
30. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

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

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

CONNOLLY, J.

The State charged Patrick B. Bauldwin with the first degree murder of Pasinetta Prince. The State contended that Bauldwin physically assaulted and strangled Prince, resulting in her death. A jury convicted Bauldwin of second degree murder, and the court sentenced him to a term of life to life in prison. Although Bauldwin raises several issues, the primary issue is whether the police violated his *Miranda* rights. We conclude that such a violation occurred—Bauldwin clearly invoked his right to remain silent during his interrogation, and the police did not scrupulously honor that right. But based on the record before us, we conclude this error was harmless. And because we find no merit to Bauldwin's other assigned errors, we affirm his conviction and sentence.

I. BACKGROUND

The State contended that Bauldwin murdered Prince on a weekend in February 2006, sometime between Saturday night and Sunday morning. At the time of Prince's death, Bauldwin and Prince were in a relationship and living together. The State's theory of the case hinged on showing that Bauldwin was possessive of Prince, that they had a rocky relationship, and that a number of events over the course of the weekend led to a struggle between Bauldwin and Prince, resulting in Prince's death. The relevant timeline is helpful to provide context for Bauldwin's assigned errors, and so we provide an overview of the weekend's events.

1. The Weekend's Events

Prince's son also lived with Bauldwin and Prince. On Friday, February 24, 2006, following school, her son came home to grab some clothes and asked Prince if he could spend the night at a friend's house. Prince said yes, and he left for the night. That evening, Bauldwin and Michelle Troxclair, his adopted sister, shared a birthday party at a club. The party started about 9 p.m. Prince could not attend because she had a role in an upcoming play in a local theater and had play rehearsal that same evening.

So Bauldwin and Prince went their separate ways, with Bauldwin going to the party and Prince going to rehearsal. Prince owned two vehicles, a Chevrolet Impala and a white van. Prince drove the van to her rehearsal, and Bauldwin had the Impala. The party ended at about 1 a.m. when the club closed. Following the party, Bauldwin went to his brother's house for an after-hours party. That party ended somewhere between 2 and 3 a.m., and Bauldwin then went home. Telephone records show that on Saturday, February 25, 2006, between 2:21 and 3:22 a.m., 19 telephone calls were made to Prince's cellular telephone number from Prince's home telephone number. The record shows that Bauldwin made these calls.

Meanwhile, after play rehearsal ended, Prince and a few friends went to a bar. They stayed there until the bar closed at 1 a.m. Prince then went to a party with friends, and she stayed there until about 3:30 to 3:45 a.m., when she left to return

home. At the party, Prince ran into a friend, Michael Scott, who offered to escort her home. After Scott saw Prince pull into her driveway, he continued on his way.

But Scott testified that he saw Prince's Impala parked a block or two away from Prince's house. Finding this odd, Scott stopped to investigate. Scott testified that he parked his vehicle behind the Impala, looked to make sure it had not been vandalized, and then walked to Prince's house to check on her. Scott knocked on the side door, and Prince answered, with Bauldwin standing behind her. Prince told Scott that she was fine and, in answer to Bauldwin's questioning him, Scott explained that he was just concerned for Prince's safety. Scott left, but then called Prince again to make sure she was okay; she said she was. Bauldwin then called Scott and told him to quit following his girlfriend.

Prince and Bauldwin presumably spent that Saturday morning and most of the afternoon at the house. Several telephone calls throughout the day indicated that Prince was alive and well. Prince's mother spoke with Prince on the telephone that morning. A friend of Prince spoke with Prince sometime during that morning or early afternoon. And Prince's son stopped by that afternoon to pick up more clothes to spend the night at his friend's house again on Saturday night. He saw Prince, but not Bauldwin. Troxclair testified that finally, at about 4:30 p.m., she received a call from Bauldwin and heard Prince in the background. This was the last time anyone heard from Prince.

Bauldwin's 4:30 p.m. telephone call to Troxclair was about another birthday party, this time for Troxclair's two younger children. The party was to take place at a hotel that night with friends and family. Following the telephone call, at around 5 p.m., Bauldwin drove Prince's van to Troxclair's house to help prepare for the party. The party lasted until about 9 p.m. Bauldwin helped clean up after the party and then asked to use Troxclair's car at about 9:30 or 10 p.m. Troxclair agreed to let him use her car, but asked him to also take her daughter's cellular telephone with him in case she needed to contact him. Bauldwin left the hotel between 10:30 and 11 p.m.

At around 2 a.m., Troxclair woke to change her child's diaper, but she realized she had left her baby supplies in the trunk of her car. She called Bauldwin to ask him to come back, which Bauldwin agreed to do. Bauldwin arrived back at the hotel within 20 minutes, and he then fell asleep in the hotel room. The record fails to show Bauldwin's whereabouts during that approximately 3- to 4-hour period on Saturday night into Sunday morning.

That Sunday morning, February 26, 2006, Bauldwin and other members of his family had breakfast and checked out of the hotel, and then Bauldwin headed back to Troxclair's house, where he fell asleep on the couch. Later that afternoon, Bauldwin attended a barbecue at his brother's house, with several other family members.

2. Prince's Body Discovered

Meanwhile, Prince's family became worried because she had not shown up at church. This was unusual, because Prince had a major role in a church play that was to take place after the service. Friends and family members tried to contact Prince throughout the day Sunday, but to no avail.

Prince's mother testified that she became worried enough that she went to Prince's house at about 5:30 p.m. When she arrived, she knocked on the door, but no one answered. There were no lights on inside or outside the house. She then called the police, and officers arrived shortly thereafter. The officers discovered Prince's body in the basement of her home.

During this time, Bauldwin was still at the barbecue. Eventually, Bauldwin and his family became aware that the police were at Prince's house. One of Bauldwin's brothers, along with Troxclair, went to Prince's house to investigate, but they had Bauldwin stay at the barbecue. Upon arriving at Prince's house, they were notified that Prince was dead. They returned to the barbecue, and then Bauldwin and two of his brothers went to the police station.

The police interviewed Bauldwin for about 3 hours and audio-recorded the interview. During this interview, Bauldwin was agitated and explained to the police that he had been drinking at the barbecue and was "blazed." Although the police

asked Bauldwin questions, Bauldwin mainly led the interview. He made several references to wanting a lawyer and was eventually allowed to speak to his lawyer on the telephone. About that time, however, Bauldwin was told that he could not leave until the police had photographed his body and taken DNA swabs. After speaking with his lawyer, Bauldwin agreed to those procedures. The photographs showed numerous small injuries on Bauldwin's body. Bauldwin did not confess to any crime during the interview, but certain statements and his overall demeanor could be considered incriminating. Following the interview, the police did not arrest Bauldwin and he was released.

3. The Police Investigation and Pretrial Motions

The police continued with their investigation and recovered several pieces of evidence from the scene. A pathologist conducted an autopsy and concluded that Prince had been strangled. Although the crime occurred in February 2006, no arrest warrant was issued until June 2009. A police spokesperson explained that financial constraints limited the department's ability to close the case quickly. Additionally, a rash of homicides occurred around that time, which meant that the detectives assigned to Prince's case could not give the case their undivided attention.

This changed in 2008, when the Omaha Police Department created the "Cold Case Unit." The purpose of this unit was to solve older cases that, for whatever reason, had gone unsolved. Det. Michael T. Kozelichki, who had originally worked on the Prince case, was assigned to the unit, and chose to work the Prince case. Kozelichki reinterviewed witnesses, interviewed many new witnesses, and evaluated evidence of the crime. Following this investigation, on June 23, 2009, the police arrested Bauldwin.

When the police arrested Bauldwin, he asked to speak to the detective working the case. Upon hearing of this request, Kozelichki brought Bauldwin to the police station to interrogate him. Police videotaped the interrogation, which lasted about 5 hours. The first 3½ to 4 hours of this interrogation

were led by Bauldwin; Bauldwin simply told his side of the story, with few questions from Kozelichki. Then Bauldwin ended the interview, and Kozelichki left the room. About 4 minutes later, Kozelichki reentered the room and began confronting Bauldwin with pieces of the State's evidence and challenging Bauldwin's version of events. Bauldwin never admitted to killing Prince, but did make several incriminating statements.

Before trial, Bauldwin moved to suppress this interrogation, along with the audio recording from 2006, asserting that the police had violated his *Miranda* rights in both instances. Specifically, Bauldwin claimed that the 2009 interrogation was inadmissible because he had invoked his right to remain silent, which the police failed to honor. And Bauldwin claimed that the 2006 audio recording was also inadmissible because he had invoked his right to counsel, which the police similarly failed to honor. The district court denied Bauldwin's motion, and at trial, both the audio recording and the videotape were played to the jury.

Bauldwin also moved to exclude the testimony of the State's DNA experts, asserting that their testimony failed to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] adopted by this court in *Schafersman v. Agland Coop*.[2] This motion challenged the reliability of the methodology employed by the State to identify Bauldwin's DNA on certain pieces of evidence. The court denied this motion and received the relevant evidence at trial. Most notably, DNA analysis did not exclude Bauldwin as a contributor to apparent bloodstains on the shirt worn by Prince at the time of her death. And a pair of Bauldwin's jeans, found at Prince's house, had apparent blood on them, from which Prince was not excluded as a contributor. The jury found Bauldwin guilty of second degree murder. The court sentenced Bauldwin to a term of life to life in prison.

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[2] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

II. ASSIGNMENTS OF ERROR

Bauldwin assigns, restated, that the district court erred in

(1) denying Bauldwin's motion to exclude his statements to law enforcement;

(2) denying Bauldwin's motion in limine regarding the reliability of the State's DNA evidence and allowing evidence on that subject to be introduced at trial;

(3) admitting exhibit 154, a photograph which depicted Prince's tongue, throat, and larynx, because it was not relevant and was unfairly prejudicial;

(4) accepting the jury's guilty verdict, because the evidence adduced at trial was insufficient to support the verdict; and

(5) imposing an excessive sentence.

III. ANALYSIS

1. Bauldwin's 2009 Statement

On June 23, 2009, police arrested and interrogated Bauldwin and videotaped the interrogation. This videotape was played in full to the jury. Bauldwin claims that the district court erred in failing to suppress this statement because the police, in obtaining it, violated his *Miranda* rights.

(a) Standard of Review

[1] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[3] we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[4]

(b) Analysis

[2,3] When a person is in custody and interrogated by government officials, *Miranda* requires a now-familiar set

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] See *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

of warnings: The police must notify a person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to an attorney, either retained or appointed.[5] These warnings exist to shield individuals from the inherently compelling pressures of custodial interrogation.[6] They also ensure that the Fifth Amendment privilege against compelled self-incrimination is protected.[7]

Regarding Bauldwin's 2009 statement, there is no question that the police subjected Bauldwin to custodial interrogation and that *Miranda* applies. And there is no dispute that at the start of the interrogation, Kozelichki read Bauldwin his *Miranda* rights and that Bauldwin executed a valid waiver. Instead, the issue is whether—following the waiver—Bauldwin clearly invoked his right to remain silent and, if so, whether the police scrupulously honored that right.

(i) Clear Invocation of Right to Remain Silent

[4,5] Whether a suspect clearly invoked his right to remain silent is not a novel issue. We have addressed it before, in various iterations, and the relevant principles remain unchanged. We have explained that a suspect has the right to "'control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.'"[8] In other words, a suspect has the right to cut off questioning at any time.[9] Even so, police officers are not required to guess whether a suspect wishes to end the interrogation; instead, the police must cease questioning the suspect only if "the suspect's invocation of the right to remain silent [is] 'unambiguous,' 'unequivocal,' or 'clear.'"[10]

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[5] See *Miranda, supra* note 3.

[6] See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[7] See *id.*

[8] *Id.* at 64, 760 N.W.2d at 58, quoting *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

[9] See *Mosley, supra* note 8.

[10] *Rogers, supra* note 6, 277 Neb. at 64, 760 N.W.2d at 58.

[6] In making that determination, we review the totality of the circumstances of the alleged invocation to assess the words in context.[11] For example, we examine the actual questions which drew the statement from the defendant and the officer's response to that statement.[12] And because in this case the facts of the alleged invocation are recorded in the videotape and are not in dispute, this issue presents solely a question of law.[13]

Bauldwin claims that he invoked his *Miranda* rights multiple times during the interrogation. We disagree. Most of the instances cited by Bauldwin do not show unequivocal invocations of a *Miranda* right, but are, at best, ambiguous. For example, at one point Bauldwin stated, "I mean, I could flood you with possibilities that I . . . I'm a . . . uh, have to tell my lawyer, but I can flood you with these things." At another point, Bauldwin said, "I shouldn't be in these shackles if I'da talked to you, uh, six, eight . . . months ago. So, we're gonna have to end this interview to save . . . save me." But after Kozelichki said, "Okay," Bauldwin immediately continued speaking at length. And at yet another point, Bauldwin explained that he was leaving out certain parts of the story because they were "for [his] lawyer's ear." Nevertheless, Bauldwin continued talking. These statements were not clear invocations of a *Miranda* right, and so Kozelichki was not required to cease questioning Bauldwin based on those statements.[14]

But about 4 hours into the interview, the following back-and-forth conversation took place:

> [Kozelichki]: . . . I'd like to talk to you about that Friday a little bit, going into Saturday, if you'd be willing.
>
> [Bauldwin]: [SIGHS] . . . man . . . [whisper]
>
> Q: And I'll give you my take on that.
>
> A: I know what your take is [Kozelichki].

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[11] See *Schroeder, supra* note 4.

[12] See *Rogers, supra* note 6.

[13] See *Schroeder, supra* note 4.

[14] See, e.g., *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004), *abrogated on other grounds, Rogers, supra* note 6.

Q: You don't know anything about my take on that, so.

A: Your take is . . . well, . . . well it . . . it's the . . . ah . . . as my grandmother used to say, bless her soul, sh . . . she's passed, "Proof is in the pudding."

Q: Uh hmm. [Affirmative]

A: And no matter how you spin it, that's your job to . . . to . . . to . . . to spin things, but I've given you what I'm gonna give you.

Q: 'Kay.

At that point, Kozelichki got up to leave the room and Bauldwin said, "No matter how you spin it . . . but it's kinda warm in here, can you at least try to get me outta here as quick as possible?" Kozelichki then left the room and closed the door. About 4 minutes later, Kozelichki reentered the room, and the following conversation took place:

[Kozelichki]: [Bauldwin], we're gonna go here in a second. Do you have anything more you want to talk about?

[Bauldwin]: No. I think, um . . .

Q: . . . I gotta get my . . .

A: . . . so you about to leave me here for a while?

Q: No. No. Just want to know if there's anything more you want to talk about, is there any questions that you have or if there's anything that you want me to tell you?

A: Well, you not gonna tell me what I wanna hear.

Q: 'Kay. It . . . ta', uh . . . uh . . .

[OFFICER SHUTS DOOR]

Q: See, when you . . . when you . . . when you make a statement like that, I'm just gonna ask what do you want to hear.

The interrogation then continued for about another hour, during which Kozelichki confronted Bauldwin with discrepancies in his story and with portions of the State's evidence against him. Following this exchange, the incriminating portions of the interrogation occurred.

Recently, in *State v. Rogers*,[15] we explained that although a determination of whether an invocation was clear and

[15] *Rogers, supra* note 6.

unequivocal is dependent on the circumstances of each particular case, patterns have emerged from the case law that provide context to our application of these rules.[16] None of these patterns are seen here. Bauldwin's statement that "I've given you what I'm gonna give you" was not prefaced with "words of equivocation such as 'I think,' 'maybe,' or 'I believe.'"[17] Nor can Bauldwin's statement reasonably be interpreted to show only that he had finished his colloquy of events[18]; instead, Bauldwin's statement was made in response to Kozelichki's offer to give his take on what happened that weekend. When viewed in context, Bauldwin's statement showed a desire to stop the interrogation altogether. And Bauldwin's refusal to talk was not limited to a specific topic, qualified by temporal words, or immediately followed by a statement that was inconsistent with a desire to remain silent.[19]

Moreover, Kozelichki's response to Bauldwin also provides context to the meaning of his statement. When Bauldwin stated, "I've given you what I'm gonna give you," Kozelichki left the room. Bauldwin's tone and demeanor indicated that he had ended the interrogation. And Kozelichki's reaction to Bauldwin's statement showed that he understood that to be Bauldwin's intent. Kozelichki replied, "'Kay," got up, left the room, and did not return until 4 minutes later. Thus, the videotape shows that not only *should* Kozelichki have reasonably understood that Bauldwin had invoked his right to remain silent, but that he *actually* understood that to be the case. Furthermore, once Kozelichki got up from his chair, Bauldwin asked, "[B]ut it's kinda warm in here, can you at least try to get me outta here as quick as possible?" This statement signaled that both Kozelichki and Bauldwin understood that Bauldwin had ended the questioning by clearly invoking his right to remain silent.

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[16] *Id.*

[17] See *id.* at 65, 760 N.W.2d at 58.

[18] See *Rogers, supra* note 6.

[19] See *id.*

(ii) Scrupulously Honored

[7] While Bauldwin clearly invoked his right to remain silent, that determination does not end our inquiry. The remaining issue is whether the police "'scrupulously honored'" Bauldwin's right to remain silent.[20] In *Miranda v. Arizona*,[21] the U.S. Supreme Court set out the following rule: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[22] In *Michigan v. Mosley*,[23] however, the Court explained that the phrase "interrogation must cease" does not mean that no further interrogation may ever be commenced. This would be an unreasonable burden on legitimate police investigation. But neither does it allow for only a "momentary cessation" of the interrogation.[24] Such an interpretation would render the right to remain silent meaningless because the police could simply continue questioning a suspect immediately after the right was invoked. Instead, the Court understood *Miranda* to mean that once a person has invoked his right to remain silent, the police must scrupulously honor that right.[25]

Obviously, this is a fact-specific inquiry. In *Mosley*, the Court held that the police had scrupulously honored the defendant's right to remain silent. In making this determination, the Court emphasized that once the defendant invoked his right to remain silent, the officer "immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade [the defendant] to reconsider his position."[26] Furthermore, more than 2 hours elapsed between the two

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[20] See *Mosley, supra* note 8, 423 U.S. at 103, quoting *Miranda, supra* note 3.

[21] *Miranda, supra* note 3.

[22] *Id.*, 384 U.S. at 473-74.

[23] *Mosley, supra* note 8.

[24] *Id.*, 423 U.S. at 102.

[25] See *id.*

[26] *Id.*, 423 U.S. at 104.

interrogations, and a different officer conducted the second interrogation, regarding an unrelated crime. Finally, the second interrogation began with another recitation of *Miranda* rights. Under those circumstances, the Court concluded that the police had scrupulously honored the defendant's right to remain silent.[27]

The *Mosley* decision does not offer a simple, bright-line rule. And while the overarching holding of *Mosley*—law enforcement must scrupulously honor a suspect's invocation of his right to remain silent—is easy to state, it is not always easy to apply. This is demonstrated by the variety of approaches taken by lower courts that have applied *Mosley*.[28] Some courts read *Mosley* to require a totality-of-the-circumstances analysis, where the factors listed in *Mosley* are neither exclusive nor exhaustive.[29] Some courts emphasize whether the suspect received *Miranda* warnings again before the onset of the second interrogation.[30] Others emphasize the length of time between the interrogations.[31] And still others follow *Mosley* relatively strictly, looking toward only the three (or four) factors which the *Mosley* court deemed important.[32]

[8] We have applied *Mosley*'s principles in several cases.[33] And in *State v. Pettit*,[34] we concluded that *Mosley* required a

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[27] See *Mosley, supra* note 8.

[28] See Quinten Bowman, *Issues in the Third Circuit: Constitutional Law—When Coerced Statements Lead to More Evidence: The "Poisonous Tree" Blooms Again in the Fifth Amendment*, 44 Vill. L. Rev. 843 (1999). See, e.g., *Fleming v. Metrish*, 556 F.3d 520 (6th Cir. 2009); *U.S. v. Schwensow*, 151 F.3d 650 (7th Cir. 1998); *U.S. v. Cody*, 114 F.3d 772 (8th Cir. 1997); *West v. Johnson*, 92 F.3d 1385 (5th Cir. 1996); *U.S. v. Hsu*, 852 F.2d 407 (9th Cir. 1988); *United States v. Finch*, 557 F.2d 1234 (8th Cir. 1977).

[29] See, e.g., *Schwensow, supra* note 28.

[30] See, e.g., *Hsu, supra* note 28.

[31] See, e.g., *West, supra* note 28.

[32] See, e.g., *Cody, supra* note 28; *Finch, supra* note 28.

[33] See, *Rogers, supra* note 6; *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Pettit*, 227 Neb. 218, 417 N.W.2d 3 (1987); *State v. Bridgeman*, 212 Neb. 469, 323 N.W.2d 102 (1982); *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980).

[34] *Pettit, supra* note 33.

three-factor analysis in determining whether the police scrupulously honored the right to remain silent. Those factors were (1) whether the police immediately ceased the interrogation once the defendant invoked his right to remain silent; (2) whether the police resumed the interrogation after a significant time and a renewal of the *Miranda* warnings; and (3) whether the police restricted the renewed interrogation to content not covered by the first interrogation.[35] Absent a contrary indication from the U.S. Supreme Court, we see no reason to change our approach.

Analyzing those factors here compels us to conclude that the police did not scrupulously honor Bauldwin's right to remain silent. While the police did immediately cease the interrogation once Bauldwin invoked his right to remain silent, the rest of the factors weigh against the police's action. Kozelichki, after leaving the room, waited only 4 minutes before reentering and continuing his interrogation. Kozelichki did not provide a fresh set of *Miranda* warnings to Bauldwin before continuing the interrogation. And the subsequent interrogation dealt with the same general subject matter as the first; namely, Bauldwin's alleged involvement in Prince's death.

In particular, we emphasize that the 4 minutes that passed between Bauldwin's invocation of his right to remain silent and Kozelichki's continued questioning was an extraordinarily short interval. This is in stark contrast to the 2-hour interval that was deemed acceptable in *Mosley*. Courts that have been confronted with a comparable short interval have generally found that it weighed heavily against determining law enforcement officers scrupulously honored a suspect's Fifth Amendment right.

For example, in *Charles v. Smith*,[36] the police attempted to interrogate a suspect about a crime "just a few minutes" after the suspect had previously invoked his right to remain silent. The same officer conducted the second interrogation, regarding

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[35] See, *Lee, supra* note 33; *Pettit, supra* note 33. See, also, *Cody, supra* note 28; *Finch, supra* note 28.

[36] *Charles v. Smith*, 894 F.2d 718, 726 (5th Cir. 1990).

the same crime. The Fifth Circuit concluded that the officer had not scrupulously honored the suspect's right to remain silent.[37] Similarly, in *United States v. Sippola*,[38] the federal district court determined that law enforcement had not scrupulously honored the suspect's right to remain silent when only 5 minutes had passed. This was true even though a different law enforcement officer conducted the second interrogation and provided another set of *Miranda* warnings.[39] And in *Shaffer v. Clusen*,[40] the federal district court determined that the police had failed to scrupulously honor a suspect's rights when only 9 minutes had passed before the suspect was interrogated again regarding the same subject following the provision of another set of *Miranda* warnings.

Cases in which courts have found no *Mosley* violation after a comparable short interval are rare and distinguishable from this case.[41] For example, in *Mills v. Com.*,[42] the court described the interval as "not more than ten or twenty minutes." And while that short of an interval gave the court "some concern," the court determined, when the circumstances were taken as a whole, that the police had scrupulously honored the suspect's right to remain silent.[43] Importantly, however, an officer again gave the *Miranda* warnings to the suspect before starting the subsequent interrogation, and the interrogation was conducted by a different officer.[44] That is not the case here.

[9] We do not ignore that the videotape presents an individual, Bauldwin, who was intelligent and, for a significant

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[37] *Id.*

[38] *United States v. Sippola*, No. 2:10-cr-21, 2010 U.S. Dist. LEXIS 67866 (W.D. Mich. July 7, 2010).

[39] *Id.*

[40] *Shaffer v. Clusen*, 518 F. Supp. 963 (E.D. Wis. 1981).

[41] See, e.g., *State v. Roquette*, 290 N.W.2d 260 (N.D. 1980); *State v. Shaffer*, 96 Wis. 2d 531, 292 N.W.2d 370 (Wis. App. 1980).

[42] *Mills v. Com.*, 996 S.W.2d 473, 483 (Ky. 1999), *overruled on other grounds, Padgett v. Com.*, 312 S.W.3d 336 (Ky. 2010).

[43] *Id.*

[44] *Id.*

portion of the videotape, controlled the flow of the interrogation. And it is true that Bauldwin could have simply continued to remain silent when faced with Kozelichki's questions. But the *Mosley* test focuses on what law enforcement did, and when, and not on the suspect's response or lack thereof.[45] And this makes sense. Similar to *Miranda*, *Mosley* imposes obligations *on the police*, not the suspect, to protect individuals against the inherently coercive nature of custodial interrogation.[46] And in this case, the detective's conduct did not comport with the law.

We also understand that Kozelichki's question—"Do you have anything more you want to talk about?"—may appear innocuous. But our review of the record convinces us that Kozelichki asked that question in the hope that Bauldwin would continue speaking to his detriment. While such questions are not overtly coercive, they undermine the *Miranda* warnings, which inform a suspect both that he has the right to remain silent and, implicitly, that law enforcement will honor his choice to invoke it. The U.S. Supreme Court has cautioned that "'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'"[47] Such a deviation occurred here. Bauldwin clearly invoked his right to remain silent, and the police failed to scrupulously honor that right.

(iii) Harmless Error

[10,11] The trial court's failure to suppress Bauldwin's 2009 statement was constitutional error. But even constitutional error does not automatically require reversal of a conviction if that error was a "'trial error'" and not a "structural defect."[48] The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error

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[45] See *U.S. v. Barone*, 968 F.2d 1378 (1st Cir. 1992).

[46] See *id.*

[47] *Miranda, supra* note 3, 384 U.S. at 459, quoting *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[48] *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Accord *Rogers, supra* note 6.

analysis.[49] Here, after considering the entire record, we conclude that this error was harmless.

[12] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[50]

The inherent difficulties in harmless error analysis are really twofold. First, the appellate court must make its determination from a "cold" record—the court does not have the opportunity to view the evidence and hear the testimony in the same way that the jury did.[51] Second, making a harmless error determination necessarily involves some speculation—an appellate court cannot know for certain whether the jury did or did not rely on certain pieces of evidence.[52] Despite these difficulties, it is the court's duty to review the whole record and determine whether the jury's verdict was surely unattributable to the error.[53]

We conclude that the jury's verdict was surely unattributable to the erroneous admission of Bauldwin's statements. We first emphasize the limited incriminating nature of Bauldwin's statement. The first 3½ to 4 hours of the interrogation consisted simply of Bauldwin's telling his side of the story. It was not until Kozelichki confronted Bauldwin with pieces of the State's evidence that the interrogation became incriminating, and even then, only a few of Bauldwin's statements were incriminating. This was not a full, "smoking gun" confession. But Bauldwin

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[49] See, *Fulminante, supra* note 48; *Milton v. Wainwright*, 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972).

[50] *Rogers, supra* note 6; *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated in part on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

[51] See Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1169 (1995).

[52] See *id.*

[53] See, e.g., *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011).

did change his story about the nature of his and Prince's relationship—he admitted that he and Prince had "fought a thousand times." And when confronted with pieces of the State's evidence, Bauldwin was unable to offer satisfactory explanations. Finally, when Kozelichki told Bauldwin that they had found Bauldwin's jeans at Prince's house soon after she was killed, Bauldwin replied "They couldn'ta been. If that was the case, I'da been in jail."

It is true these statements were incriminating. But other evidence at trial showed that Bauldwin's relationship with Prince was rocky. Testimony showed that Bauldwin and Prince had repeatedly broken up, and their relationship was described as "on again, off again" at several points. And when the other incriminating statements in the interrogation are considered in the context of the overwhelming guilt, it is clear that the jury's verdict was surely unattributable to the court's erroneous admission of Bauldwin's statement.

The State presented strong evidence of Bauldwin's motive and opportunity for the murder. Prince was found strangled in the basement of her home. There was no sign of forced entry, showing that the person who killed Prince had access to her home. Bauldwin lived with Prince. Bauldwin's whereabouts were unknown during a critical 3- to 4-hour period on Saturday night into Sunday morning, which fit the timeframe for Prince's death.

The evidence also showed that Bauldwin was overly possessive of Prince. For example, the record showed that Bauldwin made 19 telephone calls in 1 hour to Prince's cellular telephone that Saturday morning. And when Scott, Prince's friend, escorted Prince home after a house party, Bauldwin was aggressive and territorial. Further, the evidence showed that Prince was seeing other men while in a relationship with Bauldwin.

The physical evidence also supported Bauldwin's guilt. The police photographed Bauldwin that Sunday evening, and those photographs show that Bauldwin had numerous injuries on his body. Bauldwin's explanation for those injuries—that they resulted from fixing the garage door—was inconsistent with his neighbor's testimony, who explained that fixing the

door took less than a minute and that he saw no injuries to Bauldwin while helping him do so. A pathologist testified that the numerous injuries on Prince's body were possibly defensive in nature.

Finally, the DNA evidence provided crushing evidence of guilt. Bauldwin was not excluded as a contributor to apparent bloodstains on the shirt worn by Prince at the time of her death. And even more condemning, a pair of Bauldwin's jeans, found at Prince's house, had apparent blood on them, from which Prince was not excluded as a contributor. The odds of someone other than Bauldwin or Prince contributing to these respective DNA samples were infinitesimal.

We again emphasize that the erroneously admitted statement was not a confession. Portions of the statement are incriminating, but when viewed relative to the properly admitted, overwhelming evidence of Bauldwin's guilt, there is no reasonable probability that the jury's verdict was attributable to the court's erroneous admission of Bauldwin's statement. Its admission was harmless error.

2. Bauldwin's 2006 Statement to Police

On February 26, 2006, the day Prince's body was found, Bauldwin went to the police station, where the police interviewed him. The police audio-recorded his statement that day. Bauldwin asserts that the court erred in admitting this statement into evidence because Bauldwin repeatedly invoked his right to counsel, which the police failed to honor. The State argues that *Miranda* protections did not apply, because at no time was Bauldwin subject to custodial interrogation. We agree with the State. We review the court's admission of the 2006 statement under the same two-part standard that we applied to review the admission of the 2009 statement.

[13-15] *Miranda* protections apply only when a person is both in custody and subject to interrogation.[54] Whether an individual is in custody requires an examination of all the circumstances surrounding the interrogation.[55] In making

[54] See *Rogers, supra* note 6.

[55] *Id.*

that determination, the test is whether a reasonable person in the defendant's situation would have felt free to leave, and if not, then a defendant is considered to be in custody.[56] Circumstances that are relevant to this inquiry include, for example, the location of the interrogation, whether the individual initiated contact with the police, and whether the police told the defendant he was free to terminate the interview and leave at any time.[57] "Interrogation" under *Miranda* refers not only to express questioning, "but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[58] If a person is in custody and subject to interrogation, *Miranda* applies.

Bauldwin was not initially in custody. The district court made findings of fact—which, after our review of the record, we conclude are not clearly erroneous. Bauldwin went to the police station of his own accord; he was not arrested or in any way forced to come down to the station. Upon arriving there, the police placed Bauldwin in an interview room, but they did not shackle, handcuff, or restrict his freedom of movement in any way. The police told Bauldwin that he was not under arrest and that it was a matter of routine procedure for the police to speak with a victim's significant other. The police did not use any strong-arm tactics or deceptive strategies during the interview, and the atmosphere of the questioning was not police dominated. These facts show that, initially, Bauldwin was not in custody during the 2006 statement.

But when the police explicitly told Bauldwin that he could not leave until they had obtained a buccal swab and photographed his body, the police had effectively taken Bauldwin into custody. Regardless of the circumstances that brought Bauldwin to the police station, the key inquiry is whether a reasonable person would have felt free to leave. And, obviously, if the police explicitly refuse to let the person go, a reasonable person would not feel free to leave.

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[56] *Id.*

[57] See *id.*

[58] *Id.* at 54, 760 N.W.2d at 28-29.

Even so, *Miranda* applies only if the individual is subjected to custodial *interrogation*. "Interrogation" refers to words or actions of the police intended to elicit an incriminating response from the suspect.[59] Our review of the audio recording indicates that once Bauldwin was in custody, he was not interrogated. The interaction between Bauldwin and the police, from that point, was limited to allowing Bauldwin to contact an attorney; obtaining a few pieces of basic, biographical information; instructing Bauldwin about the investigation process; and taking photographs and a buccal swab. Following those procedures, the police allowed Bauldwin to leave and did not arrest him. The police never subjected Bauldwin to custodial interrogation during his 2006 statement. So *Miranda* did not apply, and the district court did not err in denying Bauldwin's motion to suppress the 2006 statement.

3. Challenge to DNA Evidence

Before trial, Bauldwin moved to preclude the State from offering its DNA evidence. Bauldwin claims that the State failed to prove that its methodology for analyzing mixed DNA samples was scientifically valid. Our review of the record, however, shows that the scientific community has generally accepted the methodology used in this case, it has been subject to peer review and publication, and the methodology is reliable. We conclude that the district court did not abuse its discretion in admitting the State's DNA evidence at trial.

(a) Standard of Review

[16] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[60]

(b) Analysis

The DNA analysis in this case used a methodology known as PCR-STR analysis. The forensic analysts used this methodology to analyze the mixed DNA samples found on certain pieces of evidence. A mixed DNA sample, as its name implies, contains DNA from two or more contributors. The results of

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[59] See *id.*

[60] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

this analysis linked Bauldwin to Prince's murder. Bauldwin asserts that the DNA results could only mislead the jury, and so the State's expert testimony in that regard should have been excluded.

[17] A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact.[61] This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology may properly be applied to the facts in issue.[62]

[18] In evaluating the admissibility of expert scientific testimony, a trial judge considers a number of factors. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in a particular technique, there exists a high known or potential rate of error; whether standards exist for controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding. Different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.[63]

Here, the expert testimony at trial indicated that with a mixed DNA sample, an analyst attempts to determine the "major" and "minor" contributors to the sample. If the analyst can determine the distinct DNA profiles for each contributor, then the analyst compares each profile to that of the individual in question. If an individual's profile matches the profile of a contributor to the DNA sample, then the analyst calculates the probability that someone other than the individual could have contributed DNA to the sample.

Bauldwin argues that the probabilities which accompany the DNA analysis serve only to mislead the jury. For example,

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[61] See *Schafersman, supra* note 2.

[62] See *id.*

[63] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). See, also, *Daubert, supra* note 1; *Schafersman, supra* note 2.

Bauldwin claims that a jury would treat a probability of 1 in 500,000 the same as 1 in 1 septillion (10^{24}). In essence, Bauldwin claims that a jury is unable to assign the appropriate weight to DNA evidence, because the probabilities which accompany it are oftentimes so small as to be indistinguishable.

[19] This is essentially a claim that a jury is not smart enough to understand and give weight to the statistical analysis that accompanies DNA evidence. Bauldwin offers no authority for this argument, and we reject it out of hand—juries are asked to analyze complex topics and evidence in many cases, and that is what the jury was asked to do here. Furthermore, DNA evidence without the accompanying probability assessment would be inadmissible because it would not aid the trier of fact.[64] We have specifically held that DNA evidence is inadmissible without the probability assessment for that very reason.[65] We are not persuaded to reconsider that position today.

Bauldwin also argues that because the PCR-STR analysis cannot definitively determine the cell source of the DNA (e.g., whether the DNA came from blood, skin, hair, or semen), it is impossible for an analyst to say that the DNA from both contributors to a mixed sample came from blood. While a presumptive test exists to indicate the presence of blood, Bauldwin asserts that such a test "will mislead the jury into believing that both contributors to the mixture contributed blood."[66] As such, Bauldwin claims that the court erroneously admitted the State's expert testimony into evidence.

Here, the court determined that the PCR-STR methodology was scientifically valid and reliable. The court found that the forensic analyst followed the proper protocols and that the analyst properly applied the methodology to the DNA samples. The court emphasized the State's expert testimony, which outlined the protocols used, the scientific community's stance on the PCR-STR analysis, the certification of the laboratory, and

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[64] See, *Daubert, supra* note 1; *Schafersman, supra* note 2; *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[65] See *Carter, supra* note 64.

[66] Brief for appellant at 38.

specific literature on analyzing mixed DNA samples. The court found that the DNA evidence was admissible.

At issue here is the reliability of the PCR-STR methodology as applied to mixed samples. The State's expert witnesses testified that the scientific community has generally accepted the PCR-STR methodology as a means to identify contributors to mixed samples of DNA. The accreditation of each individual laboratory rests, in part, on the analysts' ability to pass proficiency testing regarding mixed DNA samples. The DNA laboratory was accredited. Testimony also showed that scientific literature had been published about the PCR-STR methodology regarding mixed samples. Furthermore, we have repeatedly found that the PCR-STR analysis itself produces sufficiently reliable information to be admitted at trial.[67] The Legislature has also recognized the reliability of the PCR-STR methodology.[68]

The inability of PCR-STR analysis to definitely label the cell source of each DNA contributor in a mixed sample does not affect the underlying validity of the methodology, or its admissibility under the *Daubert*/*Schafersman*[69] framework. In essence, Bauldwin claims that the PCR-STR methodology is not scientifically valid because it is not able to do *more*—it cannot definitively identify the cell source for each contributor to a mixed DNA sample. Bauldwin's assertions, however, go to the weight of the evidence, rather than to its admissibility. We cannot say the district court abused its discretion in admitting this testimony.

4. Exhibit 154's Admissibility

Bauldwin argues that the court erred in admitting into evidence exhibit 154—a photograph of Prince's tongue, throat, and larynx, excised during the autopsy. Specifically, Bauldwin claims that exhibit 154 was not relevant to any controverted

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[67] See, *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004); *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

[68] See Neb. Rev. Stat. § 29-4118(3) (Reissue 2008).

[69] See, *Daubert, supra* note 1; *Schafersman, supra* note 2.

issue and that the danger of unfair prejudice outweighed any probative value it might have had. But the court found that the photograph demonstrated the nature and extent of Prince's injuries and that no other evidence demonstrated the internal injuries that she sustained.

(a) Standard of Review

[20,21] In proceedings where the Nebraska Evidence Rules apply, the rules control admissibility of the evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion.[70] A trial court exercises its discretion in determining whether evidence is relevant and whether its probative value is outweighed by its prejudicial effect.[71]

(b) Analysis

[22] Bauldwin first argues that exhibit 154 was not relevant to prove any element of the State's case. But at trial, Bauldwin objected only because the danger of unfair prejudice outweighed any probative value. And on appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.[72] Furthermore, not only did Bauldwin fail to object to exhibit 154 on relevancy grounds, but he conceded that exhibit 154 was, in fact, relevant. When Bauldwin's attorney objected at trial, he explained, "Certainly 154 would be relevant to the judge — or to [the pathologist's] testimony and demonstrating his opinions, however, I feel that 154 is prejudicial, its prejudicial facts would outweigh its probative value . . . ." We therefore do not consider Bauldwin's relevance objection and instead focus on his claim that exhibit 154's danger of unfair prejudice outweighed its probative value.

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[70] See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[71] See *Jackson, supra* note 67.

[72] See *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[23] Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Bauldwin asserts that exhibit 154 lacked probative value because it only depicted injuries to Prince's neck region and there was no dispute that the cause of death was strangulation. And Bauldwin claims that the gruesome nature of the photograph would be "so emotionally overwhelming as to override the jury's objectivity."[73]

[24,25] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[74] In a homicide prosecution, a court may receive photographs of a victim into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[75]

Although Bauldwin may not have actively disputed the cause of Prince's death, the State must still *prove* all of the elements of the crime beyond a reasonable doubt. The State charged Bauldwin with first degree murder, which required showing that the killing was done "purposely and with deliberate and premeditated malice."[76] How Prince died was certainly relevant as to whether Bauldwin intended to kill her. Thus, because exhibit 154 provided foundation for the pathologist's cause-of-death determination, exhibit 154 had substantial probative value. Furthermore, the State also offered exhibit 154 to demonstrate the nature and extent of Prince's injuries. And, although many photographs showed Prince's external injuries, this was the only photograph offered that depicted Prince's internal injuries. We cannot say that the trial court abused its discretion in admitting exhibit 154 into evidence.

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[73] Brief for appellant at 40.

[74] *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), *cert. denied* 559 U.S. 1010, 130 S. Ct. 1887, 176 L. Ed. 2d 372 (2010).

[75] See, e.g., *id.*

[76] See Neb. Rev. Stat. § 28-303(1) (Reissue 2008).

5. Sufficiency of the Evidence

Bauldwin asserts that there was insufficient evidence to support his conviction. Specifically, Bauldwin claims that the evidence revealed a "shoddy" police investigation,[77] that police never definitely ruled out or investigated numerous other suspects, and that the DNA evidence was unconvincing.

(a) Standard of Review

[26] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[78] And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.[79]

(b) Analysis

A jury convicted Bauldwin of second degree murder. A person commits second degree murder "if he causes the death of a person intentionally, but without premeditation."[80] Bauldwin is asking us to reweigh the evidence. This we will not do. Having already concluded that the record contains overwhelming evidence of Bauldwin's guilt, we will not repeat that evidence here. Our only inquiry is whether sufficient evidence exists to allow a rational trier of fact to find the essential elements of the crime to exist beyond a reasonable doubt. As previously discussed, there is.

A rational jury could find that Bauldwin killed Prince. And because the cause of death was strangulation, a jury could conclude that Bauldwin intentionally killed Prince without premeditation. This assignment of error has no merit.

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[77] Brief for appellant at 40.

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

[79] See *id.*

[80] Neb. Rev. Stat. § 28-304 (Reissue 2008).

6. Challenge to Sentence as Excessive

Bauldwin contends that the district court imposed an excessive sentence, because the court did not seriously consider all of the mitigating factors weighing in favor of a lesser sentence. Of course, the State views it differently. The State asserts that the district court properly considered all appropriate factors in imposing Bauldwin's sentence and, based on the violent nature of the crime, did not abuse its discretion in imposing a life sentence.

(a) Standard of Review

[27] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[81]

(b) Analysis

[28] The sentencing judge sentenced Bauldwin to a term of life to life in prison. Although this is the maximum sentence a court may impose for second degree murder, it falls within the statutory sentencing limits for second degree murder.[82] As such, we review the district court's decision for an abuse of discretion.[83] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[84]

[29,30] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[85] In imposing a sentence, the sentencing

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[81] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[82] See, *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *Davis, supra* note 81; *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[83] See *Davis, supra* note 81.

[84] *Id.*

[85] *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008).

court is not limited to any mathematically applied set of factors.[86] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[87]

Bauldwin claims that the district court did not seriously consider all of the circumstances surrounding his life. Bauldwin's brief details personal aspects of his life, as had been previously set forth in a letter submitted to the court. While Bauldwin asserts that this letter was made a part of the presentence report, we are unable to find it in our review of the record. Regardless, we conclude that the district court did not abuse its discretion in imposing the sentence in this case.

The record indicates that the court reviewed letters from members of both Bauldwin's family and Prince's family, written presentations from both sides' attorneys, and the evidence in the case before coming to its decision. And, based on the assertions made in Bauldwin's brief, all of the mitigating factors that weigh in favor of a lesser sentence were conveyed to the district court.

But the record also reveals that the trial court emphasized the violent nature of Bauldwin's crime:

> To cause a death by strangulation is different than a shot from a gun or a — or a stabbing. Those intentions are — or the act supporting those intentions to kill are nearly instantaneous, but a strangulation, . . . Bauldwin, as you know in this case, has to be prolonged. It has to be a use of extreme force and violence. The duration is a minute, the doctor testified, before someone would even pass out, and longer than that to cause their [sic] death. Those minutes where your hands had to be around her neck or the use of an instrument for the same purpose, she had to be deprived of breath for over that period of time, this person that you state that you loved and cared about, and as you caused to pass out and die and left in the basement in those early morning hours.

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[86] *Id.*

[87] *Id.*

The trial court's obvious focus on the viciousness of this attack is understandable, as is the sentence the court imposed. We cannot say that the trial court abused its discretion.

IV. CONCLUSION

During Bauldwin's 2009 statement, he clearly invoked his right to remain silent, which the police failed to scrupulously honor. The trial court's admission of Bauldwin's 2009 statement was error, but it was harmless. We find no merit to Bauldwin's other assigned errors, and so we affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
BRANDON D. REINHART, APPELLANT.
811 N.W.2d 258

Filed April 20, 2012. No. S-11-464.

1. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** Whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
6. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
7. **Hearsay.** A statement is not hearsay if it is offered against a party and is his own statement, in either his individual or a representative capacity.