CONCLUSION

For the reasons discussed, we find no error in the judgment of the compensation court review panel in affirming the award as modified. The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID W. KOFOED, APPELLANT.

817 N.W.2d 225

Filed May 4, 2012. No. S-10-613.

1. **Rules of Evidence: Proof.** Under Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 2008), before a court can admit evidence of an extrinsic crime or bad act, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic crime or bad act.
2. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
3. **Criminal Law: Judgments: Appeal and Error.** An appellate court will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime.
4. **Evidence.** In determining whether gaps in the chain of custody or alterations in the evidence compromise the integrity of the State's evidence as a whole, a court decides the issue on a case-by-case basis, considering the following factors: the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is a factor only when the rules make discretion a factor in determining admissibility.
6. **Rules of Evidence: Appeal and Error.** It is within a trial court's discretion to determine the relevance of evidence under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decisions regarding relevance will not be reversed absent an abuse of discretion.
7. **Evidence: Appeal and Error.** When an appellate court reviews the sufficiency of the evidence to support a conviction, it reviews the evidence in the light most favorable to the prosecution. It determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. And whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence,

pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.

8. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.
9. **Convictions: Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence. In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
10. **Circumstantial Evidence: Proof.** The State is not required to disprove every hypothesis of nonguilt that is consistent with the circumstantial evidence.
11. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
12. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge is actually biased against a party or if the judge's impartiality could reasonably be questioned.
13. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge because of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. Absent a showing of actual bias or prejudice, a litigant must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness.
14. **Motions for New Trial.** A new trial can be granted on grounds materially affecting the substantial rights of the defendant.
15. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

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

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

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

CONNOLLY, J.

I. SUMMARY

The special prosecutor for Cass County charged the appellant, David W. Kofoed, with tampering with evidence, a

Class IV felony. Kofoed was the supervisor of the Crime Scene Investigation Division for the Douglas County sheriff's office (CSI Division). The State charged that Kofoed falsified DNA evidence during the investigation of Matthew Livers and Nicholas Sampson as suspects in the April 2006 murders of Wayne and Sharmon Stock. The State later dismissed the charges against Livers and Sampson and convicted different suspects for the Stocks' murders.

After a rule 404[1] hearing, the court admitted evidence of an uncharged extrinsic crime. The uncharged extrinsic crime was Kofoed's alleged tampering of DNA evidence during the 2003 investigation of a child's murder. The court found that the State had proved the 2003 act by clear and convincing evidence and had established independent relevance for offering the evidence at Kofoed's trial. It received the uncharged extrinsic crime evidence as relevant to rebutting Kofoed's claim that an accident or mistake accounted for his purported finding of a victim's DNA in a suspect's vehicle during the Stock murder investigation. The court also received the evidence as relevant to whether Kofoed acted with knowledge and intent.

Following a bench trial, the court found Kofoed guilty of evidence tampering during the Stock murder investigation. In summarizing its findings, the court emphasized that the 2003 and 2006 investigations had significant similarities. The court found that in each case, Kofoed had access to the victim's DNA specimens that investigators had previously collected from the crime scene and—under unlikely circumstances and despite other investigators' failure to find such evidence—had found the victim's DNA evidence in a place that corroborated the suspect's statements implicating himself in the crime. The court overruled Kofoed's motion for a new trial. It sentenced Kofoed to a term of incarceration of 20 months to 4 years.

II. ASSIGNMENTS OF ERROR

Regarding the rule 404 hearing, Kofoed assigns that the court erred as follows:

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

(1) in sustaining the State's motion to admit evidence of his alleged act of evidence tampering in 2003;

(2) in concluding that the State had shown a sufficient chain of custody for the evidence presented to prove Kofoed's tampering of evidence during the 2003 investigation; and

(3) in excluding Kofoed's testimony and his expert's testimony about DNA evidence that was found in different cases under harsh conditions.

Regarding the trial, Kofoed assigns that the court erred in (1) overruling his motion for a directed verdict and (2) finding him guilty.

Regarding his motion for a new trial, Kofoed assigns that the trial judge erred as follows:

(1) in failing to recuse himself from the proceeding; and

(2) in overruling his motion despite his claims that (a) newly discovered evidence existed and (b) an investigator had failed to turn over important notes to the special prosecutor so that the information would be provided to Kofoed's defense counsel.

III. ANALYSIS

1. Sufficiency of the Evidence to Prove Kofoed Falsified Evidence During the Gonzalez Murder Investigation

(a) Standard of Review

We have often stated that it is within the trial court's discretion to determine the relevancy and admissibility of evidence of extrinsic crimes or bad acts under rules 403[2] and 404(2). And we will not reverse the trial court's decision in the absence of an abuse of discretion.[3] But the issue in appeals challenging the admission of extrinsic crimes or bad acts is usually whether the trial court correctly determined that the evidence was admissible for a proper purpose or that it was independently relevant for that purpose. But here, the challenge is whether the State proved that Kofoed committed the uncharged extrinsic crime of falsifying evidence.

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[2] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[3] See *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[1,2] Under rule 404(3), before a court can admit evidence of an extrinsic crime or bad act, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic crime or bad act. Clear and convincing evidence is that amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[4]

Our standard of review for insufficient evidence claims under rule 404(3) is unsettled.[5] When reviewing the sufficiency of the evidence to support a 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.[6] And whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[7]

[3] We conclude that the standard for reviewing a sufficiency of the evidence claim regarding a conviction applies equally to whether, under rule 404, the State proved a defendant committed an uncharged extrinsic crime or bad act.[8] But in applying that standard, we consider the State's different burden of proof under rule 404.[9] Thus, we will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime.

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

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

[6] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[7] *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[8] Compare *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995).

[9] See § 27-404(3).

Having determined our standard of review, we set out the facts supporting the court's rule 404 ruling on the uncharged extrinsic crime.

(b) Facts Relevant to Uncharged Extrinsic Crime of Falsifying Evidence During the Gonzalez Murder Investigation

In February 2010, the special prosecutor gave notice that he intended to offer evidence of an uncharged extrinsic crime to prove Kofoed's bias, intent, and lack of mistake or accident. Summarized, the notice stated that the evidence would show that in June 2003, Kofoed falsified DNA evidence to corroborate Ivan Henk's confession. In June 2003, Henk confessed that in January 2003, he killed his 4-year-old son, Brendan Gonzalez, and put his body in an apartment building's trash container (dumpster). At a pretrial hearing, the court heard extensive rule 404 evidence regarding these allegations.

The investigation of Brendan's death began on January 6, 2003, when Brendan's mother reported that he was missing. Officers found blood on the garage floor and on a bicycle and recliner in the garage. Kofoed and another CSI Division employee, Clelland Retelsdorf, collected blood specimens from the garage. The CSI Division stored the specimens in its biohazard room until it released the evidence to the Plattsmouth Police Department in June. DNA testing later showed that the blood in several of these samples was virtually certain to have been Brendan's blood.

Despite an extensive search, law enforcement officers did not find Brendan's body. But on June 2, 2003, Henk confessed to investigators that he had killed Brendan. He told them that he had put a comforter over a chair before decapitating Brendan with a knife. He stated that he then wrapped Brendan's body in the comforter and took it to an apartment building's dumpster. After Henk led the investigators to the dumpster, they seized it and took it to a storage building belonging to the Plattsmouth Police Department.

On the same day, June 2, 2003, Kofoed and Retelsdorf processed the dumpster for potential DNA evidence. The evidence showed that a hauling service had emptied it twice a week,

including the previous 6 months. Each time workers emptied it, the contents would roll over the front angled portion of the dumpster. It had flip lids that were often left open, and there was no shelter over it. So the contents were frequently exposed to rain and snow. When the police seized it, the dumpster had fluid in the bottom.

Kofoed and Retelsdorf removed the garbage and water and then sprayed a chemical in the dumpster that produces a color reaction to the presence of blood. They saw several reactions in the bottom of it, particularly where the front side and bottom met at an angle. Kofoed collected wet debris from this area. Retelsdorf described some of the debris that Kofoed collected as caked debris—a thick, dark substance that had built up on the bottom. In the same area, Retelsdorf swabbed the dumpster itself with cotton-tipped sticks.

Kofoed took the collected debris back to the CSI Division's crime laboratory for examination. From the total collection of debris, he separated out two items: a piece of glass and a piece of cardboard about the size of a credit card with dirt and hair on it. He put the rest of the debris in a brown paper bag.

On June 5, 2003, Kofoed filled out and signed a property report, listing six items that he and Retelsdorf had collected from the dumpster. Kofoed labeled the items "S507-33" to "S507-38," or items 33 to 38 for ease of discussion. The report contained the following items:

- Item 33: brown paper bag with the collection of debris from the dumpster;
- Item 34: packaged cotton-tipped sticks that Retelsdorf used to swab the bottom of the dumpster;
- Item 35: packaged piece of glass;
- Item 36: packaged piece of cardboard;
- Item 37: packaged round filter paper, stained pink; and
- Item 38: two packaged round filter papers.

Like the cotton-tipped sticks, investigators use the round filter papers listed in this report to swab evidence for forensic samples. Significantly, Kofoed stated in the property report that he used the filter papers in items 37 and 38 to swab item 33, which was the debris in a paper bag. In addition, he stated that he had tested the filter paper in item 37 with

phenolphthalein, which is a chemical that tests for the presumptive presence of blood. The filter paper showed a pink reaction. The record shows that when phenolphthalein reacts to iron in hemoglobin or other substances, it will produce a pink or purple color.

Retelsdorf testified that he was not present when Kofoed used the filter papers to swab the debris in item 33. But he recalled Kofoed telling him during a telephone conversation that he had swabbed the debris in item 33 with a filter paper. Retelsdorf further stated that sometime before June 5, 2003, Kofoed told him that he had obtained a positive reaction to phenolphthalein for the presence of blood on a filter paper that he had used to swab the debris in item 33.

Also on June 5, 2003, Retelsdorf took items 34 to 38 to a laboratory at the University of Nebraska Medical Center (UNMC) for testing. But he did not take item 33. Kofoed testified that he put item 33 back into the biohazard room and did not send it for testing because of the testing costs. Instead, he sent only the glass and cardboard, as the debris most likely to have DNA evidence. Retelsdorf believed that item 33 would have been stored in the biohazard room from June 2 (when the debris was collected) to June 26, when the CSI Division transferred custody of item 33 to the Plattsmouth Police Department.

Kelly Duffy, an analyst at UNMC's laboratory, tested the items that Retelsdorf brought in on June 5, 2003. She stated that if she had been given item 33 (the bag of debris), she would have separated the debris, swabbed it, and tested the filter papers for the presence of blood. Duffy stated that items 35 and 36 did not test positive for blood, so she did not further test them for DNA material.

Duffy also attempted to extract and amplify DNA material from the cotton-tipped sticks that Retelsdorf used to swab the bottom of the dumpster, but she obtained only a partial DNA profile. She reported finding alleles—variations of the DNA sequencing found at specific genetic markers[10]—for only 2

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[10] See David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Identification Evidence*, in Reference Manual on Scientific Evidence 129, 139-47, 199 (Federal Judicial Center 3d ed. 2011).

out of the 16 sites on the DNA molecule that the laboratory analyzes for individual variations. The two alleles that Duffy detected matched Brendan's alleles for those genetic markers, but Duffy stated that the alleles were not uncommon.

In contrast, from the filter papers that Kofoed had documented in the property report as swabs of item 33, Duffy obtained a full DNA profile that matched Brendan's profile at all 16 genetic markers. The probability of an unrelated Caucasian or American Hispanic matching Brendan's profile was infinitesimally small.

In April 2009, the Plattsmouth Police Department transferred custody of the evidence that Kofoed and Retelsdorf had collected during the Gonzalez murder investigation to an agent with the Federal Bureau of Investigation (FBI). The FBI first sent the evidence to its own DNA laboratory. Using phenolphthalein to test for reactions indicating blood, the FBI analyst did not detect blood in any of the debris contained in item 33. In November, the FBI sent the evidence to the Serological Research Institute (SERI), a private laboratory in California for forensic evaluation and DNA analysis.

Two forensic serologists from SERI, Kristi Spittle and Brian Wraxall, testified for the State. Wraxall stated that by using a chemical with slightly higher sensitivity to blood, he and Spittle obtained presumptive positive test results for blood when they tested some of the debris in item 33. But they were unable to find any DNA material in this debris. Nonetheless, because the UNMC laboratory had obtained a DNA profile from Kofoed's filter paper swabs, the SERI analysts attempted to amplify any DNA material that might be in the debris. They used a process called MiniFiler for degraded DNA samples. The MiniFiler process also failed to produce identifiable DNA.

The SERI analysts also failed to detect the presence of human blood on the piece of glass (item 35) or the piece of cardboard (item 36). These items initially tested positive for the presumptive presence of blood. But after the analysts extracted the material, it tested negative for the presence of human blood. So the analysts did not further test them.

In sum, the SERI analysts found only trace amounts of DNA material, from which Wraxall could not obtain even a partial profile or draw conclusions. Wraxall believed that after 6 months in a dumpster exposed to moisture, dirt, and temperatures over 70 degrees, any DNA from Brendan would have been degraded. Wraxall also testified that DNA can degrade if it is exposed to heat or moisture and sometimes when exposed to bacteria or enzymes. But it will remain stable for many years if it is kept dry at a cool temperature. So he opined that if item 33 had been stored in cool, dry conditions after Kofoed purportedly obtained DNA from swabbing it, he could have replicated UNMC's testing results, i.e., obtain a full DNA profile matching Brendan's profile, or at least he could have found some of the same alleles.

In addition to Spittle and Wraxall, the State also submitted a deposition of the chief of the FBI's nuclear DNA unit in Quantico, Virginia. All of these experts testified that it was highly unlikely that investigators would have found nondegraded DNA in the dumpster after 6 months of exposure to the elements and trash.

(c) Kofoed's Contentions

Kofoed makes a twofold claim that the State failed to prove by clear and convincing evidence that he falsified evidence during the 2003 investigation of the Gonzalez murder. First, he argues that the State's forensic evidence failed to show that he falsified evidence. Second, Kofoed contends that the integrity of the State's forensic evidence was compromised because items that were present when Duffy tested the forensic samples in 2003 were missing when they were tested in 2009. As part of this claim, he asserts that gaps in the chain of custody show that an opportunity existed for someone to have tampered with the evidence to convict him of evidence tampering.

(d) Forensic Evidence Was Sufficient to Prove the Uncharged Extrinsic Crime

In determining whether Kofoed had falsified evidence during the 2003 investigation, the court had to resolve two issues: (1) Whether Kofoed took Brendan's blood from the

blood specimens that Kofoed had previously collected from Brendan's house and placed Brendan's blood on the filter paper swab that Kofoed submitted for DNA testing; and (2) whether he falsely claimed to have obtained the blood on that filter paper from swabbing debris taken from the dumpster. Resolving these issues depended upon one factual question: Was it possible for Kofoed to have found Brendan's nondegraded DNA from blood in an open dumpster 6 months after Henk allegedly placed Brendan's body there?

Kofoed argues that the FBI and SERI, the private laboratory employed by the State, tested his collected samples only for the presence of blood, rather than searching for any type of DNA. He argues that the analysts mistakenly concluded that because there was no blood in the samples, there could be no DNA. Alternatively, he argues that the DNA in the samples could have degraded over time.

But Kofoed is mistaken in claiming that the analysts failed to look for any type of DNA material. The record shows that the SERI analysts searched for any DNA material in the debris that tested presumptively positive for blood. It was not necessary for them to analyze the entire contents of item 33 for trace amounts of DNA. Kofoed claimed to have found DNA in debris on or near the bottom of the dumpster that tested presumptively positive for the presence of blood. The evidence showed that the chemical Kofoed used for testing the debris reacts to red blood cells. Although the chemical can also react to other materials, the analysts' focus on determining whether Kofoed could have found DNA on material testing presumptively positive for blood was obviously relevant to whether Kofoed had lied about his collection of evidence.

Additionally, the evidence showed that item 33 was stored in a cool, dry place from the time that Kofoed collected the evidence in 2003 until the SERI analysts tested it in 2009. According to the DNA experts, under those conditions, any DNA in item 33 would have remained stable for a long period. So they should have been able to replicate Kofoed's purported finding of DNA on material that tested presumptively positive for blood. And the record shows that their examination of the evidence was thorough. But they found nothing.

Furthermore, the evidence refuted Kofoed's alternative explanation for the discrepancy between the testing results of his filter paper swabs and the analysts' testing results of the actual debris. Kofoed sent only his filter paper swabs (items 37 and 38) of the debris from the dumpster to the UNMC laboratory for testing. He did not send the debris in item 33 to the laboratory. But at the rule 404 hearing, Kofoed testified that he had actually swabbed the pieces of glass and cardboard (items 35 and 36) with the filter papers that he sent to UNMC for testing (items 37 and 38). And he stated that before sending the evidence to UNMC, he had obtained a presumptive positive test for blood by testing the filter paper in item 37 with phenolphthalein.

But this change in his story did not help Kofoed. Contrary to Kofoed's testimony, Duffy stated that she swabbed items 35 and 36 but that the filter paper did not test presumptively positive for blood. So she did not further test these items for DNA material. The SERI analysts also failed to find human blood on these items.

Furthermore, by the time of trial, testing of item 33 had revealed that the debris from the dumpster did not contain identifiable DNA material. This evidence conflicted with what Kofoed had stated in the property report—that he had obtained a presumptive positive test for blood after swabbing item 33. So the trial court could have concluded that Kofoed contradicted his statement in the property report in an attempt to explain why in June 2003, he did not submit item 33 to the UNMC laboratory for DNA testing. Obviously, if Kofoed had actually obtained a positive test for blood after swabbing the debris from the dumpster, he would have wanted to have item 33 further tested for DNA material.

Kofoed testified that to save money, he did not have the debris in item 33 tested. But this contention was simply not believable. The evidence showed that analysts routinely look for chemical reactions indicating the presence of blood before performing a full DNA analysis of a forensic sample. And Kofoed knew their procedures. Moreover, given the critical role that the DNA evidence played in corroborating Henk's confession, Kofoed's purported concerns about testing costs

were not credible. And the special prosecutor bit into Kofoed's credibility. On cross-examination, he showed that Kofoed had lied to bolster his credibility in other cases. Kofoed admitted that he had falsely stated under oath three times that he had a bachelor's degree in mathematics instead of a general studies degree in political science. The court clearly rejected Kofoed's explanations for not sending item 33 to the UNMC laboratory, and we find no error in that conclusion.

Moreover, three of the State's DNA experts testified that given the conditions of the dumpster, they would not expect nondegraded DNA to be present after 6 months. Even Kofoed's expert conceded on cross-examination that if every time the dumpster was emptied, most of the contents rolled directly over the tested area, an examiner was unlikely to find a full DNA profile from that area. Viewing the evidence in the light most favorable to the State, we conclude it supports a firm conviction that Kofoed could not have obtained from the dumpster a nondegraded DNA sample, fully matching Brendan's genetic profile.

(e) Evidence Was Not Compromised

During closing arguments, Kofoed moved to strike all the testimony regarding items 33 to 38 because the State had failed to established a chain of custody for this evidence. The court overruled that motion. But Kofoed's motion did not focus on the admissibility of any physical evidence. Instead, his claim at trial and on appeal is another sufficiency of the evidence claim. Kofoed argues that the State did not meet its burden in the rule 404 hearing to prove that he tampered with evidence because the evidence that the State relied on was compromised.

[4] In determining whether the State has established a sufficient chain of custody, a court decides the issue on a case-by-case basis, considering the following factors: the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.[11] Although Kofoed did not challenge the admissibility of physical evidence, we believe that this same standard

[11] See *Glazebrook, supra* note 3.

applies when the issue is whether gaps in the chain of custody or alterations in the evidence compromise the integrity of the State's evidence as a whole.

The most crucial piece of forensic evidence was item 33—the bag of debris from the dumpster. The State established a complete chain of custody for that evidence. It was not tested at the UNMC laboratory but transferred from the CSI Division to the Plattsmouth Police Department's evidence custodian in June 2003 and sent to the FBI in 2009. Plattsmouth's evidence custodian from 2002 to 2007 specifically remembered item 33 and testified that no one had opened the bag or tampered with it.

Kofoed points to conflicting evidence on whether item 33 was completely sealed for 4 days when it was in the FBI agent's possession. But even if the bag was not completely sealed in the agent's possession, Kofoed did not contend that the debris in item 33 was not the evidence that he collected or that the debris was in a substantially different form than when he collected it. He did not present evidence explaining how someone could have removed DNA from the debris he collected. Nor did he show evidence suggesting that someone had tampered with the debris. And we will not presume that official misconduct could have occurred without any evidence or argument showing that misconduct accounted for the testing results.

The lack of custodial documentation for the tested items from the dumpster similarly fails to show that the evidence was compromised. Although the evidence failed to show when the CSI Division transferred custody of the tested items to the Plattsmouth Police Department's evidence custodian, the evidence was in the custodian's possession. The custodian testified that the evidence room was kept locked and that anyone wishing to check out evidence would have signed a property report. Both the evidence custodian and her successor testified that the evidence would not have come in contact with moisture or liquids.

Kofoed also contends that when SERI received his collected samples, the evidence was missing hair from item 36 and tubes containing the tested pieces of his filter paper swabs.

We assume without deciding for this analysis that the FBI did not possess the "microtainers" because it would have sent the tested portions of the filter papers to SERI for additional testing if it had possessed this evidence. But we do not agree that the missing microtainers or the missing hair from item 36 compromised the integrity of the State's other evidence.

It is true that the hair from item 36 was missing when SERI received the evidence. But whether the tested items contained DNA from human hair was not the focus of the investigation. Instead, the analysts were trying to determine whether Kofoed had falsely claimed to have found DNA in debris testing presumptively positive for blood. Because item 36 was taken from the debris in the paper bag (item 33), whether item 36 contained DNA from blood would have been relevant to whether Kofoed could have obtained DNA from material testing positive for blood in item 33. Because the investigation was focused on DNA from blood, the loss of the hair did not compromise the reliability of the testing showing that neither item 36 nor item 33 contained identifiable DNA from blood.

Moreover, in preserving the hair and the microtainers, Kofoed was the primary custodian for the tested items after UNMC's laboratory had performed its testing. Who more than Kofoed would have the incentive to undermine or sabotage the chain of custody after the DNA testing to give himself cover if questions or accusations arose later? Simply stated, Kofoed, as the primary custodian, was the fox guarding the chicken coop. We conclude that the trial court did not err in concluding that the State's evidence was sufficient to prove that in 2003, Kofoed falsified evidence during the Gonzalez murder investigation despite the alleged missing microtainers and the alteration in item 36.

2. Court Correctly Excluded Kofoed's Expert Testimony in the Rule 404 Hearing

Kofoed contends that the court erred in excluding part of his testimony and his DNA expert's testimony regarding DNA testing in unrelated cases. Kofoed's offers of proof showed that he and his expert would have testified about cases in which analysts found identifiable DNA in evidence despite the

unfavorable environments in which investigators had found the evidence.

Kofoed's expert was another analyst who worked at UNMC's laboratory. She would have testified about finding DNA evidence on a murder victim's clothing after the passage of 3 months, despite exposure to moisture and dirt. The special prosecutor objected to the evidence as relying on hearsay, irrelevant, and lacking foundation; the court sustained the objections. The court stated that the facts of the other case would not help it decide the merits of the allegations against Kofoed.

Similarly, Kofoed would have testified that he knew from DNA studies that analysts could identify the remains of some individuals who died when the World Trade Center's twin towers collapsed in New York City, despite long-term fires and a massive amount of debris. The court sustained the special prosecutor's foundation and relevance objections to this evidence.

Kofoed argues that these testimonies would have shown that under similar, or more severe, environmental conditions, analysts have found DNA evidence. He contends that his evidence would have refuted expert testimony that he could not have found Brendan's nondegraded DNA in the dumpster.

[5,6] In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is a factor only when the rules make discretion a factor in determining admissibility.[12] It is within a trial court's discretion to determine the relevance of evidence under rule 403, and a trial court's decisions regarding relevance will not be reversed absent an abuse of discretion.[13]

We agree with the trial court that the circumstances presented in Kofoed's offers of proof were not sufficiently similar to be probative of whether Kofoed could have found Brendan's nondegraded DNA on or near the bottom of a trash dumpster. Again, the State's analysts attempted to determine whether Kofoed could have found nondegraded DNA from blood cells allegedly deposited on debris in a trash

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[12] See *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012).

[13] See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

dumpster—not DNA deposited on a victim's clothing or DNA from a human body.

The water, dirt, and trash in a dumpster presented a different fact pattern. Even if water in the dumpster did not wash out any alleged blood in it when the dumpster was tipped, Wraxall testified that the combination of dirt and water in the dumpster would have caused any DNA to degrade. He further stated that blood cells rupture and break up in the presence of water. Finally, even Kofoed's expert conceded that if every time the dumpster was emptied, most of contents rolled directly over the tested area, an examiner was unlikely to find a full DNA profile from that area. Kofoed's offers of proof did not show that DNA could survive in a nondegraded form under similar circumstances. His assignment of error is without merit.

3. Sufficiency of the Evidence to Prove That Kofoed Falsified Evidence During the Investigation of the Stocks' Murders

Kofoed argues that the court erred in overruling his motion for a directed verdict and finding him guilty of tampering with evidence. The charge stemmed from Kofoed's claim that he found Wayne Stock's blood in the vehicle that investigators suspected Matthew Livers and Nicholas Sampson had driven to the Stocks' residence on the night that they were murdered. The State had to prove that on or about April 27 or sometime on or before May 8, 2006, Kofoed falsified the DNA evidence during the investigation of Livers and Sampson for their suspected role in the Stocks' murders.

(a) Standard of Review

[7] When an appellate court reviews the sufficiency of the evidence to support a conviction, it reviews the evidence in the light most favorable to the prosecution. It determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.[14] And whether the evidence is direct, circumstantial, or a

[14] See *McCave, supra* note 6.

combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[15]

(b) Additional Facts

In 2006, on April 16 or in the early morning of April 17, the Stocks were murdered in their home. Their bodies were discovered on April 17. They had both been shot in the head. With Kofoed in charge, investigators from the CSI Division processed evidence in the house for 3 days. Investigators collected blood specimens and stored them in the CSI Division's evidence room or biohazard room.

Investigators initially focused on Livers and Sampson as suspects. Sharmon Stock's family members told investigators that they suspected Livers was involved. Livers is Wayne Stock's nephew, and Sampson is Livers' cousin. Witnesses had reported seeing a car near the Stocks' residence in the early morning of April 17, 2006. Their description of the car matched the general description of a car owned by William Sampson (William). William is Sampson's brother.

Investigators believed that because the crime scene was covered in blood, the perpetrators would have transferred blood to their vehicle after committing the crime. On April 19, 2006, State Patrol officers seized William's car, a Ford Contour. That same day, the State Patrol towed it to the CSI Division's garage. Investigators wanted to see if the car had either of the Stocks' blood in it.

On April 19 and 20, 2006, Christine Gabig, a forensic scientist with the CSI Division, thoroughly processed William's car for DNA evidence. Many parts of the car reacted to a chemical test to locate blood. But Kofoed told another investigator that because William worked in heavy construction, the chemical was probably reacting to iron in dirt instead of iron in blood. UNMC's laboratory later found no blood in the samples and swabs that Gabig collected from William's car. William testified that he had never loaned his car to Livers or Sampson. Gabig also found no blood in Sampson's vehicle.

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[15] See *Howard, supra* note 7.

Investigators had also sent in items from the Stocks' residence for DNA testing, including a gold ring with an inscription, which they had found on the kitchen floor. The gold ring was the pebble that started a landslide. This lead ultimately led investigators to Gregory Fester and Jessica Reid, who later pleaded guilty to murdering the Stocks.[16] Through inscription records, investigators eventually traced the ring to the man whose pickup Fester and Reid had stolen; they learned that the man had put his ring in the pickup's glove box.

UNMC's laboratory also tested a marijuana pipe found in the Stocks' driveway. On April 25, 2006, the CSI investigators learned that the pipe contained DNA from two people. The laboratory's June 29 written report tied the DNA on the ring and the pipe to Fester and Reid and excluded Livers, Sampson, and William as contributors. Nothing in the record shows that in late April or early May 2006—when Kofoed was accused of falsifying the blood evidence that he claimed to have found in William's car—investigators knew about Fester and Reid. Nor did they know of items found at the Stocks' residence that contained DNA evidence that pointed to other perpetrators and excluded Livers and Sampson as contributors.

On April 25, 2006, Livers volunteered to be interviewed by law enforcement officers and to take a polygraph test. During the interrogation, he confessed that he and Sampson had killed the Stocks and that one of them had thrown in the back seat of the car the shotgun they had used. The testimony of several witnesses suggests that Livers also stated he and Sampson had used William's car. Livers recanted his statements the next day.

Investigators were frustrated. They had a confession that involved William's car but the CSI Division investigators had not found any blood evidence that linked Livers and Sampson to the crime. The investigators were pressuring the CSI Division to retest items for blood evidence.

On April 27, 2006, William Lambert, a criminal investigator with the Nebraska State Patrol, asked Kofoed to recheck

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[16] See, *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

the back seat of William's car for gunshot residue to verify Livers' statements. Kofoed completed a request form to have Retelsdorf take photographs of the back seat. Retelsdorf drove the CSI Division's van to the impound lot, where he met Kofoed. A 10-foot barbed wire fence and locked gate enclosed the impound lot.

Kofoed's reexamination of William's car is the pivotal event for the charged crime. Much of the evidence focused on Kofoed's inconsistent statements about his activities; these statements were in his reports and made at different times during the investigation. Kofoed's statements also conflicted with Retelsdorf's statements about the events of April 27, 2006.

Kofoed told investigators that he decided to swab areas of the car that Gabig might have missed and that he had previously reviewed Gabig's work to learn what areas she had already swabbed. He claimed to have set up a clean processing area on the floor of the CSI Division's van by the side door. He reported that he used a high intensity light to examine the driver's compartment before swabbing it. He stated that after obtaining about five negative swabs, he swabbed under the dashboard with a filter paper. This swab produced a presumptively positive test for blood. He laid the positive filter paper on an envelope and asked Retelsdorf to test the same area.

In contrast, Retelsdorf said that he parked the van 20 to 30 feet away from William's car. Nor did he bring any equipment to process the car for blood evidence because he knew that Gabig had already done this and he believed that he and Kofoed were going to recheck the back seat for signs of a gun. While Retelsdorf was examining the back seat, he could see Kofoed by the driver's-side open door. Retelsdorf did not see Kofoed using a light as Kofoed later claimed. Nor did he see any items that would indicate that Kofoed was processing the car for DNA evidence.

After Retelsdorf put his camera back in the van, he asked Kofoed to look at an area of the back seat, which Kofoed did. Almost immediately after returning to the driver's-side open door, Kofoed told Retelsdorf that he had just obtained a presumptively positive test for blood. Retelsdorf did not see

Kofoed swab the car. But Kofoed showed Retelsdorf a filter paper with a pink positive reaction and pointed to where he had swabbed the car under the dashboard. Contrary to Kofoed's statements, Retelsdorf still saw no items for processing evidence, and he did not see a stain on the car's interior. But he swabbed the area that Kofoed had indicated and obtained a negative result. Kofoed opined that he had probably consumed the entire sample.

After examining the car, Kofoed told Retelsdorf that they would each write their own reports. Retelsdorf completed the report of his photograph activities on the same day, April 27, 2006. Retelsdorf also reported in the CSI Division's event log that he took photographs of the car on April 27. Unlike Retelsdorf, Kofoed dated his report May 8, 2006. And he made statements about his processing of William's car that directly conflicted with Retelsdorf's report and other evidence as follows:

> *On 08 May 2006 at 1800 hours*, CSI Division Commander KOFOED processed the driver's side dash board of a Ford Contour . . . utilizing filter paper and distilled water. The vehicle was secured in the [Douglas County Sheriff's office] impound lot . . . .
>
> . . . .
>
> KOFOED initially examined the driver's side compartment utilizing high intensity oblique lighting. Upon completion of the initial examination KOFOED swabbed the bottom edge of the driver's compartment dashboard below the steering wheel utilizing filter paper and distilled water. A presumptive test for blood was conducted on a section of the filter paper by employing phenolphthalein. The presumptive test indicated positive.
>
> . . . .
>
> [The filter paper] will be secured in the CSI Division . . . until forwarded to [UNMC's laboratory].

(Emphasis supplied.)

Kofoed's date of his activities was obviously false. And in contrast to his statement in his report that the filter paper would be secured, the evidence logs showed that Kofoed never put the filter paper that he collected in the CSI Division's evidence

rooms. Also, in contrast to Retelsdorf's report, Kofoed did not state in his report that Retelsdorf had been with him. He reported going to the car alone for evidence collection.

Kofoed's property report showed that he sent the positive filter paper swab to UNMC's laboratory on May 9, 2006. The laboratory's June 29 report included its analysis of the filter paper. It generated a DNA profile that completely matched Wayne Stock's DNA profile at all the loci obtained. Kofoed later admitted that besides his one filter paper swab—from under the dashboard of William's car—none of the approximately 450 pieces of evidence that the investigators had processed contained DNA evidence that tied Livers or Sampson to the crime.

In January 2007, under plea agreements, Fester and Reid both pleaded guilty to two counts of second degree murder. In May 2008, the FBI began investigating Kofoed. In September 2008, an FBI agent went to the Cass County Property and Evidence Division and viewed a paper bag containing a shirt stained with Wayne Stock's blood. The CSI Division had transferred this evidence to Cass County in June 2006. The sealed bag had been opened and resealed with tape. It had Kofoed's initials and identification code written on the tape used to reseal the bag but no date. The CSI investigator who originally marked and sealed the bag testified that Kofoed's initials were not on the bag when he placed it in the CSI Division's biohazard room.

(c) Analysis

Kofoed argues that the State's circumstantial evidence did not convincingly support an inference that he falsified DNA evidence. He contends that because the circumstantial evidence was weak, the more logical explanation for his finding of Wayne Stock's blood in William's car was accidental contamination from the crime scene.

[8,9] Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.[17] But circumstantial

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[17] *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

evidence is not inherently less probative than direct evidence.[18] In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.[19]

Kofoed contends that it did not make sense for him to have planted DNA evidence on April 27, 2006, when there were hundreds of pieces of evidence yet to be tested. We disagree. The evidence shows that law enforcement officers were focused on Livers and Sampson as suspects and were pressuring the CSI Division to find corroborating evidence to verify Livers' recanted confession. As the court found, there was no evidence that the CSI investigators knew before May 8 that the DNA on items from the Stocks' residence pointed to other perpetrators and excluded Livers and Sampson as contributors. So Kofoed did not know that the DNA evidence he falsified would be inconsistent with the DNA testing results that were issued on June 29. And even if he had learned that unknown persons were involved in the crime, that evidence would not necessarily have precluded Livers' or Sampson's guilt.

Moreover, Kofoed's deceit was amply demonstrated by the false statements that he made in his reports and the inconsistent statements that he made to investigators. First, Kofoed originally told FBI agents that before he obtained the positive filter paper swab from under the dashboard of William's car, he first took about four filter paper swabs that tested negative for blood. But he later told a grand jury that he obtained the negative tests results from using cotton-tipped sticks instead of filter paper swabs. As the special prosecutor argued, Kofoed had to change his original story that he had used only filter papers to swab William's car because it was inconsistent with his claim that the filter papers in the presumptive blood testing kit must have been contaminated with Wayne Stock's DNA from the crime scene. Under his original story, Kofoed could not explain why only the fifth filter paper in the testing kit

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[18] *State v. Babbit*, 277 Neb. 327, 762 N.W.2d 58 (2009).

[19] *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

was contaminated but the first four were not. But the more significant inconsistencies were those between the statements in Kofoed's reports and Retelsdorf's report.

As noted, contrary to the statement in Kofoed's report, he never logged his positive swab into the evidence room. And contrary to Retelsdorf's report, Kofoed falsely stated that he had obtained the presumptively positive swab on May 8, 2006, not April 27. Kofoed argued only that he must have made a mistake on his report.

But the log omission and the false May 8, 2006, date for his evidence collection were not mistakes. He put the same false date on the property report, the evidence envelope with the filter paper, and the event log. Instead, the false date he used, the omission of Retelsdorf's presence from his report, and the log omission showed that Kofoed did not want his collection of the blood specimen linked to his examination of William's car with Retelsdorf. He had to avoid this connection because Retelsdorf knew that Kofoed had not tested swabs for blood on April 27.

The false statements strongly supported an inference that Kofoed lied to conceal that he was sitting on evidence that might be needed to tie Livers and Sampson to the crime. Kofoed did not know when or if he would need that evidence. And it was only after UNMC's laboratory reported on May 4, 2006, that several items from the Stocks' residence had tested negative for blood that Kofoed claimed to have found a blood specimen in William's car.

The inferences that the trial court could reasonably draw from Kofoed's false statements were also consistent with other circumstantial evidence of his guilt. Kofoed not only had access to Wayne Stock's blood specimens, but the evidence supported a finding that he had actually accessed a sealed bag containing a shirt stained with Wayne Stock's blood and resealed it with his initials. Additionally, Kofoed's review of Gabig's work on William's car before reprocessing it for DNA evidence supported an inference that he was ensuring that he did not find DNA evidence in an area that she had already tested. Finally, the most damning evidence of Kofoed's guilt was William's testimony that he had never

loaned his car to Livers or Sampson. No evidence contradicted that testimony.

We reject Kofoed's claim that the circumstantial evidence showing that he falsified evidence was weak. We also reject Kofoed's three alternative theories: (1) Livers and Sampson were actually involved in the crime and used William's car; (2) someone besides Kofoed planted the evidence; or (3) the filter paper that Kofoed used to swab the car was contaminated with Wayne Stock's blood from the Stocks' residence. Kofoed's theories bring to mind the old saw that theories are free; facts are precious.

[10] A trier of fact must weigh the State's evidence of guilt in the light of the defendant's presumption of innocence: "Whether evidence is circumstantial or direct, 'a [fact finder] is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference.' . . . 'If the [fact finder] is convinced beyond a reasonable doubt, we can require no more.'"[20] The State is not required to disprove every hypothesis of nonguilt that is consistent with the circumstantial evidence.[21] Here, however, the court correctly determined that the evidence refuted Kofoed's alternative theories.

First, the court rejected Kofoed's theory that Livers and Sampson were involved in the murders despite the State's dismissal of the charges against them and Fester's and Reid's convictions for the crime. The court found that when deposed by Kofoed in 2010, Reid clearly stated that only she and Fester killed the Stocks. The court also found credible William's testimony, which his wife corroborated. The court specifically noted William's testimony that he was not particularly close to Sampson or to Livers and that he had never loaned either of them his car. Finally, the court noted that even Kofoed had

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[20] *State v. Pierce*, 248 Neb. 536, 547, 537 N.W.2d 323, 330 (1995), quoting *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954). See, also, *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011), citing *Mantell v. Jones*, 150 Neb. 785, 36 N.W.2d 115 (1949).

[21] See, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *abrogated on other grounds, Nolan, supra* note 12; *Pierce, supra* note 20.

stated that the only possible explanation for his finding of the blood evidence was cross-contamination of the filter paper. The court concluded that even if a viable alternative explanation for Kofoed's finding of the blood evidence were not available, it would reject the argument that Livers and Sampson were involved in the murders.

Second, the court rejected Kofoed's theory that someone besides him could have planted the evidence. The court stated that investigators had seized and secured the car, with limited access to anyone. More important, it found that after Gabig extensively processed William's car on April 19 and 20, 2006, no one requested further processing of the car to search for DNA evidence. So the court concluded that no one would have planted blood evidence in an obscure location of the car thinking that it would be discovered when the car was reprocessed for DNA evidence.

The court also rejected the possibility of another officer's contaminating William's car. It found that the special prosecutor meticulously established (1) who was in the car and how it was processed and (2) the officers processing the car had followed correct procedures to avoid contaminating it. The court found that the officers had not contaminated William's car with DNA from the Stocks' residence.

Finally, the court rejected Kofoed's theory that the presumptive blood testing kit was contaminated from the crime scene. But Kofoed contends that the court was wrong. Relying on the testimony of his coworker, Gabig, Kofoed argues that the risk of cross-contamination from a crime scene can never be eliminated even if investigators properly handled their equipment. Followed to its logical conclusion, Gabig's opinion would mean that DNA evidence is unreliable in any criminal case. We reject that argument.

The evidence showed that CSI investigators are trained in techniques to avoid cross-contamination of DNA evidence at a crime scene, both in their collection of evidence and their use of equipment. They are also trained to properly dispose of protective gloves and booties and to clean their equipment, including presumptive blood testing kits, to avoid contaminating evidence at a different location after leaving the crime scene.

Gabig testified about the correct way to use these kits without contaminating them. And she did not cite instances in which the filter papers in testing kits had been cross-contaminated from a crime scene despite investigators' proper handling of the kits. Finally, the special prosecutor impeached Gabig with her deposition testimony that the risk of contamination was miniscule or nonexistent if investigators properly used disposable gloves when handling these testing kits.

More important, the court specifically found no CSI investigators had used these testing kits at the Stocks' residence to test stains for blood. That finding is supported by the evidence. We also note Kofoed never expressed his cross-contamination theory until the summer of 2006, only after it became apparent that someone else had committed the crime and that Wayne Stock's blood could not have been in William's car. And even after Kofoed expressed his cross-contamination theory to coworkers, he never initiated an investigation to determine whether the testing kits were contaminated or whether investigators had used the kits at the Stocks' residence.

Most important, we agree with the court that Kofoed's claim of a mistake in using the testing kits was not plausible in the light of the evidence proving that he falsified DNA evidence in 2003. The court emphasized the significant similarities between Kofoed's 2003 finding of Brendan's DNA and his 2006 finding of Wayne Stock's DNA:

- In each case, law enforcement officers had identified the person who they believed was responsible for the crime and the suspect had made statements to officers implicating himself;
- In each case, officers were having difficulty finding evidence to corroborate the suspect's statements;
- In each case, under "unusual or unlikely circumstances," Kofoed obtained a victim's DNA specimen that was not recovered by other investigators processing evidence and that corroborated the suspect's statements;
- In each case, Kofoed had access to the victim's blood because the CSI Division had performed the initial crime scene investigation and stored items stained with the victim's blood in its evidence room.

We conclude that the court did not err in determining that cross-contamination did not account for Kofoed's finding of Wayne Stock's blood in William's car. The evidence strongly supported an inference that Kofoed's alternative theories arose in hindsight from his need to explain how he had found this evidence despite later evidence pointing to Fester and Reid as the perpetrators. In short, he was tangled in his own web of deceit. We conclude that cross-contamination was not a reasonable possibility under these facts. Viewed in the light most favorable to the State, the circumstantial evidence fully supports the court's conclusion that the State had proved beyond a reasonable doubt that Kofoed falsified evidence to corroborate Livers' recanted confession.

IV. MOTIONS FOR NEW TRIAL AND TO RECUSE JUDGE

In April 2010, after the court found Kofoed guilty, he moved for a new trial. He claimed that the court should grant him a new trial because of newly discovered evidence. Kofoed's allegations that are relevant to his new trial claims on appeal included the following:

(1) Lambert, the State Patrol investigator in the Stocks' murder case, did not turn over to the special prosecutor his notes about a conversation that Lambert had with Darnel Kush, an investigator at the CSI Division who worked under Kofoed. Kofoed alleged that after Kush contacted Lambert, Lambert contacted the FBI about Kofoed. Kofoed alleged that Lambert's notes about his conversation with Kush constituted material that under *Brady v. Maryland*,[22] he was entitled to receive from the special prosecutor.

(2) Douglas County Deputy Sheriff Charles Rehmeier was the trial judge's cousin, and Rehmeier was a supporter of Kush. If the trial judge had disclosed his relationship to Rehmeier, Kofoed "would have determined whether to ask the Court to recuse itself."

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[22] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(3) Cass County Deputy Sheriff Earl Schenck, Jr., who was assigned to the Gonzalez and Stock cases, had told an individual that "'blood would be found'" in the dumpster and under the Ford Contour's dashboard, "leading to the clear impression" that Schenck knew about the evidence before it was discovered.

Kofoed also moved to recuse the trial judge from further proceedings because of the judge's undisclosed relationship to Rehmeier. The court heard evidence on these motions in April 2010.

1. Evidence on Kofoed's Motions for New Trial and Recusal

Kush had worked in the CSI Division since 1995 and worked under Kofoed beginning in 2000 or 2001. The evidence showed that Kush believed Kofoed would lie to promote himself and that she had filed complaints against him. She also felt Kofoed was harassing her, and she had asked for a transfer to "get away" from him. Because of her past complaints, she was afraid to report her concerns about the Stock case. She believed Kofoed would say that she was trying to create problems for him. In October 2007, she contacted Lambert because she had formerly worked with him. In December, Lambert and Kush contacted an FBI agent about Kofoed. Kofoed claimed that the special prosecutor had to give him Lambert's notes about his conversations with Kush.

Regarding the motion to recuse, Rehmeier testified that he was the trial judge's second cousin. He said that he had last seen the judge 25 years earlier. Rehmeier's father had introduced him to the judge at a funeral. Rehmeier testified that he had not directly or indirectly discussed Kofoed's case with the judge. Kofoed presented evidence to show that after Kofoed was put on leave, Rehmeier told Kush that she had done the right thing and to "hang in there."

Finally, Kofoed questioned Schenck about conversations he allegedly had during the Gonzalez and Stock murder investigations. Schenck was asked whether he had told a woman he knew that blood would be found in the dumpster. The woman was one of Schenck's estranged wife's beauty salon customers.

Schenck denied having that conversation with the woman. He also denied having a conversation with his wife in the woman's presence in which he stated that he knew blood would be found under the dashboard of William's car. The woman did not appear to testify.

2. Trial Court's Findings and Rulings

The court stated its findings from the bench. Regarding the motion to recuse, the court first noted that a trial judge is not a competent witness to speak to an issue raised about the judge's contacts with someone involved in the case.[23] But from the evidence presented, the court made the following findings: (1) Neither Rehmeier nor Kush had been a witness in the case, (2) no one had mentioned Rehmeier's name in the hearings or at trial, (3) no evidence showed that Rehmeier had participated in the investigation or talked to the FBI, and (4) none of the court's findings at the close of trial involved Kush or Rehmeier.

The court further stated that although Rehmeier shared the judge's last name, the evidence showed that Rehmeier was the judge's distant relative and that Rehmeier had not had any contact with the judge in 25 years. The court concluded that no reasonable person who knew the circumstances of the case would question the judge's impartiality. It overruled the motion to recuse and the motion for a new trial to the extent it was premised on his relationship to Rehmeier. Additionally, the court concluded that the other issues Kofoed had raised involving Lambert, Schenck, and Kush were issues of credibility that would not have substantively changed how the case was decided. It overruled Kofoed's motion for a new trial.

3. Motion to Recuse

Kofoed argues that the court erred in overruling his motion to recuse because the trial judge had a duty to disclose his family relationship to Rehmeier. Kofoed argues that if the court had disclosed this information, he would not have waived a jury trial and potentially would have asked the judge to recuse himself from presiding over the trial.

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[23] See Neb. Evid. R. 605, Neb. Rev. Stat. § 27-605 (Reissue 2008).

(a) Standard of Review

[11] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.[24]

(b) Analysis

[12,13] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge is actually biased against a party or if the judge's impartiality could reasonably be questioned.[25] A defendant seeking to disqualify a judge because of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[26] Absent a showing of actual bias or prejudice, a litigant must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness.[27]

Kofoed does not claim that the judge's statements or conduct showed actual bias. Instead, he claims that a reasonable person would have questioned the judge's impartiality. Section 5-302.11(A) of the judicial code sets out specified circumstances when a judge's impartiality could be reasonably questioned. Some of those circumstances include a judge's personal relationship to a person connected with the litigation. Section 5-302.11(A)(2) disqualifies a judge or requires disclosure of the disqualifying relationship in the following circumstances:

> The judge knows that the judge, the judge's spouse or domestic partner, or a person *within the fourth degree of relationship* to either of them, or the spouse or domestic partner of such a person is:
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> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

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[24] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[25] Neb. Rev. Code of Judicial Conduct § 5-302.11 (previously found at Neb. Code of Judicial Conduct § 5-203(E)); *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

[26] See *Nolan, supra* note 12.

[27] E.g., *id.*

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

The court specifically found that Rehmeier and Kush were not witnesses and that Rehmeier's name was never mentioned during the trial. The record supports that finding and thus fails to show that the trial judge could have known that Rehmeier was even a potential witness. More important, the "fourth degree of relationship" is a term defined under the code to include the following family relationships: "great-great-grandparent, great-uncle or great-aunt, brother, sister, great-great-grandchild, grandnephew or grandniece, or first cousin." The code does not disqualify judges for their relationship to a second cousin who has some connection to the litigation, even if that connection had been shown. So Rehmeier was not a person whose relationship to the judge, or whose interests or connection to the litigation, could have triggered this provision.

Even apart from the lack of any showing that the circumstances set out in the code applied, no reasonable person would have questioned the trial judge's impartiality based on his distant relationship to Rehmeier. Rehmeier's contact with the judge was limited to a long-ago introduction. And Kofoed introduced no evidence to suggest that Rehmeier had communicated with the judge about the case or anything else. This assignment of error has no merit.

4. Motion for a New Trial

[14,15] A new trial can be granted on grounds materially affecting the substantial rights of the defendant.[28] A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.[29]

Kofoed's claim that he would not have waived a jury trial if he had known about the judge's relationship to Rehmeier fails

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[28] *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

[29] *Id.*

for the same reason that his recusal claim fails. Because a reasonable person would not have questioned the judge's impartiality, Kofoed cannot show that demanding a jury trial would have produced a substantially different result.

In addition to his claim regarding Rehmeier, Kofoed makes the following claims about Lambert: Kofoed contends that Lambert's notes should have been disclosed under *Brady*.[30] He argues that if Lambert had disclosed his notes about Kush, he would have called Kush to testify. His strategy would have changed to "whether or not it was reasonable to think that either Lambert or Kush, amongst others, could have planted evidence to fulfill their wish of destroying [Kofoed]."[31] His argument about Schenck's alleged statements to his estranged wife's customer is apparently the same—he would have used this evidence to bolster his claim that someone else planted the DNA evidence in William's car. Kofoed grasps at twigs thinking they are redwoods.

First, Kofoed did not prove that Schenck stated to anyone that he knew DNA evidence would be found during the Gonzalez and Stock murder investigations before it was found. Schenck denied making these statements, and Kofoed's witness did not appear to testify.

Second, even if Lambert's notes were material evidence that Kofoed was entitled to know about—a question we need not decide—under *Brady*, he must also show a reasonable probability that if the evidence had been disclosed to the defense, the result of the proceeding would have been different.[32] A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.[33] Kofoed cannot satisfy that standard.

Kofoed's claim of prejudice from not knowing about either Lambert's notes or Schenck's alleged statements is that he was not given the opportunity to prove that someone else

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[30] See *Brady, supra* note 22.

[31] Brief for appellant at 46.

[32] *McGee, supra* note 19.

[33] *Id.*

could have planted the DNA evidence in William's car. This theory is the same "mystery person" theory that he presented at trial.

But this theory was soundly rejected by the trial court, and we agree with the court that this "new" evidence would not have changed the results. Nor does it undermine confidence in the outcome. It is inconsequential whether Kofoed claims that the mystery person's motive for planting the evidence was to frame Livers and Sampson, or to frame Kofoed. The fundamental problem with his theory exists in either circumstance: How could someone else have known Kofoed would search for DNA evidence in an obscure part of William's car when no officer had requested the car to be reprocessed for DNA evidence? Who, besides Kofoed, would have known that he would take it upon himself to do so?

Throughout this prosecution, Kofoed's defense strategy has been an attempt to deflect evidence of his guilt by floating theories of a mystery perpetrator or careless investigators. At the rule 404 hearing, at trial, and on appeal, he has claimed that someone else could have tampered with the evidence to frame him. The irony of his defense is rich, and his theories plentiful. But "[t]here is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts."[34] The court did not err in overruling Kofoed's motion for a new trial.

V. CONCLUSION

Regarding the extrinsic crime at the rule 404 hearing, we conclude that the evidence was sufficient to prove that in 2003, Kofoed falsified DNA evidence during the Gonzalez murder investigation. Gaps in the chain-of-custody documentation did not undermine the integrity of the forensic evidence when the record shows that this evidence was in the evidence custodian's possession and stored under proper conditions during the relevant time period. Similarly, alterations in the forensic evidence after it was tested did not compromise the evidence. The alterations were not relevant to the testing results, and Kofoed was

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[34] Frequently ascribed to 17th-century French writer, François Duc de La Rochefoucauld.

a primary custodian in the chain of custody. The court did not err in excluding expert testimony about circumstances in which investigators and analysts were able to find DNA evidence in a harsh environment. Those circumstances were not sufficiently similar to the facts at hand to be probative of whether Kofoed could have found nondegraded DNA in a dumpster after 6 months' exposure to the elements and trash.

For the charged crime of tampering with evidence in the Stock murder investigation, we conclude that the inferences reasonably drawn from the circumstantial evidence were sufficient to prove that in 2006, Kofoed falsified DNA evidence during the Stock murder investigation to corroborate a suspect's recanted confession. The evidence did not support his theory that cross-contamination from DNA at the Stocks' residence could have contaminated the testing kit that Kofoed later used to find a victim's DNA in a vehicle that investigators believed the suspects had used.

The trial judge properly declined to recuse himself from hearing Kofoed's motion for a new trial. No reasonable person would have questioned the trial judge's impartiality under these circumstances. The court correctly denied Kofoed's motion for a new trial based on evidence that Kofoed argued would have bolstered his claim that someone else planted the DNA evidence in William's car. The car had already been thoroughly and unsuccessfully examined for DNA evidence, and no officer had requested further testing. So no one but Kofoed would have known that Kofoed would nonetheless search for, and find, a DNA sample in an obscure location of the car.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

GERRARD, J., not participating in the decision.