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assistance of counsel regarding counsel's alleged failure to obtain the sexual assault examination report. We affirm the denial of postconviction relief on all other claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD D. THOMAS, APPELLANT.
798 N.W.2d 620

Filed May 31, 2011. No. A-10-357.

1. **Rules of Evidence: Other Acts: Proof.** Evidence of other bad acts allegedly committed by a criminal defendant are not excludable under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008), which prohibits propensity evidence, in situations where the evidence is so blended or connected with the actions charged that proof of one incidentally involves proof of the other, explains the circumstances of the charged conduct, or tends to prove an element of the charged conduct.
2. **Rules of Evidence: Other Acts.** The State is entitled to present a coherent picture of the facts of the crime charged and is entitled to present evidence of other bad acts where the evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime; such evidence is intrinsic evidence not governed by Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008).
3. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Reversed and remanded for a new trial.

Chad M. Brown for appellant.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Clifford D. Thomas appeals his convictions and sentences for terroristic threats, use of a deadly weapon to commit a felony,

felon in possession of a deadly weapon, and being a habitual criminal. On appeal, Thomas asserts numerous potential errors. We conclude that the district court erred in admitting evidence concerning other bad acts allegedly committed by Thomas, and because that error requires reversal and remand, we decline to address the rest of Thomas' assignments of error.

II. BACKGROUND

Vincent Haynes is an automobile mechanic who owns his own automobile repair shop in Omaha, Nebraska. Haynes was acquainted with Thomas and had done repair work on Thomas' automobiles in the past. In late December 2007, Thomas hired Haynes to install a used transmission in Thomas' automobile. Thomas provided the used transmission, and one of the mechanics working for Haynes performed the installation.

Thomas returned to Haynes' repair shop approximately a week later and complained that the transmission was leaking. Another of the mechanics working for Haynes performed the repair work. Thomas returned again approximately 2 weeks later, and again complained that the transmission was leaking.

When Thomas returned for the second time and complained that the transmission was leaking, the mechanic who had worked on the automobile was not in the shop. Haynes testified that Thomas "started talking out loud . . . and said, you gonna do — you gonna fix my vehicle today." Haynes testified that Thomas "was cussing, you gonna fix my damn car today and this don't make no mother-fucking sense I got to keep bringing it back" and that Thomas was "making a scene." Thomas eventually left and indicated that he would return.

Later the same day, Thomas returned again. Haynes testified that Thomas was wearing "a long trench coat" and "had one of his hands in his pocket." When Haynes approached Thomas, Thomas "punched [Haynes] in the chest. Then he pulled the other hand out [of the trench coat pocket] and pulled this big, old gun out and said, you gonna fix my damn car or you gonna deal with this." Thomas also said, "[T]his ain't no fucking joke" and "you a bitch-ass nigger and everybody know you a bitch." According to Haynes, Thomas said, "I'm gonna

send somebody else up here to rob you and I'm gonna set your building on fire." Haynes testified that he "agreed to everything [Thomas] said he wanted [Haynes] to do" and assured Thomas that the automobile would be fixed. Thomas eventually left again.

Two days later, on a Monday morning, Haynes received a telephone call that prompted him to go to his repair shop. When he arrived at the building, he observed that firefighters had arrived and that the garage door was on fire.

On April 27, 2009, Thomas was charged by amended information with terroristic threats, use of a deadly weapon to commit a felony, and felon in possession of a deadly weapon. The amended information also included a habitual criminal allegation.

On August 14, 2009, the State filed a notice of its intent to introduce evidence under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008). The State indicated that it intended to offer evidence of Thomas' threat to commit arson at Haynes' business and the subsequent fire that occurred at the business 2 days after the threat. Also on August 14, Thomas filed a motion in limine specifically seeking to prevent the State from introducing evidence concerning the fire. Prior to trial, the State withdrew its intent to introduce rule 404 evidence. At the hearing on Thomas' motion in limine, the State argued that the evidence concerning the fire was intrinsic evidence and was intertwined with the charged crime of terroristic threats and therefore admissible without reference to rule 404. The court agreed with the State and overruled Thomas' motion in limine.

At trial, there was also evidence adduced concerning a conversation had prior to trial between Thomas and Haynes. The conversation was recorded by Thomas. Prior to trial, the State had filed a motion in limine seeking to prevent introduction of evidence concerning the conversation, but the court overruled the motion. The conversation allegedly included discussion of "what it would take for Haynes to help make the charges against Thomas go away" and the possibility of Haynes' taking money from Thomas "in exchange for not showing up in court." Brief for appellee at 16. At trial, an audio recording of

the conversation was played several times, and Haynes testified that the conversation took place and admitted the basic content of the conversation.

The jury deliberated for approximately 3½ hours before returning verdicts of guilty on all charges. An enhancement hearing was scheduled to occur on September 2, 2009. On September 14, the parties appeared for the enhancement hearing, which had been continued, and Thomas' counsel objected that Thomas had not received sufficient notice of the September 2 hearing. The court overruled Thomas' objection, received evidence to establish that Thomas was a habitual criminal, and set a sentencing date.

Thomas filed a motion for new trial on February 3, 2010. In the motion, Thomas asserted that an enhanced version of the audio recording of Thomas and Haynes' conversation about making the charges "go away" constituted newly discovered evidence. The court denied the motion for new trial.

On March 5, 2010, Thomas was sentenced to 10 to 30 years' imprisonment on the terroristic threats conviction, 20 to 40 years' imprisonment on the use of a deadly weapon to commit a felony conviction, and 10 to 30 years' imprisonment on the felon in possession of a deadly weapon conviction. The court ordered the first two sentences to be served consecutively, and the third sentence to be served concurrently. This appeal followed.

III. ASSIGNMENTS OF ERROR

Among Thomas' assignments of error on appeal is an assertion that the district court erred in allowing the State to introduce evidence concerning the fire that occurred at Haynes' business. Our resolution of this assignment of error obviates the need to discuss the remaining assignments of error.

IV. ANALYSIS

Thomas challenges the district court's allowance of testimony proffered by the State concerning a fire that occurred at Haynes' repair shop 2 days after Thomas allegedly made terroristic threats, including a threat to set Haynes' "building on fire." Prior to the trial, Thomas filed a motion in limine

objecting to this testimony, and he objected to it during trial on the basis of relevance and Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008). On appeal, Thomas also argues that this evidence constitutes impermissible rule 404 evidence of other bad acts that should not have been admitted.

The State's argument to the district court, and to this court, has been that the evidence was properly admitted because it was intrinsic evidence that is so intertwined with the charged offenses that it completes the picture and is actually part of the charged offense, not extrinsic evidence of other bad acts. The district court agreed, overruled Thomas' objections, and admitted the testimony on this basis.

We conclude that the State's argument that this evidence is intrinsic evidence and intertwined with the charged offenses and the authorities relied on by the State in support of this assertion are inapplicable to this case, because the State has failed to adduce any evidence connecting Thomas with the fire. Evidence of the fire itself would arguably be intrinsic evidence and intertwined with the charged offenses only if there were some evidence that Thomas was involved with the fire, but the State adduced no evidence to make this connection. As such, we reject the State's argument on appeal that "it is without question that the evidence relating to the fire at Haynes' shop was so closely intertwined with the crimes charged that it cannot be considered extrinsic." Brief for appellee at 25-26.

[1,2] In a line of cases dating back to 2001, this court and the Nebraska Supreme Court have repeatedly concluded that evidence of other bad acts allegedly committed by a criminal defendant are not excludable under rule 404's prohibition of propensity evidence in situations where the evidence is so blended or connected with the actions charged that proof of one incidentally involves proof of the other, explains the circumstances of the charged conduct, or tends to prove an element of the charged conduct. See, *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinksi*, 268 Neb. 778, 688 N.W.2d 586 (2004); *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001), *disapproved on other grounds, State v.*

Smith, 267 Neb. 917, 678 N.W.2d 733 (2004). In such situations, the State is entitled to present a coherent picture of the facts of the crime charged and is entitled to present evidence of other bad acts where the evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime; such evidence is intrinsic evidence not governed by rule 404. See *State v. Powers, supra*.

Every one of those cases, however, shared a common characteristic: there was evidence demonstrating that the other bad acts at issue were actually committed by the defendant so that they did help to complete the story or provide a total picture of the defendant's alleged actions. In *State v. Powers, supra*, the defendant was charged with committing terroristic threats when he sent threatening letters to the victim. The other bad acts evidence at issue was prior letters from the defendant to the victim. *Id.*

In *State v. Wisinski, supra*, the defendant was charged with burglary and theft by unlawful taking. The other bad acts evidence at issue was evidence that the defendant was apprehended several days after the reported burglary in a vehicle containing items stolen during the burglary. *Id.*

In *State v. Robinson, supra*, the defendant was charged with, among other crimes, first degree murder. The evidence adduced against the defendant included testimony of a witness who had been a passenger in a Chevrolet Tahoe driven by the defendant to the crime scene who testified that he waited in the Tahoe while the defendant committed the murder. There was also evidence adduced that the defendant had told another witness that he was going to "'get rid of the truck'" in "'Kansas or Texas.'" *Id.* at 712, 715 N.W.2d at 548. The other bad acts evidence at issue was evidence that a Tahoe registered to the defendant's grandmother was found destroyed by a fire in Texas and that a Kansas City police officer had seen the defendant in Kansas City exiting a bus which had originated in Houston. *Id.*

In *State v. Baker, supra*, the defendant was charged with first degree sexual assault and third degree sexual assault of a child. The other bad acts evidence at issue was evidence concerning

physical abuse and threats of harm committed by the defendant and directed at the victim and her mother. *Id.*

The present case, however, is entirely different from each of these prior cases where this court or the Nebraska Supreme Court has approved of the admission of evidence as intrinsic evidence intertwined with the charged offense. In the present case, the challenged evidence does not include any evidence actually linking Thomas to the subsequent fire at Haynes' repair shop. The State's arguments, both to the district court and to this court, all seem to presuppose such connection, but no such connection was ever demonstrated. Indeed, when an Omaha Fire Department captain testified, over Thomas' objection, concerning his investigation into the fire, he was specifically asked whether he searched for and found any evidence to link any specific suspect to the fire. He testified that he "found no evidence . . . that linked [a possible suspect] to the fire."

Because the evidence that a fire occurred at Haynes' repair shop 2 days after Thomas allegedly threatened to burn the building down did not actually include any evidence to indicate that Thomas was in any way involved in starting the fire, it was not intrinsic evidence intertwined with the charged offense. The district court erred in so finding.

[3] Evidence which is not relevant is not admissible. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* Under rule 403, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *State v. Sellers, supra.*

In this case, any minimal relevance that the evidence concerning the fire at Haynes' repair shop might have had was outweighed by the substantial danger of unfair prejudice. There was no evidence presented linking Thomas to the fire. In fact, testimony indicated that there was no such evidence. The only way the evidence was of use to the jury was for the jury to hear that Thomas had threatened to burn the building down and then

infer that he must have meant it because somebody actually started a fire at the repair shop 2 days later. Such an inference, without any evidence to connect Thomas to the subsequent fire, is certainly prejudicial and suggests a finding of guilt on improper grounds.

Because there was no connection between Thomas and the subsequent fire, we conclude that there was little or no probative value to the fire evidence, and any minimal probative value would be outweighed by the danger of unfair prejudice. See *State v. Sellers, supra* (evidence of handguns located at time of defendant's arrest lacked probative value and was unfairly prejudicial because there was no connection between handguns and defendant). The district court abused its discretion in not excluding this evidence, and this error requires that we reverse, and remand for a new trial.

V. CONCLUSION

The district court erred in overruling Thomas' objections to the State's proffer of evidence concerning the fire at Haynes' repair shop, because there was no evidence linking Thomas to the fire. We reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MICHAEL TURNBULL, APPELLANT, V. COUNTY OF PAWNEE, NEBRASKA, APPELLEE.

810 N.W.2d 172

Filed May 31, 2011. No. A-10-489.

1. **Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1901 (Reissue 2008) provides for a district court to review the judgment rendered or final order made by a tribunal inferior in jurisdiction and exercising judicial functions.
2. **Administrative Law: Public Officers and Employees: Claims: Notice: Breach of Contract: Appeal and Error.** Where an original breach of contract action requires compliance with the county claims statute, Neb. Rev. Stat. § 23-135 (Reissue 2007), to provide sufficient notice to a county of the claim, when an employee seeks judicial review of a final order rendered by an administrative body, the county is on full notice of the claim by virtue of the employee's compliance with agreed-upon procedures for asserting the claim at the administrative level.