STATE OF NEBRASKA, APPELLEE, V. RUFUS B. FREEMONT, APPELLANT.

817 N.W.2d 277

Filed July 27, 2012. No. S-11-243.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
4. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
5. **Jury Instructions: Apeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
6. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, 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. 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.
7. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
8. **Trial: Evidence: Verdicts: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

9. **Trial: Evidence: Appeal and Error.** Harmless error review looks to the entire record and views the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.
10. **Pretrial Procedure: Evidence.** Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2010) allows a defendant charged with a felony to request that the prosecuting authority provide him with copies of the results and reports of scientific tests or experiments made in connection with the case.
11. ____: ____. Pursuant to Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2010), following a proper discovery request, the State has an obligation to disclose information which is material to the preparation of a defense to the charge against the defendant.
12. **Pretrial Procedure: Evidence: Prosecuting Attorneys.** Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
13. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
14. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
17. **Jury Instructions: Appeal and Error.** Although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.
18. **Effectiveness of Counsel: Records: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
19. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

MCCORMACK, J.

I. NATURE OF CASE

Following a trial by jury, Rufus B. Freemont was convicted in Douglas County District Court of second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The court imposed an aggregate sentence of 80 to 90 years' imprisonment. Freemont appeals.

II. BACKGROUND

Freemont was charged with second degree murder in connection with the killing of Andrew Galligo on June 18, 2010. The following evidence was adduced at trial.

Police responded to a report of a shooting on 24th and Vinton Streets in Omaha, Nebraska. Sgt. Matthew Rech observed Galligo lying on the ground, surrounded by four individuals. Galligo had been shot in the chest and died as a result of the injury.

Several bystander witnesses, who were either at the scene or nearby at the time of the shooting, testified at trial. Each witness testified that prior to the shooting, Galligo had been engaged in a confrontation with a woman, later identified as Claudette Loera, in a parking lot.

According to witnesses, prior to the shooting, Loera was driving a white Chevrolet Cobalt, which was later identified as belonging to Samantha Vawter. Loera's sister, Christa Harlan, was seated in the passenger seat, and Vawter and Freemont were seated in the back seat. According to Harlan and Vawter, as the vehicle approached 24th and Vinton Streets, the passengers saw Galligo walking down 24th Street. Galligo was

wearing red and black, colors which are associated with a gang to which Loera belonged. Loera turned the car around and yelled at Galligo, asking about his gang affiliation. Loera "flipped" a gang sign at Galligo by making a gesture with her hand. Galligo was a member of a different gang, and "threw up" a gang sign at Loera in response. Loera then pulled the vehicle into a nearby parking lot, exited the vehicle, and confronted Galligo.

Loera and Galligo had a verbal confrontation, during which Harlan exited the vehicle and told Loera to leave Galligo alone and get back in the vehicle. Loera spit on Galligo and moved to return to the vehicle. Galligo asked Loera if she was getting a gun, and attempted to walk away from the vehicle. Loera followed Galligo, at which time four or five gunshots were fired from the vehicle and Galligo was struck in the chest.

Following the shooting, Loera immediately returned to the vehicle and drove from the scene. Freemont was let out at 17th and Ontario Streets. Loera then drove to an alley where she, Vawter, and Harlan changed their clothes to avoid being identified. Loera attempted to hide the vehicle behind an abandoned house, and then she walked with the others to the house of a friend named "Melissa."

1. Witness Testimony

At trial, a witness testified that she and her sister were shopping at a strip mall near 24th and Vinton Streets at the time of the shooting. As they were leaving a nearby store, the witness saw a white car, which was parked in front of the exit to the parking lot. The witness entered her car and waited for the white car to move so she could exit. She testified that she saw Loera and Galligo arguing and observed a man in the back seat of the white car place his hand, holding a gun, out of the window and shoot Galligo. The witness' sister also testified that she saw the argument between Loera and Galligo and witnessed shots being fired from the back seat of the white car, but she did not see who fired the gun.

Another witness who was also in the parking lot at the time of the shooting testified that he observed an altercation taking

place in front of a white Chevrolet Cobalt and that he heard gunfire, though he did not see who fired the shots.

An individual who was also present in the parking lot witnessed the altercation in front of a white vehicle. He testified that he witnessed a person, whom he identified as a passenger of the vehicle, attempting to break up the fight between the driver of the vehicle and another person. He stated that the person who shot Galligo was seated in the back seat of the vehicle. He testified that he had observed three persons in the vehicle at the time of the shooting—the driver, front passenger, and the rear passenger—and that he did not see the gun that fired the shots.

Another witness testified that she was in the area of 24th and Vinton Streets at the time of the shooting and that she observed two people dressed in red engaged in an argument. She heard the gunfire that followed, and the windshield of her car was struck with a bullet. She was unaware of who fired the shots.

Another witness also testified that he was in the area at the time of the shooting. He was previously acquainted with Loera and Galligo and heard them arguing in the parking lot. He heard the gunshots, but could not identify who fired the shots.

Harlan and Vawter testified. Harlan is Loera's sister, and she had been living with Melissa at the time of the shooting. Harlan testified that she knew Freemont and was acquainted with Vawter. Loera had contacted Vawter for a ride earlier that day to go to Westroads Mall and "get some weed." Loera was driving Vawter's car, and on the way home, Harlan and Loera stopped to pick up Freemont. Harlan testified that Vawter and Freemont had a child together, but that she was not well acquainted with Vawter. Freemont was carrying a backpack when they picked him up earlier that day. After picking up Freemont, Loera was driving, Harlan was seated in the front passenger seat, Vawter was in the back seat behind the driver, and Freemont was in the back passenger seat. They saw Galligo walking when they stopped at a light.

Harlan recounted the argument that followed and testified that she got out of the car and told Loera to leave Galligo

alone, that he was their cousin, and to get back into the car. Loera started back to the car, and Harlan told Galligo to keep walking, when Loera turned around as if to follow Galligo. Loera then turned to Harlan and returned to the car. As Harlan was getting into the car, she heard gunshots and was startled because neither Loera nor Galligo had a weapon. Harlan testified that the shots came from the back seat of the car and that Freemont had fired the gun. She did not observe what kind of gun it was. Harlan observed Freemont holding the gun toward the car window. Loera returned to the car and drove Harlan, Vawter, and Freemont from the scene.

The State asked Harlan if she had witnessed Freemont carrying a gun "a few days before" the incident. Freemont objected to this question, and an off-the-record discussion was held at the bench, after which the objection was overruled. Harlan answered that she had seen Freemont a few days earlier with a gun. Harlan stated that at the time, Freemont was carrying the gun in a backpack that looked the same as the one he was carrying on the day of the shooting.

The day after the incident, Harlan was questioned by police, at which time she gave the officers a fake name. Police showed Harlan a photographic array, and she identified a person other than Freemont as the shooter. Harlan said she had lied because she knew she had outstanding warrants and because she was scared. Loera had apparently threatened Harlan and Vawter, telling Harlan that if she was going to "cry," Loera would have to kill her.

Loera was arrested the day after the incident in connection with Galligo's death. Harlan spoke to Loera after she was arrested, and Harlan told Loera that she had purposely named the wrong person as Galligo's shooter. Police confronted Harlan with this conversation, showed her the same photographic array, and asked her again to identify the shooter. Harlan identified Freemont as the shooter at that time.

Vawter testified that she was seated in the back seat of the car at the time of the shooting. She stated she knew neither Loera nor Galligo possessed a weapon because both had lifted their shirts to show that they did not. Vawter said that Freemont told Loera to get back into the car while the

two were arguing. After Harlan got out of the car, Freemont reached into his backpack and pulled out a gun. He told Vawter to "sit back," and leaned across her and shot four rounds out the window at Galligo. Freemont then put the gun back into his backpack.

Vawter went to Melissa's house with Harlan and Loera. Loera threatened Vawter, told her she would probably be charged because the car was in her name, and told her she should not say anything. Vawter left the house and returned to her home. That night, Loera texted her and told her to get new license plates and hubcaps for the car. The next day, Vawter returned to Melissa's house, where Loera told Vawter to "go dump the car" because the license plate number was all over the news. Vawter left the house and called the police, informing them that she had information about the murder.

Vawter met with the police and told them that Freemont was the shooter. Vawter changed her story a number of times in speaking to the police, but consistently maintained that Freemont had fired the shots. Vawter testified that she had lied because she was afraid of Loera.

Loera was charged with being an accessory to a felony as a result of her involvement in the incident. Loera testified at Freemont's trial and stated that she had not made a deal with the prosecutor in exchange for her testimony. Loera testified to the events leading up to the altercation with Galligo and identified Freemont as the shooter. Loera stated that she was yelling at Galligo when she heard gunshots. When she looked behind her, she saw Freemont holding a gun out of the car window.

The State asked Loera if she had seen Freemont carry a gun prior to the day of the shooting. Freemont again objected to this line of questioning on the grounds of relevance and Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404 (Cum. Supp. 2010). The objection was overruled, and Loera answered that Freemont had gotten into an altercation with one of her cousins a week before the shooting, during which he displayed a gun. Loera testified that Freemont kept the gun in his backpack and that it was a .22-caliber revolver.

When the Omaha Police Department discovered Freemont's whereabouts, the fugitive unit was directed to the address to arrest Freemont. Investigator Dan Martin was involved in the arrest of Freemont. Martin testified that the fugitive unit entered the building identified as Freemont's location and that Martin heard a window break and saw someone attempting to crawl out of a second-story window. The State offered exhibit 74, which shows the building and the window out of which Freemont leapt. Freemont objected to the admission of the exhibit on the bases of relevance and §§ 27-403 and 27-404; the objection was overruled. Exhibit 73 shows the same window from a different perspective; it was also admitted into evidence. Freemont fell to the ground and was immediately tasered and arrested. Following the arrest, the officers recovered a black backpack. A gun was not recovered at any time in the investigation.

The pathologist who performed the autopsy of Galligo testified at trial. During his testimony, the State offered exhibits 56 through 58, showing the injuries Galligo suffered to his face. Freemont objected to these exhibits on the basis that they were overly prejudicial under § 27-403; the objection was overruled. The State also offered exhibit 63, showing the "exit" site of a bullet which was removed from Galligo's back. Freemont again objected on the basis of § 27-403; the objection was overruled.

Daniel Bredow, a senior crime laboratory technician and firearm and toolmark examiner employed by the Omaha Police Department, was called to testify for the State. Bredow testified regarding a bullet that had been removed from Galligo's body, marked as exhibit 41. Bredow stated that the bullet was a ".22 rimfire caliber" that was consistent with one of "96 different models" of .22-caliber weapons, including handguns, rifles, revolvers, and semiautomatics. However, Bredow ultimately testified that it was not possible to specifically determine what weapon fired the bullet marked as exhibit 41.

Freemont objected to the entirety of Bredow's testimony, and the court held a hearing outside the presence of the jury. Freemont objected on the basis that the testimony violated a discovery order previously entered in the case in July 2010.

Freemont stated that he had not received a report regarding Bredow's testimony until a week prior to the start of trial.

Freemont argued that he did not know the purpose of Bredow's proffered testimony, that he was not allowed to review the expert's report, and that he was therefore not able to retain his own expert for rebuttal purposes. The State requested the court take judicial notice of the "notice to endorse" Bredow, which was delivered to defense counsel on October 25, 2010. Defense counsel conceded that he had received the notice. The State also argued it had complied with the July 2010 discovery order by advising defense counsel of Bredow's forthcoming testimony in the form of a report sent January 3, 2011, by e-mail. The State asserted that the report was transmitted to defense counsel immediately after the State had received a copy. Neither the e-mail correspondence nor the report was offered into evidence. The trial court permitted Bredow to testify and offered defense counsel an opportunity to depose Bredow before proceeding with cross-examination, which counsel declined.

Only one witness testified on behalf of the defense. She was employed by the Omaha Police Department and assisted in the investigation of Galligo's death. She interviewed an eyewitness who testified for the prosecution. Freemont offered the videotaped interview between the defense witness and the eyewitness as exhibit 79. The court gave a limiting instruction to inform the jury that exhibit 79 was to be used for the sole purpose of impeaching the eyewitness' testimony at trial. In the video, the eyewitness identified the shooter as the driver of the white car and stated that the shooter wore a "do-rag" and had a thick mustache.

2. Jury Instructions

Following the presentation of evidence, an instruction conference was held. Freemont objected to the step instruction proposed by the court and requested that the court use the pattern jury instruction contained in NJI2d Crim. 3.1. The State objected to Freemont's proposed instruction. The court agreed with the State and ultimately gave the step instruction as jury instruction No. 4.

Freemont proposed an instruction regarding eyewitness identification based on a Connecticut pattern instruction. The State objected, noting that Nebraska has not created an eyewitness instruction and that it is not required in this jurisdiction. Freemont's proposed instruction states:

> [Y]ou should bear in mind that there has been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications which identifications were subsequently proved to be erroneous; and accordingly you should be specially cautious before accepting such evidence of identification as correct.[1]

The court denied Freemont's request to issue the instruction.

3. Convictions and Sentencing

The jury convicted Freemont on all three charges. At the sentencing hearing, the court noted that the jury apparently found Freemont guilty "fairly quickly," that there was no rational way to understand the incident, and that it bordered on "pure evil." The court sentenced Freemont to serve a term of 55 to 60 years' imprisonment on the murder count, 20 years' imprisonment for use of a deadly weapon, and 5 to 10 years' imprisonment for possession of a deadly weapon, to be served consecutively. The court awarded Freemont 264 days' credit against his sentences for time served. Freemont timely appeals.

III. ASSIGNMENTS OF ERROR

Freemont assigns that the trial court erred in (1) allowing the State to introduce evidence that Freemont possessed a firearm prior to the homicide, (2) allowing the State to introduce evidence of Freemont's "consciousness of guilt," (3) allowing the ballistics expert to testify after failing to comply with Neb. Rev. Stat. § 29-1912 (Cum. Supp. 2010), (4) allowing the State to introduce evidence of autopsy photographs, (5) failing to give the jury an instruction regarding eyewitness identification

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[1] See *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

and in giving a step instruction, and (6) finding sufficient evidence to support the verdicts. Freemont also argues that he received ineffective assistance of counsel at trial.

IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under §§ 27-403 and 27-404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[3]

[3] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[4]

[4] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[5]

[5] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6]

[6] In reviewing a sufficiency of the evidence claim, 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] The relevant question for an appellate court is whether, after viewing the evidence in the light most

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[2] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011), *cert. denied* 565 U.S. 967, 132 S. Ct. 463, 181 L. Ed. 2d 302.

[3] *Id.*

[4] *Id.*

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

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

[7] See *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011).

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[8]

V. ANALYSIS

1. Evidence of Freemont's Gun Possession

At trial, Harlan and Loera testified that sometime before Galligo's murder, they had seen Freemont with a gun, and that he carried his gun in his backpack. Freemont argues that this testimony was evidence of a prior crime—possession of a firearm by a felon[9]—and fell under § 27-404(2). As such, the trial court erred in failing to hold a hearing outside the presence of the jury to determine whether the incident occurred pursuant to § 27-404(3). The State, on the other hand, contends that the testimony was substantive evidence of a charged crime and that therefore, § 27-404(2) did not apply. We agree with Freemont that the testimony fell under § 27-404(2) and that the trial court erred in failing to hold a hearing pursuant to § 27-404(3). However, viewed in the context of the whole record, we find this error harmless.

(a) Form of Objection

As a preliminary matter, the State argues that Freemont made only a general objection to Harlan's testimony, rather than a specific one, and so no error may be predicated upon that objection. We disagree.

Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2008), explains that error may not be predicated upon an evidentiary ruling unless "a timely objection . . . appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context."

Here, the specific grounds for the objection are apparent from the record. Although Freemont made only a general objection during the relevant portions of Harlan's testimony, Freemont made a specific objection toward the same line of questioning during Loera's testimony. Specifically, Freemont

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[8] See *id.*

[9] Neb. Rev. Stat. § 28-1206 (Supp. 2009).

objected on the grounds of relevance and §§ 27-403 and 27-404. Thus, when viewed in the context of Freemont's objection to Loera's testimony, the basis for Freemont's objection to Harlan's testimony is apparent. We will therefore consider the merits of Freemont's arguments.

(b) Applicability of § 27-404(2) and (3)

Section 27-404(2) provides:

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

Freemont contends that the testimony in question was evidence of a prior crime under § 27-404(2). If so, then the trial court erred in not holding a hearing pursuant to § 27-404(3), which provides:

> When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

The State argues, however, that § 27-404(2) does not apply because the evidence was substantive evidence of a charged crime—possession of a deadly weapon by a prohibited person.

Here, the State charged Freemont only in relation to the events of June 18, 2010. The prior incident at issue occurred several days or a week (the record is unclear) before that date. It was a separate incident. And although it was a crime, it was not *charged* by the State in this prosecution. If the State intended to charge that separate incident, it stands to reason that there would be *two* counts charged for possession of a deadly weapon by a prohibited person—one for the day of the shooting and one for the prior incident. But the State charged only one count for the day of the murder. Thus, the State did

not charge Freemont for the prior incident, and evidence of the incident was therefore not substantive evidence of the charged crime. The evidence is not excluded from § 27-404(2) on that basis.

[7] Nor is Freemont's prior misconduct excluded from § 27-404(2) by being "inextricably intertwined" with the charged crime.[10] Section 27-404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.[11]

The exception does not apply to the challenged evidence in this case. The prior misconduct involved an altercation with Loera's cousin, who played no part in Galligo's murder on June 18, 2010. The prior misconduct did not provide any insight into Freemont's reason for allegedly killing Galligo. Moreover, it was not part of the same transaction and occurred several days or a week before Galligo's murder. Accepting the State's argument would open the door to abuse of the inextricably intertwined exception. Its susceptibility to abuse is why some federal courts have limited or rejected the exception.[12] We conclude that the prior incident was not inextricably intertwined with the charged crime. As such, and because the prior misconduct was not substantive evidence of a charged crime, the evidence falls under § 27-404(2) as a prior uncharged crime.

As a result, the prosecution was required by statute to prove by clear and convincing evidence that the prior misconduct

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[10] See *State v. Wisinski*, 268 Neb. 778, 781, 688 N.W.2d 586, 590 (2004).

[11] See, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinski, supra* note 10.

[12] See, *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), *cert. denied* 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234; *U.S. v. Gorman*, 613 F.3d 711 (7th Cir. 2010); *U.S. v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000).

occurred.[13] Such proof must be set forth at a hearing outside the presence of the jury.[14] The trial court did not hold such a hearing. Thus, the court erred when it allowed Harlan and Loera to testify regarding Freemont's prior misconduct. The remaining issue is whether that error was harmless.

(c) Harmless Error

[8] Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.[15] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[16]

Here, the prosecution used the evidence to help link Freemont to the murder. Both Harlan and Loera testified that they had previously seen Freemont with a gun, which he carried in his backpack. Harlan testified that it was "[p]robably" the same backpack that Freemont had on the day of Galligo's murder. Loera testified that Freemont had the same gun—a .22-caliber revolver—on the day of the shooting as he had during his prior "altercation" with her cousin. The prosecution then referenced their testimony during closing argument to reinforce the connection between that prior incident and Galligo's murder. For example, at one point the prosecutor stated that "[j]ust like [Harlan] and just like [Vawter], [Loera] sees the gun in [Freemont's] hand, the same gun that she saw him with two to three days before this incident."

[9] These statements, if viewed in isolation, would tend to militate against a finding that this error was harmless. But harmless error review looks to the entire record and views the erroneously admitted evidence relative to the rest of the

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[13] See § 27-404(3).

[14] *Id*.

[15] See *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[16] See *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

untainted, relevant evidence of guilt.[17] And after our review of the whole record, we find this error harmless.

There is no reason to believe that this evidence materially influenced the jury's verdicts. It is true that Freemont's previous possession of the murder weapon was probative of his identity as the murderer. But the evidence was relatively minor in the context of other evidence proving that he shot Galligo. For example, Vawter testified that Freemont reached into his backpack and pulled out a gun. Vawter testified that Freemont told her to sit back and then leaned across her and shot Galligo. And while Vawter changed her story a number of times in speaking to the police, she consistently maintained that Freemont had fired the shots.

The evidence was also undisputed that Freemont was the only man in the car and that he was seated in the back seat. The crux of the defense theory involved showing Loera to be the shooter, rather than Freemont. But all the witnesses with a view of the crime testified that the driver, Loera, was outside the car when Galligo was shot. Moreover, there was repeated testimony from unbiased third parties, whose credibility was not in question, that the shots came from the back seat of the car. One witness and her sister both testified that a man sitting in the back seat of the car shot Galligo. And another witness testified that the shots came out of the rear window of the car.

In short, when viewed in relation to the whole record, the erroneously admitted evidence was relatively insignificant. The State charged Freemont with second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The jury could find each and every element of those crimes to be met by the above testimony. Moreover, Harlan and Loera both testified that Freemont shot and killed Galligo. The erroneously admitted evidence did not provide some crucial link to allow the State to make its case and was largely unnecessary. Thus, the erroneously admitted evidence was relatively insignificant and did not materially influence the jury's verdicts.

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[17] See *id.*

Furthermore, Freemont's defense strategy involved specifically and repeatedly attacking Harlan's and Loera's credibility. If the jury was convinced by Freemont's tactics, as it very well could have been, then it stands to reason that it would disregard their testimony, including their testimony regarding Freemont's prior misconduct. And even assuming the jury gave weight to their testimony, it would still be tempered by Freemont's effective undercutting of Harlan's and Loera's credibility. Combined with the relative insignificance of the testimony in the first place, we can safely say that the jury's verdicts are surely unattributable to its erroneous admission.

2. Evidence of Freemont's "Flight"

Freemont argues that the trial court erred in allowing the State to introduce evidence intended to show Freemont's "consciousness of guilt." The court admitted testimony and exhibits 71 through 74, relating to Freemont's alleged attempt to avoid arrest by jumping out a second-story window. Freemont did not object to Martin's testimony in which he recounted witnessing Freemont jump from a second-story window. Following this testimony, the State offered the related exhibits. Freemont objected to the admission of the exhibits, citing §§ 27-401, 27-403, and 27-404.[18] The objections were overruled, and the exhibits were admitted into evidence.

Because the exhibits were admitted after Martin's testimony recounting the events, the exhibits are cumulative evidence.[19] The testimony indicates that Freemont could have only leapt out of a second-story window to avoid apprehension. This testimony was properly admitted without objection. So, even if we were to determine that the exhibits were erroneously admitted, such error would be harmless, because Martin's testimony presents the primary evidence related to the issue of flight.[20] We therefore cannot say that the trial court abused its discretion in admitting the related exhibits.

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[18] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), and §§ 27-403 and 27-404.

[19] See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[20] See *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

3. Expert Testimony Regarding Ballistics Comparison

Freemont argues that the trial court abused its discretion in allowing Bredow to testify regarding his ballistics testing and report. Freemont argues that the evidence admitted was within the scope of the court's July 2010 discovery order and that the State failed to provide a report detailing Bredow's findings and proffered testimony. Freemont also asserts that the trial court's proposed remedy—allowing Bredow to testify and then allowing defense counsel to depose Bredow prior to cross-examination—would have forced defense counsel "into a position where he was investigating the case at the same time he was trying it and, therefore, was insufficient to cure any prejudice caused by the State's belated disclosure of the report."[21] The order upon which Freemont apparently relies is a journal entry dated July 20, 2010, which states in part: "Mutual and reciprocal discovery ordered pursuant to statute."

[10,11] Section 29-1912(1)(e) allows a defendant charged with a felony to request that the prosecuting authority provide him with copies of the results and reports of scientific tests or experiments made in connection with the case. Pursuant to § 29-1912(1)(e), following a proper discovery request, the State has an obligation to disclose information which is material to the preparation of a defense to the charge against the defendant.[22]

The record reflects that the State made Bredow's report available to Freemont as soon as the State received it; therefore, there is no evidence of prosecutorial misconduct in the instant case. The only remaining issue we must determine is whether Freemont was prejudiced by the trial court's failure to exclude the expert witness evidence when Freemont only received the report a week prior to the commencement of trial.

[12] Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought

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[21] Brief for appellant at 24.

[22] See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.[23]

Defense counsel stated that he received the notice of Bredow's endorsement as an expert witness sometime before December 2010 and, at that time, was made aware that Bredow would testify regarding the characteristics of a slug recovered during the victim's autopsy. At no time prior to trial did defense counsel ask to depose Bredow. At the hearing, the court gave defense counsel an opportunity to depose Bredow, but counsel stated that he did not need to. The court overruled Freemont's objection and allowed Bredow to testify.

While recognizing that receiving Bredow's report so close to the commencement of trial may have posed a burden on defense counsel, we do not conclude that such delay rose to the level of prejudicial error.[24] Any prejudice that Freemont may have suffered as a result of the delay was cured by the fact that the State and the trial court made every opportunity available to Freemont to depose Bredow prior to the continuation of trial. And there is nothing to indicate Bredow could not have been deposed in the days leading up to trial regarding the tests already conducted. Because Freemont had the opportunity to depose Bredow prior to trial and was given ample opportunity to take a continuance to depose him at a later date, we determine that Freemont was not prejudiced by the late disclosure of Bredow's report. Accordingly, the trial court did not abuse its discretion in allowing Bredow to testify.

4. Admission of Autopsy Photographs

The State offered exhibits 56 through 58, which contained images of Galligo's face post mortem, and exhibit 63, which showed the site on Galligo's back where a bullet was removed during the autopsy. Freemont objected, on § 27-403 grounds,[25]

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

[24] See *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[25] See § 27-403.

to the admission of exhibits 56 through 58 and 63 and also asserted a foundational objection to exhibit 63. The objections were overruled, and the exhibits were entered into evidence.

Freemont argues that the exhibits were unfairly prejudicial and that they lacked any probative value. Freemont asserts that the parties did not contest that Galligo's death was a result of a gunshot wound to the chest; therefore, there was no legitimate purpose for the admission of the photographs. Freemont argues that the photographs of Galligo's face were especially prejudicial and lacked any probative value in light of the fact that Galligo's death did not result from any wounds or blows to the face. Because the State introduced evidence and testimony regarding the fatal gunshot wound, and a photograph of Galligo taken prior to his death for purposes of identification, Freemont argues the autopsy photographs only served to incense the jury. Freemont also states that exhibit 63 was irrelevant to the case, as it depicted "a post-mort[e]m, pathologist-generated, autopsy-related event" independent of the shooting.[26]

The State argues that the photographs contained in exhibits 56 through 58 were not admitted to show the cause of death, but to corroborate the witnesses' version regarding what took place at the scene—that Galligo was shot in the chest and then fell to the ground, hitting his face and knocking off his glasses. The State asserts that the photographs are not gruesome in nature, stating that "[a]s autopsy photographs go, they are pretty tame."[27]

Exhibit 63, the State argues, was necessary to form the foundation of Bredow's testimony. Exhibit 63 establishes that the bullet Bredow examined was taken from Galligo's body during the autopsy, as it did not exit the body at the time Galligo was shot.

[13] Pursuant to § 27-403, "'unfair prejudice' means an undue tendency to suggest a decision based on an improper basis."[28] In a homicide prosecution, photographs of a victim

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[26] Brief for appellant at 26.

[27] Brief for appellee at 31.

[28] *State v. Canbaz*, 259 Neb. 583, 592, 611 N.W.2d 395, 403 (2000).

may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[29]

[14] A defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.[30] The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[31] Though the State and Freemont agreed that a gunshot to the chest was the cause of Galligo's death, the photograph remained probative of the condition of the body. The record also reflects that the exhibits were relevant to Bredow's expert testimony and to corroborate eyewitness testimony.

The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[32] Because the exhibits here were used to present a coherent picture of the crime and to corroborate witness observations of the events leading up to the shooting, we cannot say that the trial court abused its discretion in admitting the photographs of Galligo's body.

5. Jury Instructions

Freemont argues that the trial court erred in refusing to give his proposed instruction regarding eyewitness identification and in giving an "acquit first" step instruction that is contrary to the Nebraska pattern jury instructions.[33] For the following reasons, we determine Freemont's arguments to be without merit.

(a) Eyewitness Identification Instruction

Though the jury was instructed as to issues of witness credibility, Freemont proposed an additional instruction regarding reliability of eyewitness identification. Freemont argued that

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[29] *State v. Galindo*, *supra* note 5.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Brief for appellant at 29.

the instruction was proper because the facts of the case support the contention that there was "the possibility of an honest but mistaken" eyewitness identification. The State objected, noting that Nebraska has not created a pattern eyewitness instruction and that such an instruction is not required in this jurisdiction.

Freemont's proposed instruction states:

> [Y]ou should bear in mind that there has been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications which identifications were subsequently proved to be erroneous; and accordingly you should be specially cautious before accepting such evidence of identification as correct.[34]

The court denied Freemont's request to issue the instruction.

[15] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[35]

Freemont relies on *United States v. Telfaire*[36] and its progeny for the proposition that, when requested, trial courts should give a cautionary instruction when identification is a major factor or when the circumstances of the identification call into question its reliability. This court has not had occasion to analyze the implications of *Telfaire* in this context. However, we need not determine whether the instruction proposed by Freemont amounts to a correct statement of the law in this jurisdiction, because we determine that such instruction was not warranted by the evidence here.

It has been recognized that it is reversible error to refuse to give an eyewitness identification instruction where the

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[34] See *United States v. Telfaire, supra* note 1.

[35] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[36] *United States v. Telfaire, supra* note 1.

government's case rests solely on questionable eyewitness identification.[37] And *Telfaire* specifically dealt with issues arising out of the reliability of cross-racial identifications.[38] Such issues are not present here. A number of the witnesses knew Freemont, and there is no indication of racial bias among any of the eyewitnesses who identified him as the shooter. Each identification was corroborated by another witness and by circumstantial evidence.

Furthermore, the jury here was directed to consider the ability of each witness to observe matters on which the witness had testified. Jury instruction No. 17 specifically directed the jury to consider factors that could impact credibility, including the circumstances of the testimony, the witnesses' conduct and demeanor, any interest in the outcome, and the witnesses' opportunity to observe the matters on which they testified. The court further instructed that the jury should consider the witnesses' ability to remember and relate the events accurately and the extent to which the testimony is or is not corroborated. We determine that Freemont cannot establish prejudice as a result of the court's refusal to give the tendered instruction. The credibility instruction was sufficient to protect against any prejudice related to the reliability of the eyewitness identifications, of which there were many. Accordingly, the trial court did not err in refusing to give the eyewitness identification instruction in this case.

(b) Step Instruction

Freemont objected to the step instruction given by the court and proposed that the court use the pattern jury instruction contained in NJI2d Crim. 3.1. Freemont also informed the trial court of our previous holding in *State v. Goodwin*,[39] which encourages trial courts to use the pattern instruction. The State objected to Freemont's proposed instruction. The

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[37] See, *U.S. v. Grey Bear*, 883 F.2d 1382 (8th Cir. 1989); *U.S. v. Mays*, 822 F.2d 793 (8th Cir. 1987).

[38] *United States v. Telfaire, supra* note 1.

[39] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

court agreed with the State, overruled Freemont's objection, and ultimately gave its proposed step instruction as jury instruction No. 4.

In *State v. Taylor*,[40] we recently addressed a step instruction similar to the instruction given here. *Taylor* was published after Freemont's trial and convictions. In *Taylor*, we determined that the defendant was not prejudiced by the step instruction, but again encouraged courts to use the pattern jury instruction in the future.[41] We similarly conclude that Freemont was not prejudiced by jury instruction No. 4. Therefore, the trial court did not err in giving the step instruction.

[16,17] Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.[42] However, although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.[43]

NJI2d Crim. 3.1 includes a listing of the offenses which the jury is to consider and the elements of each offense. It then provides the following direction for the jury:

> You must separately consider in the following order the crimes of (here insert crimes charged beginning with the greatest and listing included crimes in sequence). For the (here insert greatest crime) you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of (here insert greatest crime) and [stop]. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, the (here insert first lesser included). You must proceed in this fashion to consider each of the crimes in sequence

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[40] *State v. Taylor, supra* note 6.

[41] See NJI2d Crim. 3.1.

[42] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

[43] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

> until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.[44]

Jury instruction No. 4 includes two sections, each of which spells out the material elements for the two grades of homicide at issue here. Each section of the instruction then states that if the jury finds that the State has proved by evidence beyond a reasonable doubt that each and every one of the material elements set out in that section was true, the jury should find the defendant guilty of that crime. Each section goes on to state that if, on the other hand, it is found that the State had failed to prove beyond a reasonable doubt any one or more of the material elements in that section, it is the jury's duty to find the defendant not guilty of that crime. The instruction then directs the jury to "proceed to consider the lesser included offense."

Freemont correctly asserts that we encouraged courts to use NJI2d Crim. 3.1 in *Goodwin*, and we reiterated this statement in *Taylor*.[45] However, though this court noted the pattern instruction provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, we found no constitutional infirmity in the step instructions given in *Goodwin* and *Taylor*.[46]

Freemont fails to specify how he was prejudiced by the step instruction, nor does he specify a theory which the instruction prevented the jury from considering. Freemont's argument that he lacked the intent to kill and should therefore be found guilty of manslaughter and acquitted of second degree murder was presented at trial and argued by defense counsel to the jury. Accordingly, we determine that Freemont was not prejudiced by jury instruction No. 4. However, we again urge trial courts to use the pattern jury instruction in the future. It may not always be the case that the defendant is not prejudiced by the failure to give the pattern jury instruction.

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[44] NJI2d Crim. 3.1.

[45] See, *State v. Taylor, supra* note 6; *State v. Goodwin, supra* note 39.

[46] See *id*.

6. Sufficiency of Evidence

Freemont asserts that the State failed to present evidence sufficient to support his conviction. He argues that the witness testimony presents a factual conflict: On the one hand, the bystander witnesses, who were not involved in the incident, failed to make an in-court identification of Freemont as the shooter, and some witnesses even identified Loera as the shooter prior to trial. On the other hand, the witnesses involved in the incident identified Freemont as the shooter, but those individuals have a vested interest in the outcome of the case. Freemont states:

> For a trier of fact to conclude that Freemont was the shooter on the basis of this evidence would require the trier of fact to ignore facts in evidence from a set of witnesses with no vested interest in the outcome of the prosecution who indicated that a person other than Freemont shot Galligo.[47]

Freemont also states that the testimonies of Harlan, Vawter, and Loera are not reliable because each witness lied to police prior to testifying. In essence, Freemont argues that the witness testimony presented by the State was "not sufficient to allow the jury to rely on it to convict Freemont."[48]

In reviewing a sufficiency of the evidence claim, 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.[49] 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.[50]

The record reflects that a number of witnesses observed the altercation between Loera and Galligo, heard gunshots, and

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[47] Brief for appellant at 31.

[48] *Id.* at 32.

[49] *State v. Nero, supra* note 7.

[50] *Id.*

saw either a gun or smoke from the gun coming from the back seat of a white car. Two bystander witnesses testified that they observed a male fire the shots from the back seat of the car, and two others similarly testified that the shots came from the back seat of the car, though they could not see the shooter. And each witness who was directly connected with Freemont and present in or near the car on the day of the shooting identified Freemont as the shooter.

Freemont's arguments expressly ask this court to resolve conflicts in the evidence presented at trial and to pass on the credibility of witnesses. These are not matters to be resolved by an appellate court.[51] After viewing the evidence presented in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found Freemont committed the essential elements of the crime beyond a reasonable doubt. Accordingly, the evidence is sufficient to sustain Freemont's conviction.

7. Ineffective Assistance of Counsel

[18,19] Finally, Freemont raises several issues with regard to his claims of ineffectiveness of trial counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[52] The determining factor is whether the record is sufficient to adequately review the question.[53] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[54]

Freemont argues that counsel was ineffective for failing to (1) elicit evidence of third-party guilt, (2) object to inadmissible identification evidence during a pretrial suppression hearing, (3) request a cautionary instruction regarding accomplice testimony, (4) request a mistrial when the State put forward a consciousness of guilt argument during closing arguments, (5) request a continuance in order to investigate

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[51] See *id.*

[52] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[53] *Id.*

[54] *Id.*

fully Bredow's ballistics report, (6) adduce significant forensic evidence regarding bullet trajectory, and (7) elicit evidence regarding Freemont's lack of motive. For the reasons that follow, we determine that the record is insufficient to address Freemont's arguments.

Freemont's arguments regarding third-party guilt rest on claims that three witnesses identified Loera as the shooter prior to trial and that counsel failed to use this evidence at trial to impeach those witnesses. There is nothing in the present record that reflects why counsel did or did not elicit certain testimony during cross-examination. And we have no way of determining whether action taken by counsel was misguided or based upon sound strategic motive. A resolution of this question would require an evidentiary hearing, and we thus determine that it is not appropriate for review on direct appeal.

Freemont argues that counsel was ineffective in failing to object to inadmissible identification evidence. Prior to trial, counsel filed a motion to suppress identification on the basis that the procedures used to procure Harlan's identification of Freemont were unduly and innately suggestive and, therefore, prejudicial to Freemont. At the suppression hearing, Martin testified regarding the identification procedure. Martin conducted the photographic array with Harlan on two occasions. Martin testified that Harlan told Loera that she had purposely picked out the wrong photograph in the first array and that Harlan had told Martin she did so because she was scared. Freemont claims that these statements, among others, were inadmissible hearsay and that counsel was ineffective in failing to object to the statements. Freemont also appears to claim that counsel should have called Harlan to testify at the hearing. Again, the record is not sufficient to address these claims, because it does not disclose counsel's reasons for failing to call Harlan as a witness or to object to the admission of certain evidence.

Freemont next claims an accomplice testimony instruction should have been given regarding Loera's testimony. But there is nothing in the record that establishes Loera as an accomplice. The record reflects that Loera was charged as an accessory to a felony in relation to Galligo's death, but such a

charge is distinct from the determination that she acted as an accomplice.[55] The record is therefore insufficient to address this claim.

Freemont asserts that trial counsel was ineffective for failing to move for a mistrial based on the State's closing argument. Freemont claims that because the court declined to issue the State's proposed instruction regarding consciousness of guilt, it was improper for the State to reference this theory during closing arguments. Again, we cannot speculate as to why trial counsel did not interpose such an objection, and the issue is inappropriate for review here.

Freemont claims trial counsel was ineffective for failing to request a continuance in order to investigate Bredow's ballistics report. As noted above, the court gave counsel the opportunity to depose Bredow and offered a half-day continuance for that purpose. Though counsel declined this offer, the record does not indicate counsel's reasons or motive for doing so. Nor does the record suggest what evidence, if any, would have resulted from further investigation into the ballistics report. Thus, the record is insufficient to address this claim.

Freemont argues that his trial counsel failed to adduce evidence regarding bullet trajectory. Counsel cross-examined the pathologist who performed Galligo's autopsy regarding the trajectory of the bullet that killed Galligo, but there is nothing in the record which reflects that further evidence of this nature would have been probative or exculpatory. Without the identification of what evidence could have been produced that would be probative or exculpatory, this claim cannot be reached.

Finally, Freemont claims that trial counsel was ineffective in failing to elicit evidence regarding Freemont's lack of a motive to kill Galligo. Freemont argues that counsel should have offered evidence to establish that Freemont barely knew Galligo and that he was not a member of any group or organization that bore hostility toward Galligo. Again, this claim cannot be addressed on the record before us—there is no indication of trial counsel's strategy in presenting or declining to

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[55] See *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

present certain evidence. Freemont is free to raise these issues of ineffective assistance of counsel in a motion for postconviction relief.

8. Cumulative Errors

Because we find only one error in this case, and that error was harmless, a reversal cannot be predicated on cumulative error. Freemont's arguments to the contrary are without merit.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

Heavican, C.J., and Wright, J., not participating.

Cassel, Judge, concurring.

I agree with the majority opinion except in one respect. I write separately because I agree with the State that the testimonies of Harlan and Loera were not rule 404(2)[1] evidence, but, rather, substantive evidence relating to the charge of possession of a weapon by a felon.

Because the State charged Freemont with possession of a deadly weapon by a prohibited person, it had the burden to prove, as relevant to the facts of this case, that Freemont possessed a firearm and that he had previously been convicted of a felony.[2] Thus, Harlan's testimony that she saw Freemont with a gun a few days before the shooting which looked like the gun used in the shooting and Loera's testimony that she saw Freemont display the same gun that was used in the shooting a week before the shooting were relevant to prove the charge of possession of a gun by a prohibited person.

Evidence of Freemont's earlier possession is intrinsic to and directly bears on an element of the charged crime of being a felon in possession of a deadly weapon. Four reasons support my conclusion. First, this court has previously recognized that intrinsic evidence is not subject to rule 404(2). Second, several federal circuit courts, faced with strikingly similar facts, have

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[1] Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).

[2] See Neb. Rev. Stat. § 28-1206 (Supp. 2009).

determined that evidence of the accused's prior possession was intrinsic to and a part of the government's direct proof of the charged crime of unlawful possession of a firearm. Third, the rationale underlying rule 404 does not require the majority's narrow view of permissible evidence. Finally, I am not persuaded by the majority's articulated rationale.

This court has repeatedly excluded certain evidence from the reach of rule 404. In *State v. Aguilar*,[3] the court said, "Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of rule 404(2) coverage." In *State v. Wisinski*,[4] the court again held that rule 404 did not apply to the evidence. The court accepted that where evidence of other crimes is so blended or connected with the ones on trial as that proof of one incidentally involves the others, or explains the circumstances, or tends logically to prove any element of the crime charged, it is admissible as an integral part of the immediate context of the crime charged.[5] And in *State v. Robinson*,[6] this court recognized that such evidence is often referred to as "intrinsic evidence." The court again accepted that a trial court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime.[7] Thus, this court has long recognized that such evidence falls outside the rubric of rule 404.

I next turn to several federal cases that closely parallel the factual circumstances present in the case before us and begin by discussing a case from the circuit that includes Nebraska. In *U.S. v. Adams*,[8] the Eighth Circuit treated testimony from the defendant's roommate that he observed the defendant possess

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[3] *State v. Aguilar*, 264 Neb. 899, 909, 652 N.W.2d 894, 903 (2002).

[4] *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[5] See *id.*

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

[7] See *id.*

[8] *U.S. v. Adams*, 604 F.3d 596, 599 (8th Cir. 2010).

a firearm on four occasions, all within a year prior to his arrest, as intrinsic to the crime charged—being a felon in possession of a firearm—and determined that the testimony was "evidence of possession that 'directly supports' the charge." The court reasoned that the testimony helped establish the defendant's ownership or control of the gun and that the evidence was not subject to rule 404(b) of the Federal Rules of Evidence because it "'tends logically to prove [an] element of the crime charged.'"[9] Similarly, in the instant case, Harlan's and Loera's testimonies that Freemont possessed a gun directly supported the charged crime and tended to prove an element of the crime.

At least two other circuit courts have reached a similar conclusion. In *U.S. v. Dorsey*,[10] the defendant was charged with several crimes, including discharging a firearm, and he challenged the admission of testimony from two witnesses regarding his possession of a Glock-like gun 3 to 4 months before the shooting. The Ninth Circuit determined that the testimony was not evidence of prior bad acts under rule 404(b), but, rather, evidence that the defendant had a gun of the same or a similar type as the gun used in the shooting, which was relevant to show that the defendant had the means to commit the charged crimes and was the shooter. The Ninth Circuit reasoned that the evidence was inextricably intertwined with the charged crimes because it bore directly on the commission of those crimes and that the testimony "added to the circumstantial case" and "formed part of the prosecution's 'coherent and comprehensible story regarding the commission of the crime.'"[11] The Ninth Circuit further concluded that the probative value of the testimony was not outweighed by a danger of unfair prejudice because the testimony linked the defendant "to a gun that was the same as or similar to the gun likely used in the shooting."[12] The *Dorsey* court reasoned, "Evidence that [the defendant] had

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[9] *Id.*

[10] *U.S. v. Dorsey*, 677 F.3d 944 (9th Cir. 2012).

[11] *Id.* at 952.

[12] *Id.*

a Glock-like gun in January or February of 2008 made it more likely that he still had that gun on the night of the shooting in May."[13]

The 10th Circuit considered a situation in *United States v. Mitchell*,[14] where the defendant was charged with possession of an unregistered firearm based upon the discovery of a sawed-off shotgun which was found approximately 100 feet from the defendant's home. The government adduced testimony from witnesses who observed the defendant the night before the discovery of the firearm: One witness testified that he saw the defendant with a shotgun that looked similar to the shotgun introduced in evidence, while another witness testified that he saw the defendant carrying a sawed-off shotgun. The federal court concluded that the testimony was not rule 404(b) evidence because the government had to connect the defendant with the sawed-off shotgun found near the defendant's home. The court reasoned that the defendant's earlier conduct was closely and inextricably connected with the offense charged because it showed his possession of a sawed-off shotgun.

In the case before us, the State had the burden of proving beyond a reasonable doubt that Freemont possessed a deadly weapon, specifically, a firearm. His possession of a firearm on the earlier occasions, shortly before the date of the charged offense, provides circumstantial evidence that he possessed the firearm on the date of the offense.

I turn to the underlying purpose of rule 404, which operates to exclude evidence of a person's past misdeeds if the sole purpose of the evidence is to prove the existence of a trait of character, and, from that trait, an inference of particular conduct. As a commentator long ago summarized, "'[o]ur rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character.'"[15] As the U.S. Supreme Court stated,

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[13] *Id.*

[14] *United States v. Mitchell*, 613 F.2d 779 (10th Cir. 1980).

[15] David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 1.2 at 3 n.5 (Richard D. Friedman ed., 2009), quoting 1 John H. Wigmore, Evidence in Trials at Common Law § 57 (1904).

"The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[16]

But in the case before us, the evidence speaks not to Freemont's character, but, rather, to the likelihood of his possession of a firearm at the time of the charged crimes. Indeed, this circumstantial evidence of possession of the gun occurred much closer in time to the charged crimes than did the similar evidence admitted by the federal courts.

I am not persuaded by either of the reasons articulated by the majority, which first contends that Freemont's possession of a deadly weapon a few days or a week before the shooting was an uncharged crime because the State charged the possession crime as occurring on June 18, 2010—the day of the murder. The majority reasons that because the State did not charge Freemont with a separate crime for either of the prior incidents, evidence of the incidents was therefore not substantive evidence of the charged crime. But the federal cases I have already cited emphatically reject this reasoning. To take the clearest example, evidence that a person possessed a gun both on the day before and on the day after he is charged with its possession provides powerful circumstantial evidence that he or she possessed it on the day of the charge. This evidence does not speak to the defendant's character; rather, it is evidence tending to prove that he or she possessed the gun on the date charged. The majority's approach would require a rule 404 analysis simply because the observations were not on the precise day of the charged crime. In the case before us, the evidence is not so removed in time as to lose its temporal connection to the charged date of possession. While I concede that such an interval exists, it is clear to me that a matter of a few days or a week is well within the relevant time.

Second, the majority focuses on the murder, while the disputed evidence bears on the possession of the gun. The

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[16] *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

majority states that "[t]he prior misconduct did not provide any insight into Freemont's reason for allegedly killing Galligo." This, I contend, misses the point—the evidence directly spoke to Freemont's possession of a gun similar, if not identical, to the one he was charged with possessing on the date of the crime.

Moreover, the majority overlooks the significance of the language of the information setting forth the date of the offense. Notably, the information charged Freemont with unlawfully possessing a deadly weapon "on or about the 18th day of June, 2010." Testimony that Freemont possessed the gun a few days before June 18 provided confirmation that he possessed it "on or about" that date. The Eighth Circuit similarly concluded in *U.S. v. Adams*.[17] In that case, the defendant was convicted of being a felon in possession of a firearm "'on or about March 14, 2008,'"[18] and one of the defendant's roommates testified that he observed the defendant possess the firearm on four occasions, all within a year prior to his arrest. The defendant argued that the prior possession testimony altered the date of the offense, but the Eighth Circuit reasoned that "the government never wavered in its theory of the case at trial: the location where the gun was found established [the defendant] possessed the firearm 'on or about' the charged date and [the roommate's] testimony simply provided confirmation of possession."[19] In my view, Harlan's and Loera's testimonies simply provided confirmation that Freemont was in possession of a gun "on or about the 18th day of June, 2010." Because such testimony proved an element of the crime charged, no analysis under rule 404 was necessary.

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[17] *U.S. v. Adams, supra* note 8.

[18] *Id.* at 597.

[19] *Id.* at 600.