STATE OF NEBRASKA, APPELLEE, V. DALLAS L. HUSTON, APPELLANT.

824 N.W.2d 724

Filed January 11, 2013. No. S-11-539.

1. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.
3. **Pretrial Procedure: Evidence.** A motion to redact that seeks the exclusion of prejudicial evidence through redaction essentially functions as a motion in limine, even if it is not labeled as such.
4. **Pretrial Procedure: Evidence: Juries.** A motion asking for the exclusion of evidence in a particular manner, such as redaction, functions as a motion in limine so long as it requests that certain evidence be withheld from the jury due to its prejudicial nature.
5. **Pretrial Procedure: Evidence: Appeal and Error.** When a motion to redact evidence is overruled, the movant must object at trial when the specific evidence which was sought to be excluded by the motion is offered in order to preserve error for appeal.
6. **Rules of Evidence: Appeal and Error.** Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 2008), states that error can be based on a ruling that admits evidence only if the specific ground of objection is apparent either from a timely objection or from the context.
7. **Trial: Evidence.** Even if there are inadmissible parts within an exhibit, an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible.
8. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
9. **Effectiveness of Counsel: Records: Trial: 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.
10. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
11. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

CASSEL, J.

I. INTRODUCTION

Nearly 2 months before Dallas L. Huston's jury trial for second degree murder, the district court ruled on Huston's motion to redact video recordings of his police interviews—excluding portions but allowing the remainder. On appeal from Huston's later conviction and sentence, we conclude that trial counsel did not preserve any objection to the admission of the remaining portions of the recordings at trial by merely stating, "No further objection . . . ." Huston also argues, through different counsel on direct appeal, that the failure to object constituted ineffective assistance of counsel. Because we find the record to be insufficient to adequately address the question of trial counsel's effectiveness, we do not reach this issue on direct appeal.

II. BACKGROUND

Huston and Ryan Johnson were living together as a couple in a nonsexual relationship when Huston allegedly found Johnson in their bedroom with plastic wrap wrapped around his face at around 11:15 a.m. on September 16, 2009. Huston called the 911 emergency dispatch service at 11:28 a.m. Paramedics performed lifesaving measures but were unable to revive Johnson.

Given that Johnson had previously attempted suicide, the police initially investigated his death as a suicide. As part of this investigation, they interviewed Huston numerous times. Due to the number and length of these interviews, we provide only a brief overview, focusing on pertinent sections as necessary later in the opinion.

The police first interviewed Huston on the day of Johnson's death, mainly asking him questions related to (1) the possible

reasons for Johnson's apparent suicide and (2) the events leading to Johnson's death. Huston admitted that he was alone in the house with Johnson that morning, but stated that he had gotten up around 9 a.m. and spent the morning in the living room, while Johnson slept. According to Huston, he decided to check on Johnson at approximately 11:15 a.m. because Johnson had vomited earlier that morning. Huston claimed that he then found Johnson lying on the bed with plastic wrap covering his face and no perceptible pulse.

The police again interviewed Huston on September 29, 2009. It was during this interview that Huston's multiple personalities first emerged. Huston later admitted at trial that he made up these different personalities as part of a "social experiment" and that he controlled them completely. As such, we refer to these personalities solely to provide context for Huston's statements.

Shortly before the September 29, 2009, interview, the police received a report that Huston had told his friend, Nicholas Berghuis, that the personality "Vincent" helped Johnson to commit suicide. When confronted with this report during the interview, Huston admitted that he had trouble with multiple personalities, that one of his personalities was called Vincent, and that Johnson had asked for help in committing suicide in the past, but Huston denied any involvement with Johnson's death. Huston allowed the police officers to speak with the personality "Que," who explained that when Huston made those statements to Berghuis, he was describing a nightmare he had been having since Johnson's death. The personality "Que" also directed the officers to a video on Huston's computer of "Que" pretending to kill Johnson by putting a pillow over his face.

Because Huston had told Berghuis and another friend, Christopher Wilson, that one of his personalities had been involved in Johnson's death, Berghuis and Wilson arranged with the police to set up video surveillance in Wilson's house, where Huston often spent time. Huston's conversations with Berghuis and Wilson on October 6 and 7, 2009, were recorded. During these conversations, Huston's various personalities admitted that "Vincent" assisted in Johnson's death at Johnson's

request. Specifically, the personality "Vincent" admitted to (1) wrapping the plastic wrap around Johnson's face, during which time Johnson yelled, "Get it off"; (2) holding a pillow over Johnson's face when Johnson broke through the plastic wrap while trying to breathe; and (3) listening to Johnson's last heartbeats "with enjoyment."

Following the video surveillance on October 7, 2009, the police brought in Huston for questioning. Over the course of the interview, Huston went from vehemently denying any involvement in Johnson's death to admitting that the events he described were not a dream and that he physically aided in Johnson's death, albeit through the personality "Vincent."

Huston tried to retract these statements in his next interview with the police on the evening of October 8, 2009. He denied any involvement in Johnson's death and claimed that he had been "badgered" into making a confession during the previous interview. By the conclusion of the interview on October 8, however, Huston again admitted that he participated in Johnson's death by wrapping plastic wrap around Johnson's head and holding a pillow over his face.

In an interview on October 10, 2009, Huston revealed that Johnson had asked for his help in committing suicide. Huston maintained that he "helped [Johnson] commit suicide" and that he did not "murder him."

Huston was ultimately arrested and charged with second degree murder. He pled not guilty, and his case went to jury trial in January 2011.

Prior to trial, Huston filed a motion requesting the district court to redact the video recordings of his police interviews. The State agreed with some of the proposed redactions, and the court ruled on the proposed redactions to which the parties did not agree. Some of Huston's proposed redactions were sustained, but others were not. After receiving the court's rulings, the State edited the video recordings to reflect the redactions that had been agreed to by the State or ordered by the court. These video recordings were admitted into evidence at Huston's subsequent trial and were published to the jury. When asked whether there were any objections to the admission of these video recordings, Huston's counsel

responded by stating that he had either no objection or no "further" objection.

The testimony at trial included both the video recordings of Huston's police interviews—including the proposed redactions that were not sustained—and testimony from the police officers who had conducted those interviews. Of this plethora of evidence, we mention only the nine specific portions that have been identified by Huston on appeal. These segments include evidence relating to (1) Huston's "homosexual encounter"[1] with Wilson, (2) speculation that Huston is a serial killer and Huston's future dangerousness, and (3) the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide.

First, in the video recording of Huston's interview with the police on the day of Johnson's death, Huston described his "homosexual encounter" with Wilson. Huston's conversation with the police officer conducting the interview went as follows:

> [Huston:] Okay, to be completely honest, me and [Wilson] were together once. Only once. Um, it's how it came out to [Johnson] that we might have been interested in each other, but [Wilson] decided he didn't want to do that.
>
> [Police officer:] Okay, and was this early in your relationship with [Johnson]? Or—
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> [Huston:] [Interrupting.] Oh, no, no. . . . [Wilson] is only been back around—. See, [Wilson] has only been back in the picture as a friend of ours for like a month. . . . I believe in being upfront. Yes, one time and only one time me and [Wilson] were together and we—. Well, we went to bed together, and—
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> [Police officer:] [Interrupting.] How long ago was that? . . . .
>
> [Huston:] . . . Three weeks ago.
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> [Police officer:] So, it is pretty recent, then.
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> [Huston:] Yep. . . . You probably don't want to hear this, but me and [Johnson] had kind of a unique

[1] Brief for appellant at 34.

> relationship. . . . I know it's kind of a weird situation to be in [be]cause in the 4 years of our relationship, there was never anything sexual. Um, and we allowed ourselves . . . an "open relationship." We allowed ourselves what he'd call "[expletive] buddies." . . . That one and only one time that me and [Wilson] ended up . . . was kind of a "heat of the moment," you know, "spur of the moment" type thing. . . . We ended up in bed together. We kissed. We, we made out. But it never went anywhere further than that.

While this was the only evidence of the "homosexual encounter" with Wilson, Huston's physical attraction to Wilson was referenced in several of the other video recordings received into evidence at trial. In every case, the evidence related to Wilson was received into evidence without objection from Huston's trial counsel.

Second, in the video recording of Huston's October 10, 2009, interview with the police, Huston and Sgt. Gregory Sorensen of the Lincoln Police Department discussed serial killers, the possibility that Huston was a serial killer, and Huston's future dangerousness. The dialog went as follows:

> [Huston:] . . . This is what I meant, though, when I've told everybody that I want to get help. I never thought this could happen, and now that this has happened, I am so scared that I'm capable of doing it again.
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> [Sorensen:] Yeah, I think that that's probably really true.
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> [Huston:] And that scares me to death because, like I said, I have never thought of myself as a violent person, and now I don't know what to think of myself.
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> [Sorensen:] Well, especially when you consider that you have urges to kill the people that you're attracted to.
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> [Huston:] And I've done everything that I could for the last, you know . . . . You know, the earliest memories of this I have are, say, 9, 10 years old. So 18 years I have fought myself.
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> [Sorensen:] But most serial killers do the same thing at some point in time.

> [Huston:] Oh, wow.
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> [Sorensen:] At some point in time, they crossed that line. I mean, when you talk about—
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> [Huston:] [Interrupting.] I've asked myself that.
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> [Sorensen:] Whether you're a serial killer?
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> [Huston:] Uh-hum [yes]. I've asked myself that . . . . You've asked me if I have been suicidal in the past.
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> [Sorensen:] Yeah.
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> [Huston:] To be completely honest, I lied to you. Because of this, I have been. I have thought about killing myself so I wouldn't hurt anyone.

Later in the same interview, Huston stated, "I am so scared now that this could happen again."

Although not raised by Huston on appeal, at other times during the video recordings of his interviews with the police, he expressed a fear that he might commit homicide again. All of this evidence of Huston's future dangerousness was received into evidence at trial without objection.

Finally, the video recordings of Huston's police interviews referenced the opinion of the police that Huston committed murder as opposed to assisted suicide. On appeal, Huston identified four segments in which this opinion was expressed. Two of these segments were from Huston's interview with the police on October 7, 2009. During this interview, Huston engaged in the following dialog with Sorensen:

> [Sorensen:] . . . [Y]ou or Vincent were the person or persons that killed [Johnson]. And maybe at the time, it started out as a suicide, but it didn't end that way. It just didn't end that way.
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> [Huston:] See, I don't believe that.
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> [Sorensen:] You don't believe that it didn't end in a homicide?
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> . . . .
>
> [Huston:] No, I don't.
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> . . . .
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> [Huston:] They asked me that. They asked me that. Did he fight? Did he—

> [Sorensen:] [Interrupting.] He doesn't have to fight. [All] he had to do was break the seal. [All] he had to do was try to breathe, and . . . that was his intent to stay alive—he tried to breathe.

Later in the same interview, Sorensen stated: "[W]hen you put the pillow over his face, you're killing him. He's not killing himself. You're killing him."

Huston identified two more similar comments made by Sorensen in the video recordings, the first during the interview with Huston on October 8, 2009, and the second during the October 10 interview. On October 8, Sorensen said the following:

> You made a pact to commit suicide. When he started to breathe, you put the pillow over the face, which was a continuation of the act. But, say I have a gun in my hand, and say that I want to commit suicide. And so I put it to my head, but before I pull the trigger, I put the gun down. That stops me from committing suicide. Think of this: [Johnson] didn't get a chance. [Johnson] didn't get a chance to make that decision. You made it for him, with the pillow. . . . You know I'm right. He didn't get that chance. He did not get a chance.

On October 10, Sorensen and Huston engaged in the following dialog after Huston asserted that he "didn't murder [Johnson]":

> [Sorensen:] But I don't know how else you can describe it, [Huston]. . . . This isn't assisting a suicide. This, this is just not assisting a suicide. . . . I don't know if you can understand this, but if [Johnson] looks at me right now and he says, "I can't take it anymore. You got to kill me," and I pull a gun out and I shoot him dead—
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> [Huston:] [Interrupting.] You've tried to say that before and I do understand what you mean.
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> [Sorensen:] [Johnson's] just asked me to kill him and I don't have that right to do that. He can ask me all he wants, but I don't have the right to do it. And this isn't any different . . . . I know that you think that it is, but it's not.

The video recordings, including all of the aforementioned evidence that the police believed Huston committed murder, were received at trial and published to the jury without objection by Huston's counsel.

The various police officers present for Huston's interviews also testified at trial. Both Sorensen and Sgt. Kenneth Koziol, also of the Lincoln Police Department, testified before the jury, and each stated that, in his opinion, Huston committed murder. While on the stand, Sorensen explained that he called the Lancaster County Attorney during the investigation of Johnson's death "because at that point we no longer had any type of assisting a suicide . . . . So I wanted to inform the county attorney that this was a murder case." And when asked why the police were "a little bit more confrontational" when questioning Huston on October 7, 2009, Koziol explained that by that time they were "pretty confident that it [was] a homicide. We [felt] that . . . Huston caused . . . Johnson's death . . . ." Huston's counsel made no objection to these statements at trial.

Although not identified by Huston on appeal, there were numerous other instances during trial when similar opinion evidence was received into evidence. In none of these instances did Huston's counsel object.

At the conclusion of Huston's trial, the jury returned a verdict of guilty. Huston was sentenced to 50 years' to life imprisonment. He timely appeals.

III. ASSIGNMENTS OF ERROR

Huston alleges, reordered and restated, that the district court erred in admitting evidence (1) of Huston's "homosexual encounter" with Wilson; (2) of the discussion relating to serial killers, speculation that Huston is a serial killer, and Huston's future dangerousness; and (3) of the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide. Huston also claims that his trial counsel was ineffective in failing to object to this and other evidence.

IV. STANDARD OF REVIEW

[1] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[2]

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.[3]

V. ANALYSIS

1. Error in Admission of Evidence

Huston argues that the district court erred in admitting into evidence specific portions of the video recordings of the police interviews on September 16, 2009, marked as exhibit 38; October 7, marked as exhibit 81; and October 10, marked as exhibit 95. The segments to which Huston objects on appeal were previously identified in the background section of this opinion.

Before trial, Huston had filed a motion to redact segments of the video recordings that he argued were prejudicial, irrelevant, or otherwise inadmissible. Huston's motion was sustained in regard to certain proposed redactions and overruled in regard to others. Amongst the proposed redactions overruled by the court were the segments now at issue on appeal. As a result, the video recordings marked as exhibits 38, 81, and 95 still included these segments when they were received into evidence at trial and published to the jury.

When the State offered exhibits 38, 81, and 95 into evidence at trial, the district court specifically asked Huston whether he had any objections. In all three instances, Huston responded that he had "[n]o further objection . . . ." He now argues that these responses were sufficient to preserve for appeal any error that resulted from admitting these exhibits into evidence.

Before we can consider whether Huston's responses at trial were adequate to preserve any potential errors for appeal, we

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[2] *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

[3] *Id.*

must first determine whether he was required, despite the filing of a pretrial motion to redact, to raise his objections to those segments when the video recordings were introduced at trial. If he was required to object, then we must consider whether his responses were sufficient. And if they were not, it would naturally follow that his failure to adequately object relieved the trial court of its obligation to rule upon the admissibility of such evidence and also precludes us from considering the issue on appeal.

(a) Necessity of Renewed Objection at Trial

A motion to redact has received little attention in our case law and has never been the subject of any thorough discussion.[4] We take this opportunity to clarify that a motion to redact is a more specific form of a motion in limine and that, as such, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.

The first recorded appearance of a motion in limine in a case before this court was in *State v. Tomrdle*.[5] In that case, we broadly defined a motion in limine as "a procedural step to prevent prejudicial evidence from reaching the jury."[6] This definition does not limit the motion in limine to any particular form. It is simply defined by its purpose of withholding prejudicial evidence from the jury, which can occur in many ways depending on the type of evidence sought to be excluded. As one commentary has noted:

> Regardless of the formalities involved, any request for an evidentiary ruling that is made in advance of trial, that seeks an order to exclude or regulate the production of

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[4] See, *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Palu*, No. A-06-1166, 2007 WL 2770624 (Neb. App. Sept. 25, 2007) (not designated for permanent publication); *State v. Guerrant*, No. A-02-453, 2003 WL 1962919 (Neb. App. Apr. 29, 2003) (not designated for permanent publication).

[5] *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983).

[6] *Id.* at 585, 335 N.W.2d at 283.

> potentially inflammatory evidence before the jury, and that seeks relief on the ground that the suggestive or uncontrolled revelation of that evidence to the jury may unfairly prejudice the determination of the case may be regarded as a motion in limine.[7]

In the case of evidence that is part of a larger, indivisible piece of evidence, such as a document or recording, redaction may be the most effective way of excluding prejudicial evidence from the jury. Indeed, when only certain portions of a document or recording should be excluded as prejudicial, logistics require redaction of the prejudicial portions prior to trial. In such a case, redaction becomes the means of enforcing the motion in limine.

[3,4] Because a motion in limine may be enforced through redaction, a motion to redact that seeks the exclusion of prejudicial evidence through redaction essentially functions as a motion in limine, even if it is not labeled as such. In the federal courts, a motion requesting the redaction of exhibits so as to exclude prejudicial matter is considered a motion in limine and is often referred to as a "motion in limine to redact."[8] Accordingly, we hold that a motion asking for the exclusion of evidence in a particular manner, such as redaction, functions as

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[7] 20 Am. Jur. *Trials* 441, § 7 at 455 (1973).

[8] See, e.g., *U.S. v. Gayekpar*, 678 F.3d 629 (8th Cir. 2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 375, 184 L. Ed. 2d 221; *Walls v. Buss*, 658 F.3d 1274 (11th Cir. 2011), *cert. denied*, *Walls v. Tucker*, ___ U.S. ___, 132 S. Ct. 2121, 182 L. Ed. 2d 872 (2012); *U.S. v. Laurienti*, 611 F.3d 530 (9th Cir. 2010), *cert. denied* 562 U.S. 1161, 131 S. Ct. 969, 178 L. Ed. 2d 797 (2011); *Foradori v. Harris*, 523 F.3d 477 (5th Cir. 2008); *U.S. v. Jones*, 371 F.3d 363 (7th Cir. 2004); *Klungvedt v. Unum Group*, No. 2:12-cv-00651-JWS, 2012 WL 5363002 (D. Ariz. Oct. 31, 2012); *U.S. v. Matthews*, No. 1:11-cr-00227-JAW, 2012 WL 4343741 (D. Me. Sept. 21, 2012); *U.S. v. Daniels*, No. 3:11-CR-4 JD, 2012 WL 243607 (N.D. Ind. Jan. 25, 2012); *U.S. v. Carriles*, 832 F. Supp. 2d 699 (W.D. Tex. 2010); *U.S. v. Scott*, No. 06-20185, 2011 WL 4905522 (E.D. Mich. Oct. 14, 2011) (unpublished opinion); *Kopp v. U.S.*, Nos. 10-CV-871A, 00-CR-189A, 2011 WL 3171557 (W.D.N.Y. July 27, 2011) (unpublished opinion); *Miller v. Phelps*, No. 08-178-GMS, 2011 WL 2708413 (D. Del. July 12, 2011) (unpublished opinion); *Avington v. Greyhound Lines, Inc.*, No. 05-5343 (JAP), 2008 WL 5500768 (D.N.J. Apr. 3, 2008) (unpublished opinion).

a motion in limine so long as it requests that certain evidence be withheld from the jury due to its prejudicial nature.

In the instant case, Huston's motion to redact sought the redaction of the video recordings because he thought certain statements made during the interviews were prejudicial and irrelevant. He argued that the police officers' opinions that he committed murder were "biased opinion[s]" that were "not otherwise relevant," that the conversation about his dangerousness was "overly prejudicial," and that the statements about his homosexual relationship with Wilson could elicit "prejudicial stereotypes." Because the motion to redact sought a ruling by the court prior to trial that certain evidence should be excluded because it was prejudicial, it was a form of motion in limine subject to the rules and procedures usually applicable to such motions.

[5] When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.[9] Accordingly, when a motion to redact evidence is overruled, the movant must object at trial when the specific evidence which was sought to be excluded by the motion is offered in order to preserve error for appeal.

Requiring a renewed objection in the case of a motion in limine, including a motion to redact, is consistent with the well-established jurisprudential principles of "fairness in administration," discovery of truth, and just determination.[10] Objections assist the court to make correct and fair decisions on evidentiary matters by alerting the court "'to the proper course of action'"[11] on evidentiary matters and "direct[ing] the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence."[12]

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[9] *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[10] Neb. Evid. R. 102, Neb. Rev. Stat. § 27-102 (Reissue 2008).

[11] Proposed Nebraska Rules of Evidence, rule 103, comment at 14 (1973).

[12] *State v. Coleman*, 239 Neb. 800, 812, 478 N.W.2d 349, 357 (1992).

In addition to facilitating the truthful and just determination of evidentiary issues in trial proceedings, the procedure of renewing an objection following a motion in limine, including a motion to redact, also provides important procedural safeguards against reversible error, because "the timely raising of claims and objections" often results in the court's being able to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."[13] This is particularly important when considering the admissibility of potentially prejudicial evidence such as would be raised in a motion in limine or motion to redact, as a renewed objection provides the court with a final opportunity to (1) determine the potential for prejudice within the context of other evidence at trial[14] and (2) exclude unduly prejudicial evidence *before* it is revealed to the jury if the court determines that it is indeed prejudicial.

We note at this juncture that a renewed objection may not always be required under Fed. R. Evid. 103. This federal rule was revised in 2000 to eliminate the need for a renewed objection "[o]nce the court makes a definitive ruling on the record . . . either at or before trial . . . ." Significantly, Nebraska has not adopted this amendment. Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103(1)(a) (Reissue 2008), which was identical to federal rule 103 prior to the 2000 federal revision, requires an objection in the case of *all* rulings admitting evidence in order for error to be predicated upon such ruling on appeal, even when the court previously considered the admissibility of evidence during in limine proceedings.[15]

In conclusion, we hold that Huston's motion to redact is a form of a motion in limine because it seeks the exclusion of prejudicial evidence in a pretrial proceeding, and accordingly, we review it as such.

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[13] *Puckett v. United States*, 556 U.S. 129, 134, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

[14] See *U.S. v. Graves*, 5 F.3d 1546, 1552 (5th Cir. 1993) (noting that "rationale for requiring either a renewed objection, or an offer of proof, is to allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial").

[15] See, e.g., *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

(b) Adequacy of Huston's Response

Having determined that Huston was required to renew his objection to the relevant statements at trial despite having previously objected to these same statements in his motion in limine, we now turn to the question whether Huston's responses at trial that he had "[n]o further objection . . ." were sufficient to preserve these issues for appeal.

Huston argues that he did preserve these issues for appeal because the context of his responses "indicates that counsel meant no objection other than the specific objection found in Huston's 'Proposed Redactions' . . . and in [the transcript of the video] and [the court's rulings on the proposed redactions]."[16] In so arguing, Huston relies upon § 27-103(1)(a), which provides that an objection must state "the specific ground of objection, if a specific ground was not apparent from the context," and argues that his previous motion to redact was part of the context that should have been considered when the court was ruling on exhibits 38, 81, and 95.

Nebraska courts have occasionally waived the requirement to make an objection at trial and considered an issue on appeal when a party's objection was obvious from previous proceedings before the lower court. In *State v. Mowell*,[17] we held that the defendant had preserved an issue for appeal because "the prior hearing should have made the specific ground of the objections apparent to both the State and the trial court." In that case, however, the prior hearing to which we referred took place earlier that same day. During that prior hearing, the defendant had made a record as to the foundations for his objections so as to obviate the need to explain his objections in the presence of the jury during trial. When the defendant in *Mowell* objected at trial, he stated that he was objecting "'on the basis of the objections that I made previously'" and "'for the reasons previously stated.'"[18] The Nebraska Court of Appeals also considered a similar situation in *State v.*

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[16] Brief for appellant at 36 (citations omitted).

[17] *State v. Mowell*, 267 Neb. 83, 99, 672 N.W.2d 389, 402 (2003).

[18] *Id.* at 98, 672 N.W.2d at 401.

Gardner,[19] where the defendant took issue with the trial court's exclusion of evidence. In that case, the Court of Appeals determined that "[the defendant's] pretrial argument in favor of the excluded testimony constituted sufficient notice of the substance of the evidence sought to be offered to preserve error on appeal."[20] As in *Mowell*, the defendant's "pretrial argument" in *Gardner* occurred on the same day that the evidence was offered at trial.

The situation surrounding Huston's responses at trial is distinguishable from the facts in *Mowell* and *Gardner* for two reasons. These differences are such that the context of Huston's responses at trial did not encompass the motion to redact or transform his responses into proper objections sufficient to preserve error for appeal.

First, Huston's motion to redact was too far removed in time from the offering of exhibits 38, 81, and 95 at trial to be viewed as "context" to Huston's responses. In *Mowell* and *Gardner*, the court heard the defendants' objections to the evidence on the same day as the admission of that evidence at trial. Huston's objections in the motion to redact were before the court almost 2 months prior to admission of the relevant video recordings at trial. Huston's motion to redact was filed on December 3, 2010. Exhibits 38, 81, and 95 were offered into evidence on January 25, January 31, and February 2, 2011, respectively. Given the length of time between the motion to redact and the admission of the exhibits at trial, we do not find that it was apparent from the context of Huston's responses that he intended to stand on the objections made in his motion to redact. If Huston intended to do so, he should have made that connection to the pretrial proceedings unquestionably apparent, as did the defendant in *Mowell*. Given that Huston did not do so, we do not interpret his responses to the State's offer of exhibits 38, 81, and 95 as incorporating the objections raised in the motion to redact.

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[19] *State v. Gardner*, 1 Neb. App. 450, 498 N.W.2d 605 (1993).

[20] *Id.* at 455-56, 498 N.W.2d at 609.

[6] Second, even if we accept Huston's explanation that he was incorporating the objections previously made in his motion to redact, the grounds of his objections to the specific evidence mentioned on appeal still are not apparent. Section 27-103(1)(a) states that error can be based on a ruling that admits evidence only if the "specific ground of objection" is apparent either from a timely objection or from the context. In the case before us, the grounds for Huston's objections during trial to exhibits 38, 81, and 95 were not obvious from the pretrial proceedings. The motion to redact included numerous proposed redactions, and many of those proposed redactions were not sustained by the district court. Huston now assigns error to the admission of only a few of the statements that were overruled in his motion to redact. As a result, even if the court was aware that he was relying on his previous motion, it would have had no way of knowing to which statements he maintained an objection.

In previous cases, when defendants have made references to previous motions without specifically identifying the grounds for objection at trial, this court has ruled that their objections were not sufficient. For example, we have stated that a "general objection based on the 'motion in limine' [did] not identify which of the many previously filed motions provided the purported basis for [the] objection" and advised that a defendant must "[t]ell the court the reason why the evidence is inadmissible."[21] This court also has noted that after a pretrial order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal because this "obviates the necessity of the trial court's guessing whether defendant wants his statement before the jury and removes the possibility of defendant's second-guessing the admissibility of the evidence after an unfavorable result."[22]

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[21] *State v. Harris*, 263 Neb. 331, 341, 640 N.W.2d 24, 34-35 (2002).

[22] *State v. Pointer*, 224 Neb. 892, 895, 402 N.W.2d 268, 271 (1987).

[7] The district court in the instant case was forced to engage in a similar guessing game because Huston failed to tell the court why exhibits 38, 81, and 95 were inadmissible. The presence of the word "further" was not sufficient by itself to transform the statement "[n]o further objection . . ." into a specific and timely objection. We also note that Huston's statements failed to specify that he was objecting to particular segments of the video recordings and not to the exhibits *as a whole*. Failing to make this distinction can affect whether an exhibit is admissible.[23] Even if there are inadmissible parts within an exhibit, "an objection to an exhibit *as a whole* is properly overruled where a part of the exhibit is admissible."[24] Therefore, because Huston's statements failed to specify the grounds for his objection and that he was objecting to only specific portions of the exhibits, these responses at trial were not sufficient to constitute a valid objection based upon Huston's previous motion to redact.

In conclusion, we hold that the grounds for any alleged objections made by Huston in response to the offers of exhibits 38, 81, and 95 were not apparent from the context and that the alleged objections were consequently not valid under § 27-103. Because Huston did not object to exhibits 38, 81, and 95—or any allegedly inadmissible statements contained therein—when they were offered into evidence at trial, any evidentiary error that resulted from admitting these exhibits into evidence was not preserved for appeal.

2. Ineffective Assistance of Counsel

Anticipating our conclusion that Huston did not preserve for appeal any error relating to the admission of exhibits 38, 81, and 95 into evidence, he argues that his trial counsel was ineffective for failing to preserve these errors for appeal. Huston specifically argues that his trial counsel was ineffective for failing to object to the pieces of evidence that were

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[23] See *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

[24] *Id.* at 743, 566 N.W.2d at 748 (emphasis supplied).

identified in the background section of this opinion and that relate to (1) Huston's "homosexual encounter" with Wilson, (2) speculation that Huston is a serial killer and Huston's future dangerousness, and (3) the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide.

[8,9] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[25] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[26] 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.[27] In the instant case, the record is insufficient to consider Huston's claims of ineffective assistance of counsel on direct appeal.

Huston's ineffective assistance of counsel claims all relate to his trial counsel's failure to object to certain evidence from the video recordings and from trial testimony. The majority of this evidence was included in Huston's pretrial motion to redact and was later received into evidence at trial without any objection from Huston's counsel. But at least two pieces of evidence underlying Huston's ineffective assistance of counsel claims were not included in the pretrial motion to redact. Neither did his counsel object to the evidence at trial. Huston thus claims that his counsel was ineffective either for failing to object in any way to certain evidence or for failing to renew at trial the objection to evidence previously raised in the motion to redact.

Contrary to Huston's repeated assertions that his counsel's failure to object "was not the result of a plausible trial strategy,"[28] we must consider trial strategy when reviewing

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[25] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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

[27] *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[28] See brief for appellant at 38, 43, 46, and 50.

these failures to object. The decision whether or not to object has long been held to be part of trial strategy.[29] In another case involving video recording of a defendant's police interview, this court held that the decision not to object could be explained by a desire not to highlight the objectionable testimony following an unsuccessful attempt to have that evidence excluded.[30] Such an analysis requires an examination of trial strategy.

[10,11] When reviewing claims of alleged ineffective assistance of counsel, "[t]rial counsel is afforded due deference to formulate trial strategy and tactics."[31] There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.[32] Because of this deference, the question whether the failure to object was part of counsel's trial strategy is essential to a resolution of Huston's ineffective assistance of counsel claims.

There is no evidence in the record that would allow us to determine whether Huston's trial counsel consciously chose as part of a trial strategy not to object to the evidence identified on appeal. Therefore, because the record is insufficient to adequately review Huston's claims of ineffective assistance of counsel, we do not reach these claims on direct appeal.

VI. CONCLUSION

The party who opposes statements identified in a motion in limine, including a motion to redact, must renew his or her objections when those statements are offered into evidence at trial in order to preserve issues for appeal. Therefore, because the response "[n]o further objection . . ." did not present a valid objection, we conclude that Huston did not preserve for appeal any evidentiary error that resulted from admitting the statements he had previously moved to redact. We also conclude

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[29] See, e.g., *State v. Lieberman*, 222 Neb. 95, 382 N.W.2d 330 (1986); *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), *overruled on other grounds, State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[30] See *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

[31] *State v. Timmens*, 282 Neb. 787, 796, 805 N.W.2d 704, 712 (2011).

[32] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

that the record is insufficient to adequately address on direct appeal whether trial counsel's failure to object denied Huston the effective assistance of counsel. Accordingly, we affirm the judgment of the district court.

AFFIRMED.