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did not sustain that burden. And the Klines, in response to Farmers' allegations in its motion for summary judgment, provided ample evidence to show that Blade was the owner of the Suburban. An agent with American Family testified by affidavit that American Family "issued a policy of insurance to Blade . . . insuring a 1985 GMC Suburban." Further, the Suburban was titled in the name of Blade. Although Farmers argues that the issue of who owns the Suburban has not been conceded, viewing the evidence presented, we can only conclude that Blade is the owner of the Suburban. By not presenting any evidence that would put the ownership of the vehicle into controversy, Farmers took the risk that the not-owned-but-insured exclusion would be held void and that the ownership question would be decided against it in its motion for summary judgment.

Thus, reviewing the evidence in the light most favorable to the nonmoving party, we agree with the Court of Appeals that Farmers did not meet its burden for summary judgment to show the Suburban was owned by David, rather than Blade. As such, the Court of Appeals was correct in holding that there was no material issue of fact that the owned-but-not-insured exclusion does not apply.

VI. CONCLUSION

We conclude that the not-owned-but-insured exclusion violates the UUMICA. Therefore, we affirm the decision of the Court of Appeals, which reversed the district court's entry of summary judgment in favor of Farmers and remanded the cause for further proceedings.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JUNEAL DALE PRATT, APPELLANT.

766 N.W.2d 111

Filed June 5, 2009. No. S-08-279.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.

2. **DNA Testing: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008), the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the trial court. Absent an abuse of discretion, the court's determination will not be disturbed.
4. **Motions to Vacate: DNA Testing: Appeal and Error.** A court may vacate and set aside the judgment in circumstances where, under the DNA Testing Act, the DNA testing results, when considered with the rest of the evidence of the case in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.
5. **Motions for New Trial: DNA Testing.** To warrant a new trial, the court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
6. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of the case should not be relitigated at a later stage.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

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

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Heavican, C.J.

INTRODUCTION

Juneal Dale Pratt appeals from the Douglas County District Court's denial of his motion for relief under Nebraska's DNA Testing Act (the Act), Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008). In 1975, Pratt was convicted of sodomy, rape, and two counts of robbery. His convictions were affirmed on direct appeal,[1] and we later denied him postconviction relief.[2]

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[1] *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977).

[2] *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987).

In June 2004, Pratt filed a motion under the Act to have items still in evidence tested for the presence of DNA. After those items were tested, Pratt sought a certification from the district court authorizing an out-of-state deposition with a subpoena duces tecum of one of the victims in order to obtain a known sample of her DNA.

After the district court granted Pratt's motion, the State appealed. We found that we did not have jurisdiction because the certification was not a final, appealable order, and we dismissed the appeal.[3] The district court then vacated its order, found that Pratt could not collect a known DNA sample from his victim, and denied Pratt's motion to vacate his sentence or, in the alternative, motion for new trial. Pratt appeals the decision of the district court, arguing that it had no authority to vacate its prior certification. Pratt also argues that the DNA evidence was enough to exonerate him or, alternatively, that the evidence was exculpatory and warranted a new trial. We affirm.

BACKGROUND

The facts of the case can be found in our prior decisions,[4] but because Pratt is now arguing that the DNA evidence is at least exculpatory, we revisit the pertinent facts here. The victims in this case both testified at trial that they had separately picked Pratt out of a three-man lineup. Each victim also identified Pratt in a voice lineup, without any visual contact with the persons participating in the voice lineup. Both victims testified that they recognized Pratt's shoes during the lineup as the shoes of the man who had assaulted them. One victim testified that the shoes were distinctive because they were black patent leather with "suede in the middle." In addition, Pratt was wearing a ring at the lineup that both victims testified belonged to one of them.

Another robbery victim testified that approximately 1 week after the first attack, Pratt had robbed her in the same hotel where the first attack took place. Several police officers

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[3] *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007).

[4] *Pratt, supra* note 3; *Pratt*, *supra* note 2; *Pratt*, *supra* note 1.

testified regarding the chase and apprehension of Pratt after the second robbery.

Pratt testified in his own defense and gave an alibi for the sexual assault. Pratt claimed to have had an injured leg at the time and therefore had been physically incapable of the attack. Pratt also testified that he was at home on the evening of the attack. This testimony contradicted statements Pratt gave to police at the time of his arrest. Both Pratt's mother and his live-in girlfriend testified in his defense, confirming his alibi. Pratt's sister testified that the ring he had been wearing was her ring and not the victim's ring. She further testified that Pratt often wore her clothing and jewelry. Pratt claimed that he was at the hotel at the time of the second robbery, because he was renting a room in order to have sex with a different girlfriend.

On June 9, 2004, Pratt filed an amended motion under the Act to have items still in evidence from the sexual assault tested for DNA. The motion was granted, and the clothing that had been worn by the victims at the time of the attack was tested for biological material. After the testing was conducted, Pratt sought a certification from the Douglas County District Court for a subpoena duces tecum to compel a DNA sample from one of the victims. Pratt claimed that with the victim's DNA, the DNA testing laboratory would be able to construct a complete profile that would result in his exoneration.

The district court granted the certification, and the State appealed, claiming that Pratt did not have the right to compel the victim to give a DNA sample under the Act. We determined that we did not have jurisdiction because the certification from the district court was not a final, appealable order and dismissed the case.[5] Two concurring opinions suggested that Pratt did not have the right to obtain the victim's DNA through a subpoena duces tecum under the Act.[6]

After the case was sent back to the district court, the certification was vacated and a hearing was held on Pratt's motion

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[5] *Pratt, supra* note 3.

[6] *Id.* (Heavican, C.J., concurring) (Miller-Lerman, J., concurring; Stephan, J., joins).

to vacate his convictions under the Act or, in the alternative, motion for new trial. Pratt claimed that the DNA evidence, considered along with his alibi defense from trial, was sufficient to warrant vacating his convictions or, alternatively, to award him a new trial. Pratt claimed that the lineup in which he participated was highly suggestive and that the victims' identification, both in court and in the lineup, could not be trusted.

Kelly Duffy, a medical technologist, testified regarding the DNA results. Duffy stated that the results were inconclusive, that it was impossible to know when or how the DNA was deposited on the shirts, and that there was no evidence that any of the DNA was contributed from sperm, although it could have been. Duffy also testified that seven items of clothing, including both victims' clothing as well as Pratt's clothing, were stored in the same box. The clothing was not separately packaged or bagged in the box. Duffy testified that the DNA detected could be from epithelial cells and that handling the clothing could be enough to deposit the DNA.

After preliminary testing, the two shirts worn by the victims at the time of the attack were found to have "stains" that might contain DNA. None of the stains were found to be presumptively from semen. The stains, although invisible to the naked eye, fluoresced under a particular kind of light used during the testing of the clothing. A red, white, and blue shirt worn by one victim at the time of the attack had eight different stained areas, labeled B1 through B8. A yellow flowered shirt worn by the other victim had five stained areas, C1 through C5a.

Two of the areas on the red, white, and blue shirt, B4 and B7, showed the presence of male DNA, and one area, B1, was inconclusive as to whether male DNA was present. Area B4 may or may not have been a mixture of one or more individuals, and if it was not a mixture, then Pratt would be excluded. Area B7 was a mixture of more than one individual's DNA, and at least one of those individuals was male. The results were inconclusive as to how many males contributed to the mixture, but at least one of those males was not Pratt.

Partial DNA profiles were obtained from all five stained areas on the yellow flowered shirt. Area C4 showed the presence of

male DNA, while area C5 showed the possible presence of male DNA. Area C4 was a mixture of at least two people, one of them male, and Pratt could not be excluded as a contributor. Area C5 was also a mixture of at least two people, possibly more than one female and/or more than one male. Pratt could not be excluded as a contributor at area C5.

After the hearing, the district court denied Pratt's motion to vacate his conviction as well as his motion for new trial. In its order, the district court cited the fact that the evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing. The district court found that the results of the DNA testing were largely inconclusive and that while the testing did not conclusively show that Pratt was a contributor, neither did it eliminate him as a contributor. Pratt appeals the denial of his motions.

ASSIGNMENTS OF ERROR

Pratt assigns, restated and consolidated, that the district court erred by (1) vacating the subpoena duces tecum, (2) refusing to vacate Pratt's convictions based on the DNA evidence, and (3) failing to order a new trial based on the DNA evidence.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[7]

[2,3] In an appeal from a proceeding under the Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[8] A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the Act is addressed to the discretion of the trial court. Unless an abuse of discretion is shown, the court's determination will not be disturbed.[9]

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[7] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[8] *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006).

[9] See *id.*

[4] A court may vacate and set aside the judgment in circumstances where, under the Act, the DNA testing results, when considered with the rest of the evidence of the case in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.[10]

[5] To warrant a new trial, the court must determine that newly discovered exculpatory evidence obtained pursuant to the Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[11]

ANALYSIS

District Court Had Authority to Vacate Its Previous Order

Pratt first contends that the district court did not have the right to vacate its certification for a subpoena duces tecum for the out-of-state victim's DNA. Pratt claims that because of the law-of-the-case doctrine, the issue of whether he had a right to the victim's DNA had already been litigated and that the district court did not have the authority to change its order. Pratt's argument fails for two reasons.

[6] First, the law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of the case should not be relitigated at a later stage.[12] The doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal. Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.[13] A decision that could have been challenged at a previous stage of litigation, which was not challenged, is deemed to become the law of the case.[14]

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[10] See *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[11] *Buckman, supra* note 10.

[12] *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

[13] *Id.*

[14] *Id.*

In this case, the State had earlier appealed the district court's certification of a subpoena duces tecum and we determined that we did not have jurisdiction because it was not a final, appealable order.[15] The law-of-the-case doctrine does not apply under these circumstances, where we did not decide the substance of the matter but instead dismissed the appeal, sending the cause back to the district court. Therefore, the district court retained the authority to vacate or modify its decision granting a certification for a subpoena of the out-of-state victim.

We have since decided the issue of whether a person may obtain a DNA sample from a third party under the Act. In *State v. McKinney*,[16] we stated that Nebraska has no rule or statute that would authorize a defendant to collect DNA from a third party. Even if having the victim's DNA would help interpret the testing results, Pratt has not established a right to such. Pratt's first assignment of error is without merit.

DNA Evidence Does Not Exonerate or Exculpate Pratt

Pratt also argues that the DNA evidence was enough to exonerate him or, in the alternative, that the evidence was sufficiently exculpatory to warrant a new trial. Associated with this claim is Pratt's assertion that the district court erred when it determined there was a high probability the evidence had been compromised. We find no error in the district court's decision.

Section 29-4119 of the Act defines exculpatory evidence as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody." Under § 29-4123, the court may, on its own motion or after a hearing, vacate a judgment or order a new trial when the results exculpate or exonerate the defendant.

In an appeal from a proceeding under the Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the Act

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[15] See *Pratt, supra* note 3.

[16] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

is addressed to the discretion of the trial court. Unless an abuse of discretion is shown, the court's determination will not be disturbed.[17]

We have previously addressed what it means to have exculpatory or exonerating evidence.[18] In *Buckman*,[19] we stated that exonerating evidence was evidence that, when considered with the circumstances of the original trial and judgment, showed a complete lack of evidence to establish an essential element of the crime charged. We also stated that exculpatory evidence is evidence that, if it had been presented at the original trial, would probably have produced a substantially different result.

The DNA evidence in this case neither exonerates nor exculpates Pratt. First, as the district court noted, the evidence was not stored in such a way as to preserve the integrity of any DNA evidence. Although male DNA that might not be from Pratt was found on the clothing, as Duffy testified, it was impossible to tell when or how the DNA was deposited on the clothing. The articles of clothing were stored in a box without being separately packaged. Evidence stickers were present on the clothing. Duffy testified that DNA may have come from epithelial cells deposited after handling the clothing. We review factual findings of the district court for clear error, and we find none.

Second, as the district court noted in its order, the DNA testing results are, at best, inconclusive. At no point did Duffy testify that any of the male DNA on the clothing conclusively excluded Pratt from being a donor. The most Duffy could say was that one of the stains might be a mixture of male and female DNA and that if it was a mixture, Pratt would be excluded as the male donor. For two other stains determined to be a mixture of male and female DNA, Pratt could not be excluded as a donor. Therefore, the DNA evidence does not meet our standards for exculpatory or exonerating evidence.

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[17] *Poe, supra* note 8.

[18] *Id.*; *Buckman, supra* note 10; *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

[19] *Buckman, supra* note 10.

This is particularly so given the strength of the eyewitness testimony presented against Pratt. Although Pratt suggests such testimony is unreliable, we disagree. Each victim separately identified Pratt by sight and by the sound of his voice, and both victims testified that they recognized the shoes Pratt had worn during the robbery and the lineup. Both victims testified that the ring worn by Pratt at the lineup was the ring that he had stolen from one of the victims. And because Pratt testified in his own defense, the jury had the opportunity to weigh the victims' testimony against Pratt's testimony, and it clearly found the victims' testimony to be more persuasive.

Given the inconclusive nature of the DNA evidence and the strength of the eyewitness testimony at trial, the results of the DNA testing would be unlikely to produce a substantially different result if Pratt were granted a new trial.[20] Pratt's second assignment of error is also without merit.

CONCLUSION

The law-of-the-case doctrine clearly does not apply to Pratt's case, and the district court had the power to vacate its certification for a subpoena duces tecum. Furthermore, having since decided *McKinney*,[21] our law is settled that the Act does not give Pratt the right to compel DNA testing of a third party. Finally, the DNA evidence as presented by Duffy was inconclusive, because Pratt could not be excluded or included as a donor. Pratt is not entitled to have his convictions vacated or to receive a new trial.

AFFIRMED.

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[20] *Buckman, supra* note 10.

[21] *McKinney, supra* note 16.