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in violation of the Fifth Amendment to the U.S. Constitution and Neb. Const. art. I, § 12.

In *In re Interest of J.R.*,[34] we held that SOCA does not constitute ex post facto legislation because it is not punitive in nature. We are not persuaded by the argument that we should reconsider this holding. Indeed, we recently reaffirmed it in *In re Interest of A.M.*,[35] where we also held that because SOCA is not punitive in nature, it cannot violate the coextensive protections afforded by the Double Jeopardy clauses of the state and federal Constitutions. Accordingly, we conclude that the district court did not err in overruling D.H.'s motion to dismiss the petition on constitutional grounds.

V. CONCLUSION

For the reasons discussed above, we overrule D.H.'s motion to dismiss the appeal and affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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[34] *Id.*

[35] *In re Interest of A.M., ante* p. 482, 797 N.W.2d 233 (2011).

STATE OF NEBRASKA, APPELLEE, V.
ROY L. ELLIS, APPELLANT.
799 N.W.2d 267

Filed May 27, 2011. No. S-09-148.

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 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.

4. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith; or, stated another way, the rule prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
5. **Evidence: Other Acts.** Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
6. ____: ____. In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
7. **Trial: Evidence: 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.
8. **Motions for Mistrial.** The decision to grant a motion for mistrial is within the trial court's discretion.
9. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
10. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
11. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
12. **Trial: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), framework, once the reasoning or methodology of expert opinion testimony has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue.
13. ____: ____. A general foundational objection is insufficient to preserve an issue under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
14. **Trial: Expert Witnesses: Pretrial Procedure.** To sufficiently call specialized knowledge into question under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.

15. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
16. **Sentences: Death Penalty.** That a method of execution is cruel and unusual punishment bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself.
17. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below.
18. **Constitutional Law: Statutes.** A grant of administrative authority is not necessarily an unconstitutional delegation of legislative power.
19. **Administrative Law: Statutes: Legislature.** The Legislature may enact statutes to set forth the law, and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose.
20. **Constitutional Law: Legislature.** Although the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.
21. **Legislature.** Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.
22. **Constitutional Law: Sentences: Death Penalty: Jurors.** In death penalty cases, an eligibility or selection factor is not unconstitutional if it has some commonsense core of meaning that a juror can understand.
23. **Constitutional Law: Sentences: Death Penalty: Appeal and Error.** Because the proper degree of definition of eligibility and selection factors in death penalty cases often is not susceptible of mathematical precision, a vagueness review is quite deferential.
24. **Homicide: Aggravating and Mitigating Circumstances.** "Exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim.
25. **Sentences: Aggravating and Mitigating Circumstances: Juries.** Mitigating circumstances, and the "weight" to be assigned to the aggravating and mitigating circumstances, are relevant only to the sentencing panel's exercise of its discretion to decide which statutorily authorized sentence to impose and do not require determination by a jury.
26. **Federal Acts: Actions.** Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.
27. ____: ____. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Without it, a cause of action does not exist and courts may not

create one, no matter how desirable that might be as a policy matter or how compatible with the statute.

28. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
29. **Trial: Witnesses: Juries.** The credibility of witnesses is for the jury, and a jury's findings may be based upon the uncorroborated testimony of a single witness.
30. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** A capital sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by the Nebraska Supreme Court.
31. **Sentences: Aggravating and Mitigating Circumstances: Proof.** While there is no burden of proof with regard to mitigating circumstances, because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.
32. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
33. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
34. ____: ____: ____: ____. The Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. The purpose of such review is to ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.
35. ____: ____: ____: ____. The Nebraska Supreme Court's proportionality review, which is separate from the sentencing panel's, looks only to other cases in which the death penalty has been imposed and requires the court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

W. Patrick Dunn, Jerry M. Hug, and Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

GERRARD, J.

Roy L. Ellis was convicted of first degree murder in connection with the killing of 12-year-old Amber Harris and sentenced to death. This is Ellis' automatic direct appeal from his conviction and sentence.[1] Although many issues are presented on appeal, the primary issue we must decide is whether the trial court erred in admitting evidence of prior bad acts committed by Ellis and whether Ellis was prejudiced by that evidence. We conclude that Ellis was not prejudiced by admission of the evidence and find no merit to his other assignments of error.

I. BACKGROUND

Amber disappeared on November 29, 2005, after she was dropped off by her school bus about five blocks from her North Omaha, Nebraska, home. A few weeks later, Ellis was arrested and incarcerated in the Douglas County Correctional Center on unrelated charges. Several witnesses reported that while in jail, before Amber's body was found or Ellis was a suspect in her killing, he made a number of remarks suggesting that he was involved in Amber's disappearance.

To begin with, Ellis made telephone calls from jail suggesting that he needed to get out of jail to take care of some things and "find some stuff." Ellis had lived in a boarding house on Lake Street, although he moved to another residence nearby before Amber disappeared. While in jail, Ellis called his former neighbors, asking repeatedly about any activity at the boarding house. But no more of those calls were made after February 14, 2006, when Amber's bookbag was found in a large trash storage container behind the boarding house. Although Ellis continued to call his former neighbor after the bag was found, he no longer asked about the boarding house.

While he was incarcerated during early 2006, Ellis also repeatedly asked Terrelle Smith, a Douglas County corrections officer, for information regarding Amber's case. Because Smith

[1] See Neb. Rev. Stat. § 29-2525 (Reissue 2008).

was studying criminal justice, Ellis also asked him questions about criminal investigation, regarding subjects such as fingerprint identification and the decomposition of buried bodies. Ellis asked Smith whether blood or semen left outside would be contaminated by the elements and how long it would take before contaminated semen would no longer be considered relevant evidence. And Ellis asked Smith for books on forensics and DNA examination. Ellis also asked Brandon Clark, another corrections officer, about how long semen would last inside a dead body and in a forested, rural area and asked Clark to perform Internet research for him on the subject.

Ellis also asked Darryl Chambers, a fellow inmate, if he knew how long semen would last inside a decomposed body. And another inmate, Clarence Dennis, heard Ellis asking other inmates questions about how long blood and semen would last when exposed to the elements and what was necessary to keep dirt from subsiding above a buried body. Clenix Martin, another inmate, said Ellis had asked him about the persistence of DNA left outside, whether DNA could be traced after a body had decomposed, and how long it took a body to decompose.

Ellis also made more particular statements that foreshadowed what would be discovered about the circumstances of Amber's disappearance after her body was found. Dennis heard Ellis say that he had previously taken women to Hummel Park, in a rural area north of Omaha, and forced them to have sex with him by threatening to leave them in the park alone at night. Smith overheard Ellis saying that if a woman did not do what he wanted, "[h]e would just hit them upside their heads." Ellis told Chambers that he liked underage girls. Ellis told his cellmate, David Shaffer, that he had sexually molested underage girls, some of them at Hummel Park.

Shaffer said that Ellis expressed an unusual interest in Amber's disappearance and cut out newspaper articles about the case. Ellis told Martin that he had sexually assaulted a young girl and strangled her. When Shaffer mentioned to Ellis that it was "crazy what happened to that Amber Harris girl," Ellis replied, "that's why I got to get out and cover my tracks." And both Dennis and Chambers said Ellis had admitted to sexually assaulting Amber and striking her in the head.

According to Dennis, Ellis said he hit Amber in the head with a hammer.

Finally, on May 11, 2006, Amber's decomposed body was discovered by passers-by, covered with a mound of soil, in a secluded, wooded area of Hummel Park. Amber had been killed by blunt force trauma to the skull, resulting from at least two blows to the head with a blunt object. Because of decomposition, it was impossible to tell whether Amber had also been choked or strangled. Although Amber's sweater was still on, her jeans and underwear had been removed. Amber's jacket, jeans, and bra had been found in her bookbag. Amber's blood was on the jacket and jeans, and DNA was found on the jeans, in a shape resembling a handprint, in a mixture from which Ellis could not be excluded as a contributor.

Ellis was charged with first degree murder on theories of both premeditated murder and felony murder, for which the predicate felony was sexual assault. Over Ellis' objection, in addition to the evidence described above, the State adduced evidence that Ellis had sexually assaulted his former stepdaughters when they were between 12 and 15 years old. The jury found Ellis guilty of first degree murder, and an aggravation hearing was held at which the jury found two aggravating circumstances to exist. A three-judge sentencing panel sentenced Ellis to death.

More specific details will be set forth below as they relate to some of Ellis' separate arguments.

II. ANALYSIS

Ellis' assignments of error can be separated into two broad categories: issues relating to evidence at trial and issues arising out of the capital sentencing proceedings.

1. Evidentiary Issues

(a) Rule 404 Evidence

(i) Background

The State, over Ellis' objection, presented testimony from Ellis' former stepdaughters that Ellis had sexually assaulted them during a 3-year period from 1993 to 1995. Ellis' first assignment of error takes issue with that evidence.

The State argued that the evidence was relevant to the issues of motive, identity, intent, and opportunity. The district court agreed in part, finding that the crimes were sufficiently similar to help establish the identity of Amber's killer. The court reasoned that Amber was of a similar age to Ellis' stepdaughters and also noted that when Ellis had first assaulted one of the girls, he removed her pants but left her shirt on, similar to the condition in which Amber's body had been discovered. And one of the girls testified that Ellis struck her in the head with his fist. The court also found that the prior assaults were relevant to prove that Ellis acted intentionally for the purpose of forced sexual penetration.

However, the court rejected the State's contention that the prior bad acts were relevant to motive, reasoning that the State's argument on motive actually went to Ellis' propensity to commit such acts. And the court found that the assaults did nothing to show Ellis' opportunity to attack Amber.

Nonetheless, the court found that the probative value of the evidence outweighed its potential for unfair prejudice, and admitted it subject to an instruction to the jury to consider the evidence only as relevant to identity and intent. And in opening and closing arguments, the State argued that the prior assaults tended to prove that Ellis was the killer and that he acted intentionally. Ellis moved for a mistrial during the State's closing argument, asserting that the State was using the evidence to prove Ellis' propensity to act. But that motion was overruled.

(ii) Assignments of Error

Ellis assigns that the district court committed reversible error in admitting evidence of the prior sexual assaults on Ellis' stepdaughters, because intent and identity were not proper purposes for receipt of said evidence, and abused its discretion in denying two mistrial requests due to prosecutorial misconduct where the State argued propensity in context of the evidence admitted pursuant to Neb. Evid. R. 404.

(iii) Standard of Review

[1-3] 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 Neb. Evid. R. 403 and 404(2),[3] and the trial court's decision will not be reversed absent an abuse of discretion.[4] The decision whether to grant a motion for mistrial is also within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[5]

(iv) Analysis

Ellis argues that the district court's rulings were erroneous. The State continues to argue that the evidence was relevant to prove Ellis' identity and intent.

Rule 404(2) provides that 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. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. We note that rule 404 has been amended to permit the admission, in a criminal case in which the defendant is accused of a sexual assault, of evidence of another offense of sexual assault.[6] Those amendments were not in effect at the time of trial in this case and do not affect our analysis in this appeal.

[4] Rule 404(2) prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith; or, stated another way, the rule prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[7] The difficulty with the State's argument that Ellis' assaults on his stepdaughters were

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[2] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[3] Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008).

[4] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[5] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[6] See Neb. Rev. Stat. §§ 27-404(4) and 27-414 (Cum. Supp. 2010).

[7] See *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

relevant to intent is that to the extent that the argument has any logical basis, it is in the propensity-based reasoning that rule 404(2) precludes. The district court concluded, and the State also contends, that the factual similarities between the prior assaults and Amber's killing prove intent as well as identity. But, as explained below, we find those similarities to be superficial and unpersuasive. And, to the extent that the prior assaults do show intent, it is only because they support the inference that Ellis is the type of person who assaults young women. This is classic propensity reasoning that should be excluded under rule 404(2).

The alleged similarities between the offenses are not compelling. We addressed a comparable situation in *State v. Trotter*,[8] in which prior acts of spousal abuse were offered as evidence that the defendant had committed child abuse. But we explained that we could not

> say that the crimes charged and the evidence of [the defendant's] previous acts in this case are so similar, unusual, and distinctive that the trial judge in this case could reasonably find that they bear the same signature. The evidence of the manner in which [the defendant] may have abused his ex-spouses is similar to the extent it constituted abuse. While the acts of child abuse and spousal abuse are concededly similar in nature in that they both involve the abuse of a person, the facts described by the district court and the State could be present in most any situation where there is any type of abuse. The similarities the State points to in the case at bar are, in essence, the similarities in the statutory definition of the crimes themselves, not the manner in which [the defendant] may have carried them out.[9]

[5,6] The same is true here. Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they

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[8] See *id.*

[9] *Id.* at 461, 632 N.W.2d at 340.

bear the same signature.[10] In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.[11]

But in this case, the prior acts were separated by more than a decade from Amber's disappearance. And the purported "signature" of the crime is that the victims were approximately the same age, they were isolated and alone when they were assaulted, one of Ellis' stepdaughters was subjected to blows to the head, and Ellis' other stepdaughter was, on at least one instance, assaulted while nude only from the waist down. These facts are not so distinctive as to separate these prior acts from nearly any other forcible sexual assault.

[7] Therefore, we conclude that the trial court abused its discretion in admitting evidence, during the guilt phase of the trial, of Ellis' assaults on his stepdaughters. But the State also argues that any error was harmless. 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.[12] And here, given the strength of the State's other evidence, we conclude that the erroneously admitted evidence was harmless.

We recognize that the admission of other acts evidence, by its nature, is usually prejudicial to the defendant. But this is the rare instance in which it was not. For one thing, Shaffer testified, without objection, that Ellis admitted molesting young girls and impregnating his stepdaughter. And more fundamentally, Ellis was inescapably tied to Amber's killing through DNA evidence that, as we will explain below, was admissible and persuasive, and physical evidence that proved to be consistent with Ellis' careless statements that had already been reported to investigators. There was no innocent explanation

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[10] *Trotter, supra* note 7.

[11] *Id.*

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

for how Ellis' DNA came to be on Amber's bloody clothing. Nor is there any innocent explanation for how several witnesses came forward with information *before* Amber's body or Ellis' DNA on her clothing had been discovered linking Ellis to the killing—some of whom even accurately described Amber's cause of death and the possible location of her body. This evidence can only be explained by the conclusion that Ellis was the killer.

Given Ellis' statements, the physical evidence, and the other circumstantial evidence, we have no doubt that any reasonable trier of fact would have found Ellis guilty of the charge against him. In particular, no reasonable trier of fact could overlook the testimony of Dennis, Smith, and Shaffer, each of whom was interviewed several weeks before Ellis' DNA was identified on Amber's clothing and at least a month before Amber's body was found in Hummel Park. Each witness found Ellis' interest in the case suspicious, and they all described details of the case that they had no way of knowing unless they heard them from the person who killed Amber. Therefore, although we find merit to Ellis' first assignment of error, we find that the error was not prejudicial to Ellis.

[8,9] For similar reasons, we find no merit to Ellis' second assignment of error. Ellis argues that the district court should have ordered a mistrial after the State made arguments during opening and closing statements that referred to the other acts evidence discussed above and, according to Ellis, referred to his propensity to commit such acts. Because the evidence was itself inadmissible, the court also erred in permitting argument based upon it. But the decision to grant a motion for mistrial is within the trial court's discretion,[13] and a defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.[14] Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only

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[13] *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

[14] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

the possibility of prejudice.[15] Because we have concluded that the actual admission of the evidence was not prejudicial, we similarly conclude that the State's argument based upon that evidence was not prejudicial, because of the strength of the State's remaining evidence.

(b) Jailhouse Informer Statute

(i) Background

Before trial, Ellis moved to exclude testimony from Martin and Dennis, claiming the State had failed to make certain disclosures required by the statutes in effect at the time concerning "jailhouse informers."[16] Specifically, Ellis argued, the State was required to disclose the witnesses' known criminal history, any agreement made in exchange for the testimony, the statements allegedly made by the defendant, any other cases in which the witness had testified, and whether the witness had recanted at any time.[17] The State argued that the witnesses were not "jailhouse informers" because although they were in jail when they initially spoke to the State, they were no longer in jail at the time of trial. The district court agreed. And, the court noted, the State had in any event provided Ellis with the witnesses' criminal history records and informed Ellis that the witnesses had been promised no benefit for their testimony. And Martin and Dennis testified to that effect at trial.

(ii) Assignment of Error

Ellis assigns that the district court erred in denying his motion to exclude testimony pursuant to § 29-1929 and that as a result, his constitutional due process rights were violated.

(iii) Standard of Review

[10] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.[18]

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[15] *Id.*

[16] See Neb. Rev. Stat. §§ 29-1928 and 29-1929 (Cum. Supp. 2006).

[17] See *id.*

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

(iv) Analysis

It should be noted that since Ellis' trial, the statutes upon which he relies have been repealed. However, the provisions have been substantially reenacted as part of Neb. Rev. Stat. § 29-1912 (Cum. Supp. 2010), and now specifically define "jailhouse witness" as a person who was in jail at the time the statements to which the person will testify were first disclosed. So, the question of statutory interpretation Ellis presents is a case of last impression. And, on the record before us, it is not a question we need to answer.

We explained in *State v. Gutierrez*[19] that the jailhouse informer statutes were discovery provisions, intended to ensure that criminal defendants have the opportunity to meaningfully confront the testimony of a jailhouse informer at trial. And the district court found that, even if Martin and Dennis were considered to be jailhouse informers, the State had complied with the statutory requirements. Nor is it apparent how Ellis was prejudiced by any deficiency in the State's disclosure.

The only point Ellis makes on appeal that appears to relate to prejudice is that after his testimony at trial, Dennis entered into a plea agreement for some charges that had been pending against him. But there is no evidence that the plea agreement had been reached, or contemplated, at the time Dennis testified. In other words, nothing in the record is contrary to the district court's express finding, in ruling on Ellis' motion to exclude testimony, that the relevant statutes were substantially complied with. The court did not abuse its discretion in rejecting Ellis' motion, and we find no merit to Ellis' assignment of error.

(c) DNA Evidence

(i) Background

As noted above, the State presented DNA evidence relating to a sample found on Amber's jeans that tended to implicate Ellis in the killing. Before trial, Ellis moved to exclude the

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[19] *Gutierrez, supra* note 12.

DNA evidence, but his motion was overruled, as was his foundational objection at trial.

The State's witness, Dr. James Wisecarver, explained generally that the testing process used in this case involved looking at 16 different genetic markers scattered throughout the genome at different loci. One of those is a sex marker that identifies the gender of the contributor; the other 15 are used to compare to known reference samples (in this case, for Amber and Ellis) to see if they are the same or different.

The DNA found on Amber's jeans was a mixture of DNA from at least two people, one of whom was male. Wisecarver explained that it was not possible to separate the mixture into a major and minor contributor at each locus. Instead, he said, the presence of the mixture was taken into account when calculating the likelihood that any other person would have any combination of the genetic markers that had been identified. Wisecarver explained that the purpose of the statistical calculations was to determine the likelihood that "we're going to find somebody, anybody, that could have any of these markers in any combination." In other words, Wisecarver said, when testing a mixture, "[w]e make no inferences as to who matches up with whom in there. We just want to say in all the populations how many people would we have to screen in order to find somebody, anybody, that would fit in here in any combination of those."

Given that Amber's genetic profile was known, Wisecarver testified that only 1 in 2.3 billion people would be expected to "plug in" as the other contributor to the mixture. And despite those odds, Ellis could not be excluded as a contributor to the mixture.

On cross-examination, Wisecarver was asked about what happened when two samples had common alleles—in other words, when the two possible contributors to the mixture were genetically identical at a tested locus. Wisecarver conceded that when such a common genetic marker was found at a locus, in this case, it was not possible to tell who had contributed the allele. But, Wisecarver said, it was still scientifically appropriate to consider such a locus when making statistical calculations.

(ii) Assignment of Error

Ellis assigns that the district court erred in denying his motion in limine regarding the State's use of DNA evidence.

(iii) Standard of Review

[11] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[20]

(iv) Analysis

[12] Ellis does not contend that the State's witnesses were not qualified to testify, or that their basic reasoning and methodology was not reliable. Rather, Ellis contends that under our *Daubert/Schafersman* framework,[21] that methodology was not properly applied in this case. We have said that under that framework, once the reasoning or methodology of expert opinion testimony has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue.[22]

Ellis' appellate argument is focused on the use of common alleles in the State's statistical analysis. Ellis contends that the "overriding issue" with that method is that "where there is uncertainty as to the contributor, as long as the suspect is 'fully represented' . . . then that location counts against the suspect in calculating the possibility of exclusion."[23] This, according to Ellis, "is fundamentally unduly prejudicial and should not have been allowed."[24]

[13,14] Ellis cites no authority that is specifically relevant to the issue he raises, nor is it clear that he raised that issue in the trial court. It was not addressed in his pretrial motion, which was addressed generally at the theory of PCR-STR

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[20] *Casillas, supra* note 2; *Daly, supra* note 14.

[21] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[22] See *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[23] Brief for appellant at 55.

[24] *Id.* at 56.

DNA testing that was applied in this case.[25] Nor did he raise it at trial beyond a general foundational objection, which is insufficient to preserve a *Daubert/Schafersman* issue.[26] We have explained that to sufficiently call specialized knowledge into question under *Daubert/Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.[27] To meet this burden, Ellis' pretrial motion should have identified what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.[28] But the issue now raised by Ellis was not identified then.

Furthermore, Ellis' argument rests upon a misunderstanding of the way in which the DNA statistics were calculated. As Wisecarver explained, the purpose of examining each locus is to determine two things: (1) whether the contributor of the reference sample can be excluded as a contributor and (2) how commonly one might expect the profile that is generated to occur randomly in the population.[29] In other words, the initial question was not whether the alleles that were found at each locus identified Ellis as the contributor; instead, it was whether the testing *excluded* Ellis as a *possible contributor*. And obviously, an allele that could be found in both Ellis' and Amber's genetic profile would not exclude Ellis as a possible contributor.

On the second step, the fact that the DNA sample was a mixture clearly affected the calculation of how many people might be expected to have genetic profiles consistent with the sample, which is presumably why the probabilities found in this case are relatively modest compared to others. While 1 in 2.3 billion

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[25] See, generally, *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[26] See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[27] *Casillas, supra* note 2.

[28] See *id.*

[29] See, generally, *Fernando-Granados, supra* note 25.

people might seem like a daunting figure, other cases involving single-contributor or major-contributor samples have produced probabilities of 1 in several quintillion.[30] But that goes to the weight of the evidence, not its admissibility—in fact, Ellis explored that issue on cross-examination of one of the State's experts. The district court did not abuse its discretion in concluding that the DNA evidence was admissible, and we find no merit to Ellis' assignment of error.

2. Capital Sentencing Issues

(a) Repeal of Electrocution as Method of Execution

(i) Background

As noted above, Amber disappeared on November 29, 2005, and was presumably killed shortly thereafter. Ellis was charged with first degree murder on February 6, 2007. At the time, the Nebraska death penalty statutes provided that the mode of inflicting the punishment of death was electrocution.[31] But on February 8, 2008, this court decided *State v. Mata*,[32] in which we held that death by electrocution violated the cruel and unusual punishment provision of the Nebraska Constitution.[33] Ellis was sentenced to death on February 9, 2009. On May 28, the Governor approved 2009 Neb. Laws, L.B. 36, which amended the death penalty statutes to provide that a sentence of death shall be enforced by intravenous injection of a lethal substance.[34] The Legislature adjourned sine die on May 29, and L.B. 36 took effect 3 months later.[35]

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[30] Compare, e.g., *Edwards, supra* note 22; *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007); *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *Fernando-Granados, supra* note 25.

[31] See Neb. Rev. Stat. § 29-2532 (Reissue 2008).

[32] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[33] See, *id.*; Neb. Const. art. I, § 9.

[34] See § 29-2532 (Cum. Supp. 2010).

[35] See, L.B. 36; Neb. Const. art. III, § 27.

(ii) Assignment of Error

Ellis contends that the repeal of electrocution as the method of carrying out a sentence of death by L.B. 36 requires a sentence of life in prison.

(iii) Standard of Review

[15] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[36]

(iv) Analysis

Ellis argues that he is not subject to the death penalty because at the time of the offense, electrocution was the sole method of carrying out a death sentence. Ellis concludes that he must be sentenced to life imprisonment because at the time of his sentencing, there was no valid method of punishment.

Ellis' argument is without merit for two reasons. First, in L.B. 36, the Legislature expressly stated that "[n]o death sentence shall be voided or reduced as a result of a determination that a method of execution was declared unconstitutional under the Constitution of Nebraska or the Constitution of the United States."[37] Instead, "[i]n any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution."[38] Thus, to the extent that Ellis' argument relies on the purported effect of L.B. 36, it is evident that the Legislature did not intend L.B. 36 to affect any sentence of death that had already been imposed.

[16] But Ellis' argument does not hinge upon L.B. 36; rather, it hinges upon our decision in *Mata*. Ellis' argument is really that because we struck down electrocution in *Mata*, he could not have been sentenced to death until another means of enforcing a death sentence was enacted. Ellis' argument, however, is inconsistent with *Mata*, in which we *affirmed* the defendant's

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[36] *Sellers, supra* note 5.

[37] Neb. Rev. Stat. § 83-968 (Cum. Supp. 2010).

[38] See *id.*

death sentence despite striking down the only method available under state law to enforce that sentence.[39] We explained:

> Having concluded that electrocution is cruel and unusual punishment, we face the question of how to dispose of this appeal. The fact remains that although the Nebraska statutes currently provide no constitutionally acceptable means of executing [the defendant], he was properly convicted of first degree murder and sentenced to death in accord with Nebraska law. We have already affirmed his conviction. *His sentence of death, although it cannot be implemented under current law, also remains valid.*
>
> Under Nebraska law, the sentencing panel can fix the sentence either at death or at life imprisonment. Because a panel's sentencing authority does not extend beyond that, the method of imposing a death sentence is not an essential part of the sentence. And Nebraska's statutes specifying electrocution as the mode of inflicting the death penalty are separate, and severable, from the procedures by which the trial court sentences the defendant. *In short, that a method of execution is cruel and unusual punishment "'"bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself."'"* Because we find no error in imposing a sentence of death, we affirm the district court's judgment.[40]

Although Ellis was sentenced after *Mata* was decided, his situation is not meaningfully distinguishable. The sentence was lawfully imposed, and although the sentence could not have been executed at that very time, the sentence itself remains

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[39] See *Mata, supra* note 32. See, also, *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied*, Nos. 10-9897, 10A819, 2011 WL 1325226 (U.S. Neb. May 23, 2011); *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010), *cert. denied* 560 U.S. 945, 130 S. Ct. 3364, 176 L. Ed. 2d 1256; *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).

[40] *Mata, supra* note 32, 275 Neb. at 67-68, 745 N.W.2d at 278-79 (emphasis supplied). See, also, *Galindo, supra* note 39.

valid. The sentencing panel did not err in imposing a sentence of death because of *Mata*.

(b) Constitutionality of Death Penalty Statutes

[17] Ellis raises a number of arguments that challenge the constitutionality of various aspects of Nebraska's death penalty statutes.[41] The district court found no merit to any of Ellis' claims. Whether a statute is constitutional is a question of law; accordingly, on each of these arguments, we are obligated to reach a conclusion independent of the decision reached by the court below.[42]

(i) Separation of Powers

Ellis argues that the statutes establishing the procedure for enforcing a sentence of death, Neb. Rev. Stat. § 83-964 et seq. (Cum. Supp. 2010), delegate a legislative function to the executive branch in violation of the Nebraska Constitution. Ellis asserts, therefore, that his death sentence should be voided and that he should be sentenced to life imprisonment.

As noted above, Nebraska law now provides that "[a] sentence of death shall be enforced by the intravenous injection of a substance or substances in a quantity sufficient to cause death. The lethal substance or substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services."[43] The Director of Correctional Services

> shall create, modify, and maintain a written execution protocol describing the process and procedures by which an execution will be carried out consistent with this section. The director shall (a) select the substance or substances to be employed in an execution by lethal injection, (b) create a documented process for obtaining the necessary substances, (c) designate an execution team composed of one or more executioners and any other personnel deemed

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[41] See Neb. Rev. Stat. § 29-2519 et seq. (Reissue 2008 & Cum. Supp. 2010).

[42] *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010).

[43] § 83-964.

> necessary to effectively and securely conduct an execution, (d) describe the respective responsibilities of each member of the execution team, (e) describe the training required of each member of the execution team, and (f) perform or authorize any other details deemed necessary and appropriate by the director.[44]

The only substantive direction provided by the Legislature regarding the execution protocol is that the protocol "shall require that the first or only substance injected be capable of rendering the convicted person unconscious and that a determination sufficient to reasonably verify that the convicted person is unconscious be made before the administration of any additional substances, if any."[45]

[18-20] Ellis argues that the Legislature has unconstitutionally delegated its legislative responsibility to establish an execution protocol, in violation of the Nebraska Constitution.[46] But a grant of administrative authority is not necessarily an unconstitutional delegation of legislative power.[47] The Legislature may enact statutes to set forth the law, and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose.[48] Although the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.[49]

[21] We have said that delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of

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[44] § 83-965(2).

[45] § 83-965(3).

[46] See Neb. Const. art. II, § 1.

[47] *Yant, supra* note 42.

[48] See *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[49] See, *id.*; *Yant, supra* note 42.

continuous decision.[50] The subject at issue here clearly fits that description, which is why similar arguments based on comparable statutes have been uniformly rejected in other jurisdictions.[51] Those courts have reasoned that by specifying the purpose of the statute, the punishment to be imposed, and generally identifying the means, a legislature has declared a policy and fixed a primary standard, permitting delegation of details that the legislature cannot practically or efficiently perform itself.[52]

We agree, and likewise conclude that Nebraska's Legislature has provided reasonable limitations and standards for carrying out the duties of establishing a protocol for lethal injection. The tasks assigned to the director are highly technical and require a course of continuous decision, making it appropriate to delegate them. We also note, as an aside, that even if Ellis' separation of powers argument had merit, his sentence would not be void. Rather, as explained above, our holding in *Mata* dictates that his sentence would remain valid, even if the State lacked a constitutional means of enforcing it.[53] But we resolve Ellis' argument here on a more fundamental basis: Ellis is incorrect when he asserts that Neb. Const. art. II, § 1, has been violated. So, we find no merit to his assignment of error.

(ii) Constitutionality of Aggravating Circumstances

Generally, Ellis argues that the Nebraska death penalty statutes are unconstitutional on their face. Specifically, he contends that the third part of § 29-2523(1)(a) and the first and second parts of § 29-2523(1)(d) are unconstitutional on their face and as interpreted by the courts of the State of Nebraska and as applied in this case. But we have previously rejected each of Ellis' arguments.

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[50] *Yant, supra* note 42.

[51] See, *Sims v. State*, 754 So. 2d 657 (Fla. 2000); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978).

[52] See, e.g., *Sims, supra* note 51; *Ex parte Granviel, supra* note 51.

[53] See *Mata, supra* note 32.

a. § 29-2523(1)(a)

[22,23] To begin with, Ellis contends that § 29-2523(1)(a), which provides as an aggravating circumstance that the defendant "has a substantial prior history of serious assaultive or terrorizing criminal activity," is unconstitutional because it fails to define those terms clearly. But we have concluded otherwise on a number of occasions.[54] In death penalty cases, an eligibility or selection factor is not unconstitutional if it has some commonsense core of meaning that a juror can understand.[55] Because the proper degree of definition of eligibility and selection factors in death penalty cases often is not susceptible of mathematical precision, a vagueness review is quite deferential.[56]

We have explained that "serious," "assaultive," and "terrorizing" are words in common usage with meanings well fixed and generally clearly understood and that the term "substantial history" is likewise reasonably clear.[57] "History" refers to the individual's past acts preceding the incident for which he is on trial, and "substantial" refers to an actual, material, and important history of acts of terror of a criminal nature. And we have concluded that our interpretation and application of § 29-2523(1)(a) are neither unconstitutionally vague nor overbroad.[58]

Ellis acknowledges this authority, but contends that we should reconsider it in light of the fact that juries, and not judges, are now responsible for factfinding with respect to aggravating

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[54] See, *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata, supra* note 32; *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

[55] *Mata, supra* note 32.

[56] *Id*.

[57] See *Holtan, supra* note 54. Accord *Bjorklund, supra* note 54.

[58] See, *Hessler, supra* note 54; *Bjorklund, supra* note 54; *Ryan, supra* note 54.

circumstances.[59] Ellis cites no authority for the proposition that these constitutional determinations are predicated on the identity of the fact finder. Instead, the relevant question is whether or not the instructions given to the jury, based upon appellate courts' narrowing constructions, are unconstitutionally vague.[60] And Ellis does not contend that the instructions given in this case were inconsistent with the narrowing constructions that we have given this aggravating circumstance.[61] In short, Ellis has not offered any compelling reason to overrule our authority holding that § 29-2523(1)(a) is constitutionally sufficient. We decline to do so.

b. § 29-2523(1)(d)

Similarly, Ellis takes issue with § 29-2523(1)(d), which provides as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." This aggravating circumstance contains two separate disjunctive components which may operate together or independently of one another.[62] Few provisions of Nebraska law have been more challenged, and as they are currently construed, they are constitutional.[63] Ellis again acknowledges this, and again contends that we should reevaluate those holdings in light of jury factfinding. We again decline to do so.

[24] Ellis specifically takes issue with the use of the term "helpless" in our construction of (and the jury instruction for) the "exceptional depravity" prong of § 29-2523(1)(d). We have

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[59] See, generally, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[60] See, *State v. Cromwell*, 211 Ariz. 181, 119 P.3d 448 (2005); *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005) (en banc).

[61] Compare *Sandoval, supra* note 39.

[62] *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[63] See, *Mata, supra* note 32; *Hessler, supra* note 54; *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra* note 54; *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *Ryan, supra* note 54. See, also, *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996); *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

held that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim.[64] Ellis argues that the district court erred in including "helpless" in the jury instruction because it does not have a constitutionally acceptable definition.

Ellis points out that our construction of the "exceptional depravity" prong is broader than that of the Arizona law upon which it was based, because in Arizona, unlike Nebraska, a mere finding that the victim was helpless would *not* be sufficient to establish the aggravator.[65] But the fact that our construction may be broader than Arizona's does not make it unconstitutional. Our definition of "exceptional depravity" has been repeatedly upheld.[66] We note, in particular, that the same argument Ellis makes was squarely presented to the Eighth Circuit in *Palmer v. Clarke*,[67] which reversed the district court's conclusion that helplessness, standing alone, would not compel a finding of heinousness or depravity[68]; instead, the Eighth Circuit held that our construction of the exceptional depravity aggravator was "'clearly constitutional.'"[69]

And the basic question is whether the aggravating circumstance has been construed to permit a principled distinction between those who deserve the death penalty and those who do not.[70] The helplessness of the victim makes such a

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[64] *Moore, supra* note 62; *Palmer, supra* note 54.

[65] See *State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006).

[66] See, *Joubert, supra* note 63; *Mata, supra* note 32; *Hessler, supra* note 54; *Palmer, supra* note 63.

[67] See *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005).

[68] See *Palmer v. Clarke*, 293 F. Supp. 2d 1011 (D. Neb. 2003), *affirmed in part and reversed in part, Palmer, supra* note 67.

[69] *Palmer, supra* note 67, 408 F.3d at 439, quoting *Joubert, supra* note 63.

[70] *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). See, also, *Sandoval, supra* note 39.

distinction. We reject Ellis' argument that "[a]ny victim of a homicide could be said to be 'helpless.'"[71] Many courts have found the helplessness of a victim to be a determinative factor in evaluating the depravity of a defendant's conduct.[72] A "helpless" victim is readily understood to be one who is unable to defend oneself, or to act without help.[73] It is not difficult, for instance, to see the difference between a shooting that occurs in the context of a fight between two adult men[74] and the killing of an abducted 12-year-old girl. One circumstance clearly merits the death penalty more than the other, which is the distinction that the Constitution requires.[75] The killing of a victim who has already been rendered helpless exhibits a callous disregard for the sanctity of human life that sufficiently distinguishes cases in which consideration of the death penalty is warranted.[76]

As an aside, we note that the jury was instructed, with respect to the first prong of § 29-2523(1)(d), that it should find that the murder was especially heinous, atrocious, or cruel if Ellis inflicted serious mental anguish or serious physical abuse and that mental anguish "includes a victim's uncertainty as to his or her ultimate fate." We have since disapproved this instruction in *State v. Sandoval*.[77] But in this appeal, Ellis has not taken issue with the inclusion of mental anguish. So, we need not consider the effect of the "mental anguish" instruction

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[71] Brief for appellant at 76.

[72] See, *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990); *Strouth v. State*, 999 S.W.2d 759 (Tenn. 1999); *State v. Chaney*, 967 S.W.2d 47 (Mo. 1998) (en banc); *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982). Cf. *Hargrave v. Wainwright*, 804 F.2d 1182 (11th Cir. 1986), *vacated on other grounds on rehearing en banc* 832 F.2d 1528 (1987).

[73] Concise Oxford American Dictionary 417 (2006).

[74] See, e.g., *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, Thorpe, supra* note 12.

[75] See *Lewis, supra* note 70.

[76] See, *Tokar v. Bowersox*, 198 F.3d 1039 (8th Cir. 1999); *Hargrave, supra* note 72; *Strouth, supra* note 72; *Chaney, supra* note 72; *Quintana, supra* note 72.

[77] *Sandoval, supra* note 39.

here. We note, however, that in this case, unlike *Sandoval*, there is considerable evidence that sexual abuse was inflicted on Amber before her death, and we have consistently held that murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering are "especially heinous, atrocious, [or] cruel."[78]

In sum, we find no merit to Ellis' argument that either § 29-2523(1)(a) or § 29-2523(1)(d) is unconstitutional, on its face or as applied in this case. We note that Ellis' brief also asserts a number of other facial challenges to the Nebraska death penalty statutes: for instance, he asserts due process, equal protection, uniformity, and cruel and unusual punishment claims under the state and federal Constitutions. But his "laundry list" of constitutional claims contains no argument other than his assertions that these provisions were violated; he neither assigned them specifically as error nor argued them sufficiently to preserve them for appellate review.[79]

(iii) Jury Consideration of Mitigating Evidence

Ellis contends that the Nebraska death penalty statutes' prohibition on presenting mitigating evidence to a jury violates the 6th, 8th, and 14th Amendments to the U.S. Constitution. In a related argument, Ellis contends that the Nebraska death penalty statutes' prohibition against the jury's assigning any relative "weight" to an aggravating circumstance in comparison to any mitigating circumstance violates the 6th, 8th, and 14th Amendments to the U.S. Constitution.

We have previously rejected both of these arguments.[80] We have explained that the U.S. Supreme Court's holding in *Ring v. Arizona*[81] does not require that a jury make findings

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[78] See, *id.*; *Gales, supra* note 63. See, also, *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008).

[79] See, *Mata, supra* note 32; *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[80] See, *Sandoval, supra* note 39; *Mata, supra* note 32; *Hessler, supra* note 54; *Gales, supra* note 63; *Gales, supra* note 59.

[81] *Ring, supra* note 59.

other than the existence of the aggravating circumstances upon which a capital sentence is based and that neither *Ring* nor any other authority "'require[s] that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.'"[82]

It is the finding of an aggravating circumstance increasing the defendant's authorized punishment which implicates the right to trial by jury, so "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[83] As the Court explained in *Apprendi v. New Jersey*,[84] facts in aggravation of punishment and facts in mitigation are fundamentally distinct.

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.[85]

[25] In other words, mitigating circumstances, and the "weight" to be assigned to the aggravating and mitigating circumstances, are relevant only to the sentencing panel's exercise of its discretion to decide which statutorily authorized sentence to impose and do not require determination by a jury. We find no merit to Ellis' assignments of error.

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[82] *Hessler, supra* note 54, 274 Neb. at 501, 741 N.W.2d at 424, quoting *Gales, supra* note 59. See, also, *Sandoval, supra* note 39; *Mata, supra* note 32.

[83] *United States v. Booker*, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

[84] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[85] *Id.*, 530 U.S. at 491 n.16.

(iv) Bifurcation of Factfinding and Sentencing

Ellis contends that the Nebraska death penalty statutes' separation of an aggravating circumstance fact finder (jury) and a mitigating circumstance fact finder (three-judge panel) where the sentence is ultimately to be determined by "weighing" the various factors is irrational, incoherent, and incapable of reasoned application, resulting in the sentencing panel's making specific factual findings in violation of *Ring*[86] and the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution. As we understand Ellis' argument, it is that the sentencing panel's imposition of sentence is unconstitutional because the sentencing panel cannot know, with certainty, the grounds upon which the jury based its findings of aggravating circumstances.

But we effectively rejected that argument in *State v. Hessler*.[87] In that case, the defendant had argued that the capital sentencing statutes are

> "irrational, unworkable, incoherent, and incapable of rendering a fair and just determination of life and death" . . . because the sentencing panel, which was not the fact finder during the aggravation phase, is not in as good a position as the jury to assign a weight to the aggravating circumstances, to weigh aggravating circumstances against mitigating circumstances, and to determine the sentence.[88]

We found no merit to that argument because, as explained above, there is no constitutional support for the contention that the jury's constitutional role extends beyond finding the facts that are necessary to condition an increase in the defendant's maximum punishment.[89]

The sentencing panel is *statutorily* limited to weighing the aggravating circumstances found by the jury, but there is no *constitutional* basis to argue that the sentencing panel is limited

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[86] *Ring, supra* note 59.

[87] *Hessler, supra* note 54.

[88] *Id.* at 501, 741 N.W.2d at 424.

[89] See *Ring, supra* note 59.

in the evidence it may consider, or the view of the evidence it may take, in exercising its sentencing discretion. The facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of constitutional analysis.[90] Once the jury has found the facts necessary to authorize the maximum penalty for an offense, "'it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'"[91] We find no merit to Ellis' argument that the Constitution does not permit the sentencing panel to weigh the aggravating circumstances and the evidence.

(v) Jury Sentencing

Ellis argues that the Nebraska death penalty statutes do not allow the jury to make the determination of life or death in violation of the 6th, 8th, and 14th Amendments to the U.S. Constitution. But we previously rejected this argument in *Hessler*.[92] *Ring* stands for the proposition that the jury must find the existence of the fact that an aggravating circumstance existed, but states may leave the ultimate life-or-death decision to the judge if they require a prior jury finding of aggravating circumstances in the sentencing phase.[93] We find no merit to Ellis' assignment of error.

(vi) Unanimous Findings of Fact by Jury

Ellis argues that the Nebraska death penalty statutes prejudice the defendant's right to a jury trial because no unanimous findings of specific facts are required before the jury may find an aggravating circumstance. But, if the defendant waives a jury, then the three-judge panel is required to make a unanimous finding of any fact in support of an aggravating

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[90] *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

[91] *Apprendi, supra* note 84, 530 U.S. at 497. Accord *Ring, supra* note 59.

[92] See *Hessler, supra* note 54.

[93] *Ring, supra* note 59 (Scalia, J., concurring).

circumstance. According to Ellis, this "unequal treatment,"[94] based on the assertion of a right to a jury trial, is in violation of the 6th, 8th, and 14th Amendments to the U.S. Constitution and the U.S. Supreme Court's decision in *United States v. Jackson*.[95]

But we rejected an identical argument in *Hessler*.[96] In *Jackson*, the Court had struck down a statute that authorized imposing a death sentence only if a jury recommended the death sentence, so, if the defendant waived his right to a jury trial, or pled guilty, the sentencing court could only impose a life sentence. The Court struck down the statute because it improperly coerced or encouraged the defendant to waive his or her Sixth Amendment right to a jury or his or her Fifth Amendment right to plead not guilty, thereby penalizing a defendant who asserted those rights.[97]

In *Hessler*, the defendant argued that Nebraska's statutory scheme violates *Jackson* because a defendant who prefers to have the same fact finder determine both the aggravating circumstances and the sentence must waive the right to have a jury find the aggravating circumstances. The defendant complained that "[i]n order for [him] to receive the additional benefit of unanimous findings of fact—in writing—supporting the aggravating circumstances,"[98] he was required to waive a jury determination, and according to the defendant, that violated *Jackson*. But we found that argument unpersuasive, explaining that

> [u]nlike *Jackson*, under the Nebraska death penalty statutes, a defendant cannot avoid the risk of a death penalty by waiving the right to a jury determination of aggravating circumstances; even if the defendant waived such right, the sentencing panel could still impose a death

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[94] Brief for appellant at 86.

[95] *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

[96] *Hessler, supra* note 54. See, also, *Sandoval, supra* note 39; *Galindo, supra* note 39; *Mata, supra* note 32.

[97] See *Jackson, supra* note 95.

[98] Brief for appellant at 71, *Hessler, supra* note 54 (No. S-05-629).

> penalty. . . . Unlike *Jackson*, in which the benefit to waiving the right to a jury was the elimination of exposure to the death penalty, the Nebraska statutory scheme does not provide a clear advantage to a defendant who waives his or her right to have a jury determine aggravating circumstances. The Nebraska statutory scheme does not improperly coerce or encourage a defendant to waive his or her right to a jury and does not penalize a defendant who asserts such right.[99]

Simply put, "[r]equiring three judges to unanimously agree on any fact supporting an aggravating circumstance does not necessarily make a favorable sentence more likely than requiring 12 jurors to unanimously agree under alternative theories."[100] *Jackson* did not hold that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.[101] A defendant's decision to waive a jury finding of aggravating circumstances would obviously implicate procedural differences, the advantages and disadvantages of which can be weighed by the defendant—but insisting on the jury finding does not penalize the defendant for that choice within the meaning of *Jackson*. We find no merit to Ellis' assignment of error.

(vii) Federal Preemption

Ellis argues that § 83-964 et seq. are in violation of the federal Controlled Substances Act (CSA)[102] and the Federal Food, Drug, and Cosmetic Act (FDCA)[103] and therefore are preempted under the Supremacy Clause of the U.S. Constitution. Specifically, he asserts that Nebraska's lethal injection statutes violate the CSA by permitting a controlled substance to be used without a prescription for a legitimate medical purpose

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[99] *Hessler, supra* note 54, 274 Neb. at 502-03, 741 N.W.2d at 425.

[100] *Mata, supra* note 32, 275 Neb. at 21, 745 N.W.2d at 249.

[101] *Mata, supra* note 32, citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

[102] 21 U.S.C. § 801 et seq. (2006 & Supp. III 2009).

[103] 21 U.S.C. § 301 et seq. (2006 & Supp. III 2009).

and violate the FDCA because the Director of Correctional Services is not required to obtain FDA approval of the drug or drugs used in the lethal injection protocol. And Ellis argues that the federal statutes preempt any Nebraska laws with which they conflict.[104]

[26,27] But the initial question posed by Ellis' argument is one of standing: whether either of the federal statutes relied upon by Ellis gives rise to a private right of action to enforce it. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.[105] The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.[106] Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute.[107]

And courts have consistently held that neither the FDCA nor the CSA creates a private remedy.[108] The U.S. Supreme Court has expressly held that "[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance . . . ."[109] As a result, the Fifth Circuit has rejected an argument similar to Ellis' under the FDCA, denying a stay of execution on the basis that the defendant had not made a showing of likelihood

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[104] See, generally, *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[105] *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[106] *Id.*

[107] *Id.*

[108] See, *Durr v. Strickland*, 602 F.3d 788 (6th Cir. 2010), *cert. denied* 559 U.S. 1087, 130 S. Ct. 2147, 176 L. Ed. 2d 757; *O'Bryan v. McKaskle*, 729 F.2d 991 (5th Cir. 1984). See, also, *West v. Ray*, No. 3:10-0778, 2010 WL 3825672 (M.D. Tenn. Sept. 24, 2010); *Ringo v. Lombardi*, No. 09-4095-CV-C-NKL, 2010 WL 3310240 (W.D. Mo. Aug. 19, 2010); *Jones v. Hobbs*, 745 F. Supp. 2d 886 (E.D. Ark. 2010).

[109] *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n.4, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001). See, also, *Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983).

of success on the merits.[110] The court noted that it was "unable to identify the legal footing for [the defendant's] present effort to enforce this detailed federal administrative scheme," given that the FDCA provides that all proceedings to enforce it shall be by and in the name of the United States or, under limited circumstances, by a State government.[111] The FDCA provides Ellis with no privately enforceable right of action.

Similarly, the Sixth Circuit recently held in *Durr v. Strickland*[112] that declaratory relief was unavailable to a defendant making arguments effectively identical to Ellis'. In *Durr*, the defendant argued that using lethal injection drugs without a prescription from a licensed medical practitioner and distributed without proper authorization violated the CSA and FDCA. But the Sixth Circuit affirmed the federal district court's conclusion that "no private right of action exists under either act."[113]

The CSA expressly gives the Attorney General the power to enforce its provisions,[114] and where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.[115] Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons, and a statute that focuses on the agency that will do the regulating is yet another step further removed.[116] The CSA's focus is on those who handle controlled substances, and on the authority of the Attorney General to enforce the act—it does not focus on the individuals protected by it, and evinces no intent to create a private remedy.[117]

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[110] See *O'Bryan, supra* note 108.

[111] See, *id.* at 993 n.2; 21 U.S.C. § 337.

[112] See *Durr, supra* note 108.

[113] *Id.* at 789. See, also, *West, supra* note 108; *Jones, supra* note 108.

[114] See, e.g., 21 U.S.C. §§ 821, 824, and 877.

[115] *Karahalios v. Federal Employees*, 489 U.S. 527, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989).

[116] See, *Alexander, supra* note 105; *Ringo, supra* note 108.

[117] *Ringo, supra* note 108.

We find that reasoning persuasive, and likewise conclude that neither the FDCA nor the CSA provides a private right of action that Ellis can assert. We also note that even if Ellis' argument had merit, for the reasons explained above, Ellis' challenge to the legality of the lethal injection protocol would not invalidate his sentence.[118] So, we find no merit to his assignment of error.

(c) Sufficiency of Evidence

(i) Background

The jury was instructed, at the aggravation hearing, as to several of the aggravating circumstances set forth in § 29-2523(1). As relevant, the jury was instructed that it should find an aggravating circumstance if it found that Ellis had "a substantial prior history of serious assaultive or terrorizing criminal activity."[119] The jury was also instructed to find whether the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity.[120] The jury was instructed that the murder was especially heinous, atrocious, or cruel if Ellis inflicted serious mental anguish or serious physical abuse, meaning torture, sadism, or sexual abuse, on Amber before her death. And the jury was told that the murder manifested exceptional depravity if Ellis apparently relished the murder, inflicted gratuitous violence on Amber, or needlessly mutilated her; if there was a cold, calculating planning of Amber's death; or if Amber was helpless.

In determining whether those aggravating circumstances existed, the jury was instructed to consider the evidence received at the trial of guilt.[121] And the State adduced additional evidence at the aggravation hearing. Evidence of Ellis' prior criminal convictions was presented, establishing that Ellis had been convicted of two robberies and two associated charges of

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[118] See *Mata, supra* note 32.

[119] See § 29-2523(1)(a).

[120] See § 29-2523(1)(d).

[121] See § 29-2520(4)(c).

use of a firearm to commit a felony[122] and two counts of first degree sexual assault on a child in connection with his assaults of his stepdaughters. And the State adduced testimony from Ellis' former daughter-in-law, who had become involved in a sexual relationship with Ellis after she and Ellis' son were divorced. She described how Ellis threatened and harassed her and violently assaulted her on several occasions. The jury was instructed that the State had to prove beyond a reasonable doubt that Ellis had committed the uncharged offenses committed—specifically, whether Ellis had committed the offense of terroristic threats, assault in the third degree, or false imprisonment in the first degree.

The jury found that Ellis had a substantial prior history of serious assaultive or terrorizing criminal activity[123] and that Amber's killing was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.[124]

(ii) Assignment of Error

Ellis argues that there was insufficient evidence for the jury to find either of those aggravating circumstances and that as a result, the sentencing panel erred in relying on those circumstances in reaching the sentence of death.

(iii) Standard of Review

[28] When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.[125]

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[122] See, *State v. Ellis*, 219 Neb. 408, 363 N.W.2d 389 (1985); *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983).

[123] See § 29-2523(1)(a).

[124] See § 29-2523(1)(d).

[125] *Sandoval, supra* note 39; *Gales, supra* note 63.

(iv) Analysis

[29] Ellis' first argument is that there was insufficient evidence to find that he has a substantial prior history of serious assaultive or terrorizing criminal activity.[126] Ellis contends that because the testimony of his former daughter-in-law was uncorroborated, it was insufficient to support the uncharged conduct used by the State to prove this aggravating circumstance. This argument is plainly without merit. To begin with, the credibility of witnesses is for the jury, and a jury's findings may be based upon the uncorroborated testimony of a single witness.[127] Ellis' former daughter-in-law's testimony, even standing alone, would have been sufficient evidence to support the jury's finding.[128]

But that testimony did not stand alone. As noted above, the State also adduced evidence of Ellis' convictions for armed robbery and sexual assault. And we note that while evidence that Ellis had sexually assaulted his stepdaughters should not have been admitted at trial, it would have been admissible during the aggravation hearing as relevant to this aggravating circumstance.[129] Taken together, the evidence was certainly sufficient to prove Ellis' substantial prior history of serious assaultive or terrorizing criminal activity.[130]

Ellis also argues that there was insufficient evidence to support a finding that the killing was especially heinous, atrocious, or cruel.[131] Ellis contends that "there was no clear directive from the jury" that it had found sexual abuse had occurred

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[126] See § 29-2523(1)(a).

[127] See, *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990).

[128] See *id.*

[129] See, generally, *Galindo, supra* note 39. See, e.g., *State v. Williams*, 73 Ohio St. 3d 153, 652 N.E.2d 721 (1995); *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987); *State v. Price*, 126 Wash. App. 617, 109 P.3d 27 (2005); *LaFevers v. State*, 897 P.2d 292 (Okla. Crim. App. 1995).

[130] See, e.g., *Hessler, supra* note 54; *Bjorklund, supra* note 54; *Holtan, supra* note 54; *Rust, supra* note 54.

[131] See § 29-2523(1)(d).

before Amber's death.[132] But, given our standard of review, that is not the question. Rather, the question is whether taken in the light most favorable to the State, a rational jury could have found that sexual abuse had occurred. Given how Amber's clothing had been removed, and Ellis' statements admitting to rape and inquiring about the degradation of semen, there is little question that the evidence was sufficient to support a finding of sexual abuse. And this was sufficient to prove that the murder was especially heinous, atrocious, or cruel.[133]

Finally, Ellis contends that the evidence was insufficient to prove that the murder manifested exceptional depravity by ordinary standards of morality and intelligence.[134] But in support of this contention, Ellis merely restates his argument with respect to whether the victim was "helpless," which we have rejected above.

In sum, the evidence was sufficient to support the jury's findings of aggravating circumstances. Ellis' assignment of error has no merit.

(d) Failure to Find Statutory Mitigating Circumstances

(i) Background

At sentencing, Ellis presented expert testimony that he had schizoaffective disorder and a history of polysubstance abuse. However, Ellis' expert witness, Dr. Bruce Gutnik, admitted that his diagnosis was based on Ellis' self-reporting of symptoms such as hallucinations and emotional instability. Gutnik also admitted that Ellis seemed to be exaggerating some of his symptoms, and Gutnik noted that he had been unable to corroborate some of Ellis' self-reported symptoms. And Gutnik had not performed any psychological tests on Ellis that might have detected malingering.

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[132] Brief for appellant at 90.

[133] See, e.g., *Gales, supra* note 63; *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979).

[134] See § 29-2523(1)(d).

The State presented Dr. Y. Scott Moore as a rebuttal witness. Moore found no evidence of schizophrenia, noting that Ellis displayed no symptoms of schizophrenia when he was examined despite reporting that he had not been medicated for approximately 2 years. Instead, Moore diagnosed Ellis with antisocial personality disorder, which Moore explained is not a psychotic disorder, although it is a mental disorder that can be serious. Moore said that psychological testing that had previously been performed at the Lincoln Regional Center had suggested that Ellis was exaggerating symptoms and malingering, and Moore explained how Ellis' self-reported symptoms were more consistent with deception than a genuine mental illness.

Ellis argued that this evidence proved two mitigating circumstances: The crime was committed while the offender was under the influence of extreme mental or emotional disturbance,[135] and at the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.[136] But the sentencing panel found that while Ellis suffered from some sort of mental condition, the evidence did not show that his condition was "extreme."[137] And the sentencing panel found the evidence insufficient to show that on November 29, 2005, Ellis was unable to appreciate the wrongfulness of his conduct or conform his conduct to the law. Thus, the sentencing panel did not find either of these statutory mitigating circumstances to exist. But the sentencing panel did consider Ellis' history of mental health problems as a nonstatutory mitigating circumstance,[138] although the panel found it did not approach or exceed the weight the panel gave to the aggravating circumstances that had been found.

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[135] See § 29-2523(2)(c).

[136] See § 29-2523(2)(g).

[137] See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[138] See *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990).

(ii) Assignment of Error

Ellis assigns that the sentencing panel erred in failing to find the evidence submitted at the sentencing hearing supported a finding of statutory mitigating factors under § 29-2523(2)(c) and (g).

(iii) Standard of Review

[30,31] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[139] We note that while there is no burden of proof with regard to mitigating circumstances, because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on Ellis.[140]

(iv) Analysis

Ellis argues that a diagnosis of either schizoaffective disorder or antisocial personality disorder would prove that the crime was committed while Ellis was under the influence of extreme mental or emotional disturbance within the meaning of § 29-2523(2)(c). But we have explained that for purposes of § 29-2523(2)(c), "extreme" means that the disturbance must be "'existing in the highest or the greatest possible degree, very great, intense, or most severe.'"[141] Neither expert who testified at sentencing described a condition that could be fairly characterized as extreme.

Beyond that, given the evidence of malingering on Ellis' part, Moore's testimony was more persuasive. And Moore described a person who has antisocial personality disorder as someone who does not think in terms of right and wrong, but instead in terms of self-gratification, and does not understand or have interest in the rights or feelings of others. While this is an apt description of what the record establishes concerning

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[139] See, *Gales, supra* note 63; *Dunster, supra* note 137; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

[140] See *Vela, supra* note 39.

[141] *Dunster, supra* note 137, 262 Neb. at 369, 631 N.W.2d at 911, quoting *Holtan, supra* note 54.

Ellis' behavior, it is not an extreme mental disturbance, nor are we persuaded that it in any way mitigates Ellis' conduct.

With respect to § 29-2523(2)(g), we agree with the sentencing panel that the evidence was insufficient to support a finding that *at the time of the crime*, Ellis was unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. Neither Gutnik nor Moore testified to that effect. Gutnik did not express an opinion on Ellis' ability to appreciate the wrongfulness of his conduct or conform it to the law at any time, and although Moore discussed the general effect of antisocial personality disorder on a person's ability to distinguish right from wrong, Moore specifically said that he was "not able to provide any information about [Ellis'] state of mind at the time of the crime." Moore explained that Ellis denied committing the crime and that "[h]is denial does not seem to be the outgrowth of any sort of psychotic thinking." And, we note, Ellis' evident attempts to conceal the crime are inconsistent with any claim that he was unable to appreciate its wrongfulness.

In sum, the evidence falls far short of proving what is required by § 29-2523(2)(g). We have said, in the context of an insanity defense, that the fact that a defendant has some form of mental illness or defect does not by itself establish insanity.[142] The same is true of § 29-2523(2)(g). Because there was no evidence that Ellis' ability to appreciate the wrongfulness of his conduct or conform his conduct to the law was impaired at any time, much less at the time of the crime, there was no basis to find this mitigating circumstance.[143]

We find no merit to Ellis' argument that the sentencing panel should have found statutory mitigating circumstances.

(e) Sentencing Panel Proportionality Review

(i) Background

In a capital sentencing proceeding, the sentencing panel is required to consider whether the sentence of death is excessive

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[142] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[143] See, *Sandoval, supra* note 39; *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990).

or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[144] In this case, the panel explained that it found three opinions of this court to be particularly pertinent in its proportionality review: *Hessler*,[145] *State v. Joubert*,[146] and *State v. Otey*.[147] The panel found that in light of its review of those cases, which will be discussed in more detail below, imposing a sentence of death in Ellis' case would not be excessive or disproportionate to the penalty imposed in similar cases.

(ii) Assignment of Error

Ellis argues that the sentencing panel erred in the proportionality review to be conducted pursuant to § 29-2522(3) and thus violated Ellis' rights under the 5th, 8th, and 14th Amendments to the U.S. Constitution.

(iii) Standard of Review

[32] In a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.[148]

(iv) Analysis

Ellis' argument is simply that the facts of *Hessler*, *Joubert*, and *Otey* are insufficiently similar to those of the instant case to make a valid comparison. We disagree. Obviously, a proportionality review does not require that a court "color match" cases precisely.[149] It would be virtually impossible to find two murder cases which are the same in all respects.[150] Instead, the question is simply whether the cases being compared are sufficiently similar, considering both the crime and the defendant, to provide the court with a useful frame of reference for

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[144] § 29-2522(3).

[145] *Hessler, supra* note 54.

[146] *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986).

[147] *Otey, supra* note 133.

[148] *Vela, supra* note 39.

[149] See *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

[150] *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

evaluating the sentence in this case. And the cases relied upon by the sentencing panel in this instance were sufficiently similar for purposes of evaluating proportionality.

In *Hessler*, the defendant was convicted of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony, based upon the killing of a 15-year-old girl who disappeared while making deliveries on her newspaper route.[151] The girl's body was found in the basement of an abandoned house. The defendant admitted to having sex with her, but claimed it was consensual; he said that after the victim suggested she would not keep the encounter secret, he took her to the basement of the abandoned house and shot her. The defendant was sentenced to death based upon findings that he had a substantial history of serious assaultive or terrorizing criminal activity, that the murder was committed in an effort to conceal the commission of a crime, and that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity.[152]

In *Joubert*, the defendant was convicted of two counts of first degree murder arising out of the killings of two young boys.[153] In each instance, the defendant had abducted the victim and taken him to a secluded area, where he tormented and killed each victim. The defendant was sentenced to death in each case based upon findings that the murder was committed in an effort to conceal the commission of a crime; that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity; and, in one case, that the defendant had a substantial history of serious assaultive or terrorizing criminal activity.[154]

Finally, in *Otey*, the defendant was convicted of first degree murder in the perpetration of a first degree sexual assault, after he entered the victim's apartment and raped her, then stabbed her, struck her on the head with a hammer, and strangled her

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[151] *Hessler, supra* note 54.

[152] See *id.*

[153] *Joubert, supra* note 146.

[154] See *id.*

with a belt.[155] The defendant was sentenced to death based upon the court's findings that the murder was committed in an effort to conceal the commission of a crime and that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity.[156]

Ellis asserts that

> the facts in these three cases are in no way similar to this case. Each of the defendants in the cases the sentencing panel determined were to be used in their proportionality analysis confessed the facts supporting their convictions. The testimony provided by the State's witnesses in this case does not establish any facts remotely similar to the facts in these cases.[157]

Ellis is essentially arguing that the instant case is not comparable to the cases relied upon by the sentencing panel because in this case, Ellis neither confessed nor left a living witness. In other words, Ellis seeks to benefit from the partial success of his efforts to conceal direct evidence of his crime.

But that is one form of success for which society has no reward.[158] While there is no *direct* evidence of many of the details of the crime that are most pertinent to this issue, there is plenty of *circumstantial* evidence, and it does not take much imagination to infer from that evidence how events must have unfolded when Amber was abducted, taken to a rural area, raped, and then murdered. Circumstantial evidence, we have said, is sufficient to support the inferences necessary to convict someone of murder[159]; there is no reason that it cannot also be used to support the inferences necessary to evaluate a murderer's appropriate sentence.

In short, we find no merit to Ellis' argument that the cases relied upon in the sentencing panel's proportionality review

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[155] See, *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *Otey, supra* note 133.

[156] See *id.*

[157] Brief for appellant at 100-101.

[158] See *Edwards, supra* note 22.

[159] See *id.*

were not comparable. On our de novo review, we agree with the sentencing panel that those cases are relevant and helpful in evaluating the proportionality of Ellis' sentence.

(f) Supreme Court De Novo Review and Proportionality Review

[33] Finally, in reviewing a sentence of death, we conduct a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.[160] In so doing, we consider whether the aggravating circumstances justify imposition of a sentence of death and whether the mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.[161] Having considered the evidence, we are of the opinion that the aggravating circumstances—particularly the cruelty inflicted by Ellis' abduction and sexual assault of Amber—justify imposing the death penalty and that the sole mitigating circumstance identified by the sentencing panel—Ellis' history of mental health problems—does not approach or outweigh those aggravating circumstances. We conclude that the aggravating and mitigating circumstances support imposing the death penalty.

[34,35] In addition, we are required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty.[162] The purpose of such review is to ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.[163] Our proportionality review, which is separate from the sentencing panel's, looks only to other cases in which the death penalty has been imposed and requires us to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death

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[160] *Gales, supra* note 63.

[161] See § 29-2522(1) and (2).

[162] See, § 29-2521.03; *Palmer, supra* note 54.

[163] See *Vela, supra* note 39.

penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.[164]

In conducting our review, we agree with the sentencing panel that our decisions in *Hessler*, *Joubert*, and *Otey*, discussed in detail above, are particularly pertinent here.[165] In addition, we note our decisions in *State v. Gales*[166] and *State v. Williams*.[167] In *Gales*, the defendant was convicted of, as relevant, two counts of first degree murder.[168] The defendant had, as relevant, raped and murdered a 13-year-old girl and murdered her 7-year-old brother because he was a potential witness. The defendant was sentenced to death based on findings that he had previously been convicted of a crime of violence, he committed the murders in an effort to conceal his identity as the perpetrator, he committed another murder at the same time, and, with respect to the girl, the murder was especially heinous, atrocious, or cruel.[169] And in *Williams*, the defendant was convicted of two counts of murder in the first degree, and one count of first degree sexual assault, after he shot two women, raping one of them.[170] He was sentenced to death based upon findings that he had previously been convicted of a crime of violence, he committed the murders in an effort to conceal his identity as the perpetrator, he committed another murder at the same time, and the murder was especially heinous, atrocious, or cruel.[171]

Having reviewed our capital jurisprudence, and taking note of comparable cases, we are persuaded that the imposition of the sentence in this case was not greater than those imposed in other cases with the same or similar circumstances.

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[164] See, *Hessler, supra* note 54; *Gales, supra* note 63.

[165] *Hessler, supra* note 54; *Joubert, supra* note 146; *Otey, supra* note 133.

[166] See, *Gales, supra* note 63.

[167] *Williams, supra* note 150.

[168] See *Gales, supra* note 63.

[169] See *id.*

[170] See *Williams, supra* note 150.

[171] See *id.*

III. CONCLUSION

Although we find that Ellis' argument regarding evidence admitted pursuant to rule 404(2) has merit, we find that the error was harmless; the physical evidence, and statements Ellis was reported to have made before the physical evidence connected him to the crime, established his guilt beyond any reasonable dispute. The district court, however, correctly overruled Ellis' objections to alleged "jailhouse informer" testimony and DNA evidence. And we find no merit to Ellis' constitutional challenges to Nebraska's capital sentencing scheme or his claims that the evidence is insufficient to support the findings of the jury and the sentencing panel. Finally, we find, on our de novo review, that the death penalty is warranted and proportional in this case. Therefore, Ellis' conviction and sentence are affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MAURO YOS-CHIGUIL, APPELLANT.
798 N.W.2d 832

Filed May 27, 2011. No. S-10-671.

1. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
3. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred presents a question of law.
4. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision. The court reviews factual findings for clear error.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order.