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use and that he freely and voluntarily consents to the entry of an order of disbarment and freely and voluntarily waives his right to proceedings prior to entry of an order. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY D. GLAZEBROOK, APPELLANT.

803 N.W.2d 767

Filed September 30, 2011. No. S-09-1170.

1. **Appeal and Error.** Absent plain error, an appellate court will not consider an issue not raised to the trial court.
2. **Constitutional Law: Speedy Trial.** The right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities knew of the offense.
3. **Constitutional Law: Criminal Law: Due Process: Proof: Time.** The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay. But dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.
4. **Criminal Law: Due Process: Time.** A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.
5. **Trial: Due Process: Time: Appeal and Error.** When reviewing a trial court's determination of a claim of denial of due process resulting from preindictment

delay, an appellate court will review determinations of historical fact for clear error, but will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial.

6. **Due Process: Proof: Time.** A defendant alleging that a delay in filing charges constituted a denial of due process cannot rely on the real possibilities inherent in the delay, such as dimmed memories, inaccessible witnesses, and lost evidence. The defendant must show actual prejudice.
7. **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.
8. ____: ____: ____. In reviewing the admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), an appellate court considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
9. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission 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. The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.
10. **Evidence: Other Acts.** The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.
11. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
12. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having "special" or "independent" relevance, which means its relevance does not depend on its tendency to show propensity.
13. **Rules of Evidence.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), is, upon objection to its admissibility, required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.
14. **Evidence: Other Acts.** 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.

15. **Trial: Juries: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
16. ____: ____: ____: ____. 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.
17. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
18. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
19. ____: ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.
20. ____: ____: ____. It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading.
21. **Evidence.** Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.
22. **Trial: Evidence.** Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.
23. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
24. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
25. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for a new trial.

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

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

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and MOORE, Judge.

STEPHAN, J.

In 2009, Jeffrey D. Glazebrook was convicted of first degree murder in connection with the 1977 death of Sadie May McReynolds. He was sentenced to life imprisonment. In this direct appeal, Glazebrook contends that the State's delay in charging him with the offense violated his constitutional rights and that the trial court erred in receiving certain evidence over his objections. We find no merit in the constitutional claim, but we determine that the conviction must be reversed because the district court improperly received evidence of Glazebrook's criminal history.

I. FACTS AND PROCEDURAL BACKGROUND

1. 1977 CRIME

Shortly after 1 p.m. on November 7, 1977, the Ashland, Nebraska, rescue squad was dispatched to the Ashland home of 97-year-old McReynolds. McReynolds was a widow who lived alone. She was transported to a Lincoln, Nebraska, hospital, where the admitting nurse documented bruises on McReynolds' right lower leg, left thigh, left wrist, and left hand. McReynolds also had large amounts of dried blood on her face, abdomen, legs, and feet. An examination at the hospital disclosed that McReynolds sustained injuries to her vagina and urethra. McReynolds died on November 20, 1977, as a result of her injuries.

2. PRETRIAL PROCEEDINGS

In 2008, a Saunders County grand jury indicted Glazebrook on one count of first degree sexual assault and one count of felony murder in the first degree in connection with the assault and death of McReynolds. The State later filed the operative second amended information charging Glazebrook with a single count of first degree murder. The State alleged that Glazebrook killed McReynolds during the perpetration of a sexual assault or a robbery. Following a preliminary hearing, the court determined there was probable cause to believe that

Glazebrook committed the murder but stated there was no evidence a robbery had occurred.

Glazebrook filed a plea in abatement asserting various arguments, including that the delay in filing charges against him had unfairly prejudiced his right to present a defense, in violation of his due process rights under the federal and state Constitutions. The district court overruled the plea in abatement but specifically stated that Glazebrook could raise the issue of preindictment delay at trial. Glazebrook then entered a plea of not guilty.

Before trial, the State filed a motion requesting a hearing on the admissibility of other "crimes, wrongs, or acts" committed by Glazebrook. The pretrial motion asserted the other crimes were relevant to prove the identity of the person who killed McReynolds and as "proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident."

A rule 404[1] hearing was conducted in June 2009. At the hearing, the State informed the court that its sole ground for seeking admission of the other crimes evidence was that it was relevant to the identity of the person who killed McReynolds. The State then adduced evidence that in 1978, Glazebrook committed a physical assault in Ashland upon a female victim, E.S., for which he was convicted and sentenced to 4 to 10 years' imprisonment. The State also adduced evidence that in 1991, Glazebrook committed a sexual assault in Lincoln against another female victim, K.B., for which he was convicted and sentenced to 15 to 35 years' imprisonment. We shall discuss this evidence in more detail in our analysis of Glazebrook's assignment of error regarding its admissibility. After the hearing, the district court entered an order allowing the State to adduce the other crimes evidence at trial.

3. Trial

First responders testified they found McReynolds lying on the floor, partially in a hallway and partially in a bathroom, dressed in a flannel nightgown which she was still wearing

[1] Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008).

when she was taken to the hospital. An Ashland police officer who was one of the first officers at the crime scene arrived while McReynolds was still being attended to by the first responders. The officer observed bloodstains primarily in the bathroom, but also in other rooms in the house. Nebraska State Patrol Investigator Ron Osborne arrived at the scene a short time later, and Osborne thereafter directed the investigation.

At Osborne's request, Trooper James Snyder of the Nebraska State Patrol went to the Lincoln hospital to which McReynolds was taken. Snyder arrived at the hospital at 1:30 p.m. and was present in the emergency room when McReynolds was questioned by a nurse regarding the events which led to her injuries. McReynolds reported that her doorbell rang sometime after 9:30 p.m. on the preceding day and that when she responded, an unidentified man grabbed her and pushed her down "'"over [her] organs."'" He told her to do certain things, such as to "'spread [her] feet apart.'" McReynolds thought that his objective was sex. The man eventually apologized and left.

Utilizing a "rape kit," the nurse assisted an attending physician in obtaining tissue specimens from McReynolds, including fingernail scrapings, vaginal and rectal smears, and hair specimens. Snyder took possession of the rape kit and delivered it the same afternoon to Karen Schmidt, who was then the chief forensic serologist at the State Patrol Criminalistics Laboratory (crime lab) in Lincoln. Schmidt placed the rape kit in a locked evidence room at the crime lab. On the following morning, Osborne brought additional items of evidence to Schmidt, including a nightgown and a washcloth. Schmidt inventoried and numbered each item of evidence and placed each item in a separate paper bag labeled with the case number. The nightgown and washcloth were placed in a paper bag which was initialed by Schmidt and Osborne.

Schmidt later performed nondestructive testing on the tissue specimens included in the rape kit. She also examined the nightgown, which had McReynolds' name on it and was heavily stained with blood and urine. Schmidt was unable to detect the presence of semen from either the rape kit specimens or the nightgown. Schmidt did find that the blood on the nightgown was the same type as the sample of McReynolds' blood

from the rape kit specimen. Schmidt also observed hairs on the nightgown, which she removed and mounted on four individually numbered microscope slides. After examining the slides, Schmidt determined that slides Nos. 3 and 4 contained hairs that did not come from McReynolds. Schmidt identified the hairs on slide No. 3 as head hairs and those on slide No. 4 as pubic hairs. After examining the slides, Schmidt stored them in slide mailers and put them in the crime lab's evidence room; the nightgown was placed in its paper bag and returned to the evidence room. The nightgown and other evidence were later released to Osborne, but the slides containing the hair specimens obtained from the nightgown were retained in the crime lab.

An investigator with the Nebraska State Patrol interviewed Glazebrook in December 1977, at Osborne's request. Glazebrook, then a 17-year-old, resided in Ashland, as did other members of his family. He told the investigator he had not known McReynolds personally, but he knew who she was because he had scooped her walks on one occasion and his brother may have mowed her lawn. Glazebrook told the investigator that on the evening of the assault, he and a few friends were in Council Bluffs, Iowa, and he returned to his grandparents' home in Ashland at approximately 11:45 p.m. Glazebrook's grandparents lived approximately one block from McReynolds' home. He denied assaulting McReynolds and said he did not know who did.

A urologist who treated McReynolds following the assault found that her urethra was severely lacerated and torn. A forensic pathologist reviewed the medical records and concluded the injuries McReynolds sustained in the assault were the direct cause of her death.

Nebraska State Patrol Lt. Robert Frank began reviewing the McReynolds files as a cold case in 1996. He knew about advances in DNA testing and was looking for DNA evidence. When he learned of the slides containing the hair specimens, Frank went to the locked long-term evidence storage facility, where he located a cardboard box with the McReynolds case number on it. Inside the box was a black plastic garbage bag containing individual brown paper bags and boxes. One of the

paper bags contained the nightgown and the washcloth. Frank testified neither this paper bag nor any of the others had been sealed or stapled shut. He determined the evidence had not been checked out of the storage facility after 1978, but was unable to locate the slides.

Frank then contacted the crime lab to ask about the slides. The crime lab found two of the four slides, Nos. 3 and 4, and Frank had those slides sent to an outside facility for DNA testing. No nuclear DNA could be obtained from the slides, and they were returned to the crime lab in November 1997.

In late 1999, Frank learned of a new technology known as mitochondrial DNA (mtDNA) testing. This technique differs from nuclear DNA testing in that it utilizes DNA from outside the cell nucleus which is inherited only from the individual's mother. The testing of mtDNA can exclude individuals as donors, but cannot identify a specific individual as a donor or identify the donor's sex, race, or ethnicity. Frank obtained slides Nos. 3 and 4 from the crime lab and sent them, along with two vials of Glazebrook's blood, to a testing facility. At the facility's request, Frank later sent 19 head hairs obtained from Glazebrook.

Pamela Pogue performed mtDNA testing on the slides prepared by Schmidt and sent to her by Frank. Pogue also tested the hair specimens and blood obtained from Glazebrook. Over a defense objection with respect to chain of custody and relevance, Pogue testified that Glazebrook could not be excluded as the donor of the hair on one of the slides. Pogue sent the mtDNA sequence she found on that slide to the Federal Bureau of Investigation's database to determine how often that particular mtDNA sequence had been found in an individual. The database showed that the sequence had been found in 1 of 563 African Americans, 0 of 1,219 Caucasians, 0 of 302 Hispanics, and 0 of 342 Asians.

Although 19 hair samples taken from Glazebrook were sent to Pogue to serve as known samples of his mtDNA, only 1 hair sample was returned after the mtDNA testing was completed. Pogue testified she did not know what happened to the remaining 18 hair samples, but she was confident that they were not consumed in the testing process.

Over Glazebrook's objection, evidence regarding the assaults committed by Glazebrook on E.S. and K.B. was received at trial. The court instructed the jury that the evidence was received "for the limited purpose of establishing the identity of the person responsible for the charged offense" and that the jury must consider the evidence "for that limited purpose and for no other."

After the State rested, Glazebrook renewed his plea in abatement and a hearing was held outside the presence of the jury. Glazebrook adduced evidence that generally showed the records of his assignments within the penal system had been destroyed and that certain witnesses he wished to call could not remember the events. The district court overruled the renewed plea in abatement.

The jury returned a verdict of guilty, and Glazebrook was sentenced to life imprisonment. He perfected this timely direct appeal.

II. ASSIGNMENTS OF ERROR

Glazebrook assigns, restated and renumbered, that the district court erred in (1) not dismissing the charge on the basis of preindictment delay, in violation of his rights under the 6th Amendment and the Due Process Clause of the 14th Amendment to the U.S. Constitution; (2) receiving the other crimes evidence over his objection; and (3) receiving the mtDNA evidence over his objection.

III. ANALYSIS

1. Preindictment Delay

[1,2] Glazebrook argues the State's delay in filing charges against him in connection with the McReynolds homicide violated his rights under the 6th Amendment and the Due Process Clause of the 14th Amendment. He did not assert his Sixth Amendment claim in the district court. Absent plain error, this court will not consider an issue not raised to the trial court.[2]

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[2] See, *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated in part on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

There can be no plain error with respect to this issue, because the right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities knew of the offense.[3] Thus, we need not consider Glazebrook's Sixth Amendment claim.

[3-5] The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay.[4] But dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.[5] Our cases do not clearly delineate the standard of review applicable to trial court rulings on this issue. We conclude that a criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact and requires the dual standard of review which we have employed for other mixed questions, such as ineffective assistance of counsel[6] and juror misconduct.[7] Accordingly, when reviewing a trial court's determination of a claim of denial of due process resulting from preindictment delay, we will review determinations of historical fact for clear error, but we will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial.[8]

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[3] *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

[4] *U.S. v. Sturdy*, 207 F.3d 448 (8th Cir. 2000). See, also, *State v. Huebner, supra* note 3.

[5] *United States v. Marion, supra* note 3; *State v. Huebner, supra* note 3.

[6] *Golka v. State*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[7] *State v. Thorpe, supra* note 2.

[8] See *State v. Davis*, 345 Or. 551, 201 P.3d 185 (2008).

[6] On this issue, Glazebrook had the burden of establishing that the delay in filing charges actually prejudiced his defense and that the State intentionally caused the delay to gain an unfair tactical advantage.[9] On appeal, he argues only the prejudice prong of this test, contending that the passage of time dimmed the memories of witnesses and deprived him of the ability to call witnesses, now deceased, who may have had knowledge of unspecified facts. But a defendant alleging that a delay in filing charges constituted a denial of due process "cannot rely on the real possibilities inherent in the delay, such as dimmed memories, inaccessible witnesses, and lost evidence. The defendant must show actual prejudice."[10] Glazebrook's evidence falls far short of this requirement. And there is no evidence to support the second prong of the test, which requires a showing that the State intentionally caused the delay to gain an unfair tactical advantage. As the Supreme Court has noted, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."[11] Accordingly, the district court's determination that Glazebrook failed to establish a denial of due process resulting from preindictment delay was not clearly erroneous.

2. Evidence of Other Crimes

(a) Additional Facts

Glazebrook argues the district court erred in receiving, over his objection, evidence of other crimes he committed. We summarize the other crimes evidence here.

(i) Assault on E.S.

In May 1978, Glazebrook was convicted by a jury of an assault with intent to inflict serious bodily injury on E.S. Glazebrook was sentenced to 4 to 10 years' imprisonment. He was 17 years old at the time the crime was committed. E.S. was 56 when she was assaulted and died before the rule 404

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[9] See *State v. Huebner, supra* note 3.

[10] *Id.* at 345, 513 N.W.2d at 289.

[11] *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

hearing in this case. At trial, the State offered the testimony of E.S. from the 1978 trial and a portion of Glazebrook's testimony from that trial. This evidence was received over Glazebrook's objections under rules 403[12] and 404, subject to the court's limiting instruction as noted above.

E.S. testified at the 1978 trial that she had fallen asleep on her living room sofa on the evening of February 1, 1978. She woke to find a man standing over her and striking her head with a hammer. E.S. tried to resist, but he struck her several times. Suddenly he stopped and left. After he left, she discovered that her wallet was missing from her purse, which had been in her kitchen. The investigation revealed that Glazebrook broke into her house through a basement window and picked up the hammer in the basement. He could have taken the purse without disturbing her as she slept. Glazebrook testified at the 1978 trial that he knew E.S. from helping his brother mow her lawn, but stated he had never been in her home.

(ii) Assault of K.B.

In September 1991, Glazebrook entered a no contest plea to a charge of first degree sexual assault of K.B. and was convicted and sentenced to a term of 15 to 35 years' imprisonment. K.B. testified at the trial of this case, over Glazebrook's rules 403 and 404 objections, and subject to the same limiting instruction given with respect to the testimony of E.S.

K.B. was 45 years old at the time of the assault and lived in a basement apartment at her parents' home in Lincoln. Glazebrook was dating K.B.'s daughter at the time. In February 1991, K.B. was asleep in her apartment when she was awakened at 2 a.m. by a noise at her door. When the noise persisted, she got up to investigate. She found the door to her apartment ajar, and when she attempted to close it, Glazebrook unexpectedly entered. He told K.B. he had had an argument with her daughter and asked if he could use her restroom. K.B. agreed. When Glazebrook returned, he grabbed K.B.'s shoulders and pushed her to the floor, where they struggled and K.B. screamed for help. During the struggle, Glazebrook removed

[12] Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

K.B.'s underwear and digitally penetrated her. K.B. managed to break away and run to the door, but Glazebrook caught her and dragged her onto her bed. When K.B.'s father heard the commotion and called down the stairs to ask what was going on, K.B., fearing for her life, told Glazebrook that if he left she would not tell about the incident. Glazebrook then left, and K.B. later called the police.

(b) Applicable Law and Standard of Review

Glazebrook's principal objection to the evidence of his prior crimes was based on rule 404(2), which 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.[13] For completeness, 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.[14] Those amendments were not in effect at the time of trial in this case and do not affect our analysis in this appeal.

[7,8] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[15] In reviewing the admissibility of other crimes evidence under rule 404(2), an appellate court considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to

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[13] Rule 404(2).

[14] See rule 404(4) and Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010).

[15] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

consider the evidence only for the limited purpose for which it was admitted.[16]

[9,10] Rule 404(2) prohibits the admission 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.[17] The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.[18] The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.[19]

[11-13] But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[20] Such evidence is often referred to as having "special" or "independent" relevance, which means its relevance does not depend on its tendency to show propensity.[21] The proponent of such evidence is, upon objection to its admissibility, required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.[22] In this manner, the claimed independent relevance of the evidence is identified for the finder of fact and the appellate court.

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[16] See, *State v. Epp, supra* note 15; *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[17] *State v. Ellis, supra* note 15. See, also, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[18] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[19] *State v. Trotter, supra* note 17; *State v. Sanchez, supra* note 18.

[20] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[21] *State v. Baker, supra* note 20; *State v. Sanchez, supra* note 18; *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[22] *State v. Burdette, supra* note 16; *State v. Sanchez, supra* note 18.

[14] Here, the evidence of other assaults committed by Glazebrook was offered and received for the sole purpose of proving Glazebrook's identity as McReynolds' assailant. 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.[23] 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.[24] For example, we held in *State v. Burdette*[25] that evidence of prior crimes was admissible to prove the identity of the perpetrator of the charged offense, where the victims of the prior crimes and the charged offense were chosen from newspaper articles identifying women likely to be living alone; the victims were bound, gagged, and blindfolded in a similar manner; and the victims were subjected to both anal and vaginal penetration.

But in other cases, we have held that general similarities between prior crimes and the charged offense are insufficient to establish admissibility of the prior crimes to prove identity under rule 404. In *State v. Trotter*,[26] we held that prior incidents of spousal abuse perpetrated by the defendant should not have been admitted on the issue of identity in his prosecution for child abuse and manslaughter, because the prior crimes and the charged offense were not so similar, unusual, and distinctive as to establish a "signature" methodology. While noting that both the charged offense and the prior acts involved abuse of a person, we reasoned the similarities urged by the State as the basis for admissibility to prove identity were, "in essence, the similarities in the statutory definition of the crimes themselves, not the manner in which [the defendant] may have

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[23] *State v. Ellis, supra* note 15; *State v. Trotter, supra* note 17.

[24] *Id.*

[25] *State v. Burdette, supra* note 16.

[26] *State v. Trotter, supra* note 17.

carried them out."[27] Recently, in *State v. Ellis*,[28] we concluded that evidence of the defendant's prior sexual assaults directed at his minor stepdaughters should not have been received on the issue of identity in his prosecution for first degree murder in which the State alleged that the death of the minor female victim occurred in the perpetration of a sexual assault. We noted the prior acts occurred more than a decade before the charged offense and that although the victims were approximately the same age, assaulted in isolated locations, and subjected to blows on the head, these facts were not "so distinctive as to separate [the] prior acts from nearly any other forcible sexual assault."[29]

(c) Application of Law to Facts

(i) Assault of E.S.

Because McReynolds was unable to identify her assailant before her death, a jury could have concluded that someone other than Glazebrook committed the crime. Therefore, identity was a fact of consequence in the case.[30] In determining that evidence of the assault on E.S. was admissible under rule 404(2), the district court reasoned (1) both E.S. and McReynolds were considerably older than Glazebrook, (2) Glazebrook had done odd jobs for both women prior to the assaults, (3) both assaults occurred late at night in the homes of women who lived alone, (4) both victims lived near Glazebrook's home, (5) both attacks involved violence and resulted in serious injuries, and (6) the attacks occurred in November 1977 and February 1978.

The use of violence and the occurrence of injury are inherent in any assault, and the commission of an assault during nighttime hours in the victim's home is hardly unusual. The temporal proximity of the two attacks and the fact that both victims lived near Glazebrook and near each other lends some

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

[28] *State v. Ellis, supra* note 15.

[29] *Id.* at 581, 799 N.W.2d at 282.

[30] See *State v. Sanchez, supra* note 18.

credence to a finding that the attack on E.S. is probative of the identity of the attacker of McReynolds. But the key in any identity analysis is whether the crimes are so unusual and distinctive that the trial judge can reasonably find that they bear the same signature.[31] Here, the fact that Glazebrook knew both women because he had performed odd jobs for them is not unusual, especially considering they all lived in a small town. And although both victims were older than Glazebrook, nothing about their ages creates a signature method of attack. In addition, we note that the attacks also have substantial dissimilarities, in that E.S. was attacked with a weapon, while McReynolds was not. E.S. was robbed, but McReynolds was not. And McReynolds was sexually assaulted, while E.S. was not. Viewing the evidence as a whole, we conclude that although there is some temporal and geographic relationship between the crimes, the manner in which the attacks on E.S. and McReynolds were committed is not so similar, unusual, or distinctive that they could reasonably be found to bear the same signature. The evidence of the attack on E.S. was therefore inadmissible under rule 404(2). Accordingly, we conclude the district court abused its discretion in receiving evidence of Glazebrook's assault on E.S.

(ii) Assault of K.B.

In determining that evidence of the assault against K.B. was admissible on the issue of the identity of McReynolds' assailant, the district court reasoned (1) both victims were considerably older than Glazebrook, (2) both assaults occurred late at night in the homes of women who lived alone, (3) Glazebrook knew both women, and (4) both women were forced to the floor and digitally penetrated. But again, the use of violence and the occurrence of injury are inherent in any assault, and the commission of a sexual assault during nighttime hours in the victim's home is hardly unusual. And although Glazebrook knew both K.B. and McReynolds, the manner by which he knew them differed greatly, in that K.B. was the mother of his girlfriend and McReynolds was an elderly woman who lived

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[31] *State v. Ellis, supra* note 15.

in his hometown and for whom he performed odd jobs. And while both victims were older than Glazebrook, nothing about the age difference creates an inference of a signature method of carrying out the crimes. It is notable too that McReynolds was assaulted in Ashland, while the assault upon K.B. occurred more than 13 years later in Lincoln. Viewing the evidence as a whole, we conclude that while there are some general and superficial similarities between the crimes, the manner in which they were committed is not so similar, unusual, and distinctive that they could be reasonably found to bear the same signature. The evidence of Glazebrook's assault on K.B. was therefore inadmissible under rule 404(2). Accordingly, we conclude the district court abused its discretion in receiving evidence of Glazebrook's assault of K.B.

(d) Harmless Error Analysis

[15,16] An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[32] 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.[33] In *Ellis*, we determined that erroneous admission of other crimes evidence was harmless in light of the strength of other evidence, including DNA test results which linked the defendant to the crime.

Here, the other evidence of guilt is not as compelling. The mtDNA testing utilized in this case can exclude individuals as donors, but it cannot identify a specific individual as a donor or identify the donor's sex, race, or ethnicity. Although the testing established that Glazebrook could not be excluded as the donor of the hair found on the nightgown, it did not establish with certainty that the hair was his. And, as noted below, there are

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[32] *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[33] *State v. Ellis, supra* note 15; *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated in part on other grounds, State v. Thorpe, supra* note 2.

circumstances affecting the weight to be given to the mtDNA test results.

Based on our review of the entire record, we conclude that the erroneous admission of evidence concerning Glazebrook's other crimes was not harmless beyond a reasonable doubt. Accordingly, the error requires reversal and a new trial.

3. Evidence of mtDNA Testing

[17] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[34] We invoke this principle to discuss Glazebrook's contention that the district court erred in receiving Pogue's testimony regarding mtDNA test results. Glazebrook makes a three-part argument. First, he contends there was insufficient foundation with respect to the chain of custody of the nightgown from which a hair specimen was obtained and subjected to mtDNA testing. Second, Glazebrook contends there were "unexplained alterations" to the hair specimens which affected the integrity of the testing.[35] Third, Glazebrook argues there was no comparative mtDNA profile of McReynolds or other persons who were present at the crime scene.

(a) Foundation and Chain of Custody of Nightgown

As noted, the hair specimens tested for mtDNA were taken from a nightgown which Osborne delivered to the crime lab on the day after McReynolds was hospitalized. Osborne died prior to Glazebrook's trial, and his testimony was not preserved. Glazebrook argues there was insufficient foundational evidence regarding when, where, or by whom the nightgown was taken into the custody of law enforcement.

[18-23] Where objects pass through several hands before being produced in court, it is necessary to establish a complete

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[34] *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011); *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), *modified on denial of rehearing* 276 Neb. 965, 767 N.W.2d 68 (2009).

[35] Brief for appellant at 39.

chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.[36] Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.[37] It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading.[38] Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.[39] Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.[40] Our review concerning the admissibility of such evidence is for an abuse of discretion.[41]

Glazebrook relies on *Priest v. McConnell*[42] and *Raskey v. Hulewicz*[43] in support of his argument that foundation for the nightgown was insufficient. In *Priest*, the defendant sought to introduce evidence that one of the victims of an automobile accident was intoxicated at the time he was killed. The record showed a doctor recalled taking blood samples from the victim at the mortuary, but did not remember to whom he passed them for handling. A sheriff testified he took both blood and urine samples to his office, but did not remember from whom he received the samples. The doctor who performed the autopsy received the samples from the sheriff, locked them in his laboratory, and later gave them to the technician who performed

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[36] *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977).

[37] *Id.*

[38] See, *State v. Tolliver, supra* note 36; *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992).

[39] *State v. Tolliver, supra* note 36.

[40] *Id.*

[41] See *id.*

[42] *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985).

[43] *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970).

the alcohol testing. On that record, we concluded the evidence of the victim's level of intoxication was inadmissible because there was no evidence of the origin of the urine sample of the victim and little evidence of the origin of the blood sample. In *Raskey*, we held the trial court did not abuse its discretion in refusing to admit the results of a urine test where there was no evidence regarding customary procedures for obtaining and preserving a urine sample and the testimony of the person responsible for taking the sample was equivocal.

The chain of custody evidence is considerably stronger in this case than in *Priest* or *Raskey.* Schmidt, the forensic serologist who obtained the hair specimens from the nightgown, testified she took the nightgown from a paper bag Osborne delivered to her on the day after McReynolds was found and taken to the hospital. Osborne was identified as the Nebraska State Patrol investigator responsible for Saunders County who responded to the crime scene and directed the investigation. There was testimony that in 1977, it was standard procedure for State Patrol investigators to place evidence in a clean paper bag for delivery to the crime lab. There was evidence McReynolds was wearing a nightgown when she was found lying on the floor after the assault and that there was blood on the floor. There is also testimony that McReynolds was wearing a nightgown when she arrived at the hospital and that she had dried blood on her body. Schmidt testified that the nightgown had McReynolds' "name on the back cover" and was heavily soiled with blood and urine. Testing established that bloodstains on the nightgown matched McReynolds' blood type. Schmidt testified as to the manner in which she placed the hair specimens from the nightgown on microscope slides, which were retained in the custody of the crime lab from 1977 until they were sent out for DNA testing in 1996 and again in 1999. There is no evidence of tampering. From this evidence, it is reasonably probable that the nightgown from which the hair specimen was taken was the nightgown worn by McReynolds at the time of the assault and that it was on her person or in the custody of the State Patrol at all relevant times prior to the mtDNA testing. We therefore conclude the district court did not abuse its discretion in deciding that there was sufficient

foundational evidence regarding chain of custody to permit testimony regarding the results of mtDNA testing on the hair specimen taken from the nightgown.

(b) Unexplained Alterations in Hairs

Glazebrook argues that because two of the original microscope slides containing hair obtained from the nightgown are now missing and only 1 of the 19 hair samples taken from him were returned by the crime lab which performed the mtDNA tests, the test results cannot be associated with the McReynolds assault with any degree of confidence. We conclude these matters go to the weight of the test results, not their admissibility.

(c) Absence of Comparative mtDNA Profiles

Glazebrook argues the results of mtDNA testing should not have been admitted because "[t]he State did not obtain an elimination mtDNA profile for . . . McReynolds or any of the other ten individuals" who were present at the McReynolds residence during the initial investigation of the crime.[44] Glazebrook cites no authority for this argument. We note that the only two bases for Glazebrook's objection to the mtDNA test results were "chain of custody," as discussed above, and "relevancy." Thus, the issue presented is whether the mtDNA test results were relevant in the absence of comparative mtDNA profiles from other persons at the crime scene.

[24] Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[45] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[46] Schmidt testified that when she examined the hairs she found on the

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[44] Brief for appellant at 37.

[45] *State v. Sellers, supra* note 2.

[46] *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010); *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

nightgown under a microscope, they appeared to be of a different color, diameter, and length than hair samples obtained from McReynolds. There was thus a reasonable inference that the hairs were left by McReynolds' assailant. Pogue testified mtDNA testing can exclude persons as donors of the tissue from which the mtDNA was extracted, but cannot identify specific persons as donors.

The State was not required to produce mtDNA profiles of each person who was present at the crime scene, as Glazebrook contends. But it is clear from the record, and from the jurisprudence and forensic literature, that mtDNA "is not a unique identifier because it is shared by individuals within a given maternal line."[47] Thus, the fact that a defendant cannot be excluded as the donor of mtDNA found at a crime scene is of limited probative value in the absence of evidence upon which to assess the significance of that fact, such as a reliable estimate of the number of persons who could be excluded as donors. At least one court has held that statistical statements based upon a sample of the population may be utilized to estimate the frequencies of mtDNA types in the general population.[48] In cases where mtDNA evidence has been held to be admissible, the evidence has included expert testimony regarding the statistical significance of the fact that the defendant could not be excluded as the donor. For example, in *State v. Pappas*,[49] there was evidence that at a 95-percent confidence interval, 99.7 percent of the Caucasian population could be excluded as the source of the questioned sample. Similarly, in *Magaletti v. State*,[50] there was testimony that at a 95-percent confidence interval, 99.93 percent of persons randomly selected would not match the mtDNA sample.

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[47] See *State v. Pappas*, 256 Conn. 854, 882, 776 A.2d 1091, 1109 (2001), citing Mitchell M. Holland & Thomas J. Parsons, *Mitochondrial DNA Sequence Analysis — Validation and Use for Forensic Casework*, 11 Forensic Sci. Rev. 21 (1999).

[48] *State v. Pappas, supra* note 47.

[49] *Id.*

[50] *Magaletti v. State*, 847 So. 2d 523 (Fla. App. 2003).

As noted, the State presented evidence in this case that according to the Federal Bureau of Investigation's database, the particular mtDNA sequence obtained from the evidence had been found in 1 of 563 persons of African American descent, 0 of 1,219 Caucasians, 0 of 302 Hispanics, and 0 of 342 persons of Asian descent. But Pogue noted that back in 1999, this was a small database, and the record includes no explanation of the significance of this raw data in arriving at a statistical probability analysis to establish relevancy.[51] Although this issue was not preserved for appeal, we note that the statistical significance of the fact that a particular individual cannot be excluded as the donor of mtDNA is an important factor in determining the relevancy of mtDNA evidence.

4. Sufficiency of Evidence

[25] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Glazebrook's conviction. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[52] The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.[53] We conclude the evidence against Glazebrook was sufficient to sustain the verdict.

IV. CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause for a new trial.

Reversed and remanded for a new trial.

Connolly, J., participating on briefs.

Wright, J., not participating.

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[51] See *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[52] See, *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011); *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[53] *Id.*