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upon that information in formulating D.S.' discharge instructions. The discharge instructions included a therapy referral and recommended that a physical examination be conducted. The trial court did not err in finding that the interview of D.S. was reasonably pertinent to medical diagnosis and treatment.

The only issue in this appeal was whether the trial court properly admitted D.S.' interview over Vigil's hearsay objection. We determine that the trial court did not err in finding that the elements of the medical purpose exception found in rule 803(3) were met. Therefore, Vigil's assignment of error lacks merit and we affirm the convictions and sentences imposed below.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

AFFIRMED.

HEAVICAN, C.J., WRIGHT, and GERRARD, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. MARCO ENRIQUE TORRES, JR., APPELLANT.

812 N.W.2d 213

Filed February 3, 2012. No. S-10-111.

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. **Statutes.** The interpretation of a statute presents a question of law.
4. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards,

however, is a question of law, which an appellate court reviews independently of the trial court's determination.

5. **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.
6. **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.
7. ____: ____: ____. A sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by an appellate court.
8. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
9. ____: ____. 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).
10. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
11. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), 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.
12. **Rules of Evidence.** A proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.
13. **Rules of Evidence: Jury Instructions.** Any limiting instruction given upon receipt of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), shall likewise identify only those specific purposes for which the evidence was received.
14. **Intent: Words and Phrases.** Intent is generally defined as the state of mind accompanying an act.
15. **Rules of Evidence: Other Acts.** Under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), evidence of other crimes or wrongs, while not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, is admissible for other purposes, including motive.

16. **Words and Phrases.** Though difficult to define, character has been described as the generalized tendency to act in a particular way.
17. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
18. **Jury Instructions: Appeal and Error.** In making a determination as to whether the giving of an overly broad jury instruction is harmless, an appellate court must decide whether the giving of the instruction materially influenced the jury to reach a verdict adverse to the substantial rights of the defendant.
19. **Conspiracy: Hearsay: Rules of Evidence.** Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008), is applicable regardless of whether the defendant is charged with conspiracy.
20. ____: ____: ____. Before a trier of fact may consider testimony under Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008), a prima facie case establishing the existence of a conspiracy must be shown by independent evidence.
21. **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.
22. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
23. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
24. **Aggravating and Mitigating Circumstances: Mental Distress: Juries.** A jury may not consider a victim's mental anguish in finding the existence of the aggravating circumstance set forth in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008).
25. **Aggravating and Mitigating Circumstances: Proof: Words and Phrases.** Exceptional depravity pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
26. **Homicide: Aggravating and Mitigating Circumstances.** The Nebraska Supreme Court has identified specific narrowing factors that support a finding of exceptional depravity: (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.
27. **Homicide: Aggravating and Mitigating Circumstances: Other Acts: Words and Phrases.** History as contemplated by Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 2008) refers to the individual's past acts preceding the incident for which he or she is on trial, and substantial refers to an actual, material, and important history of acts of terror of a criminal nature, but does not refer to the particular incident involving the homicide for which he or she is subject to sentence.
28. **Sentences: Aggravating and Mitigating Circumstances: Proof.** There is no burden of proof with regard to mitigating circumstances, but 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.

29. **Aggravating and Mitigating Circumstances: Words and Phrases.** For purposes of Neb. Rev. Stat. § 29-2523(2)(c) (Reissue 2008), extreme means that the disturbance must be existing in the highest or the greatest possible degree, very great, intense, or most severe.
30. **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.
31. ____: ____: ____: ____. In reviewing a sentence of death, the Nebraska Supreme Court considers whether the aggravating circumstances justify imposition of a sentence of death and whether any mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.
32. ____: ____: ____: ____. 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.
33. ____: ____: ____: ____. 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 Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Kirk E. Naylor, Jr., and Peter K. Blakeslee for appellant.

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

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge.

HEAVICAN, C.J.

I. INTRODUCTION

Marco Enrique Torres, Jr., was convicted by jury of two counts of first degree murder, one count of robbery, three counts of use of a deadly weapon to commit a felony, and one count of unauthorized use of a financial transaction device. Torres was sentenced to death on each count of murder, 50 years' to 50 years' imprisonment on each of the robbery and use counts, and 20 months' to 5 years' imprisonment for the unauthorized use of a financial transaction device. In this automatic appeal

of his conviction and death sentence,[1] Torres assigns a number of errors related to both the trial and sentencing phases of his trial. We affirm.

II. FACTUAL BACKGROUND

1. Welfare Check Leads to Discovery of Victims

On March 5, 2007, at approximately 8:50 p.m., law enforcement officers responded to a request to perform a welfare check on the owner of a Grand Island, Nebraska, home, Edward Hall. The check was requested by Gina Padilla, a resident of the home. In the home, officers discovered Hall's body, bound with an orange extension cord, gagged with the belt from a bathrobe, and seated in an armchair on the first floor of the home. The body of Timothy Donohue, another resident of the home, was discovered upstairs.

2. Autopsy Results and DNA Evidence

Autopsies were performed on both Hall and Donohue by a forensic pathologist. Hall's autopsy revealed that he had suffered three "contact" gunshot wounds to the head and that those wounds were made by a small-caliber weapon. Hall's lips were purple, suggesting a lack of oxygen prior to his death. Hall's cause of death was listed as asphyxiation by gagging, suffocation, physical restraint, and multiple deeply penetrating gunshot wounds. The pathologist testified that in any case, the gunshots would have killed Hall, but that if Hall had not been shot, he would have asphyxiated.

Donohue's cause of death was three gunshot wounds to the head and chest. The pathologist testified that these shots were fired at close range, again probably contact or near-contact shots.

The pathologist was unable to give an exact time of death for either Hall or Donohue, but did testify that it was his opinion that both died at or around the same time, on March 3, 2007, or possibly in the early hours of March 4. The pathologist indicated that it was not possible to determine who died first.

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

DNA testing was performed on the bathrobe belt found gagging Hall and the extension cord binding Hall, as well as on cigarette butts found in Donohue's room. Torres' DNA was found in a mixture with Hall's DNA on the belt and could not be excluded as a source of DNA on the extension cord. And Torres' DNA was a contributor to DNA mixtures found on the cigarette butts.

3. Relationship Between Hall and Other Players

From the record, it appears that Hall was a generous person. This generosity was apparently responsible for Donohue's taking up residence in Hall's home—Hall allowed Donohue to move into a room on the second floor. This generosity was also apparently the reason for Padilla's presence in Hall's home; she moved in after agreeing to keep the house clean and look after Hall's many cats.

Padilla was dating a man named "Jose Cross," who dealt drugs in the Grand Island area. Cross eventually moved into Hall's home and used the house as a base for his drug business. Through that drug business, Cross was acquainted with a man named "William Packer," who also ran an area drug business. It was through Packer that Torres met Cross, Padilla, and Donohue.

4. Torres Obtains Gun

In early February 2007, Torres informed Packer that he wished to obtain a gun. Packer took Torres to the home of a man who arranged for the delivery of a weapon. The man left Torres and Packer alone in a room with the weapon, and, according to the man's testimony, after Torres and Packer left the room, the gun was also gone. The man further testified that the gun in question was a black or brown .22-caliber revolver.

5. Events of March 2007

On March 1, 2007, Torres contacted Cross about staying at Hall's home, as he had nowhere else to go. Cross was reluctant, but Donohue agreed to allow Torres to stay in his room.

Early the next morning, March 2, 2007, Cross and Padilla left Hall's home for a planned trip to Texas with Padilla's

mother, leaving Torres with Hall and Donohue. According to Cross, Torres, who was originally from Texas, was interested in returning to Texas. Cross testified that he did not want Torres to know that the couple was leaving or where they were going, because he knew Torres had a gun.

It is not clear from the record what Torres, Donohue, and Hall did during the daytime hours of March 2, 2007. But at approximately 11 p.m., Hall went to a discount store in Grand Island to purchase a home theater system. Afterward, Hall, who was driving his white Ford Focus station wagon, took a friend and her son out for a late meal. Hall paid for the meal at 12:49 a.m. on March 3 and then dropped off the friend and her son at the son's apartment. This was apparently the last time Hall was seen alive; another witness testified that she had daily or near-daily contact with Hall, but that the last time she spoke with him was on March 2.

Bank records show that between 2:41 and 2:54 a.m. on March 3, 2007, Hall's automatic teller machine (ATM) card was used several times. ATM security footage reveals that it was Torres who was using Hall's card. Bank records indicated that the last transaction, at 2:54 a.m., occurred at a discount store in Grand Island. Security footage from that store shows Torres entering the store alone at approximately 2:52 a.m. and leaving at approximately 3:30 a.m. Torres then apparently went to a motel in Grand Island.

Telephone records from the motel show that repeated calls were made to Cross' cellular telephone from rooms in which Torres was known to have stayed. According to Cross, in one call, Torres allegedly asked for drugs, so Cross arranged for his brother, who was also in Grand Island, to bring some drugs to Torres. In a second call, Torres allegedly told Cross that Cross and Padilla should not go back to Hall's house without letting Torres know. Torres then indicated that after Cross and Padilla had left Hall's house earlier the previous day, Donohue became angry and tried to break into Cross and Padilla's room. When Torres tried to stop him, Hall came upstairs and mentioned something about calling the police. Cross testified, "[Torres] told me that, you know, can't have cops, and he had to put them to sleep." Cross testified that he understood that to mean

that Torres had killed Hall and Donohue. Cross testified that he did not remember when these conversations took place; telephone records suggest that the calls were probably placed at 10 a.m. or later on March 3, 2007.

Torres checked out of the motel in Grand Island on March 5, 2007. Several days later, on or about March 8, Torres arrived in Houston, Texas. Once in Houston, he contacted an ex-girlfriend who resided there. The ex-girlfriend met Torres, who was driving a white station wagon, and accompanied him to a local motel.

While at the motel, Torres learned of the investigation into the murders of Hall and Donohue and that he was wanted for questioning. Torres also learned that law enforcement was on the lookout for Hall's white Ford Focus station wagon. That vehicle was later found in Texas and had been burned. A partial vehicle identification number was traced back to Hall and to the investigation into Hall's murder. Torres' ex-girlfriend testified that she accompanied Torres to the area where the burned station wagon was recovered, but that she did not actually witness Torres set fire to the vehicle. Houston area law enforcement later determined that Torres was staying in the area and apprehended him on March 26, 2007.

6. Torres Interviewed in Texas

Grand Island law enforcement officers went to Texas to interview Torres. According to the testimony of a Grand Island investigator, one of the first things Torres did during the interview was deny killing "those people." During the interview, Torres indicated that he knew Packer, Cross, and Padilla, as well as some of their acquaintances, including Hall, Donohue, and the man who arranged for the delivery of a weapon to Torres. Torres acknowledged that he used drugs with some of these individuals.

Torres then indicated that Packer, Cross, and Padilla were manufacturing a methamphetamine-like substance at Hall's house with the assistance of Donohue and with Hall's knowledge. During this interview, Torres initially blamed Cross and Padilla for the murders and, when he learned both had alibis, shifted the blame to Packer.

In Torres' possession when he was apprehended was Packer's cellular telephone. Torres explained that he had gotten the telephone from Packer and also that Hall had given Torres Hall's car and ATM card. At one point, Torres indicated that Cross and Padilla went with him to the ATM to use the card. But Torres also told law enforcement that Padilla had given him Hall's ATM card, jokingly noting to Torres, "[h]a ha, I have . . . Hall's card" as she did so. Torres stated that he used the card at the discount store only to prove to Padilla that she had already taken all of the money out of the account. In addition, law enforcement recovered from Torres' motel room in Houston ammunition for a .22-caliber weapon.

7. Trial

Torres' trial was held August 17 to 27, 2009. The jury found him guilty of two counts of first degree murder, one count of robbery, three counts of use of a deadly weapon to commit a felony, and one count of unauthorized use of a financial transaction device.

8. Penalty Phase

The State alleged four aggravating factors pursuant to Neb. Rev. Stat. § 29-2523 (Reissue 2008): (1) The murder was committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of such crime[2]; (2) at the time the murder was committed, the offender also committed another murder[3]; (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence[4]; and (4) the offender has a substantial prior history of serious assaultive or terrorizing criminal behavior.[5] Following his convictions, pursuant to Neb. Rev. Stat. § 29-2520(3) (Reissue 2008), Torres waived his right to a jury determination of whether the aggravating circumstances had been met. On November 13, 2009, a

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[2] § 29-2523(1)(b).

[3] § 29-2523(1)(e).

[4] § 29-2523(1)(d).

[5] § 29-2523(1)(a).

three-judge panel was convened for a sentencing determination hearing. At that hearing, the State offered into evidence the bill of exceptions from Torres' trial, as well as testimony from several law enforcement officers. Torres introduced evidence regarding the effects of methamphetamine on the body.

On January 29, 2010, the sentencing panel made written findings as required by statute and found all four aggravating factors as alleged above with respect to Hall's murder and three of the four aggravating factors with respect to Donohue's murder. With respect to Donohue, the panel declined to find that his murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."[6] The panel also considered and rejected all statutory and nonstatutory mitigating factors.

We are now presented with Torres' automatic appeal of his convictions and sentences.

III. ASSIGNMENTS OF ERROR

Torres assigns, renumbered, that the district court erred in (1) admitting evidence of certain prior acts of Torres under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008); (2) admitting the testimony of two witnesses regarding Torres' alleged efforts to get those witnesses to testify falsely on Torres' behalf; and (3) overruling his motion to suppress.

Torres also assigns, restated and consolidated, that the sentencing panel erred in (4) receiving for purposes of the State's proof of aggravating circumstances the trial court's bill of exceptions over Torres' objections; (5) its retroactive application of Neb. Rev. Stat. §§ 83-964 to 83-972 (Cum. Supp. 2010); (6) not finding that § 83-964 is unconstitutional in violation of the distribution of powers clause of the Nebraska Constitution,[7] Nebraska case law, and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution; (7) not finding Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 2008 & Cum. Supp. 2010) unconstitutional on their face; (8) not finding § 29-2523(1)(a), (b), and (d)

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[6] § 29-2523(1)(d).

[7] Neb. Const. art. II, § 1.

unconstitutional on its face, as interpreted by this court and as applied to Torres; (9) using "the victim's 'mental suffering' and the 'victim's uncertainty as to [his] ultimate fate'" as support for finding that Hall's murder was "especially heinous, atrocious, cruel" under § 29-2523(1)(d) and also finding that the State proved this aggravator beyond a reasonable doubt; (10) finding that the State proved beyond a reasonable doubt the existence of the aggravators under § 29-2523(1)(a) and (b); and (11) concluding that no statutory or nonstatutory mitigating factors existed.

IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[8] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2) and Neb. Evid. R. 403,[9] and the trial court's decision will not be reversed absent an abuse of discretion.[10]

[3] The interpretation of a statute presents a question of law.[11]

[4] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.[12]

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

[9] Neb. Rev. Stat. § 27-403 (Reissue 2008).

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

[11] See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

[12] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

[5] 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.[13]

[6] 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.[14]

[7] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[15]

V. ANALYSIS

1. Rule 404 Evidence

In his first assignment of error, Torres argues that the district court erred in admitting evidence of a prior incident wherein Torres kidnapped Packer and then held Packer, Cross, and Padilla at gunpoint. On February 12, 2007, Packer called Cross and asked Cross for permission to stop by Hall's residence, where Cross was living. Cross agreed. But, Cross said, when Packer arrived, Torres was with Packer, holding Packer at gunpoint. Torres then forced Cross and Packer into Cross and Padilla's room. Torres made Cross bind Packer with duct tape. Torres took Packer's ATM card, obtained the personal identification number for the card, and ordered Cross and Padilla to withdraw nearly $800 from the account. Cross gave the money to Torres. Eventually, Torres released Packer, Cross, and Padilla, but took and kept Packer's money and Packer's cellular telephone. Cross testified that Torres let Packer go after Cross agreed to provide transportation for Torres to Texas.

During this event, Torres made Packer contact the Lincoln and Omaha airport authorities, as well as two airlines and various other individuals, in order to obtain a plane ticket to get

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[13] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[14] *Id.*

[15] See *id.*

Torres to Texas. Apparently, Torres planned to fly to Texas to meet with some associates. Meanwhile, Cross was to drive to Texas to deliver a package of "ice," a potent form of methamphetamine, for Torres. Though apparently Packer was unable to provide the "ice" to Torres, Torres attempted to fill the order so it could be taken to Texas. Though the record is not clear about the details, Torres apparently kidnapped Packer in an attempt to make him fill the order for "ice," which Torres needed to be delivered to Texas. Cross testified that during the kidnapping and the days following, he made certain promises to Torres involving driving Torres to Texas because Cross wanted to "get rid of the problem, which was to take [Torres] back to [Texas]."

We note that Torres was, in a separate case, convicted of kidnapping and robbery and the two associated use of a firearm counts for the February 2007 incident described above and was sentenced to consecutive terms totaling 90 to 140 years' imprisonment.

[8-11] Section 27-404(2) provides in relevant part:

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

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[16] 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).[17] Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[18] An appellate court's analysis under rule 404(2) considers (1) whether the

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[16] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[17] *Id.*

[18] *Id.*

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.[19]

[12,13] A proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.[20] And any limiting instruction given upon receipt of such evidence shall likewise identify only those specific purposes for which the evidence was received.[21]

Before trial, both the State and Torres filed motions regarding the admissibility of the evidence relating to this kidnapping and robbery. A hearing was held on these motions, at which time the bill of exceptions from Torres' trial on the kidnapping charge was admitted into evidence. Following the hearing, the district court overruled Torres' motion and found by clear and convincing evidence that the incident did occur and was admissible for purposes of motive, intent, plan, knowledge, opportunity, and identity. The district court noted:

> In this particular set of facts the evidence . . . goes to the relationship between [Torres] and the location of the criminal activity alleged; it goes to the method used in the criminal activity alleged such as the use of a gun, the tying up of individuals and goes to motive of obtaining money and transportation to the State of Texas. The Court will allow the evidence for these limited purposes under [rule 404(2)].

However, at trial, the district court admitted the evidence as relevant only to show Torres' intent, motive, and opportunity.

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[19] *Id.*

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

[21] See *id.*

The jury was instructed accordingly, both at the time the evidence was admitted and in the final instructions to the jury prior to the submission of the case.

On appeal, Torres argues that the evidence of this kidnapping was inadmissible, as it was not independently relevant, but, rather, was relevant only to show his propensity to be violent.

Because the jury was instructed only with respect to motive, intent, and opportunity, this court will address only those reasons for independent relevance. We affirm the district court's decision insofar as it concluded that this evidence was admissible to show Torres' motive, but conclude that this evidence was not relevant to show his intent or opportunity. As such, it was error for the district court to instruct the jury that it could consider the evidence with respect to intent and opportunity. However, as we explain below, we conclude that the admission of this evidence for these latter reasons was harmless.

(a) Opportunity

We begin by considering whether this evidence was relevant to show Torres' opportunity to rob and murder Hall and Donohue. The district court explained that the kidnapping offered evidence of the relationship between Torres and Hall's house. But we disagree that this prior incident is relevant to show opportunity.

In essence, the district court found that such evidence was relevant to show that because Torres had been in the house when he kidnapped and robbed Packer, Cross, and Padilla, he had the opportunity to later enter the house to rob and murder Hall and Donohue. But there is no evidence in the record suggesting that this was so. For example, there is no evidence that by having been in the house before, Torres had access to a key, security code, or any other information that might give him the opportunity to again enter the house for the purpose of robbing and murdering Hall and Donohue. And as with intent, opportunity was largely undisputed: Other evidence established that Torres was staying at Hall's house, and it would not have been necessary to admit evidence of the entire incident in order to establish that Torres had been to Hall's house before. As such,

we conclude that the prior kidnapping incident was inadmissible to show Torres' opportunity.

(b) Intent

[14] Intent is generally defined as "[t]he state of mind accompanying an act."[22] In this case, the State was required to prove that Torres intended to steal from Hall and that he purposely and with deliberate and premeditated malice murdered Hall and Donohue. But we do not find that intent was at issue in this case. Here, there is no dispute that these crimes were intentional; there is only a dispute over whether Torres committed them. We agree with Torres that this evidence was not admissible to show his intent where intent was not at issue.

(c) Motive

We next address motive. The district court concluded the February 2007 incident showed that Torres' motive to restrain, rob, and kill Hall was to obtain money and transportation to Texas, which was something that Torres, during that prior incident, attempted to obtain in the same manner from Packer, Cross, and Padilla.

On appeal, Torres argues that the evidence relating to the kidnapping of Packer, Cross, and Padilla is simply character, or propensity, evidence and relevant only to show that he is a violent person and that the evidence is therefore inadmissible. We disagree and instead conclude that the district court correctly admitted the evidence to show Torres' motive.

[15-17] Under rule 404(2), "[e]vidence of other crimes or wrongs," while "not admissible to prove the character of a person in order to show that he or she acted in conformity therewith," is admissible for other purposes, including motive. Though difficult to define, character has been described as the generalized tendency to act in a particular way.[23] On the other hand, motive is defined more specifically as that which leads or

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[22] Black's Law Dictionary 881 (9th ed. 2009).

[23] David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 8.3 (Richard D. Friedman ed. 2009).

tempts the mind to indulge in a criminal act.[24] A person's prior actions can help to show motive because of the light they shed on that person's state of mind.[25] So in the case of motive, the prior act and the uncharged act need not be similar.[26]

There is a fine line between prior bad acts evidence that goes only to the character of the actor and prior bad acts evidence that speaks upon the actor's motive to commit a later crime. And the weaker the inferences of motive, the less probative the evidence on the ultimate issue of identity and the stronger the argument that the court should exclude the evidence to avoid the risk of unfair prejudice.[27]

We agree that motive reasoning requires propensity inferences. But, so long as the evidence is also relevant for reasons not based on the defendant's character, it is admissible under rule 404(2). As one commentator noted:

> The rule regulating the circumstantial use of uncharged misconduct . . . only forbids the use of the evidence [when such use is based upon a moral judgment of an actor's character traits]. If there is a rational chain of inferences that does not require an evaluation of character, the court may admit the evidence. That is the purpose and message of the uncharged misconduct rule. As one author put it, "All character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence." The theory behind the use of uncharged misconduct to prove "motive" shows that the rule does not avoid all propensity inferences, but only those that are based on character. It is supposed that the dangers associated with character do not exist, or at least are minimized, when the phenomenon that drives behavior is not based on morality.[28]

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[24] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[25] Leonard, *supra* note 23, § 8.4.1.

[26] See *id.*

[27] *Id.*, § 8.5.1(c).

[28] *Id.*, § 8.3 at 495-96.

We acknowledge that in previous cases, we have defined the concept of "special" or "independent" relevance as relevance that "does not depend upon its tendency to show propensity."[29] But in context, it is clear that we were referring to propensity generally, in the sense of a character trait and not a specific propensity to do a particular thing. As we explained in *State v. McManus*[30]:

> If the evidence is relevant because it tends to show the defendant's criminal disposition or propensity to commit a certain type of crime, it is relevant for an improper purpose and is inadmissible under rule 404(2). However, if it is relevant to show something other than the defendant's character, then it is relevant for a proper purpose and is admissible under rule 404(2).

In other words, "propensity" is meant to refer simply to criminal propensity, i.e., character.

It is obvious that evidence is not barred by rule 404(2) just because its relevance could be characterized in terms of "propensity." For instance, one of the paradigmatic uses of other acts evidence is the use of previous acts to establish a modus operandi, or "signature," that is methodologically so reminiscent of the charged crime as to earmark it as the defendant's handiwork.[31] It is well established that such evidence is admissible when the acts are sufficiently similar to be probative on the issue of identity—yet it is equally clear that the special relevance of the evidence depends on what can be characterized as the defendant's "propensity" to commit crimes in an idiosyncratic way. Motive evidence is much the same: It can easily be framed as relevant because it shows a defendant's "propensity" to commit crimes for a particular reason, i.e., motive. Someone who has a motive to commit a crime could also be described as having a "propensity" to commit the crime. But where the defendant's motive is particular—in other words, is not based

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[29] See, e.g., *State v. Williams*, 282 Neb. 182, 195, 802 N.W.2d 421, 432 (2011).

[30] *State v. McManus*, 257 Neb. 1, 7-8, 594 N.W.2d 623, 628-29 (1999).

[31] See, e.g., *U.S. v. Ingraham*, 832 F.2d 229 (1st Cir. 1987).

in the defendant's character—evidence of prior acts is nonetheless admissible to show the defendant's motive to commit the charged crime because an inference of a *criminal* propensity is not required to establish independent relevance.

We agree with the district court that in this case, the evidence of the February 2007 kidnapping was independently relevant to show Torres' motive. We note that the motive for that first incident—to obtain money and transportation to Texas—was the same motive Torres had for robbing Hall. Thus, the link between the two incidents is clear; the evidence surrounding the kidnapping shows that Torres' motivation was to get to Texas. Torres made Packer call for plane tickets and made plans for Cross to drive to Texas while Torres flew there. Cross testified that Torres released Packer, Cross, and Padilla only after Cross agreed to drive Torres to Texas. During this event, Torres also had Cross and Padilla withdraw money from Packer's bank account, which money Torres then kept. And in the incident resulting in Hall's and Donohue's deaths, Torres stole Hall's ATM card and attempted multiple times to withdraw money from Hall's bank account. Torres also stole Hall's car, which was later found in Texas and was further linked to Torres by the testimony of Torres' ex-girlfriend.

The evidence surrounding the kidnapping and robbery of Packer, Cross, and Padilla was, therefore, independently relevant because it proved Torres' rather desperate desire for money and transportation to Texas. And when Hall and Donohue were killed, the perpetrator apparently took Hall's money and then drove Hall's car to Texas. The logical relevance of the rule 404(2) evidence does not depend on an inference that Torres acted in conformity with a general propensity to commit crimes—rather, it depends on the inference that the person who killed Hall and Donohue wanted money and transportation to Texas, and the rule 404(2) evidence proved Torres' pressing desire to obtain those specific things. Although the evidence also reflects poorly on Torres' character, its logical relevance is independent of that.

Additionally, we note that the fact that Hall and Donohue ultimately were murdered, in addition to Hall's being robbed, is of no consequence to our determination here. First, as noted

above, unlike other theories relating to the introduction of prior bad acts evidence, admission based upon motive does not require any similarity between the prior act and the charged act. This is so because it is the state of mind behind the acts that shows the motive. And in this case, the prior evidence shows that the motives to commit each *robbery* were the same, even though the latter robbery eventually ended in the deaths of Hall and Donohue.

We are also not persuaded by the insistence in the concurrence that Torres' motive for the Packer kidnapping was not the same as his motive for Hall's and Donahue's murders. The concurrence bases this assertion on its review of the evidence from the kidnapping trial and concludes that the motive as shown at that trial was the result of a drug deal gone bad and was not an effort to obtain money and transportation to Texas. But the concurrence acknowledges that the need for money and transportation was underlying Torres' actions as shown at the kidnapping trial. We do not find this conclusion inconsistent with this court's determination that the continued need for money and transportation was still a motivating factor for Torres to rob Hall and murder Hall and Donohue.

We therefore conclude that the evidence at issue was admissible to show Torres' motive.

(d) Evidence More Prejudicial Than Probative

We next turn to the question of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and we conclude that it was not. Specifically, as explained above, this event was probative of Torres' motive to rob Hall and eventually murder Hall and Donohue. We acknowledge that the evidence was highly prejudicial to Torres; however, it was also highly probative of Torres' motive to commit the charged crimes. We find that the court did not abuse its discretion in concluding that the probative value of the evidence was not outweighed by the potential for unfair prejudice.

(e) Harmless Error

[18] We have concluded that the district court was correct in admitting the challenged evidence because it was independently relevant to the issue of Torres' motive, but that the

district court erred in admitting the evidence to show Torres' intent and opportunity. We must therefore determine whether the district court's error prejudiced Torres, or whether instead the error was harmless. In making that determination, we must decide whether the giving of the overly broad instruction materially influenced the jury to reach a verdict adverse to the substantial rights of Torres.[32]

Though the district court erroneously instructed the jury that it could consider the prior incident wherein Torres kidnapped Packer, Cross, and Padilla as independently relevant evidence of Torres' intent and opportunity, it did not instruct the jury that it could consider that incident for any reason the jury wished. The instruction as given protected Torres from an inference that simply because he committed the earlier kidnapping, he also committed the crimes at issue in this case. Moreover, we have concluded that intent was not at issue in this case. Torres could not have been prejudiced by an instruction to the jury that it could consider this evidence for intent when there was no dispute that the crimes at issue were committed intentionally. Similarly, instructing the jury that it could consider the previous kidnapping as relevant to opportunity could not have prejudiced Torres, because his opportunity to commit the crime was not contested and, in any event, the prior kidnapping was not particularly helpful in that regard.

In short, there was no basis from which the jury could conclude that Torres committed the charged crimes but did not do so intentionally; nor was there any basis for the jury to reason that Torres could not have committed the charged crimes because he had no opportunity to do so. Therefore, permitting the jury to consider Torres' prior bad acts as relevant to those issues could not have prejudiced Torres. The court's erroneous limiting instruction provides no basis for reversing Torres' convictions or sentences.

As such, while we conclude that the district court erred in instructing the jury that it could consider evidence of the prior incident involving Packer, Cross, and Padilla as relevant to

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[32] See, *Ellis, supra* note 13; *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

show intent and opportunity, we conclude that any error therein was harmless error and not reversible error.

2. Conspiracy Exception to Hearsay Rule

In his second assignment of error, Torres assigns that the district court erred in allowing two witnesses to testify regarding Torres' attempts to have them fabricate evidence exonerating him. Torres contends that the testimonies of these witnesses was hearsay and did not fall within the coconspirator exclusion set forth in Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008).

Some background is helpful. At trial, there was evidence presented that Torres attempted to bribe witnesses and fabricate evidence in his case. Robert Mattson, one of Torres' fellow inmates at the Hall County jail, testified that Torres wanted Robert to have his wife, Jennifer Mattson, contact law enforcement with a story suggesting that a person other than Torres had admitted to Hall's and Donohue's murders. According to Jennifer, Torres had offered her $10,000 to do so and she met with Torres' mother in furtherance of this plan. Torres actually wrote Jennifer a letter, which was addressed by name to one of his original attorneys, but by location to Jennifer's address, and which detailed the story Torres wished her to tell.

And another of Torres' fellow inmates, Stacy Alexander, testified that Alexander contacted his girlfriend, Amanda Lane, and requested that she assist Torres in convincing Alexander's ex-brother-in-law, James Hemmingway, to approach law enforcement with a story about Torres. Lane testified that she and Hemmingway met Torres' mother at the Grand Island police station. Other evidence shows that Torres' mother actually accompanied Hemmingway inside the police station. However, once there, Hemmingway admitted the fabrication to law enforcement and provided the narrative which Lane had written for him. Lane testified that Torres' mother paid her $300, which she split with Hemmingway.

[19,20] Rule 801(3) provides that "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, "[a] statement is not hearsay if [it]

is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."[33] This court has held that rule 801(4)(b)(v) is applicable regardless of whether the defendant is charged with conspiracy.[34] But before a trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of a conspiracy must be shown by independent evidence.[35]

(a) Testimony of Jennifer

We begin with the testimony of Jennifer. On appeal, Torres argues that the district court erred in finding Jennifer's testimony was not hearsay under rule 801(4)(b)(v) because there was no evidence presented that she planned to participate in the plot to fabricate evidence.

Torres' argument is without merit. There is no requirement under the plain language of rule 801(4)(b)(v) that the person testifying to the statement be a part of the conspiracy. And this court, in *State v. Hudson*,[36] found that statements made by a coconspirator, but testified to by a non-coconspirator, were admissible under rule 801(4)(b)(v).

Rather, the only requirements for such statement to be admissible are that (1) the statement be made by a coconspirator, (2) the statement be in furtherance of the conspiracy, and (3) the State show prima facie evidence of that conspiracy by independent evidence. All of these requirements were met with respect to Jennifer's testimony.

First, the statements in question were made by Jennifer's husband, Robert, a coconspirator. These statements were made to Jennifer with the intent to gain her agreement to participate in Robert's and Torres' plan to fabricate evidence in order to exonerate Torres. And Robert's own testimony, introduced prior

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[33] § 27-801(4).

[34] *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).

[35] See *id.*

[36] *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

to Jennifer's testimony, established that the conspiracy existed. Thus, Jennifer's testimony regarding Robert's statements to her was admissible under rule 801(4)(b)(v).

(b) Testimony of Lane

With respect to Lane's testimony, Torres argues that there was insufficient evidence shown that a conspiracy existed and that as such, the statements were not admissible under rule 801(4)(b)(v). We again find Torres' argument without merit.

Prior to Lane's testifying, Alexander testified that he asked Lane to do certain things as requested by Torres. And in her own testimony, Lane stated without objection that Alexander wanted her to talk to Hemmingway about having him "take this story that [Torres] told [Alexander] to the cops." Through Alexander's testimony, the State showed that Torres and Alexander had some type of agreement. When considered along with Lane's testimony, the State has shown that this agreement involved, at least in part, Alexander's inducing Lane and Hemmingway to provide to law enforcement a story intended to exonerate Torres. Such actions constituted a conspiracy, and Torres' argument that the State failed to show prima facie evidence of that conspiracy is without merit.

Torres' second assignment of error is without merit.

3. Motion to Suppress

In his third assignment of error, Torres argues that the district court erred in overruling his motion to suppress. Torres contends that law enforcement failed to honor his request to cut off questioning during an interview on March 26, 2008, which he claims he did when he stated that he was "done" at around the 2-hour 30-minute mark of the interview.

We stated in *State v. Rogers*[37]:

> The U.S. Supreme Court has explained that once the right to cut off questioning has been invoked, the police are restricted to "'scrupulously honor[ing]'" that right. This means, among other things, that there must be an appreciable cessation to the interrogation. However, before the police are under such a duty, the invocation of the right to

[37] *State v. Rogers*, 277 Neb. 37, 52, 760 N.W.2d 35, 50-51 (2009).

> cut off questioning must be "unambiguous," "unequivocal," or "clear." This requirement of an unequivocal invocation, the Court has explained, prevents the creation of a "third layer of prophylaxis" which could transform the prophylactic rules of *Miranda* "'into wholly irrational obstacles to legitimate police investigative activity.'" To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent. And if the suspect's statement is not an "unambiguous or unequivocal" assertion of the right to remain silent, then there is nothing to "scrupulously honor" and the officers have no obligation to stop questioning.

In this case, Torres waved his hand in front of the interviewing officer, who had been asking a question about telephone calls made by Torres to Cross. At the same time, Torres said to the officer, "End of conversation; we're done." However, immediately afterward, and with no prompting or questioning by law enforcement, Torres continued the conversation regarding the telephone calls. A review of the interview also shows that Torres subsequently continued to freely engage in the interview and continued to converse with the officers.

Based upon these facts, we cannot say that Torres unambiguously or unequivocally asserted his right to remain silent. This court recently noted that "[w]e have never held that any utterance of 'I'm done,' no matter what the surrounding circumstances or other statements, will be construed as cutting off all further questioning."[38] For this reason, the district court did not err in denying Torres' motion to dismiss.

Torres' third assignment of error, and final trial error assignment, is without merit.

4. Admission of Trial Bill of Exceptions During Sentencing Proceeding

In his fourth assignment of error, Torres assigns that the sentencing panel erred in receiving for purposes of the State's

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[38] *State v. Schroeder*, 279 Neb. 199, 218, 777 N.W.2d 793, 809 (2010).

proof of aggravating circumstances the trial court's bill of exceptions. Torres argues that the admission of the trial court's bill of exceptions contained inadmissible hearsay and violated his due process and confrontation rights.

Following the jury verdicts of guilty, Torres waived his right to a jury determination of any alleged aggravating circumstances, as provided in § 29-2520(3). That subsection provides:

> The defendant may waive his or her right to a jury determination of the alleged aggravating circumstances. The court shall accept the waiver after determining that it is made freely, voluntarily, and knowingly. If the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, such determination shall be made by a panel of judges as a part of the sentencing determination proceeding as provided in section 29-2521.

Section 29-2521 provides the general framework for the sentencing procedure taken in cases involving the death penalty:

> (1) When a person has been found guilty of murder in the first degree and (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) such person waives his or her right to a jury determination of the alleged aggravating circumstances, the sentence of such person shall be determined by:
>
> (a) A panel of three judges . . . .

Section 29-2521(3) sets out the specific procedure to be followed "[w]hen a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520." And, as is relevant in this case, § 29-2521(2) provides the procedure where a defendant has waived his or her right to a jury determination:

> In the sentencing determination proceeding before a panel of judges when the right to a jury determination of the alleged aggravating circumstances has been waived, the panel shall, as soon as practicable after receipt of the written report resulting from the presentence investigation

> ordered as provided in section 29-2261, hold a hearing. At such hearing, *evidence may be presented as to any matter that the presiding judge deems relevant to sentence* and shall include matters relating to the aggravating circumstances alleged in the information, to any of the mitigating circumstances set forth in section 29-2523, and to sentence excessiveness or disproportionality. The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances. Each aggravating circumstance shall be proved beyond a reasonable doubt. *Any evidence at the sentencing determination proceeding which the presiding judge deems to have probative value may be received.* The state and the defendant or his or her counsel shall be permitted to present argument for or against sentence of death. The presiding judge shall set forth the general order of procedure at the outset of the sentencing determination proceeding. *The panel shall make written findings of fact based upon the trial of guilt and the sentencing determination proceeding*, identifying which, if any, of the alleged aggravating circumstances have been proven to exist beyond a reasonable doubt. Each finding of fact with respect to each alleged aggravating circumstance shall be unanimous. If the panel is unable to reach a unanimous finding of fact with respect to an aggravating circumstance, such aggravating circumstance shall not be weighed in the sentencing determination proceeding. After the presentation and receipt of evidence and argument, the panel shall determine an appropriate sentence as provided in section 29-2522.

(Emphasis supplied.)

Torres argues that the sentencing panel should not have been permitted to receive the trial record into evidence. He claims that this was improper because two of the three members of the panel were thereby limited to evaluating the evidence from a transcript instead of live testimony. But we rejected a similar argument in *State v. Ryan*.[39] In *Ryan*, the sentencing provisions

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[39] *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

in effect at the time required a sentencing panel to determine aggravating and mitigating circumstances and provided for a hearing at which "'evidence may be presented as to any matter that the court deems relevant to sentence [and a]ny such evidence which the court deems to have probative value may be received.'"[40] We have reached the same conclusion under the comparable current statute.[41] And, we noted, the statute required the panel's determination to be "'supported by written findings of fact based upon the records of the trial and the sentencing proceeding.'"[42]

Based on that statutory language, we concluded that the sentencing panel "not only [had] the statutory *authority* to consider the trial record," but was "statutorily *required* to make written findings of fact based upon that record."[43] And as noted above, § 29-2521(2) now contains language that is effectively identical to the language we relied upon in *Ryan*. It is a well-established principle of statutory interpretation that when legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.[44] We conclude that based on the language of § 29-2521(2), our decision in *Ryan* is controlling and the sentencing panel is not only permitted, but required, to consider the trial record.

In addition to finding that the procedure followed by the sentencing panel was proper, we reject Torres' arguments regarding hearsay, confrontation, and due process. We turn first to hearsay. Hearsay is defined by rule 801(3) as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

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[40] *Ryan, supra* note 39, 248 Neb. at 442, 534 N.W.2d at 790 (emphasis omitted).

[41] See, *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009); *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[42] *Ryan, supra* note 39, 248 Neb. at 441, 534 N.W.2d at 790 (emphasis omitted).

[43] *Id.* at 442, 534 N.W.2d at 790.

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

matter asserted"; in other words, an out-of-court statement. But the bill of exceptions at issue was a word-for-word transcription of all of the statements made by the witnesses *in court and at Torres' trial*. The bill of exceptions, then, quite plainly falls outside of the definition of hearsay. And even if the bill of exceptions was hearsay, it would nevertheless be admissible under § 29-2520 or § 29-2521 as discussed above.

We next address and reject Torres' argument that his right to confrontation was violated when the panel admitted the record of the trial of guilt. But in situations such as this, where a jury determination of aggravating circumstances was waived, the statutes are clear that the panel's determination of those circumstances is to be part of the sentencing proceeding.[45] And we have found that the right to confrontation is inapplicable to sentencing proceedings.[46]

Nor do we find that Torres' due process rights were violated. The capital sentencing statutes make it clear that the sentencing panel is to make the determination of aggravating circumstances based upon the trial of guilt and a sentencing hearing. Torres waived his right to have the jury determine the aggravating circumstances. In doing so, he waived many of the rights that are present during such a hearing, but not available at sentencing.[47] A defendant's decision to waive a jury finding of aggravating circumstances obviously implicates procedural differences, the advantages and disadvantages of which can be weighed by the defendant.[48] Moreover, Torres was permitted to introduce whatever evidence and witnesses he chose during the sentencing determination proceeding.

Torres' fourth assignment of error is without merit.

5. Retroactive Application of §§ 83-964 to 83-972

In his fifth assignment of error, Torres argues that the sentencing panel erred in retroactively applying §§ 83-964

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[45] §§ 29-2520(3) and 29-2521(2).

[46] *Galindo, supra* note 41.

[47] See *id.*

[48] See *Ellis, supra* note 13.

to 83-972. Torres contends that the retroactive application of the death penalty statutes would be a violation of the rights given him under the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions.[49] At its essence, Torres' argument is that he could not be sentenced to death unless a method of execution existed, at the time of sentencing, under which he could be put to death.

[21] We recently addressed Torres' basic argument in both *State v. Mata*,[50] and *State v. Ellis*.[51] In *Mata*, this court found electrocution to be unconstitutional as cruel and unusual punishment under Neb. Const. art. I, § 9. But even as we held the method of execution unconstitutional, we upheld the defendant's death sentence, noting:

> 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.[52]

[22,23] We did not explicitly address the validity of a death sentence in the context of the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions in *Mata* or *Ellis*. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing

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[49] See, U.S. Const. art. I, § 10; Neb. Const. art. I, § 16.

[50] *Mata, supra* note 39.

[51] *Ellis, supra* note 13.

[52] *Mata, supra* note 39, 275 Neb. at 67-68, 745 N.W.2d at 278-79.

penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[53] This court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.[54]

We find Torres' argument on this point to be without merit. Put simply, the sentencing court always had the authority to sentence Torres to death; the State's enactment of a new method of execution and its accompanying protocol simply made it possible for the State to enforce that sentence. As *Mata* made clear, the method of execution does not bear upon the sentence of death itself. Nothing about this scenario violates Torres' rights under the Ex Post Facto Clauses of the federal and state Constitutions.

Torres' fifth assignment of error is without merit.

6. Separation of Powers

In his sixth assignment of error, Torres argues that § 83-964 is unconstitutional, in violation of the distribution of powers clause of the Nebraska Constitution, Nebraska case law, and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. Section 83-964 provides: "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."

In *Ellis*, we recently addressed the question of whether the Legislature could properly delegate to the Department of Correctional Services the function of creating, maintaining, and administering a lethal injection protocol and concluded that it could.[55] We decline to revisit that decision.

As such, Torres' sixth assignment of error is without merit.

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[53] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

[54] *Id.*

[55] *Ellis, supra* note 13.

7. Constitutional Challenge to Death Penalty Statutes and § 29-2523(1)(a), (b), and (d)

In his seventh and eighth assignments of error, Torres argues generally that the Nebraska death penalty statutes[56] are unconstitutional on their face and specifically contends that § 29-2523(1)(a), (b), and (d) are unconstitutional on their face, as interpreted by the courts of the State of Nebraska and as applied in this case. We have previously rejected these arguments and do so again today.

(a) Aggravator (1)(a)

Torres first argues 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 the terms "substantial," "history," and "serious assaultive or terrorizing criminal activity." We have addressed and rejected this argument before, including most recently in *Ellis*.[57] We decline to overrule that authority, and as such, we decline to conclude that aggravator (1)(a) is unconstitutional, either facially or as interpreted by the courts of this state.

Torres also argues that this aggravator is unconstitutional as applied to him, because the sentencing panel used as evidence of this prior history the incident wherein he kidnapped Packer, Cross, and Padilla. Torres notes that he fed Packer food and drugs and released him unharmed and contends that if this behavior were sufficient to support a finding of this aggravator, such would be unconstitutional.

Torres attempts to downplay the incident involving Packer, Cross, and Padilla. Torres suggests that he held them for a period of time, fed them food and drugs, and then let them go. This characterization is not entirely accurate. Torres held

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[56] §§ 29-2519 to 29-2546.

[57] *Ellis, supra* note 13. See, also, *Hessler, supra* note 41; *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata, supra* note 39; *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).

Packer at gunpoint and forced him to drive to Hall's home to meet Cross and Padilla. Torres then held all three at gunpoint. Torres forced Cross and Padilla to tie Packer up. He forced Packer to hand over his ATM card and its personal identification number. Torres then made Cross and Padilla withdraw money from Packer's account to buy food for everyone. Though Cross and Padilla were allowed to leave on their own, they were concerned for Packer's safety and did not want anyone to get hurt, so they returned. Torres then continued to hold them at gunpoint and forced Packer to make various telephone calls to obtain transportation to Texas. Torres eventually let Packer go. Packer indicated that he was released so he could make a court date. However, Packer and Cross both also testified that part of the reason Packer was released was because Cross promised to drive Torres to Texas. And though Packer was allowed to leave, Torres kept Packer's cellular telephone and also took $800 from Packer.

Given the circumstances of Torres' prior assaultive behavior, we decline to conclude that the application of aggravator (1)(a) would be unconstitutional as applied to Torres. Torres' argument with regard to this aggravator is without merit.

(b) Aggravator (1)(b)

Torres next argues that § 29-2523(1)(b) is unconstitutional. This subsection provides as an aggravating circumstance that "[t]he murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime." But we have repeatedly held that this aggravator is constitutional, most recently in *State v. Hessler*,[58] and we decline to revisit that holding today. Torres' argument regarding aggravator (1)(b) is without merit.

(c) Aggravator (1)(d)

Finally, Torres contends that § 29-2523(1)(d), which provides as an aggravating circumstance that the murder was

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[58] *Hessler, supra* note 41. See, also, *Bjorklund, supra* note 57; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); *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).

"especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," is unconstitutional. In particular, Torres takes issue, as many have before him, with the "exceptional depravity" prong of this aggravator.

We decline to address what so many courts have previously found to be a constitutional aggravator,[59] and we conclude that the aggravator as a whole, and the "exceptional depravity" prong in particular, is not unconstitutional on its face or as interpreted by the courts of this state.

Torres also argues that aggravator (1)(d) is unconstitutional as applied to him. Torres contends:

> In the case at bar, the defense pathologist noted that the extension cord used to tie the victim . . . Hall did not appear to be that tight, and there was no evidence that he had been tied up for an extended period of time. . . . In the absence of grounds for exceptional depravity that more "suitably directed, limited, and defined" that prong of the aggravator, the aggravator is simply too vague and overbroad to be constitutionally applied . . . .[60]

We do not find this contention relevant to a discussion of whether aggravator (1)(d) was constitutional as applied to Torres. In its findings, the panel noted that Torres relished the murders, as evidenced by the fact that he told Cross that he put Hall and Donohue to "sleep," as well as the fact that he later retold the story of the murders to a fellow inmate, Robert, while incarcerated. The panel also noted that Hall was tied up and gagged and was helpless when robbed, shot, and killed. These facts are not lessened by the fact that the cord binding Hall was not very tight or the fact that Hall might not have been tied up very long before he was shot. We decline to conclude that these factors would somehow make the

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[59] See, *Ellis, supra* note 13; *Mata, supra* note 39; *Hessler, supra* note 41; *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra* note 57; *Palmer, supra* note 57; *Ryan, supra* note 57. See, also, *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996); *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

[60] Brief for appellant at 94.

application of this aggravator to Torres unconstitutional. His argument on this point, and also with regard to this aggravator, is without merit.

8. Considering Hall's "Mental Suffering" and "Uncertainty as to His Ultimate Fate" to Support Existence of § 29-2523(1)(d)

(a) Did Sentencing Panel Err in Considering "Mental Suffering"?

In his ninth assignment of error, Torres first argues that the sentencing panel erred when it considered Hall's "'mental suffering'" and "'uncertainty as to [his] ultimate fate'" as support for finding that § 29-2523(1)(d) applied to Torres. The basis of Torres' argument is this court's decision in *State v. Sandoval*,[61] which was released after the sentencing order was filed in this case. In *Sandoval*, this court held that it was error for the district court to instruct the jury that it could consider the victim's "'mental anguish'" in finding the existence of aggravator (1)(d)—specifically, in including "'mental anguish'" in the standard for whether the murder was "'especially heinous, atrocious, or cruel.'"[62]

[24] We agree with Torres insofar as he argues that mental anguish should have not been considered by the sentencing panel, and thus, the findings made by the panel to that end were erroneous. A jury may not consider a victim's mental anguish in finding the existence of the aggravating circumstance set forth in § 29-2523(1)(d). But unlike in *Sandoval*, where the error resulted in a finding that the aggravator was not established, in this case, the failure of this one finding does not mean the failure of the entire aggravator.

Sandoval dealt with an erroneous jury instruction with regard to mental anguish. The jury in *Sandoval* was asked to determine only whether the various aggravators were established and did not provide any additional factual findings. Thus, where the jury instruction was incorrect, it was not possible for this court

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[61] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 563 U.S. 1012, 131 S. Ct. 2912, 179 L. Ed. 2d 1254 (2011).

[62] *Id.* at 352-53, 788 N.W.2d at 211-12.

to determine whether the jury's finding of the aggravator had been based upon the incorrect instruction and the entire aggravator had to be disregarded.[63]

But aggravator (1)(d) 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."[64] This aggravating circumstance contains two separate disjunctive components which may operate together or independently of one another.[65] In *Sandoval*, the jury instruction and verdict form did not permit us to determine upon which prong the jury's finding of aggravator (1)(d) had been based—thus, we could not conclude that the jury's finding had not been based on the inclusion of "'mental anguish'" in the court's instruction on "'especially heinous, atrocious, or cruel.'"[66] In this case, however, the sentencing panel made detailed findings and explained that *both* prongs of the aggravator had been proved. As a result, Torres was not prejudiced by the sentencing panel's erroneous understanding of aggravator (1)(d)'s "especially heinous, atrocious, [or] cruel" provision so long as the evidence was sufficient to support the panel's finding that the murder exhibited exceptional depravity. We now turn to that question.

(b) Did State Prove Aggravator (1)(d)
Beyond Reasonable Doubt?

Having concluded that the sentencing panel erred in considering Hall's mental suffering, we now turn to Torres' argument that the sentencing panel erred in finding that the State proved beyond a reasonable doubt the existence of § 29-2523(1)(d) with regard to the murder of Hall.

We find that the "exceptional depravity" prong was proved beyond a reasonable doubt and supports the finding of this aggravator.

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[63] See, also, *Ryan, supra* note 57.

[64] § 29-2523(1)(d) (emphasis supplied).

[65] *Ellis, supra* note 13.

[66] *Sandoval, supra* note 61, 280 Neb. at 352-53, 788 N.W.2d at 211-12.

[25,26] Exceptional depravity pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.[67] We have identified specific narrowing factors that support a finding of exceptional depravity: (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.[68]

The evidence in this case was sufficient to show beyond a reasonable doubt the presence of this aggravator with regard to Hall's death. A "helpless" victim is readily understood to be one who is unable to defend oneself, or to act without help.[69] The evidence establishes that Hall was bound and gagged when he was shot, showing not only that Hall was helpless, but that the murder was senseless because Hall posed no threat to Torres. And Hall was not simply shot to death—he had been gagged and strangled to the point of asphyxiation, demonstrating the infliction of gratuitous violence. The evidence was clearly sufficient to prove the existence of exceptional depravity, and therefore, the sentencing panel did not err in finding that the State proved beyond a reasonable doubt aggravator (1)(d).

9. Proof of Aggravators

In his 10th assignment of error, Torres contends the sentencing panel also erred in finding that the State proved beyond a reasonable doubt the existence of § 29-2523(1)(a) and (b). Torres does not appeal the sentencing panel's determination that at the time the murder was committed, he also committed another murder, thereby establishing aggravator (1)(e).

(a) Aggravator (1)(a)

Torres first argues that the sentencing panel erred in finding he had a substantial history of serious assaultive or terrorizing activity and that thus, the finding of aggravator (1)(a) was in error. Torres argues that he had only two prior incidents, a

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[67] See *Ryan, supra* note 39.

[68] *Id.*

[69] *Ellis, supra* note 13.

domestic violence charge from 1999 and the kidnapping and other charges surrounding the February 2007 incident with Packer, Cross, and Padilla. Torres contends that the kidnapping was "not sufficiently removed in time or sequence from the events of the homicides to warrant a finding that the kidnapping established a 'substantial history'" and notes that the only prior violent offense he had was a misdemeanor domestic violence assault from "many years earlier." [70]

[27] We have previously addressed an argument similar to the one made by Torres here. In *State v. Moore*,[71] the defendant argued that one prior murder, committed just 4 days before the murder the sentencing panel was considering, while indicative of serious assaultive criminal behavior, could not be described as a substantial history as contemplated by § 29-2523(1)(a). We disagreed, noting:

> "'"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. It does not refer to the particular incident involving the homicide for which he is subject to sentence."[72]

In this case, Torres had previously been convicted of kidnapping, robbery, and two counts of use of a weapon to commit a felony in the February 2007 incident involving Packer, Cross, and Padilla. That event took place 3 weeks prior to the murders of Hall and Donohue. Particularly given the nature of that prior incident, it alone is a sufficient substantial history under aggravator (1)(a).

Even if it were not, aggravator (1)(a) would still have been met. In addition to being met by a substantial prior history, the aggravator is met when the offender was previously convicted of a "crime involving the use or threat of violence."[73] And in this case, as noted above, Torres was convicted of kidnapping

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[70] Brief for appellant at 103.

[71] *Moore, supra* note 58.

[72] *Id.* at 836, 553 N.W.2d at 141 (quoting *Holtan, supra* note 57).

[73] § 29-2523(1)(a).

and robbery as well as two use of a weapon charges relating to the prior incident with Packer, Cross, and Padilla. Such is sufficient to show a previous conviction for purposes of this aggravating circumstance.

The sentencing panel did not err in finding that the State proved beyond a reasonable doubt aggravator (1)(a).

(b) Aggravator (1)(b)

Torres next argues that the sentencing panel erred in finding that § 29-2523(1)(b) was met. That subsection provides as an aggravating circumstance the situation where one murder was "committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime."

This court held in *State v. Lotter*[74] that for aggravator (1)(b) to apply, a defendant "must commit the murder in an effort to conceal some crime or to conceal the identity of the perpetrator of some crime other than the murder itself." In this case, Torres was found to have both robbed and killed Hall. In addition, Torres was found to have killed both Hall and Donohue. Given these facts, the sentencing panel could infer that Hall was killed to conceal Torres' identity as the perpetrator of the robbery and, further, that Donohue was killed to conceal Torres' identity as the murderer of Hall.[75]

Torres contends that the sentencing panel erred in finding this aggravator because it lacked a jury finding as to whether Torres was guilty of premeditated murder or felony murder. Torres argues that if he was convicted of felony murder, the predicate felony—in this case, robbery—could not be used as the "crime" to be concealed for purposes of this aggravator. Torres cites no authority to suggest that the robbery could not be used to support the finding of this aggravator; nor do we find his argument persuasive.

A review of the jury instructions and verdict forms shows that the jury was instructed as to the elements of both first degree murder and felony murder with the predicate offense of robbery. In addition, the jury was instructed as to the elements

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[74] *Lotter, supra* note 58, 255 Neb. at 522-23, 586 N.W.2d at 635.

[75] See *Sandoval, supra* note 61.

of the separate charge of robbery. Torres was found guilty on all charges. Thus, it is clear that the jury found Torres guilty of robbery and murder, regardless of whether the ultimate conviction was premeditated murder and robbery or felony murder with robbery as its predicate offense. The robbery was clearly a separate offense. Nor are we persuaded that the predicate felony for a felony murder cannot, for purposes of aggravator (1)(b), be the crime that the perpetrator sought to conceal. The fact that double jeopardy might preclude punishment for the predicate felony[76] does not change the fact that statutorily it is a separate crime that the defendant could have sought to conceal.

The sentencing panel did not err in finding that the State proved beyond a reasonable doubt aggravator (1)(b).

10. Mitigating Factors

In his 11th and final assignment of error, Torres asserts that the sentencing panel erred by not finding any statutory or nonstatutory mitigating factors. We disagree.

Torres first argues that the sentencing panel erred by not finding the existence of statutory mitigators (2)(c) and (2)(g): Section 29-2523(2)(c) considers whether the crime was committed while the offender was under the influence of extreme mental or emotional disturbance; § 29-2523(2)(g) considers whether 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.

[28] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[77] We have held that there is no burden of proof with regard to mitigating circumstances, but 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.[78]

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[76] See *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

[77] *Ellis, supra* note 13.

[78] *Id.*

(a) Mitigator (2)(c)

Torres argues that this mitigator existed due to his methamphetamine use at the time of the murders. Torres directs this court to the testimony of a licensed drug and alcohol counselor, during the sentencing phase, that the use of methamphetamine can induce hyperawareness, paranoia, and breaks with reality. In addition, Packer, who admitted that he was addicted to methamphetamine, testified that the drug caused memory loss, created an altered mental state, caused confusion about what was real and not real, and induced hallucinations and paranoia. Torres further argues that the record shows he was using methamphetamine at the time of the murders.

We question Torres' implicit assumption that voluntary intoxication can form the basis for finding mitigator (2)(c).[79] But assuming without deciding that such could be the case, we nonetheless evaluate the factual merits of Torres' argument if for no other reason than that the same evidence underlies Torres' argument with respect to mitigator (2)(g).

Though Torres contends he was using methamphetamine at the time of Hall's and Donohue's murders, the evidence on that point is contradictory. The presentence investigation states that Torres began using methamphetamine in January 2007. He started by smoking the drug, but in February, Torres began using it intravenously, and he did so throughout that month. According to Torres, his girlfriend had been "'shoot[ing] him up'"; when that relationship ended, Torres returned to smoking the drug, apparently one "bowl" every other day. The presentence report indicated that Torres said he continued to do so until his arrest in March, which happened in Texas on March 26. However, the report also indicates that Torres stated that by the time he left Nebraska for Texas on or about March 5, he was not using methamphetamine because "'a big deal was going down and he needed to be clear-headed.'"

[29] Upon our de novo review, we conclude that the sentencing panel did not err in not finding the existence of

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[79] See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Cf. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

mitigator (2)(c). For purposes of this mitigator, "extreme" means that the disturbance must be "'"existing in the highest or the greatest possible degree, very great, intense, or most severe."'"[80] The risk of nonproduction and nonpersuasion in this instance was on Torres; he failed to present sufficient evidence to show that he was under the influence of methamphetamine at the time of the murders, let alone to show that any drug use rose to the level of an extreme mental or emotional disturbance.

(b) Mitigator (2)(g) and Nonstatutory Mitigators

For these same reasons, we conclude that Torres did not produce sufficient evidence of methamphetamine use around the time of the murders which resulted in impairment by intoxication such as would require a finding of the existence of mitigator (2)(g) or a finding of nonstatutory mitigators based upon Torres' alleged methamphetamine use. And we note that the sentencing panel explicitly concluded that even if such impairment were shown, it would be insufficient to outweigh the aggravating factors found by the panel.

11. Supreme Court De Novo Review and Proportionality Review

[30,31] Finally, in reviewing a sentence of death, the 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.[81] In so doing, it considers whether the aggravating circumstances justify imposition of a sentence of death and whether any mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.[82] Having considered the evidence, we are of the opinion that the aggravating circumstances, and the lack of any mitigating circumstances, justify imposition of the death penalty.

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[80] *Ellis, supra* note 13, 281 Neb. at 611, 799 N.W.2d at 300-301.

[81] *Ellis, supra* note 13.

[82] *Id.*

[32,33] 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.[83] 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.[84] 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 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.[85]

In conducting our review, we agree with the sentencing panel that our decisions in *State v. Palmer*[86] and *State v. Peery*[87] are pertinent here. In *Palmer*, the defendant was convicted of felony murder in the death of a coin shop operator who was robbed, beaten, and tied up. The victim's cause of death was strangulation. The defendant was sentenced to death based upon findings that the murder was committed in an apparent attempt to conceal the defendant's identity as the perpetrator of the robbery and that the murder manifested exceptional depravity by ordinary standards of morality and intelligence. And in *Peery*, the defendant was convicted of first degree murder and robbery. Like the victim in *Palmer*, the victim in *Peery* was a coin dealer who was robbed and tied up, as well as gagged, before being shot three times. The defendant in *Peery* was sentenced to death based upon findings that the murder was committed in an apparent attempt to conceal the defendant's identity as the perpetrator of the robbery and that

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Palmer, supra* note 57.

[87] *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

the murder was especially heinous, atrocious, or cruel or manifested exceptional depravity by ordinary standards of morality and intelligence.

Having reviewed our capital jurisprudence, and taking note of comparable cases, we are persuaded that the sentences imposed in this case were not greater than those imposed in other cases with the same or similar circumstances, and accordingly, we uphold the sentencing panel's imposition of the death sentence.

VI. CONCLUSION

Although we find that the jury was improperly instructed regarding some of the evidence admitted under rule 404(2), we find that this error was harmless. We find no merit to any of Torres' other assignments of error relating to his trial.

We also find merit to Torres' argument that the sentencing panel incorrectly considered the mental suffering of one of his victims in determining whether the aggravating circumstance of § 29-2523(1)(d) was in existence. However, the failure of this one finding does not affect the existence of the aggravator. Otherwise, we find no merit to Torres' assignments of error regarding sentencing.

Accordingly, we affirm Torres' convictions and sentences.

AFFIRMED.

WRIGHT, J., not participating.

CONNOLLY, J., concurring in part, and in part dissenting.

I dissent from the majority opinion's conclusion that extrinsic evidence of Torres' kidnapping and robbery of Packer was admissible to show Torres' motive for robbing Hall or killing Hall and Donohue. This conclusion is contrary to the pretrial evidence of Torres' conflicting motives that the court reviewed when it admitted the extrinsic evidence. It is also contrary to the evidence presented at trial about Torres' actual motives for the murders. Moreover, finding the prior kidnapping and robbing of Packer relevant to Torres' motive for robbing Hall or committing the murders required the jurors to engage in classic propensity reasoning—Torres kidnapped and robbed Packer, so he must have robbed and killed Hall and Donohue. So admitting the evidence violated our standard of admissibility under

rule 404(2).[1] But because the properly admitted evidence of Torres' guilt was overwhelming enough to conclude that the verdict was surely unattributable to erroneous admission of Torres' extrinsic acts, I conclude that the error was harmless.

Regarding the sentencing phase of Torres' trial, I disagree with the majority opinion's conclusion that the sentencing panel constitutionally applied the exceptional depravity aggravator. The evidence did not support the sentencing panel's conclusion that Torres relished the murders, and the majority opinion fails to analyze this issue. But I conclude that the panel's reliance on this component of the exceptional depravity prong was also harmless error.

I. THE COURT IMPROPERLY ADMITTED EXTRINSIC ACTS EVIDENCE

In the information, the State alleged two theories of first degree murder: premeditated murder and felony murder. And the court instructed the jury on both theories. It also instructed the jury on the charge that Torres had robbed Hall. But the court did not limit the admission of the kidnapping and robbery of Packer to proving Torres' motive for robbing Hall. And its jury instruction did not distinguish between considering the evidence for Torres' motives for robbing Hall and for committing the murders:

> This evidence regarding actions of [Torres] involving . . . Packer is presented to you solely for the limited purpose of helping you to decide whether [Torres] had the motive, intent and opportunity to go to the place where the crimes that the defendant is charged with are alleged to have occurred on or about March 3 through March 5, 2007, as alleged and commit the crimes that he is presently charged with. You must consider that evidence only for that limited purpose and no other.

This instruction permitted the jurors to consider the prior kidnapping and robbery crimes as proof of Torres' motive for robbing Hall and his motive for murdering Hall and Donohue. I believe that the court erroneously admitted the evidence for both purposes.

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[1] See Neb. Rev. Stat. § 27-404(2) (Reissue 2008).

1. Torres' Motive for the Extrinsic Crimes Was Not the Same as His Motive for the Murders

(a) The Motive for the Kidnapping and Robbery of Packer Was a Drug Deal Gone Bad

The evidence that the court received for admitting the extrinsic acts showed that Torres kidnapped and robbed Packer over a drug deal; Packer had apparently failed to provide methamphetamine that he owed Torres. Packer testified that during the robbery, Torres wanted an ounce of methamphetamine and stated that he would leave after he got it. The record showed that an ounce of methamphetamine cost between $800 and $1,200 and sold for about $2,400 on the street.

Cross and Packer made calls to find drugs but were unsuccessful. They eventually convinced Torres to release Packer to make a court appearance after Packer promised that he would return with methamphetamine for Torres. But Torres first took $800 to $850 in cash from Packer's wallet. He was angry because Packer's failure to produce the methamphetamine had endangered Torres' girlfriend and son, who were in Texas. Torres wanted Packer to get him money and a plane ticket to Texas. But the money that Torres took was consistent with what Torres believed Packer owed him in drugs. And after Padilla and Cross purchased food, all four of these people ate and used drugs together. When Torres' girlfriend later asked Torres about the incident with Packer because she had read about it in the news, he told her that it "was a deal that had gone bad."

This evidence indicated that Torres (1) intended to force Packer to find the drugs he had promised to provide, or intended to take the equivalent in cash; and (2) intended to make Packer pay for Torres' transportation to Texas to make an exchange for other drugs that Packer wanted or to appease a drug source there. The motive for these actions was Torres' anger over Packer's failure to follow through with a drug deal.

(b) Torres' Motive for the Murders of Hall and Donohue Was Different

In contrast, the court admitted no evidence that showed Torres was angry with Hall or Donohue over a drug deal. Instead, a police report indicated that Torres killed Hall and

Donohue to silence them. The police report documented an interview with Robert Mattson, who was incarcerated with Torres after his arrest. Torres had told Mattson that he had murdered Donohue and Hall. Mattson reported the following:

> [Torres] "tied up some old man, he killed a guy that came home, and then he killed the old man." . . .
>
> [Torres] told [Mattson] that he tried to make it look like a robbery. [Mattson] was not clear on the details, but [Torres] told [Mattson] that he had a bunch of money and/or ingredients to make drugs that were ripped off from him. [Torres] went to the house to scare them and ended up tying up the old man. [Mattson] continued that during this, some other guy came home and flipped out on [Torres]. [Torres] told [Mattson] that he shot the guy that was flipping out on him. [Torres] told [Mattson] that he did not want to, but since he shot the other guy he had to shoot the old man. [Mattson] advised the old man's name was [Hall].

At the murder trial, the direct evidence of Torres' motive for the murders was also that he killed Hall and Donohue to silence them. Mattson testified that Torres told him that Donohue owed Torres a lot of money and that Torres went to Hall's house to scare Hall and Donohue. Torres said he tied up Hall when Donohue came home. Torres and Donohue then argued, and Donohue was going to call the police. Torres shot Donohue upstairs. When Torres went back downstairs, Hall was screaming for him to call an ambulance. Torres stated that he did not know what to do and shot Hall.

Cross similarly testified that Torres had admitted to killing Hall and Donohue to keep them from calling the police. He testified that after he and Padilla left Hall's house, he spoke to Torres on the telephone. As stated in the majority opinion, Torres told Cross that "Donohue became angry and tried to break into Cross and Padilla's room. When Torres tried to stop him, Hall came upstairs and mentioned something about calling the police. Cross testified, '[Torres] told me that, you know, can't have cops, and he had to put them to sleep.'"

The police report that the court reviewed for its admissibility ruling showed that Torres' motive for going to Hall's house

to commit a robbery was to obtain money or contraband that Torres believed Hall or Donohue had stolen from him. The report also showed that Torres' motive for the murders was to silence Hall and Donohue. So the pretrial evidence of Torres' motive for the robbery and murders was sufficient to alert the court that a conflict existed between Torres' motive for the extrinsic crimes and his motive for the charged crimes.

It is true that a defendant's extrinsic bad act can show his or her motive for the charged crime even if the defendant's motives for the separate acts were not the same.[2] But here, the State produced the extrinsic bad acts specifically to show that Torres robbed and murdered Hall and Donohue for the same reason that he had kidnapped and robbed Packer: Because he was desperate to get to Texas and had no means of doing so. And if the court had inquired further, it might have recognized that the motives were not the same. But I do not believe that evidence showing that Torres kidnapped and robbed Packer because he was angry that Packer had failed to deliver drugs to Torres supports a conclusion that Torres robbed or murdered Hall and Donohue to get money to go to Texas, except through classic propensity reasoning—Torres kidnapped and robbed Packer; therefore, Torres robbed Hall and murdered him and Donohue.

2. Extrinsic Acts Evidence of Torres' Motive for the Murders Was Not Independently Relevant

Even if Torres killed Donohue and Hall to get money and a car to go to Texas, admitting evidence that he previously kidnapped and robbed Packer to prove that motive violated our admissibility standard under rule 404(2). Since 1999, we have required extrinsic acts evidence to be independently relevant.[3] As stated in the majority opinion, extrinsic acts evidence is independently relevant if its relevance does not depend upon a tendency to show propensity.[4] But a juror could only conclude

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[2] See 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:16 (rev. ed. 2001).

[3] See *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[4] See, e.g., *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

that Torres' kidnapping and robbing of Packer were relevant to prove his motive for the murders by reasoning that Torres was the type of person who would use violence to take a person's property. The propensity inference in the chain of reasoning necessary to find this evidence relevant to motive is unavoidable.

I agree with the majority opinion that character is a generalized tendency to act in a particular way. But when a person's general tendency continues over time and governs similar but disconnected circumstances, the person's disposition is generally called his or her character trait or propensity.[5]

We have distinguished between *logical* relevance and *independent* relevance and have held that even if the State's extrinsic acts evidence is logically relevant to a permissible purpose, it is inadmissible if it lacks independent relevance.[6] And we have specifically held that a court should exclude evidence when its relevance depends on classic propensity reasoning about the defendant's character.[7] Our standard of admissibility is consistent with the decisions of many other jurisdictions,[8] as well as the opinions of major legal commentators.[9] So I strongly disagree with the following statement in the majority

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[5] See, 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.02 (Joseph M. McLaughlin ed., 2d ed. 2011); Lee E. Teitelbaum & Nancy Augustus Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M.L. Rev. 423 (1983).

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

[7] See, *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *McManus, supra* note 3; *State v. Sutton*, 16 Neb. App. 185, 741 N.W.2d 713 (2007).

[8] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), *cert. denied* 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234; *U.S. v. Commanche*, 577 F.3d 1261 (10th Cir. 2009); *U.S. v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *State v. Cassavaugh*, 161 N.H. 90, 12 A.3d 1277 (2010); *State v. Johnson*, 340 Or. 319, 131 P.3d 173 (2006); *State v. Clifford*, 328 Mont. 300, 121 P.3d 489 (2005); *Masters v. People*, 58 P.3d 979 (Colo. 2002).

[9] See, 1 Imwinkelried, *supra* note 2, § 2:19; 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:28 (3d ed. 2007); 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5239 (Supp. 2011).

opinion: "[M]otive reasoning requires propensity inferences. But, so long as the evidence is also relevant for reasons not based on the defendant's character, it is admissible under rule 404(2)." This conclusion upends our rule 404(2) jurisprudence and is based on a misreading of the treatise on which the majority relies. In that treatise, the author distinguishes between a person's motivation to take an action in specific circumstances and a person's propensity to act in a particular manner under general circumstances.[10] The confusion here arises because the author refers to a person's propensity attached to a motive and a person's propensity attached to character. He also argues that whenever a person has a motive to commit a crime, concluding that the person acted on that motivation involves some inference about the person's bad character. He argues that "[t]he question, therefore, is whether the connection between the existence of the motive and acting on the motive requires a character inference."[11] But he explains the difference between a person's motive and character propensities as follows:

> [H]ow does motive-based propensity differ from character-based propensity? Primarily, the law assumes that motive is more specific than character, and its existence in a given situation does not depend upon the person's morality. Under the right set of circumstances, even non-violent people can possess a motive to act violently, and honest people can have a motive to lie. . . . We assume that a motive might exist because *any person* might possess one under those specific circumstances. The tendency to have such a motive is simply *human*; it does not derive from a trait of character specific to the person involved in the trial.[12]

This case offers a textbook example of the distinction that the author makes. As noted, the direct evidence in the murder trial showed that Torres' motive for the murders was to keep Hall and Donohue from calling the police. This is a classic

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[10] See David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 8.3 (Richard D. Friedman ed. 2009).

[11] *Id.* at 502.

[12] *Id.* at 496 (emphasis in original).

example of motive proof that does not rely on propensity reasoning, or reasoning that the defendant acted in conformity with a bad character trait. Under this proof, the defendant committed the murder in response to the specific possibility

> of being charged with [an extrinsic] crime as a result of Victim's reporting of the crime to the authorities. Arguably, at least, to make the inference we need not ask whether Defendant possesses a violent character, nor is the inference based on the sorts of general motivations that might affect all people. We need only note the possibility that *any* person with this specific motive is more likely to act on the motive than a randomly chosen person without such a motive.[13]

In contrast, the State's reason for presenting Torres' prior act of kidnapping and robbery was to show his motive of needing money and a car. When admitting extrinsic bad acts evidence to show financial stress as a motive for the charged crime, courts must carefully consider whether jurors are likely to view the motive evidence as actually a reflection of character.[14]

Obviously, most people under financial stress are no more likely to commit a robbery or murder than a person without financial stress. So when the court permitted the jurors to consider Torres' prior kidnapping and robbery crimes to show his motive for the murders, a juror was all but certain to infer that he would not have committed the murders except for his specific propensity to commit violent acts to get other people's property when he is under financial stress. Under these facts, I believe the risk was unacceptably high that jurors would infer that Torres had robbed Hall or murdered Hall and Donohue because of a flaw in his character—as illustrated by his previous crimes against Packer.

In *State v. Sanchez*,[15] this court addressed the issue of asking jurors to infer conduct from a proffered motive that is certain to invoke propensity reasoning. There, the State attempted

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[13] *Id.* at 505 (emphasis in original).

[14] See Leonard, *supra* note 10.

[15] *Sanchez, supra* note 6.

to prove a defendant's motive for sexually assaulting a child through evidence of his sexual assaults against other children. We held that the proof of the defendant's motive relied on propensity reasoning: "[U]nder the guise of motive, the State is really attempting to prove propensity, i.e., that one who in the past was motivated to seek sexual gratification from children is likely to do so again."[16] Other courts have specifically rejected the admission of extrinsic acts evidence to prove a motive of financial stress under similar circumstances.[17]

I would hold that the court erred in admitting Torres' extrinsic acts to prove this motive. Similarly, the State's proof of Torres' intent based on his extrinsic acts required jurors to conclude that he intended to achieve the goal implied by his motive.[18] Because the State's proof of motive depended upon an inference about Torres' character, the same inference was necessarily present when his motive was used to show that he intended to kill Hall and Donohue. So even if intent had been genuinely at issue, I believe the court additionally erred in instructing jurors that they could consider Torres' extrinsic crimes as proof of his intent. But I conclude that Torres' verdict of guilt was surely unattributable to the erroneous admission of his prior acts to show his motive and intent.

3. Erroneous Admission of Extrinsic Acts Was Harmless

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[19] Harmless error exists when there is some incorrect conduct by the trial court that, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right.[20] When determining whether an

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[16] *Id.* at 310, 597 N.W.2d at 375.

[17] See, e.g., *Varoudakis, supra* note 8; *U.S. v. Utter*, 97 F.3d 509 (11th Cir. 1996).

[18] See 22 Wright & Graham, *supra* note 9, § 5240.

[19] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[20] *Id.*

alleged error is so prejudicial as to justify reversal, we generally consider whether the error, in the light of the totality of the record, influenced the outcome of the case.[21]

Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[22] The erroneous admission of evidence that is not cumulative may constitute harmless error beyond a reasonable doubt when the defendant's conviction is supported by overwhelming evidence that has been properly admitted or admitted without objection.[23]

Here, the record shows that Torres was using Hall's ATM card shortly after Hall was last seen by someone other than Torres or Donohue. Torres' DNA was on the cloth bathrobe belt that was used to gag Hall. Hall and Donohue were killed by gunshot wounds from a small-caliber weapon. Torres had obtained a small-caliber weapon, and the police found ammunition for such a weapon among Torres' possessions in his Houston motel room. Torres burned Hall's car after he got to the Houston area and learned that the police were looking for him. He also bribed witnesses to fabricate exculpatory evidence for him. And most important, Torres told both Mattson and Cross that he had killed Hall and Donohue. Although he gave slightly different versions of the story to these witnesses, the versions were similar in all significant aspects and sufficient to conclude that he had truthfully conveyed his conduct.

Even if Torres could provide a plausible explanation for any single piece of this evidence, when considered together, the evidence of his guilt was overwhelming. Thus, I conclude that there is no reasonable probability that the erroneously admitted evidence materially influenced the jury's verdict of

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[21] *Id.*

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

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

guilt. I therefore concur in the majority's judgment affirming Torres' convictions.

II. NO CONSTITUTIONAL ERROR OCCURS IN THE WEIGHING PROCESS WHEN THE SENTENCER GIVES AGGRAVATING WEIGHT TO THE SAME EVIDENCE UNDER A DIFFERENT SENTENCING FACTOR

As the majority opinion notes, the sentencing panel issued its order before we issued our decision in *State v. Sandoval*.[24] In *Sandoval*, the majority disagreed with the U.S. Supreme Court's approval of a state court's "mental anguish" narrowing factor under an "especially heinous, atrocious, or cruel" aggravator in *Walton v. Arizona*.[25] In *Walton*, the Court affirmed the Arizona Supreme Court's narrowing factor of mental anguish under a heinousness aggravator when the victim would have been uncertain as to his ultimate fate. But the *Sandoval* majority concluded that "[a]ll victims threatened by a deadly weapon would have uncertainty as to their ultimate fate."[26] It therefore disapproved of the "mental anguish" narrowing factor for Nebraska's "especially heinous, atrocious, or cruel" murder under aggravator (1)(d).[27]

I disagreed with that decision. And I continue to believe that the mental anguish factor for a victim's uncertainty of his ultimate fate could be constitutionally considered when the evidence would support one of two findings: (1) The victim would have been uncertain whether the defendant intended to kill him and had time to agonize over whether the defendant would decide to kill him; or (2) the victim would have been certain of the defendant's intent to kill him and had time to agonize over his imminent doom before the defendant committed the

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[24] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 563 U.S. 1012, 131 S. Ct. 2912, 179 L. Ed. 2d 1254 (2011).

[25] *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[26] *Sandoval, supra* note 24, 280 Neb. at 353, 788 N.W.2d at 212.

[27] See Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008).

murder. But now, under *Sandoval*, the mental anguish narrowing factor under § 29-2523(1)(d) is invalid. So the question is, How do we deal with the sentencing panel's reliance on the mental anguish factor to find the existence of the heinousness prong of aggravator (1)(d)?

I believe that the majority opinion incorrectly analyzes this issue in two major respects: First, it fails to apply the proper standard for determining whether constitutional error occurred in the sentencing process. Second, it fails to set out and apply the correct standard for determining whether a sentencing error in a capital case is harmless.

1. Unconstitutional Skewing Under *Brown v. Sanders*

As I have previously pointed out,[28] the U.S. Supreme Court's decision in *Brown v. Sanders*[29] has changed the analytical framework for determining whether a constitutional error occurs in a capital sentencing case when a sentencer considers an invalid sentencing factor. Under *Brown*,

> [a]n invalidated sentencing factor (whether an eligibility fact or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.[30]

In other words, if the sentencer could have given aggravating weight to the same facts and circumstances under a different sentencing factor, then no constitutional error occurred.[31]

For example, in *Brown*, the state court invalidated two of the four eligibility factors that the jury considered in determining whether a death sentence was appropriate. Nonetheless, in addition to these sentencing factors, the California sentencing scheme included a catchall sentencing factor for considering

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[28] See *Sandoval, supra* note 24 (Connolly, J., concurring in part, and in part dissenting).

[29] *Brown v. Sanders*, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

[30] *Id.*, 546 U.S. at 220 (emphasis in original).

[31] See *Brown, supra* note 29.

"'[t]he circumstances of the crime of which the defendant was convicted in the present proceeding.'"[32] Because the catch-all sentencing factor permitted the jury to consider the same aggravating facts and circumstances presented under the invalidated factors, no constitutional error in the weighing process occurred.[33]

Here, the sentencing panel found that the State had proved the mental anguish factor because Torres bound and gagged Hall before killing him. The panel concluded that these circumstances constituted mental suffering because Hall was completely at Torres' mercy and could not know his ultimate fate. It did not find the existence of physical torture. So under *Brown*, the question is whether the sentencing panel nonetheless gave aggravating weight to the binding and gagging facts under a different sentencing factor. Although the majority opinion does not acknowledge the *Brown* standard, it concludes that the evidence supported the existence of the narrowing factors for the "helplessness of the victim" and "senselessness of the crime" under the exceptional depravity prong of aggravator (1)(d).

I agree that evidence showing Torres killed Hall after he had bound and gagged him supported the existence of the helpless victim factor under the exceptional depravity prong.[34] Because the sentencing panel properly gave aggravating weight to the evidence under this narrowing factor, its consideration of the evidence did not skew its weighing process under *Brown*. Thus, no constitutional error occurred.

2. An Appellate Court's Finding That Sufficient Evidence Supported Other Sentencing Factors Does Not Cure Constitutional Error in a Capital Sentencing Case

If the sentencing panel had improperly considered—under any aggravating factor—evidence that Torres killed Hall after

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[32] *Id.*, 546 U.S. at 222.

[33] See *id.*

[34] See, *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), citing *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

Torres had bound and gagged him, I do not believe the error could be cured by simply concluding that other narrowing factors under aggravator (1)(d) were supported by sufficient evidence. Under *Brown*, no constitutional error occurred here, so no harmless error analysis is required. But the *Sandoval* majority did not follow *Brown* in determining whether unconstitutional skewing occurred in the weighing process. So the rule stated in *Sandoval* is the law. Under that rule, constitutional error occurred because the sentencing panel relied on an invalidated factor and harmless error analysis is required:

> When an appellate court reviewing a death penalty invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that the sentencing panel did not consider in its balancing, the appellate court may, consistent with the U.S. Constitution, conduct a harmless error analysis or remand the cause to the district court for a new sentencing hearing.[35]

A sentencing error is not harmless because an appellate court concludes that other aggravating factors are sufficiently supported by the evidence. This court lacks statutory authority to reweigh mitigating and aggravating circumstances on appeal. In doing so, we act "as an unreviewable sentencing panel in violation of Nebraska law."[36] To reweigh mitigating and aggravating circumstances violates a capital defendant's due process rights under Nebraska law. So I disagree with the following statement in the majority opinion:

> [T]he sentencing panel made detailed findings and explained that both prongs of the aggravator had been proved. As a result, Torres was not prejudiced by the sentencing panel's erroneous understanding of aggravator (1)(d)'s "especially heinous, atrocious, [or] cruel" provision so long as the evidence was sufficient to support the panel's finding that the murder exhibited exceptional depravity.

(Emphasis omitted.)

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[35] *Sandoval, supra* note 24, 280 Neb. at 349-50, 788 N.W.2d at 209.

[36] *Id.* at 358, 788 N.W.2d at 214-15.

Instead, in *State v. Ryan*,[37] we explained that *Chapman v. California*[38] governs harmless error analysis of constitutional errors. The question under *Chapman* "is not whether the legally admitted evidence was sufficient to support the death sentence, . . . but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained.'"[39] This standard is consistent with the harmless error standard that we apply when reviewing a court's improper admission of evidence in the guilt phase of a capital case. And the U.S. Supreme Court also applies the *Chapman* standard to constitutional errors occurring in the sentencing phase of a capital murder trial.[40]

I would agree that there is no reasonable probability that the sentencing panel's consideration of the mental anguish factor under the heinousness prong contributed to Torres' sentences because the panel properly gave aggravating weight to the same evidence under the helpless victim sentencing factor. This is similar to what we concluded in *State v. Ryan*.[41] Although *Brown* has since subsumed this analysis under its constitutional error inquiry, our harmless error analysis in *Ryan* is consistent with *Brown* under a different analytical framework.

But the statements and analysis in the majority opinion are not consistent with U.S. Supreme Court precedent. The majority opinion would make harmless error turn on whether a death sentence is supported by other sufficient evidence under different narrowing factors, without regard to whether the *same* evidence supported the existence of those factors. In addition to being inconsistent with the fact that we do not reweigh aggravating and mitigating circumstances, this harmless error

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[37] *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[38] *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[39] See *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988), quoting *Chapman, supra* note 38. Accord *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

[40] See *Satterwhite, supra* note 39.

[41] See *Ryan, supra* note 37.

standard ignores what *Chapman*[42] requires. I therefore dissent from the majority's harmless error standard and analysis.

III. SENTENCING PANEL ERRED IN GIVING AGGRAVATING WEIGHT TO EVIDENCE SUPPORTING THE "RELISHING OF THE MURDER" FACTOR

In addition to finding the existence of the mental anguish factor, the sentencing panel found the existence of four narrowing factors under the exceptional depravity prong of aggravator (1)(d). It found that the following factor existed only as to the murder of Hall: the helplessness of the victim. The panel also found that the following factors existed for the murders of both Hall and Donohue: (1) the senselessness of the crime; (2) the infliction of gratuitous violence on the victims; and (3) the apparent relishing of the murder.

Torres assigns that "[t]he sentencing panel erred in finding the evidence sufficient to prove beyond a reasonable doubt the existence of aggravators 1(a), 1(b), *and 1(d)*."[43] Under this assignment of error, Torres argues that his statements to Cross and Mattson did not show that he relished the murders, and he refers to his previous argument on this issue. Torres had previously argued in his brief that the sentencing panel's erroneous consideration of the mental anguish factor was not harmless because we could not say that the sentencing panel had given great weight to other factors that could be applied to any murder or that were contrary to the evidence. And Torres explicitly argued that the evidence did not show he had relished the murders:

> There is nothing in the differing versions of the murders given to Cross and Mattson by [Torres] that suggests that [Torres] relished the murders. The mere fact that [Torres] informed another person that he committed the murders adds nothing worthy of the tag "exceptional depravity," — i.e. "marked by exceptional debasement, corruption, perversion or deterioration." . . . Nothing in

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[42] *Chapman, supra* note 38.

[43] Brief for appellant at 103 (emphasis supplied).

> the Bill of Exceptions suggests that [Torres'] manner of telling Cross and Mattson what happened was of a bragging, gloating, or arrogant nature . . . . If Cross's account of [Torres'] phone call is accepted as true, then it can be said that [Torres] did not gratuitously murder . . . Hall, but rather found it necessary to do so because [Torres] did not want the cops to be called.[44]

But in affirming the sentencing panel's finding of the relishing of the murder factor, the majority opinion ignores these arguments. In giving short shrift to a constitutional argument in a death penalty case, we fail in our duty "to protect the constitutional rights afforded under both the federal and the state Constitutions."[45] Equally important, I do not agree that the evidence supported the existence of the relishing of the murder factor.

As I explained in my *Sandoval* concurrence, we adopted our exceptional depravity narrowing factors from the Arizona Supreme Court. And under that court's precedents, relishing the murder refers to the defendant's actions or words, apart from the murder itself, that show the defendant savored or took pleasure in a killing. I provided examples of the type of conduct that proves the existence of that factor under Arizona precedents. In general, the defendant's conduct must show the defendant's debasement or perversion in savoring the killing. And Torres' statements to Cross and Mattson—that he killed the victims to keep them from calling the police—do not fit the bill.

In contrast, the majority does not attempt to compare these facts to analogous facts or to clarify what relishing the murder means for future guidance. But I do not believe that Torres' admissions that he committed the murders can show he relished the murders without some additional statement showing that he took pleasure in killing the victims, as distinguished from his indifference to human life—a definition that would apply to any murder and would fail to preclude arbitrary sentencing.

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[44] *Id.* at 100-101.

[45] *Mata, supra* note 37, 275 Neb. at 38, 745 N.W.2d at 260.

Similarly, the majority opinion's conclusion that these facts satisfy the relishing of the murder factor trivializes the purpose of having narrowing factors under the exceptional depravity prong. Those factors guide the sentencer in determining whether a murder was totally and senselessly bereft of any regard for human life.[46] By lowering the bar for proving this narrowing factor, the majority opinion undermines our efforts to clearly channel the sentencer's discretion so that the death penalty is not imposed in an arbitrary manner. The narrowing factors cannot be vague themselves.

I also conclude that the sentencing panel could not have considered Torres' statements to Cross and Mattson under any other sentencing factor that it found to exist. Under *Brown* or *Sandoval*, then, the sentencing panel's giving aggravating weight to these statements was constitutional error. I believe that this error requires us to conclude that there is no reasonable probability that the sentencing panel's improper consideration of the relishing sentencing factor contributed to Torres' sentences because the other aggravating facts that the sentencing panel found to exist overwhelmingly supported the sentences. And I believe that we can reach that conclusion.

Although evidence that Torres admitted to killing Hall and Donohue was powerful evidence of his guilt, it was minor evidence when considered to determine whether Torres was deserving of the death penalty. In contrast to this evidence, the sentencing panel properly weighed evidence that Torres murdered Hall and Donohue at the same time; that he murdered Hall while he was helpless because Torres had bound and gagged him; and that he murdered Hall and Donohue to keep them from calling the police, i.e., to conceal the robbery and his identity as the perpetrator. In addition, the panel properly weighed Torres' history of serious assaultive and terrorizing activity. This evidence showed that under threat of their death, Torres had kidnapped and robbed Packer and forced Cross and Padilla to follow his orders.

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[46] See, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *Palmer, supra* note 34.

It is true that the sentencing panel did not specify which factors or evidence it considered most significant. But neither did the panel's order state that Torres' statements to Cross and Mattson weighed heavily in its decision. Considering the overwhelming aggravating evidence that the sentencing panel weighed, I believe that we can conclude beyond a reasonable doubt that Torres' statements to Cross and Mattson did not materially influence the sentencing panel. Instead, the panel appears to have been so convinced of its sentencing decision that it overreached in finding that the relishing of the murder factor existed. That was error, but it was harmless error.

In sum, I agree with the conclusions in the majority opinion because I conclude that the errors in the guilt and sentencing phases were harmless. But I do not agree with how the majority opinion has analyzed these issues. I believe that the majority opinion incorrectly holds that extrinsic bad acts are admissible to prove motive even if they are relevant to motive only by reasoning that the defendant acted in conformity with a bad character. As stated, this conclusion will upend our rule 404(2) jurisprudence.

Even more so, I disagree with the majority opinion's holding that a defendant in a capital murder case is not prejudiced by a sentencer's reliance on an invalidated narrowing factor if other evidence supports the sentencer's finding that another factor existed. I believe that this analysis is contrary to the constitutional requirements for finding capital sentencing errors harmless and how we have previously analyzed such errors. I believe this opinion will significantly confuse the way we review capital sentencing procedures.