opinion. Although our reasoning differs from that of the district court, the entry of judgment in favor of Experian was not error. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONTAVIS McCLAIN, APPELLANT.
827 N.W.2d 814

Filed March 22, 2013. No. S-12-256.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **Trial: Expert Witnesses: Pretrial Procedure: Notice.** A challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.
3. **Trial: Evidence: Appeal and Error.** To preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), a litigant must object on that basis and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence.
4. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which the appellate court reviews independently of the court's determination.
5. **Confessions: Police Officers and Sheriffs.** Interrogation necessarily includes elements of psychological pressure which are meant to elicit a confession. The question is whether the techniques used are so coercive as to overbear the suspect's will.
6. **Jury Instructions: Appeal and Error.** Whether a court's jury instructions were correct is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination of the court below.
7. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve

conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

8. **Effectiveness of Counsel: Records: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
9. **Effectiveness of Counsel: Evidence: Appeal and Error.** An appellate court will not address an ineffective assistance of counsel claim on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

CONNOLLY, J.

I. NATURE OF THE CASE

The State charged Dontavis McClain with first degree felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. These charges stemmed from the robbing and killing of a pizza delivery worker. The jury found McClain guilty on all counts. McClain argues that the court erred in receiving into evidence his confession and certain DNA reports and related testimony. McClain also argues that the court incorrectly instructed the jury, that there was insufficient evidence to support his convictions, and that he received ineffective assistance of counsel. For various reasons, we find no merit to McClain's assigned errors. We affirm.

II. BACKGROUND

1. THE CRIMES AND INVESTIGATION

On a Friday in September 2010, just after 11 p.m., the Douglas County sheriff's office received a "down[ed] party"

call at an apartment complex in Omaha, Nebraska. An officer responded to the call and saw a man lying on the ground, not breathing, with blood on his arm. The officer radioed for an ambulance and then began cardiopulmonary resuscitation. The ambulance arrived minutes later, took over the man's care, and eventually transported him to the hospital. The man, Christopher Taylor, never revived. The autopsy showed that Taylor had been stabbed twice in the back, puncturing a lung and kidney. He died from hemorrhaging and complete blood loss.

As soon as the ambulance arrived, the responding officer secured the scene, notified his supervisor, and requested a crime scene unit to process the area. The crime scene unit photographed the scene and bagged items of potential evidentiary value. The crime scene primarily included one apartment in the complex and the immediately surrounding area. The officers canvassed the area for witnesses and possible leads.

Certain items found at the scene—such as a pizza-warming bag and a receipt for pizza—led the officers to a nearby restaurant. The officers discovered that Taylor worked at that restaurant as a pizza delivery worker. The shift manager provided them with the telephone number from which the order had been placed for the delivery to the apartment complex. The officers subpoenaed the owner information and call logs for that telephone number. The resulting information showed that "M. Fountain," later identified as Michelle Fountain, owned the telephone. Followup investigation revealed that Michelle Fountain's son Larry Fountain usually used the telephone.

After speaking with Larry Fountain (hereinafter Fountain), the officers discovered that he had loaned his telephone to Bryton Gibbs, who also lived in the apartment complex, and another man, whom he referred to as "Mississippi," to order pizza. Fountain had overheard Gibbs and "Mississippi" planning to rob a pizza delivery worker. The officers then searched Gibbs' home and interviewed Gibbs' mother, who told them that her son had been "hanging out" with Marcus Robinson and that Robinson had been driving Gibbs around that day. The officers then interviewed Robinson, who confirmed that he had driven Gibbs and "Mississippi" around that day, and he

told them that he had overheard "Mississippi" tell Gibbs that "[y]ou didn't have to cut him." Both Fountain and Robinson gave the officers physical and clothing descriptions of Gibbs and "Mississippi."

On Sunday, September 12, 2010, the Douglas County sheriff's office received information that Gibbs and "Mississippi" were at a church at 31st and Lake Streets. Officers went there and arrested them, identifying both Gibbs and "Mississippi" based on prior knowledge and their descriptions. The officers then identified "Mississippi" as McClain from his Mississippi identification card and driver's license.

2. McClain's Interrogation, Trial, and Sentences

That same day, the officers placed McClain in an interrogation room. McClain signed a consent form for the officers to collect physical evidence from him. McClain also waived his *Miranda* rights and agreed to talk to the officers. After initially denying any involvement in Taylor's death, McClain confessed to planning and executing the robbery with Gibbs and said that Gibbs had stabbed Taylor. Before trial, McClain moved to suppress this evidence, but the district court denied the motion. The court concluded that the officers had probable cause to arrest McClain, that McClain's confession was voluntary, and that the interrogator had properly informed him of his *Miranda* rights.

The State charged McClain with first degree felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. At trial, the State presented testimony from various officers regarding the circumstances surrounding Taylor's death, the processing of the crime scene, and the investigation which led to McClain's arrest. The State also presented testimony from DNA experts which purported to link McClain to the murder. McClain objected to this evidence under Neb. Rev. Stat. § 27-403 (Reissue 2008) and on general foundation grounds. McClain claimed that the DNA laboratory, because of a recent change in protocol, currently calculated the statistical likelihood of a DNA match, when before the change, it would have simply determined that the evidence was

inconclusive. McClain argued that there was no explanation for the change in protocol, and so the court should exclude the evidence. The court overruled the objection. The State also presented testimony from Fountain and Robinson, among others, which identified McClain as one of the people involved in the robbing and killing of Taylor.

McClain's defense rested primarily on attacking the credibility of the State's witnesses, emphasizing the relative lack of physical evidence linking McClain to Taylor's death (in contrast to the wealth of evidence linking Gibbs), and arguing that McClain's confession should be given little weight because it resulted from coercion and underhanded tactics. McClain also offered testimony from one witness which seemed to indicate that another individual might have been involved in the crimes, and not McClain. At the end of trial, the jury convicted McClain on all counts. The court sentenced McClain to life to life in prison for the murder conviction, 1 to 50 years in prison for the use of a deadly weapon conviction, and 10 to 10 years in prison for the conspiracy conviction. The court ordered McClain to serve the 10-to-10-year prison sentence concurrently with the life-to-life prison sentence, while the court ordered him to serve the 1-to-50-year prison sentence consecutively to the others.

III. ASSIGNMENTS OF ERROR

McClain alleges, consolidated and restated, that the court erred in (1) admitting certain DNA evidence, (2) overruling his motion to suppress evidence of his interrogation, (3) failing to instruct the jury regarding unlawful manslaughter, and (4) finding that there was sufficient evidence to convict him of the crimes charged. McClain also alleges that he received ineffective assistance of counsel.

IV. ANALYSIS

1. DNA Evidence

A DNA report and accompanying testimony purported to link McClain to the crimes. The DNA evidence indicated that McClain was not excluded as a partial contributor to DNA found on the back seat of the getaway car and that Taylor was

not excluded as a partial contributor to DNA from apparent blood found on McClain's shoes, though the probabilities were not definitive.

McClain objected to this evidence both before and during trial. McClain noted that under an earlier testing protocol, the DNA laboratory would not have reported the above probabilities either because they fell below a certain threshold or because the known and unknown DNA samples did not share enough DNA markers. Under the earlier protocol, the laboratory would have simply determined that the DNA analysis was inconclusive. Under the current testing protocol, however, the DNA laboratory conducted and reported the probability assessment.

McClain argues that the DNA evidence was inadmissible under the *Daubert*/*Schafersman*[1] framework. McClain argues that the State's DNA experts did not know the reason for the change in protocol and so they could not provide adequate foundation for the evidence. We conclude, however, that McClain did not adequately preserve any *Daubert*/*Schafersman* issue for appellate review and that the court did not otherwise abuse its discretion in admitting this evidence.

(a) Standard of Review

[1] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[2]

(b) Analysis

[2,3] We have explained that all specialized knowledge, including scientific knowledge, falls under the rules of *Daubert*/*Schafersman*.[3] We have also explained that, assuming timely notice of proposed testimony is given,

> [a] challenge to the admissibility of evidence under *Daubert* and *Schafersman* should take the form of a

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

[2] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

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

> concise pretrial motion. It should identify, *in terms of the Daubert and Schafersman factors*, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.[4]

And "to preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert*/*Schafersman*, a litigant *must object on that basis* and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence."[5]

McClain did not meet these requirements. McClain filed a pretrial motion in limine to exclude the DNA evidence under Neb. Rev. Stat. §§ 27-401 through 27-403 (Reissue 2008). The motion in limine did not use the language of *Daubert*/*Schafersman* to attack the validity or reliability of the evidence, but instead used the language of § 27-403 to argue that the danger of unfair prejudice outweighed the evidence's probative value. Specifically, the motion stated in part: "That any testimony regarding this statistical likelihood that someone other than [McClain] contributed the genetic material is not probative of identification, but could mislead the jury, confuse the issues and is unduly prejudicial to [McClain] and is therefore inadmissible under Neb. Rev. Stat. §27-403." That the motion in limine contested the evidence's admissibility only under § 27-403 is made perfectly clear from the bill of exceptions, in which McClain's trial counsel stated:

> Well, Judge, I anticipate, prior to the State adducing DNA evidence, filing a motion in limine *not on a Daubert type issue at all*, but more on just a [§ 27-]403 issue based off of what I would call a change in protocol . . . from the Med Center DNA lab.

(Emphasis supplied.) Nor did McClain object under *Daubert*/*Schafersman* at trial. Instead, McClain specifically noted that his motion in limine was "just a [§ 27-]403 motion [and] not

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[4] *State v. Huff*, 282 Neb. 78, 116, 802 N.W.2d 77, 107 (2011) (emphasis supplied).

[5] *State v. King*, 269 Neb. 326, 333, 693 N.W.2d 250, 258 (2005) (emphasis supplied).

a Daubert-type objection or anything like that." And when the State offered the DNA evidence at trial, McClain's trial counsel renewed his "objection based [only] on the motion in limine previously discussed."

It is true that, as pointed out at oral argument, McClain's trial counsel did include a general foundational objection and explained that he took issue with the expert's testimony because the expert did not know the underlying reasons for the change in protocol. But we do not read this as an objection under *Daubert*/*Schafersman* for there is nothing in that objection which would have alerted the court or the State that McClain was challenging the validity or reliability of the DNA testing results. Instead, we read McClain's general foundation objection and argument in his brief as challenging whether the State's witness qualified as an expert because he did not know why the protocol had changed.[6]

On this record, we find no merit to McClain's objection to the expert's qualifications. The expert testified that the DNA laboratory changed its protocol to conform to a national DNA working group's recommendations, that such recommendations come out periodically and are from DNA experts, and that it is the DNA laboratory's general practice to discuss the recommendations and decide whether to adopt them. And the witness had lengthy qualifications and experience working with DNA and the specific processes at issue. We cannot say the court abused its discretion in determining that the witness was a qualified expert on this issue and overruling McClain's general foundation objection. And McClain's brief does not argue that the court erred in admitting the evidence over his objection under § 27-403. We find no abuse of discretion in the court's admitting this evidence.

2. Motion to Suppress

McClain argues that the court erred in admitting his confession into evidence because (1) it resulted from an illegal arrest and (2) it was not voluntary. The State rejoins that the arrest was proper because the officers had probable cause

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[6] See Neb. Rev. Stat. § 27-702 (Reissue 2008).

to arrest McClain and because McClain's confession was voluntary and not the product of any improper interrogation techniques.

(a) Standard of Review

[4] In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, we apply a two-part standard of review. Regarding historical facts, we review the court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the court's determination.[7]

(b) Analysis

McClain first argues that the officers lacked probable cause to arrest him. And if that were the case, McClain asserts, his subsequent confession was inadmissible because they obtained it "'"by exploitation of an illegal arrest."'"[8] We conclude, however, that the officers had probable cause to arrest McClain. As such, the confession was not excludable as the product of an illegal arrest.

Both the state and the federal Constitutions protect individuals against unreasonable searches and seizures by the government.[9] An arrest is a "seizure" of a person and must be justified by probable cause.[10] Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[11] Probable cause is a flexible, commonsense standard that depends on the totality

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[7] See, e.g., *Bauldwin, supra* note 2; *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[8] See, e.g., *State v. Ball*, 271 Neb. 140, 153, 710 N.W.2d 592, 604 (2006).

[9] See, U.S. Const. amend. IV; Neb. Const. art. I, § 7. See, also, *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[10] See *McCave, supra* note 9.

[11] See *id*.

of the circumstances.[12] We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[13] And when a court denies a motion to suppress pretrial and again during trial on renewed objection, we consider all the evidence, both from trial and from the hearings on the motion to suppress.[14]

The court determined that McClain's arrest was proper, and we agree. Our review of the record shows that the officers had probable cause to believe that McClain, referred to at the time of the arrest only as "Mississippi," had committed a crime. The investigation revealed that Gibbs and "Mississippi" were involved in the crimes. Both Fountain and Robinson gave detailed physical and clothing descriptions for "Mississippi," as well as Gibbs, whom the officers also knew from previous incidents. Although Fountain and Robinson were initially less than truthful with the officers, the court found that the information they provided "corroborated the physical evidence at the crime scene and the events that occurred [around] the time that the robbery and homicide occurred." That implied finding of credibility was not clearly erroneous. On the morning of the arrest, the sheriff's office received word that both Gibbs and "Mississippi" were at a church and went to arrest them. The officers noted that the man with Gibbs matched the physical and clothing description of "Mississippi" and specifically that both suspects were "dressed as [the officers] had been told they would be."

In sum, the officers knew that Gibbs and "Mississippi" were involved in the crimes, that they had been together, and that they were at the church. When the officers arrived at the church, the man with Gibbs matched the physical and clothing description of "Mississippi" provided by Fountain and Robinson. Because the officers had probable cause to arrest "Mississippi," later identified as McClain, his statements during custody were not the product of an illegal arrest.

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[12] See *id.*

[13] See *id.*

[14] See *Ball, supra* note 8.

McClain also argues that his confession was inadmissible because it was involuntary. McClain asserts that the interrogation room was physically intimidating, that the interrogator was hostile and threatening, and that the interrogator impliedly promised McClain leniency if he cooperated. After viewing the interrogation, however, we conclude that McClain's will was not overborne and that his confession was voluntary.

The Due Process Clauses of both the state and the federal Constitutions preclude admitting an involuntary confession into evidence.[15] The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.[16] In making this determination, we apply a totality of the circumstances test.[17] Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.[18] Coercive police activity is a necessary predicate to a finding that a confession is not voluntary.[19]

The court determined that McClain's confession was voluntary, and after our review of the interrogation, we agree. Certainly, the physical characteristics of the interrogation room, specifically that it was small and windowless, are one factor to consider.[20] But the room was a seemingly standard interrogation room, with chairs and a desk, and was not so inherently coercive as to render McClain's confession involuntary.

[5] We also do not find the interrogator's questioning techniques to be improper. The officer raised his voice, pointed his pen at McClain, shifted his chair closer to McClain during the interrogation, and repeatedly used (in various ways) the phrase

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[15] See, U.S. Const. amend. XIV; Neb. Const. art. I, § 3; *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[16] See *Goodwin, supra* note 15.

[17] See *id.*

[18] See *id.*

[19] See *id.*

[20] See, e.g., *U.S. v. Murdock*, 667 F.3d 1302 (D.C. Cir. 2012).

"cold blooded killer." But interrogation necessarily includes elements of psychological pressure which are meant to elicit a confession.[21] The question is whether the techniques used are so coercive as to overbear the suspect's will.[22] Here, they were not. Notably, the interrogation leading to the confession was relatively short, lasting just over 1½ hours. More important, the video shows that McClain was intelligent and thoughtful, that he was aware of why he was in the room, and that he too was trying to get information, specifically the extent of the interrogator's knowledge about the crimes.

Nor are we convinced that the interrogator improperly promised McClain a benefit in exchange for his confession. Such a promise may render a suspect's confession involuntary and inadmissible.[23] But for that to be the case, "'the benefit offered to a defendant must be definite and must overbear his or her free will,'" thus rendering the statement involuntary.[24] Numerous cases demonstrate this principle. For example, in *State v. Mayhew*,[25] the county attorney told the defendant that if he told the truth, the county attorney would recommend that the court sentence the defendant concurrently with the unrelated sentence the defendant was then serving. In *State v. Smith*,[26] the police officer interrogating the 15-year-old defendant told him that if he confessed, the officer would try to get the case transferred to juvenile court. In both cases, we held that the resulting confessions were involuntary.[27]

This case is notably different from those. Here, at various points, the interrogator said things like the following: "[I]t does matter who did it"; "there's a difference when you're standing up in front of the judge, who did it and didn't do it"; "there's

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[21] See *U.S. v. Astello*, 241 F.3d 965 (8th Cir. 2001).

[22] See, *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993).

[23] See *Goodwin, supra* note 15.

[24] *Id.* at 961, 774 N.W.2d at 746.

[25] *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984).

[26] *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979).

[27] See, *Mayhew, supra* note 25; *Smith, supra* note 26.

a difference between who did the killing and who was just there"; and "there's also a difference between cooperating and not cooperating." These statements do not promise any *definite* benefit which could render McClain's subsequent confession involuntary.

We agree with the court that McClain's confession was voluntary. Although the interrogator exerted pressure on McClain, the interrogator's techniques were not improper. And we conclude that the interrogator did not improperly promise McClain any definite benefit in exchange for his confession. This assigned error has no merit.

3. Jury Instructions

McClain argues that the court erred in failing to instruct the jury on unlawful act manslaughter as a lesser-included offense of felony murder. McClain's argument, essentially, is that a jury could have found McClain guilty of theft, which is not a predicate felony for felony murder, rather than robbery. And if the jury found him guilty of theft, then he could be guilty only of unlawful act manslaughter and not of felony murder.

(a) Standard of Review

[6] Whether a court's jury instructions were correct is a question of law.[28] On a question of law, we are obligated to reach a conclusion independent of the determination of the court below.[29]

(b) Analysis

We addressed this same argument in *State v. Schroeder*.[30] And like *Schroeder*, even assuming that unlawful act manslaughter is a lesser-included offense of felony murder, the evidence did not warrant such an instruction.

A court must instruct on a lesser-included offense if "(1) the elements of the lesser offense . . . are such that one cannot commit the greater offense without simultaneously committing

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[28] See, e.g., *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[29] See, e.g., *id.*

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

the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense."[31] A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes any money or personal property from another person.[32] The various crimes of theft do not contain this element of violence or fear, but are otherwise similar insofar as the perpetrator deprives the victim of his or her possessions.[33]

There is no rational basis upon which a jury could conclude that McClain committed a theft rather than a robbery, because McClain's actions contained an element of violence or fear, and most likely both. McClain admitted that he grabbed Taylor from outside the apartment, pulled him in, and threw him to the ground. McClain admitted that he heard Taylor repeatedly ask what was going on. McClain said that Gibbs turned off the lights, after which Gibbs stabbed Taylor and McClain took the money from Taylor. A rational jury could not consider this to be a simple theft. Therefore, the court correctly refused to give an unlawful act manslaughter instruction, even assuming that it was a lesser-included offense of felony murder.

4. Sufficiency of the Evidence

McClain argues that the evidence was insufficient for the jury to convict him of felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. We disagree. There was ample evidence, most notably McClain's own confession, that he and Gibbs planned to and did rob Taylor and that Taylor died after Gibbs stabbed him during the robbery.

(a) Standard of Review

[7] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof,

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[31] *Id.* at 216, 777 N.W.2d at 807.

[32] See, Neb. Rev. Stat. § 28-324 (Reissue 2008); *Schroeder, supra* note 30.

[33] See, Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 2008 & Cum. Supp. 2012); *Schroeder, supra* note 30.

the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[34] The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[35]

(b) Analysis

The thrust of McClain's argument is that the State failed to adduce sufficient evidence to convict McClain of the relevant charges. In support of this argument, McClain attacks the credibility of the State's witnesses. He also notes the relative lack of physical evidence tying McClain to the crimes and that a witness for McClain cast doubt on his involvement in the crimes. McClain's argument essentially asks us to resolve conflicts in the evidence, pass on the credibility of witnesses, and reweigh the evidence, which we will not do.[36] We ask only whether a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.[37] The answer is yes.

To prove felony murder, as relevant here, the State had to prove that McClain killed "another person . . . in the perpetration of or attempt to perpetrate any . . . robbery."[38] The record shows that the State prosecuted McClain under an aider or abettor theory. A person who aids or abets "another to commit any offense may be prosecuted and punished as if he were the principal offender."[39] "[A]n alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself

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[34] See *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

[35] See *id.*

[36] See *id.*

[37] See *id.*

[38] Neb. Rev. Stat. § 28-303 (Reissue 2008).

[39] Neb. Rev. Stat. § 28-206 (Reissue 2008).

or herself possessed such intent."[40] The required intent was the intent to commit the underlying felony—robbery—rather than the intent to kill.[41] So if there was sufficient evidence for a jury to conclude beyond a reasonable doubt that McClain intended to rob Taylor and that Taylor died "in the perpetration of or attempt to perpetrate" the robbery, then regardless who actually stabbed him,[42] the felony murder conviction must stand.

A rational trier of fact could find beyond a reasonable doubt that McClain intended to rob Taylor. A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes any money or personal property from another person.[43] McClain admitted to intending to steal from Taylor during his confession, and the record clearly demonstrates that he and Gibbs took Taylor's property through force or violence, or by putting Taylor in fear. A rational trier of fact could also infer McClain's intent from testimony demonstrating that he acted in concert with Gibbs. For example, Fountain testified that he overheard Gibbs say "we should rob this pizza man" with McClain nearby, Robinson testified that he drove Gibbs and McClain away from the crime scene, and another witness testified that McClain told him afterward that Gibbs had made a "rookie mistake." And, of course, a rational trier of fact could also find beyond a reasonable doubt that Taylor died during the perpetration of the robbery.

To prove that McClain was guilty of using a deadly weapon to commit a felony, the State had to prove that McClain used a deadly weapon, such as a knife, to commit a felony.[44] In *State*

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[40] *State v. Mantich*, 249 Neb. 311, 324, 543 N.W.2d 181, 191 (1996).

[41] See *Mantich, supra* note 40.

[42] See, e.g., *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955). See, also, *U.S. v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000).

[43] See § 28-324.

[44] See Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2012).

v. Mantich,[45] we explained that "one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act." In *Mantich*, the defendant was one of several people who "kidnapped, robbed, and terrorized" the victim at gunpoint.[46] We noted that "using a firearm to commit these acts [was] a natural and probable consequence of the kidnapping, robbery, and terrorizing" of the victim.[47] And as the defendant was an aider and abettor of those criminal acts, he "could properly be convicted of using a firearm to commit a felony even if the jury believed that he was unarmed."[48]

The same reasoning applies here. McClain and Gibbs robbed Taylor, and Taylor died during the perpetration of the robbery. The record shows that McClain intended to rob Taylor, that Gibbs stabbed Taylor with a knife, and that Taylor later died from those wounds. As McClain was an aider and abettor of those criminal acts, a rational trier of fact could properly find beyond a reasonable doubt that McClain was guilty of using a deadly weapon to commit a felony even if McClain did not actually use the knife.

Finally, to prove McClain had conspired to commit a robbery, the State had to prove that McClain intended to promote or facilitate the robbery, that he agreed with one or more persons to commit the robbery, and that McClain, or a coconspirator, committed an overt act furthering the conspiracy.[49] McClain admitted that he agreed with Gibbs to rob Taylor, and they obviously committed an overt act furthering the conspiracy since they actually robbed Taylor. A rational jury could find these essential elements beyond a reasonable doubt. This assigned error has no merit.

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[45] *Mantich, supra* note 40, 249 Neb. at 327, 543 N.W.2d at 193.

[46] *Id.*

[47] *Id.* at 327-28, 543 N.W.2d at 193.

[48] *Id.* at 328, 543 N.W.2d at 193.

[49] See, Neb. Rev. Stat. § 28-202 (Reissue 2008); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

5. Ineffective Assistance of Counsel

[8,9] Finally, McClain alleges several instances of ineffective assistance of counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[50] The determining factor is whether the record is sufficient to adequately review the question.[51] The logical extension of that principle is that we will not address an ineffective assistance of counsel claim on direct appeal if it requires an evidentiary hearing.[52]

McClain alleges, restated, four different ineffective assistance of counsel claims as follows: Trial counsel failed to (1) adequately communicate with McClain; (2) properly attack the credibility of the State's witnesses, including that one witness was improperly coached; (3) conduct depositions of witnesses who were either codefendants or eyewitnesses; and (4) peremptorily strike a juror during voir dire when the juror expressed bias toward Taylor. We conclude that the record is insufficient to address the first three claims, but is sufficient to address the fourth.

In his fourth claim, McClain argues that one juror expressed bias toward Taylor and that his trial counsel should have struck her from the jury. McClain argues that his counsel's failure to do so prejudiced him because the juror was more likely to find him guilty and the trial would have turned out differently had a different individual been on the jury.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[53] McClain must show that his counsel's performance was deficient and that this deficient performance actually prejudiced his defense.[54] The record is sufficient to address this claim and shows neither deficient

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[50] *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[51] See *id.*

[52] See *id.*

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

[54] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

performance nor prejudice from trial counsel's failure to peremptorily strike this juror.

During voir dire, the juror said that she had previously read a newspaper article explaining that "a pizza delivery person was killed, I believe, by three gentlemen in an apartment complex. I'm not sure how. That's basically all I know." When asked whether "there [was] any other information that [she] recall[ed] from that news article about what was going on or the people that allegedly were involved," she replied: "Yes. The gentleman was I believe the father [sic] and was a Christian person who gave some of his money to charities." But the juror, again in response to questioning, explained that if she were selected, she would require the State to meet its burden of proof and to provide her evidence to make a decision. She stated that she would put aside anything that she had heard in the prior weeks and months and rely on the evidence and instructions during trial. Finally, she explained that she had read only the one article, that she had never heard McClain's name in connection with the incident, and that she had not formed an opinion as to McClain's guilt or innocence. This claim has no merit.

V. CONCLUSION

We conclude that McClain did not properly preserve any alleged error under *Daubert*/*Schafersman* and that the court did not otherwise abuse its discretion in admitting the State's DNA evidence. We also conclude that the court properly admitted McClain's confession into evidence because the officers had probable cause to arrest him and because his confession was voluntary. We find no merit to McClain's arguments that the court improperly instructed the jury or that there was insufficient evidence to sustain the jury's verdicts. Though the record is insufficient to review the majority of McClain's ineffective assistance of counsel claims, the record is sufficient to conclude that his counsel was not ineffective for failing to peremptorily strike one of the jurors during voir dire. We affirm McClain's convictions and sentences.

AFFIRMED.