jurisdiction, and the district court did not err when it denied the motion to continue. However, we conclude that the district court did err when it gave a written instruction stating that the jury must consider Abram's refusal to testify as an admission of guilt. Although such error is not structural error, we conclude that the error was not harmless and that it requires reversal of Abram's convictions. Because there was sufficient evidence to support the convictions, we remand the cause for a new trial on the charges of attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EDDIE R. KIBBEE, APPELLANT.
815 N.W.2d 872

Filed July 13, 2012. No. S-11-361.

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: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive 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.
5. **Constitutional Law.** Under both the federal Constitution, U.S. Const. art. I, § 10, and the state Constitution, Neb. Const. art. I, § 16, no ex post facto law may be passed.
6. **Constitutional Law: Statutes: 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.

7. **Constitutional Law: Appeal and Error.** Ordinarily, Nebraska's ex post facto clause is construed to provide no greater protections than those guaranteed by the federal Constitution.
8. **Constitutional Law: Criminal Law: Statutes.** Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.
9. **Criminal Law: Statutes: Time.** Statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. In contrast, the procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
10. ____: ____: ____. A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt.
11. **Constitutional Law: Criminal Law.** There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.
12. **Constitutional Law: Rules of Evidence.** Ordinary rules of evidence do not violate the Ex Post Facto Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case.
13. **Constitutional Law: Criminal Law: Statutes: Witnesses: Time.** Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage.
14. **Rules of Evidence: Witnesses: Juries: Words and Phrases.** A witness competency rule regulates the manner in which facts may be placed before a jury, while a sufficiency of the evidence rule governs the sufficiency of the facts presented to the jury for meeting the burden of proof.
15. **Constitutional Law: Rules of Evidence: Statutes: Sexual Misconduct: Other Acts.** Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), does not violate the Ex Post Facto Clauses of the federal and state Constitutions. It is an ordinary rule of evidence which relates to admissibility and simply provides that evidence of prior sexual misconduct may be admitted to prove propensity.
16. **Rules of Evidence: Sexual Misconduct: Other Acts.** Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), expands upon Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), and governs the admission of evidence of an accused person's other sexual misconduct or sex offenses.
17. **Rules of Evidence.** When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.

18. **Rules of Evidence: Other Acts.** Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), provides three factors that a court may consider in balancing the probative value of relevant evidence of prior acts with the danger of prejudice from the admission of that evidence: (1) The probability that the other offense occurred, (2) the proximity in time and intervening circumstances of the other offenses, and (3) the similarity of the other acts to the crime charged.
19. **Other Acts: Evidence: Words and Phrases.** Evidence of prior acts may be admitted where there are an overwhelming number of significant similarities, but the term "overwhelming" does not require a mechanical count of the similarities, but, rather, a qualitative evaluation.
20. **Rules of Evidence: Other Acts: Time.** Remoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible.
21. ____: ____: ____. Whether evidence of other conduct is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
22. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
23. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
24. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
25. ____: ____: ____. An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.
26. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
27. **Lesser-Included Offenses.** For an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense.
28. ____. Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
29. **Lesser-Included Offenses: Sexual Assault.** Under the strict statutory elements approach, third degree sexual assault is not a lesser-included offense of first degree sexual assault.
30. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
31. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.

32. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

Appeal from the District Court for Thayer County: VICKY L. JOHNSON, Judge. Affirmed.

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

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

Eddie R. Kibbee was convicted by a jury of first degree sexual assault and felony child abuse. At issue in this appeal is the admission of evidence of Kibbee's prior sexual contacts with minors, which he claims violates Nebraska rules of evidence and the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16. We affirm his convictions.

FACTS

INCIDENT

According to Kelsey D., she was 16 years old when Kibbee had sexual contact with her on August 9, 2009. Kelsey testified that on August 8, she went to a teen dance from about 9:30 p.m. to midnight. She had planned to spend the night at the home of Crystal J., for whom Kelsey sometimes babysat. Kelsey had met Kibbee through Crystal, and before going to Crystal's home, Kelsey went to Kibbee's house. When she arrived, only Kibbee's roommate, Bobby W., was present. Around 12:45 or 1 a.m., Kibbee arrived along with several other people, including Kelsey's brother. Kelsey began drinking and had one beer and then a vodka and orange juice drink that Kibbee made for her. Kibbee brought her a second drink, but Kelsey did not finish it because it was "too strong."

Because Kelsey was tired and did not want to walk to Crystal's house, she lay down on the couch in the living room of Kibbee's house. She awoke later to find Kibbee sitting next to her. Kelsey's pants and underwear were around her ankles, and Kibbee was touching her vaginal area with his hands. Kibbee placed his fingers into her vagina. Kelsey tried to turn away from him and told him to stop several times. She asked Kibbee to take her to Bobby. Before Kibbee stopped, he put his mouth on her vagina. Kibbee finally stopped, pulled up Kelsey's pants, kissed her on the cheek, and walked away. He returned to his room without saying anything to Kelsey.

Kelsey testified that she sat and thought about what happened for a couple of minutes and then went into Bobby's room, woke him up, and told him what had happened. She lay down next to Bobby in his bed and fell asleep. She awoke the next day at about 11 a.m. when Kibbee came into the bedroom, touched her foot, and told her the time. Kelsey reported the incident the next evening to her brother, her mother, and law enforcement.

Charges

Kibbee was charged with first degree sexual assault, a Class II felony, for subjecting another person to sexual penetration without consent or when Kibbee knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his conduct, and with child abuse, a Class IIIA felony, for knowingly and intentionally causing or permitting Kelsey, a minor, to be placed in a situation that endangered her life or physical or mental health or to be sexually abused.

Prior Bad Acts Evidence

Before trial, the State filed a notice of intent to offer evidence pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), to show that (1) Kibbee had provided alcohol to minor females in his residence on several occasions; (2) in August 2009, Crystal attended a party at Kibbee's home, fell asleep, awoke to find her pants around her ankles, and saw Kibbee walking out of the room; and

(3) Kibbee had previously had sexual contact with several females in various towns in Iowa between 1985 and 1995.

The State also filed a notice of intent to offer evidence pursuant to Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), of similar offenses committed by Kibbee against four females. Kibbee objected to the § 27-414 notice, arguing that its application violated the ex post facto prohibitions of the federal and state Constitutions because § 27-414 was not in effect on August 8 and 9, 2009, the dates of the offense alleged in the information.

Hearing Under § 27-404(2)

At a hearing to consider the §§ 27-404(2) and 27-414 issues, evidence was received from three women who had previous contacts with Kibbee in Iowa. In a deposition, Melissa C. testified that in 1983, when she was 10 years old, she went to the home of her aunt, Karen P., to babysit her cousins, Jennifer P. and Jackie P. Karen was living with Kibbee in Grinnell, Iowa. Melissa had been asleep on the couch, but she woke up when Kibbee and Karen returned home. Melissa was wearing a nightgown and underwear. She dozed off again and then awoke to find Kibbee sitting on the floor next to her. He was touching the inside of her right leg, and he told Melissa to be quiet because her aunt was in a nearby bedroom with the door open. Melissa said Kibbee moved his hand upward and touched and rubbed her vaginal area and eventually put his finger in her vagina. Melissa believed the incident lasted about 5 minutes. She told Kibbee to stop. He returned to his bedroom, and Melissa stayed on the couch and cried. Melissa did not tell her aunt, but several months later, she told her mother and her mother's boyfriend. Melissa said there was an investigation, but Kibbee was not charged.

Jennifer, Karen's daughter, testified at the pretrial hearing. She was born in 1982, and her mother dated Kibbee from the time Jennifer was about 3 months old. Jennifer said Kibbee abused her mother and physically and sexually abused Jennifer and her sister, Jackie, who is 2 years older. Jennifer's first memories of sexual abuse were when she was approximately 5 years old and they lived in a farmhouse outside of

Brooklyn, Iowa. Jennifer remembered waking up with a pillow over her face and Kibbee's fingers inside her vagina. He also tried to penetrate her with his penis. Jennifer did not tell anyone because Kibbee threatened to kill her mother and sister. Jennifer said that the abuse continued as long as Kibbee lived in the home and that in every instance, she was asleep and woke up to find Kibbee touching her. When Jennifer was 5 or 6 years old, she told her mother about the abuse, but her mother did not believe her or her sister and told them not to tell anyone else. On one occasion, Jennifer observed Jackie tied to a bed while naked and Kibbee at the end of the bed, also naked. When Jennifer was about 11 years old, she and her sister were placed in foster care and they reported Kibbee's actions.

Heather P. also testified by deposition. Heather, who was born in 1982, met Kibbee when she was about 9 or 10 years old and was friends with Jennifer and Jackie. Heather said that she and her sister were helping the family move and that all the beds had been moved to the new residence. The other girls slept on the floor in the bedroom, but Heather was concerned about bugs and did not want to sleep on the floor. Karen told Heather she could sleep on a sofa sleeper with Karen and Kibbee. Karen slept in the middle of the bed. Heather, who wore shorts and a T-shirt to bed, was awakened to feel a man's hand on her stomach. Kibbee moved his hand under her shirt, but Heather put up her arm to block him from being able to touch her breasts. He then moved his hand into the waistband of her shorts, and she moved his hand away and got up. Heather woke up her sister, and they ran home.

Crystal testified that about 1 week before the incident with Kelsey, she had been drinking alcohol at Kibbee's house and awoke on the floor in Bobby's room to find her underwear pulled down to her thighs and her shorts pulled down to her knees. She saw Kibbee in the doorway, and then he closed the door.

The State also offered several exhibits of Kibbee's prior convictions. In 1994, Kibbee was found guilty of assault with intent to commit sexual assault and was sentenced to 2 years'

probation. In February 1995, Kibbee's probation was revoked after he violated an order forbidding him from having contact with children under the age of 18 and failed to obtain an evaluation for sexual abusers. Kibbee was found guilty of aiding and abetting possession of alcohol by a minor in Iowa in 1998 and was fined $100. Kibbee was incarcerated in Illinois from January 11 to November 16, 2006, after being charged with criminal sexual assault.

Trial Court's Ruling

The trial court found clear and convincing evidence that the sexual assaults against Melissa, Jennifer, and Heather had occurred and that there was a high degree of similarity to the act with which Kibbee was charged. It concluded that evidence of these assaults could be presented at trial. The court found insufficient evidence of alleged sexual assaults by Kibbee against Jackie and Crystal.

The court noted the similarities among the events:

> All of the victims were 16 or younger. All were female. They were all approached while asleep in [Kibbee's] home and digitally penetrated or attempted to be penetrated. All were known to [Kibbee]. Three were visitors to his home; the other lived in his home. Admittedly, there is a significant time lapse between the occurrence of some of the acts and the current crime; however, these incidents are highly probative. The number of victims and assaults on the victims follow serially beginning in approximately 1983, with some gaps, until the present assault. This fact is also probative.

Having found clear and convincing evidence that the other sexual assaults were committed by Kibbee, the court then found that the prior sexual assaults could be admitted to show motive, opportunity, preparation, or plan and that the admission would not be unduly prejudicial to Kibbee. However, the court determined that evidence related to Kibbee's supplying alcohol to minors had limited probative value and would be unduly prejudicial. The court overruled Kibbee's ex post facto objections.

"JUDICIAL ADMISSIONS"

Prior to trial, Kibbee filed "Judicial Admissions," in which he admitted that he had sexual contact with Kelsey on August 9, 2009. He stated that Kelsey, her brother, Bobby, Crystal, and Crystal's friend were all present and all consumed alcoholic beverages. Kibbee stated that Kelsey fell asleep on the couch around 2 or 2:30 a.m. Kelsey's brother, Crystal, and Crystal's friend left the residence, and Kibbee and Bobby went to their bedrooms. Around 4:30 or 5 a.m., Kibbee left his bedroom and knelt on the floor next to Kelsey, who was on the couch. Kelsey's pants and underwear were around her ankles. Kibbee admitted that he touched Kelsey in her groin area with his hand and that Kelsey told him to stop. Kelsey turned on her side, pushed Kibbee away, and covered her vaginal area with her legs. Kibbee said he then stopped touching Kelsey, but he kissed her one last time on the face, pulled up her underwear and pants, and walked out of the living room. Kibbee admitted that his actions in kissing and touching Kelsey were an attempt to sexually stimulate her for the purpose of Kibbee's own sexual gratification and not for a medical or health reason.

Kibbee also filed a motion in limine asking that the State be precluded from presenting evidence regarding Kibbee's sexual activity with the three women from Iowa, since his judicial admissions resolved all factual issues except whether Kelsey was subjected to sexual penetration without her consent or whether Kibbee knew or should have known that Kelsey was mentally or physically incapable of resisting or appraising the nature of Kibbee's conduct. Kibbee argued that motive, opportunity, preparation, and plan are not essential elements of first degree sexual assault and that the prior bad acts evidence should not be admitted.

The court overruled Kibbee's motion in limine, determining that § 27-414 allowed the testimony of the witnesses for any relevant purpose.

JURY TRIAL

During trial, and prior to the testimony of the women from Iowa, the court gave a limiting instruction based on § 27-414. The instruction explained that evidence of the commission of

another offense of sexual assault is admissible and may be considered for any relevant matter, including the similarities of the offenses, to show Kibbee's motive, opportunity, preparation, or plan. However, evidence of a prior offense on its own is not sufficient to prove Kibbee guilty.

The jury found Kibbee guilty of both charges. He was sentenced to a prison term of 30 to 40 years for the sexual assault conviction and to a prison term of 4 to 5 years for the child abuse conviction. The sentences were ordered to be served concurrently to each other, but consecutively to the sentences imposed in any other case. Kibbee was given credit for 464 days served.

ASSIGNMENTS OF ERROR

Kibbee assigns the following errors: The trial court erred in (1) admitting evidence of Kibbee's prior sexual contacts with minors in Iowa, in violation of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and § 27-404; (2) admitting evidence of prior sexual contact with minors under § 27-414, in violation of the Ex Post Facto Clauses of the U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16; (3) admitting evidence of prior sexual contacts with minors to show character and propensity contrary to § 27-403, if § 27-414 was applicable; (4) rejecting Kibbee's judicial admissions to avoid prejudice associated with the Iowa bad acts evidence; (5) overruling Kibbee's motion for a mistrial after his judicial admissions were offered as part of the State's case in chief during the trial; and (6) failing to instruct the jury on the lesser-included offense of third degree sexual assault after the judicial admissions were received into evidence.

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.[1] Where the Nebraska Evidence Rules commit the

[1] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[2]

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[3]

[4] Whether jury instructions given by a trial court are correct is a question of law. When dispositive 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.[4]

ANALYSIS

Alleged Violation of Ex Post Facto Clause

Kibbee argues that the trial court erred in admitting evidence of his prior sexual contacts with minors under § 27-414, because the statute was not in effect at the time of the sexual contact with Kelsey. The statute was adopted by the Legislature in 2009 and became operative on January 1, 2010. Thus, Kibbee asserts that admission of the evidence violated the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

Section 27-414 provides in part:

> (1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.

[5-7] Under both the federal Constitution, U.S. Const. art. I, § 10, and the state Constitution, Neb. Const. art. I, § 16,

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[2] *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[3] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[4] *State v. Nolan, supra* note 2.

no ex post facto law may be passed.[5] "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."[6] Ordinarily, Nebraska's ex post facto clause is construed to provide no greater protections than those guaranteed by the federal Constitution.[7]

[8-10] We have held:

> Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto. The Ex Post Facto Clause does not, however, extend to limit legislative control of remedies and modes of procedure which do not affect matters of substance. Thus, statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. In contrast, the procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
>
> A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt. In other words, a rule is substantive if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the manner of determining a defendant's culpability are procedural.[8]

[11] The U.S. Supreme Court has identified four types of laws which may violate the proscription against ex post facto

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[5] See *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[6] *Id.* at 503, 779 N.W.2d at 338-39.

[7] See *id.*

[8] *State v. Galindo*, 278 Neb. 599, 614-15, 774 N.W.2d 190, 210 (2009) (emphasis omitted).

laws. In *Carmell v. Texas*,[9] the Court cited Justice Chase, who, in *Calder v. Bull*,[10] cataloged the types of ex post facto laws as those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.[11]

The *Carmell* Court determined that an amended Texas statute was an ex post facto law under the fourth category. The law in effect at the time the crime was committed required both the victim's testimony and corroborating evidence, and the amended law provided that the defendant could be convicted based only on the victim's testimony. "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof."[12] In each of those instances, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction."[13]

[12] However, in a footnote, the Court stated:

> We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. . . . Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the

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[9] *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

[10] *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798).

[11] *Carmell v. Texas, supra* note 9; *Calder v. Bull, supra* note 10.

[12] *Carmell v. Texas, supra* note 9, 529 U.S. at 532.

[13] *Id.*, 529 U.S. at 533.

> presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force.[14]

[13] In *Carmell*, the State of Texas argued that the case was controlled by *Hopt v. Utah*[15] and *Thompson v. Missouri*.[16] In *Hopt*, the Court held that there was no violation of the Ex Post Facto Clause by an amended law that allowed a convicted felon to testify as a witness against the defendant at trial.

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not . . . alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.[17]

In *Thompson*, the Court also found no ex post facto violation by an amended statute that allowed the introduction of expert handwriting testimony when such evidence had not previously been permitted.[18]

[14] The *Carmell* Court distinguished *Hopt* and *Thompson* by noting that the statute at issue was not a witness competency rule, which regulates the manner in which facts may be placed before a jury, but, rather, a sufficiency of the evidence rule, which governs the sufficiency of the facts presented to

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[14] *Id.*, 529 U.S. at 533 n.23.

[15] *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884).

[16] *Thompson v. Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898).

[17] *Hopt v. Utah, supra* note 15, 110 U.S. at 589-90.

[18] *Thompson v. Missouri, supra* note 16.

the jury for meeting the burden of proof.[19] A rule governing the sufficiency of the evidence would always run in the prosecution's favor because it will always make it easier to convict. However, a witness competency rule could assist either the State or the defendant. For example, a felon witness might help a defendant if the felon is able to relate credible exculpatory evidence.[20] "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained."[21] The Court noted that while prosecutors may meet all the requirements of witness competency rules, they may not have introduced sufficient evidence to convict the offender. Sufficiency of the evidence rules inform as to whether the evidence is sufficient to convict as a matter of law, which does not mean that the jury must convict.[22] The law at issue in *Carmell* was deemed to violate the proscription against ex post facto laws.

Like *Carmell*, the fourth category of ex post facto laws is at issue in the case at bar. We must determine whether § 27-414 altered the legal rules of evidence such that less or different evidence was needed in order to convict Kibbee. We conclude that it did not.

Section 27-414 provides that evidence of a prior sexual assault is admissible "if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules." As such, it governs the admissibility of evidence, not its sufficiency.

In *Schroeder v. Tilton*,[23] the Court of Appeals for the Ninth Circuit affirmed the determination by the state trial court that admission of evidence of the defendant's prior sex crimes

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[19] *Carmell v. Texas, supra* note 9.

[20] See *id.*

[21] *Id.*, 529 U.S. at 546.

[22] *Carmell v. Texas, supra* note 9.

[23] *Schroeder v. Tilton*, 493 F.3d 1083 (9th Cir. 2007).

did not violate the Ex Post Facto Clause. The defendant was charged in 1999 with five counts of sexual misconduct for events that took place in January 1994. The State introduced evidence of prior uncharged conduct, which the court admitted under § 1108 of the California Evidence Code. Section 1108 had become effective in 1996—after the commission of the charged offenses but prior to trial.

Section 1108 provides in part: "'In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.'"[24]

On appeal, the defendant argued that applying § 1108 to him violated the Ex Post Facto Clause of the federal Constitution. The appellate court held that § 1108 was not the type of rule contemplated by *Carmell* because it "'deems more evidence relevant and makes more evidence admissible, but it does not thereby eliminate or lower the quantum of proof required or in any way reduce the prosecutor's burden of proof. The prosecutor still had to prove the same elements beyond a reasonable doubt to convict defendant.'"[25]

The defendant sought habeas corpus relief and again argued that the state court violated the Ex Post Facto Clause when it admitted evidence of his prior sexual misconduct under § 1108.

The court noted that evidence of the commission of another sexual offense was admissible if it did not violate California's general ban on the use of propensity evidence.[26] A balancing was still required to determine whether the probative value of the evidence substantially outweighed the probability that the admission of the evidence would necessitate undue consumption of time or create danger of prejudice, of confusing the issues, or of misleading the jury.[27]

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[24] *Id.* at 1086, quoting Cal. Evid. Code § 1108(a) (West 2009).

[25] *Id.* at 1086.

[26] *Schroeder v. Tilton, supra* note 23, citing Cal. Evid. Code § 1101(b) (West 2009).

[27] *Id.*, citing Cal. Evid. Code § 352 (West 2011).

The court stated: "In sum, § 1108 creates an exception to the general ban on propensity evidence, so that evidence of prior sexual misconduct may be presented to the jury to demonstrate propensity to commit the crime charged, provided that the prejudicial value of that evidence does not substantially outweigh its probative value."[28]

The *Schroeder* court noted that in *Carmell*, the Court held that the amended law violated the Ex Post Facto Clause because it "'changed the quantum of evidence necessary to sustain a conviction.'"[29] Thus, "*Carmell* distinguished ordinary rules of evidence, which govern admissibility or competency, for example, from those rules that affect the sufficiency of the evidence."[30]

However, in *Schroeder*, it was not error to conclude that § 1108 is an ordinary rule of evidence and that it does not violate the Ex Post Facto Clause. The statute "simply states that evidence of prior uncharged sexual misconduct may be admitted to prove propensity."[31] It does not address the sufficiency of the evidence made admissible by the law. Section 1108 relates to admissibility, not sufficiency, as nothing in the statute "suggests that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime."[32] The court concluded that § 1108 did not affect the quantum of evidence sufficient to convict the defendant. It held that there was no violation of the defendant's right to be free from retroactive punishment.[33]

Other jurisdictions have also found that a statute similar to § 27-414 does not violate the Ex Post Facto Clause. In Louisiana, a statute provided that evidence of the commission of another sexual offense may be admissible and may be

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[28] *Id.* at 1087.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1088.

[32] *Id.*

[33] *Id.*

considered for any matter to which it is relevant subject to a balancing test.[34] The appellate court found that evidence of prior sex crimes was admissible to prove propensity and was not unfairly prejudicial since a limiting instruction was given to the jury.[35]

A Texas statute was amended to provide that evidence of other crimes committed by the defendant against the child victim shall be admitted for relevant matters.[36] The defendant argued that the statute, which was amended between the dates of the offenses and the date of his trial, was an ex post facto law. The court disagreed, finding that the "statute enlarges the scope of the child's admissible testimony, but leaves untouched the amount or degree of proof required for conviction."[37] The statute "eliminates the necessity of showing the evidence falls within one of the Rule 404(b) exceptions. [B]ut, in no way does it alter the quantum of proof required by law to support the conviction."[38]

In Oklahoma, the appellate court stated that "[t]he mere fact that a retroactively-applied change in evidentiary rules works to a defendant's disadvantage does not mean the law is *ex post facto*. The issue is whether the change affected the quantum of evidence necessary to support a conviction."[39] It found no ex post facto violation by the admission of testimony about other acts of sexual abuse.

A Washington statute that permitted, but did not require, admission of evidence of prior sexual offenses did not violate ex post facto laws.[40] The court disagreed with the defendant's argument that sex offense evidence is propensity evidence that reduces the quantum of evidence the State must produce in

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[34] *State v. Willis*, 915 So. 2d 365 (La. App. 2005).

[35] *Id.*

[36] *McCulloch v. State*, 39 S.W.3d 678 (Tex. App. 2001).

[37] *Id.* at 684.

[38] *Id.*

[39] *James v. State*, 204 P.3d 793, 795 (Okla. Crim. App. 2009).

[40] *State v. Scherner*, 153 Wash. App. 621, 225 P.3d 248 (2009).

order to convict. It found that the statute did not "subvert the presumption of innocence because it does not concern whether the admitted evidence is sufficient to overcome the presumption of innocence."[41] In addition, the statute expressly retained the trial court's ability to balance probative value against prejudicial effect.[42]

In the case at bar, § 27-414 is similar to the California statute discussed in *Schroeder*. Section 27-414 states, in pertinent part:

> (1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.

The California statute allows evidence of the defendant's commission of another sexual offense if the offense is not inadmissible for relevancy. The *Schroeder* court determined that the statute did not affect the quantum of evidence sufficient to convict the defendant.[43] The same is true in this case.

[15] Section 27-414 does not violate the Ex Post Facto Clauses of the federal and state Constitutions. The statute does not affect the sufficiency of the evidence and does not change the quantum of evidence needed for conviction. It is an ordinary rule of evidence which relates to admissibility and simply provides that evidence of prior sexual misconduct may be admitted to prove propensity. The statute does not suggest that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime. The trial court did not err in finding that § 27-414 does not violate the Ex Post Facto Clauses of the federal and state Constitutions.

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[41] *Id*. at 642, 225 P.3d at 257.

[42] *Id*.

[43] *Schroeder v. Tilton, supra* note 23.

Admission of Evidence of Prior Acts

Kibbee argues that the trial court erred in admitting evidence of prior sexual contacts with minors in Iowa in violation of §§ 27-403 and 27-404. In addition, he claims that even if this court determines that § 27-414 does not violate ex post facto laws and is therefore applicable here, the Iowa bad acts evidence was not admissible "propensity" evidence under § 27-414 because it was prejudicial and its admission substantially outweighed its relevance as set out in § 27-403.

Although the trial court analyzed the admission of the evidence under § 27-404, we find that the first step in determining whether evidence of prior sexual contacts should be admitted is to review the evidence pursuant to § 27-414. Having conducted such a review, we find no error in the admission of prior acts evidence under § 27-414, and therefore, we do not find it necessary to conduct a separate analysis under § 27-404(2).

In relevant part, § 27-414 provides:

> (3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

The trial court followed the procedure of the statute, conducting a hearing outside the presence of the jury. After receiving evidence of Kibbee's previous sexual contacts with minors, the court found by clear and convincing evidence that the State had proved that three of the sexual assaults had occurred. The court then conducted a balancing test under § 27-403 and found similarities among the previous events sufficient to conclude that the evidence was probative.

This court has not yet addressed the application of § 27-414, except to note that § 27-404 had been amended to permit the admission of evidence of a prior sexual assault offense.[44] Section 27-414 was not in effect at the time of the trials in those cases and therefore did not affect our analysis.

Evidence of prior bad acts in sexual assault cases was previously governed solely by § 27-404(2), which provides:

> 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.

[16] Section 27-414 expands upon the admission of evidence of an accused person's other sexual misconduct or sex offenses.[45] It was intended to "harmonize[] provisions in Neb. Rev. Stat. § 27-404 and incorporate[] the applicable federal ev[i]dentiary threshold."[46] Senator Mike Flood, who introduced the bill, stated that it

> puts Nebraska in line with a growing number of other jurisdictions, including the federal government, who have liberalized the admission of other crimes in sex offense cases. It is important to note that such evidence of other sex offenses is not automatically admitted. The court must subject this other crimes evidence to the probative value versus unfair prejudice balancing test found in Section 27-403 in the Nebraska rules of evidence.[47]

The federal rule of evidence from which § 27-414 is drawn provides that when a defendant is accused of an offense of sexual assault, evidence of another sexual assault offense is admissible, as long as it is relevant.[48] Evidence found

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[44] See, *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011); *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[45] Introducer's Statement of Intent, L.B. 39, 101st Leg., 1st Sess. (Mar. 19, 2009).

[46] *Id.*

[47] Floor Debate, L.B. 39, 101st Leg., 1st Sess. 4 (Apr. 22, 2009).

[48] See Fed. R. Evid. 413(a).

admissible under federal rule 413 is still subject to exclusion under federal rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice.[49] The Court of Appeals for the Eighth Circuit has stated that the federal rules were intended to allow the jury to consider a defendant's prior bad acts in the area of sexual abuse for the purpose of showing propensity.[50]

In *U.S. v. Benais*,[51] the court held that in a trial for a second rape, testimony from a first rape victim was admissible because it carried probative value that was not substantially outweighed by the danger of unfair prejudice. "The evidence was probative and the only prejudice was that prejudice made admissible by Rule 413. There was no unfair prejudice as required for exclusion under Rule 403."[52]

Federal rule of evidence 413 "address[es] propensity evidence in the context of sexual assault" and "provide[s] an exception to the general rule codified in Rule 404(a), which prohibits the admission of evidence for the purpose of showing a defendant's propensity to commit bad acts."[53] Rule 413 has three threshold requirements: The court must determine that the defendant is accused of an offense of sexual assault, then it must find that the evidence proffered is evidence of the defendant's commission of another offense of sexual assault, and then it must determine, as with all evidence, that it is relevant.[54] "A defendant with a propensity to commit acts similar to the charged crime is more likely to have committed the charged crime than another. Evidence of such a propensity is therefore relevant."[55]

The federal court has held that "Rule 413 supersedes Rule 404(b)'s restriction and allows the government to offer

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[49] *U.S. v. Benais*, 460 F.3d 1059 (8th Cir. 2006). See Fed. R. Evid. 403.

[50] *U.S. v. Benais, supra* note 49.

[51] *Id.*

[52] *Id.* at 1063 (emphasis omitted).

[53] *U.S. v. Benally*, 500 F.3d 1085, 1089 (10th Cir. 2007).

[54] *Id.*, citing *U.S. v. Guardia*, 135 F.3d 1326 (10th Cir. 1998).

[55] *U.S. v. Guardia, supra* note 54, 135 F.3d at 1328.

evidence of a defendant's prior conduct for the purpose of demonstrating a defendant's propensity to commit the charged offense."[56]

In *U.S. v. Holy Bull*,[57] the Court of Appeals for the Eighth Circuit stated:

> Evidence of prior bad acts is generally not admissible to prove a defendant's character or propensity to commit crime. Fed.R.Evid. 404(b). However, Congress altered this rule in sex offense cases when it adopted Rules 413 and 414 of the Federal Rules of Evidence. After the adoption of Rules 413 and 414, in sexual assault and child molestation cases, evidence that the defendant committed a prior similar offense "may be considered for its bearing on any matter to which it is relevant," including the defendant's propensity to commit such offenses. Fed.R.Evid. 413(a), 414(a). If relevant, such evidence is admissible unless its probative value is "substantially outweighed" by one or more of the factors enumerated in Rule 403, including "the danger of unfair prejudice." *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir.1997).

[17] When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.[58]

> In Rule 413 cases, the risk of prejudice will be present to varying degrees. Propensity evidence, however, has indisputable probative value. That value in a given case will depend on innumerable considerations, including the similarity of the prior acts to the acts charged, . . . the closeness in time of the prior acts to the charged acts, . . . the frequency of the prior acts, the presence or lack of intervening events, . . . and the need for evidence beyond the testimony of the defendant and alleged victim.[59]

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[56] *Id.* at 1329.

[57] *U.S. v. Holy Bull*, 613 F.3d 871, 873 (8th Cir. 2010).

[58] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[59] *U.S. v. Guardia, supra* note 54, 135 F.3d at 1331.

[18] Because this is our first consideration of § 27-414, we have not specifically discussed the factors which may need to be taken into consideration in determining whether evidence of a prior sexual assault may be admitted. The statute itself provides three factors that the court may consider in the balancing test: "(a) [T]he probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged."[60]

In considering the probability that the other offense occurred, we have noted:

> "[E]vidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, sexual offenses against the defenseless, except in cases of the fortuitous presence of an eyewitness, would likely go unpunished."[61]

As for similarities between previous contacts and those on which current charges are based, we found a number of likenesses in the facts of prior sexual assaults in *State v. Carter*.[62] The issue was whether evidence could be admitted that the defendant, who was charged with murder in the first degree in the commission of a sexual assault, had previously had recurring sexual contact with his two daughters and his half sister. We noted a number of similarities between the sexual assaults of his daughters and half sister and the victim in that case: All assaults occurred when the victims were between the ages of 6 and 11; all of the victims were subjected to multiple assaults; all assaults occurred at the defendant's residence, his mother's residence, or the victim's residence; all of the victims had either a familial or a family-like relationship to the defendant; all assaults occurred while the defendant had

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[60] § 27-414(3).

[61] *State v. Stephens*, 237 Neb. 551, 556, 466 N.W.2d 781, 785-86 (1991), quoting *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

[62] *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

custody or was in complete control of the victims; and each of the victims was incapable of giving consent.[63] We also noted some differences, but found they did not compel the exclusion of the evidence. "An absolute identity in every detail cannot be expected."[64]

[19] We held that evidence of prior acts may be admitted where there are "an overwhelming number of significant similarities," but "'[t]he term "overwhelming" does not require a mechanical count of the similarities but, rather, a qualitative evaluation.'"[65]

In the case at bar, we see a number of similarities between the prior acts and the acts upon which the charges are based. All of the victims were under the age of majority at the time the sexual assault occurred. Melissa and Heather were both awakened to find Kibbee touching them inappropriately. Melissa reported that Kibbee was sitting on the floor next to her, similar to the report by Kelsey that Kibbee was kneeling on the floor next to her when he digitally penetrated her. Kibbee digitally penetrated both Melissa and Heather. Jennifer reported similar abuse when she was awakened by Kibbee's touching her. She also reported Kibbee's digitally penetrating her and attempting to penetrate her with his penis. All of the victims knew Kibbee. He was living with Melissa's aunt at the time of the assault on Melissa. Heather was friends with the daughters of the woman with whom Kibbee was living. And Jennifer was the daughter of that woman.

We determine that there were sufficient similarities between Kibbee's prior acts and the charged acts. Kelsey was a visitor in Kibbee's house who fell asleep on the couch. She was awakened to find Kibbee sitting next to her and her pants and underwear around her ankles. Kibbee touched her vaginal area and digitally penetrated her. She knew Kibbee prior to the incident.

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[63] *Id.*

[64] *Id.* at 964-65, 524 N.W.2d at 773.

[65] *Id.* at 965, 524 N.W.2d at 773, quoting *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993).

Another factor which we must take into consideration is the closeness in time of the prior acts to the charged acts. The Iowa acts took place between 1983 and 1995, and the assault against Kelsey took place in 2009.

This court has previously considered the question whether prior acts were too remote in time to be admitted into evidence, although the analysis was conducted pursuant to § 27-404(2). We find that it applies to our analysis under § 27-414.

[20] In *State v. Yager*,[66] the defendant argued that evidence of sexual contacts which occurred from 11 to 20 years prior to trial was too remote to be relevant. After stating that the evidence was relevant to prove motive, intent, and absence of mistake, we stated that the admissibility of evidence concerning other conduct must be determined upon the facts of each case. "[N]o exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote."[67]

> "[R]emoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Rule 404(2) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible."[68]

[21] We concluded that the prior acts were actually committed between 6 and 9 years earlier and were properly admitted into evidence. The question whether evidence of other conduct "is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence."[69]

Evidence of sexual contacts which began 27 years before the incident on which the charges were based was found

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[66] *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

[67] *Id.* at 485, 461 N.W.2d at 744.

[68] *Id.* at 486, 461 N.W.2d at 745, quoting *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989).

[69] *Id.* at 486, 461 N.W.2d at 745.

admissible in *State v. Stephens*.[70] The defendant was charged with sexually assaulting his infant granddaughter, and at trial, his 32-year-old stepdaughter testified that the defendant had sexual contact with her repeatedly over a substantial period of time, starting when she was a child between the ages of 4 and 5. The defendant argued that the contacts were temporally too remote and untrustworthy to have been admitted.

The court noted that the admission of all evidence is subject to the overriding protection of § 27-403, which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[71] We stated: "The high degree of similarity between the prior acts when his stepdaughter was between 4 and 5 years old and the circumstances surrounding the charged offense here counterbalances the remoteness of the events, leaving us with a solidly positive probative value."[72]

In a case in which the prior act occurred 10 years earlier, this court stated:

> [N]o exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. The question of remoteness in time is largely in the sound discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.[73]

Section 27-414 requires the trial court to apply a balancing under § 27-403, and provides that the evidence shall be admitted unless the risk of prejudice substantially outweighs the probative value of the evidence. In this case, the trial court found that there was a high probability that the offenses in Iowa

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[70] *State v. Stephens, supra* note 61.

[71] *Id.*

[72] *Id.* at 558, 466 N.W.2d at 787.

[73] *State v. Kern*, 224 Neb. 177, 185-86, 397 N.W.2d 23, 29 (1986).

occurred and that while they were somewhat remote in time, there was a high degree of similarity to the acts with which Kibbee was charged. The court declined to admit evidence of two other incidents. It conducted a balancing under § 27-403 and determined that the incidents were highly probative, even though there was a significant time lapse between the occurrence of some of the acts and the current crime. The court stated, "The number of victims and assaults on the victims follow serially beginning in approximately 1983, with some gaps, until the present assault. This fact is also probative." The court concluded that the prior sexual assaults could be admitted to show motive, opportunity, preparation, or plan under § 27-404(2) and that the admission of the prior bad acts was not unduly prejudicial to Kibbee.

Each of the Iowa offenses was strikingly similar to the acts charged in the present case. The evidence of the incidents was relevant under the circumstances. The probative value of the evidence of the prior bad acts outweighed any prejudicial effect.

In addition, the trial court gave the jury a limiting instruction concerning the testimony of the victims of the prior acts in Iowa. The instruction stated:

> The testimony of Heather . . . , Melissa . . . , and Jennifer . . . relates to [Kibbee's] commission of other instances of sexual assault or child molestation.
>
> In a criminal case in which [Kibbee] is accused of an offense of sexual assault, evidence of [Kibbee's] commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant including the similarities of the other offenses for the purpose of determining the credibility of [Kelsey] or for the purpose of showing [Kibbee's] motive, opportunity, plan or preparation as it relates to the sexual assault charge. However, evidence of a prior offense on its own is not sufficient to prove [Kibbee] guilty of the crime charged. Bear in mind as you consider this evidence, at all times the State has the burden of proving that [Kibbee] committed each of the elements of the offense charged. I remind you that [Kibbee]

> is not on trial for any act, conduct or offense not charged in the Information.

The trial court's instruction clearly directed the jury as to the limited use of the evidence.[74] The trial court did not err in admitting the evidence of prior acts.

KIBBEE'S JUDICIAL ADMISSIONS

Kibbee next argues that the trial court erred when it refused to receive into evidence his judicial admissions and allowed the evidence of the prior bad acts.

Kibbee cites *Old Chief v. United States*[75] for support. In that case, the defendant, who was charged with assault with a dangerous weapon and use of a firearm in a crime of violence, offered to stipulate that he was a convicted felon, rather than allowing the State to enter into evidence the full record of his previous conviction. The Court held that a trial court abused its discretion in refusing to allow the defendant to concede the fact of a prior conviction and instead admitting the full record of a prior judgment. The Court stated that the name or nature of the prior offense raised the risk of a tainted verdict when the purpose of the evidence was solely to prove the element of the prior conviction.[76] The Court stated:

> [T]he accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of

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[74] *State v. Carter, supra* note 62.

[75] *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

[76] *Id.*

> narrative evidence, an assurance that the missing link is really there is never more than second best.[77]

The Nebraska Court of Appeals has held that "[t]he 'forced acceptance' of a stipulation of convicted felon status is a narrow exception to the general rule that the State is allowed to choose how it proves the elements of the charges it has lodged against the defendant."[78]

Kibbee's case differs from *Old Chief*, in which the defendant sought to stipulate to the fact that he was a convicted felon. Kibbee's judicial admissions did not admit to any element of first degree sexual assault. He admitted only to sexual contact without the victim's consent and without serious personal injury, which is an element of third degree sexual assault.[79] The State had the burden to prove beyond a reasonable doubt all elements of first degree sexual assault. It was entitled to use the evidence of the prior bad acts from Iowa, which we have found to be admissible under §§ 27-403 and 27-414. The evidence in *Old Chief* concerned only the status of the defendant, not an element of the crime. We find no error in the trial court's refusal to allow Kibbee's judicial admissions as a substitute for the §§ 27-403 and 27-414 evidence.

[22-25] We also note that Kibbee argues that his right to a fair trial under the Due Process Clause was denied by seemingly contradictory positions taken by the State. Prior to trial, the State had objected to Kibbee's judicial admissions. However, at the end of its case in chief, the State read the judicial admissions into evidence. We find no error, because Kibbee did not object when the State offered the admissions into evidence. Nor did he object when the State asked to read the admissions to the jury. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[80] When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in

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[77] *Id.*, 519 U.S. at 189.

[78] *State v. McDaniel*, 17 Neb. App. 725, 732, 771 N.W.2d 173, 180 (2009).

[79] See Neb. Rev. Stat. § 28-320 (Reissue 2008).

[80] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

resolving an issue never presented and submitted to it for disposition.[81] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[82] An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[83] The trial court did not err in allowing the State to read the judicial admissions to the jury.

[26] Kibbee also claims that the court erred in overruling his motion for mistrial after the State read the judicial admissions into evidence. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[84] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[85] We find no abuse of discretion in the trial court's denial of Kibbee's motion for a mistrial.

Lesser-Included Offense

Finally, Kibbee argues that the trial court erred in refusing to instruct the jury on third degree sexual assault as a lesser-included offense of first degree sexual assault.

[27] The Nebraska Court of Appeals has held, in *State v. Schmidt*,[86] that under the strict statutory elements approach, sexual assault in the third degree is not a lesser-included offense of sexual assault in the first degree. For an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense.[87]

> In examining the elements of each crime, it is possible to have sexual penetration as defined without having

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[81] *Id*.

[82] See *id*.

[83] See *id*.

[84] *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[85] *State v. Huff, supra* note 3.

[86] *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

[87] See *id*.

> sexual contact as defined. Whereas the latter requires that the sexual contact be "for the purpose of sexual arousal or gratification," the former does not require the same. Because the crime of first degree sexual assault can be committed without at the same time committing third degree sexual assault, the latter is not a lesser-included offense.[88]

[28,29] This court denied further review of the *Schmidt* decision. And we have not changed our approach to determining whether an offense is a lesser-included one: Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.[89] We therefore adopt the reasoning of the Court of Appeals in *Schmidt* and hold that under the strict statutory elements approach, third degree sexual assault is not a lesser-included crime of first degree sexual assault.

[30-32] Whether jury instructions given by a trial court are correct is a question of law.[90] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[91] The trial court did not err in overruling Kibbee's objection to the jury instruction stating that third degree assault is not a lesser-included offense of first degree sexual assault. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[92]

CONCLUSION

There is no merit to any of Kibbee's assigned errors, and the convictions and sentences are affirmed.

AFFIRMED.

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[88] *Id.* at 675-76, 562 N.W.2d at 875-76.

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

[90] *Id.*

[91] *Id.*

[92] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).