IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. NADEEM

STATE OF NEBRASKA, APPELLEE,
V.
MOHAMMED NADEEM, APPELLANT.

Filed February 26, 2013. No. A-10-981.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth D. Elliott for appellant.

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

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

SIEVERS, Judge.

INTRODUCTION

Mohammed Nadeem appealed from a judgment and sentence rendered following a guilty verdict convicting him of the felony offenses of attempted first degree sexual assault and attempted third degree sexual assault of a child. In *State v. Nadeem*, 19 Neb. App. 565, 809 N.W.2d 825 (2012) (*Nadeem I*), we reversed the convictions, finding that it was plain error for the trial court to have used a procedure by which the identities of the jurors were largely hidden by assigning them numbers. *Nadeem I* was issued after we vacated our first opinion in this case on Nadeem's motion for rehearing. Our decision in *Nadeem I* was reversed by the Nebraska Supreme Court in *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012) (*Nadeem II*), which found that Nadeem, who was represented by counsel, waived any objection to the use of a numbers jury and that we erred in applying a plain error analysis with respect to the use of such a jury. The Supreme Court remanded the cause to us for consideration of the assigned errors which we did not address because of the outcome we reached in *Nadeem I*. We now address the other

assigned errors pursuant to the Supreme Court's remand. We reverse the convictions again based on ineffective assistance of trial counsel.

FACTUAL BACKGROUND

On August 6, 2009, H.K. was with a friend at a Lincoln public library. H.K. was 14 years old at the time. While H.K. was sitting at a table in a reading room of the library using her laptop computer, she noticed Nadeem, whom she did not know, standing within a couple feet of her looking at a newspaper and glancing over at her. Shortly thereafter, Nadeem began talking to H.K. and asked several questions, including how old she was, to which she replied 15. Nadeem asked H.K. for her telephone number. When she said it was her mother's number that she could not give him, he asked if he could give her his number, and she testified that she said, "I guess." Nadeem then left the area, and shortly thereafter, he returned and gave H.K. a piece of paper with a name, "John Nadeem," and a telephone number; asked her to call him; and told her he hoped to hear from her and to have a nice day. When H.K.'s mother later picked up H.K. and her friend from the library, H.K. told her mother about her encounter with Nadeem. H.K. and her mother reported the incident to the library and then called the police. The next day, the police asked H.K. to make a controlled call to Nadeem from the police station, which she agreed to do.

H.K. spoke with Nadeem and asked him why he wanted her to call. Nadeem indicated that he wanted to talk to her more and to see her. The conversation continued, and they began discussing what they would do together, which led to Nadeem's indicating that he wanted to touch H.K. When asked how, Nadeem said that he had a "grand collection of ideas" in regard to what type of touching. H.K. then volunteered to Nadeem that she was a virgin, and at that point, Nadeem asked H.K. if she wanted to lose her virginity and when she wanted to lose it. H.K. told him that she did not know how to do that, and he told her it could be done by "sexual stimulation" such as "licking," "kissing," and "fingering." When H.K. stated that she did not know what "fingering" meant, Nadeem said he could not explain it but he could show her. H.K asked Nadeem three times if they were going to have "sexual intercourse," but he appeared not to understand that term. When H.K. asked him if he was going to "put his penis in her vagina," he said he could. At H.K.'s suggestion, Nadeem and H.K. agreed to meet at the library about 30 minutes later, and H.K. told him to bring a condom and a can of a particular soda pop. Nadeem was arrested when he arrived at the library, shortly after the call, although he had neither of the requested items. At that time, Nadeem was 22 years old and H.K. was 14 years old, although she told Nadeem again during the telephone call that she was 15. We will set forth additional facts as needed for the analysis of the remaining assignments of error.

ASSIGNMENTS OF ERROR

Nadeem's remaining assigned errors for us on this remand are that (1) the evidence was insufficient to support the verdict of guilty of attempted first degree sexual assault and attempted third degree sexual assault of a child, (2) the district court erred by admitting testimony of prior "unusual behavior" exhibited by Nadeem in the library in the months leading up to this incident, (3) the district court erred by failing to give Nadeem's proposed jury instruction No. 2, (4) the district court abused its discretion by imposing excessive sentences, and (5) Nadeem received ineffective assistance of counsel.

STANDARD OF REVIEW

The scope of review in a criminal appeal is limited to the errors assigned and discussed in the appellant's brief and the appellate court's right to note plain error appearing on the record. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

An appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence. Such matters are for the finder of fact. *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id.*

Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of that discretion. *Id.*

ANALYSIS

Sufficiency of Evidence.

When an appellant claims that there was insufficient evidence to support a verdict of guilty, the appellate court will sustain the conviction if, "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." *State v. Leonor*, 263 Neb. 86, 93, 638 N.W.2d 798, 805 (2002). 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. *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

Nadeem argues that the evidence failed to prove that he had the intent to commit the crimes charged. Under Neb. Rev. Stat. § 28-201(2) (Reissue 2008), it is necessary that

> [w]hen causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

In short, Nadeem had to have the intent to do the acts which he was charged with attempting and had to take a substantial step toward the acts. For the conduct to be considered a substantial step necessary for a conviction of an attempt crime, it must be "strongly corroborative of the defendant's criminal intent." § 28-201(3). Nadeem argues that the only evidence presented of a "substantial step" was that Nadeem showed up at the library at the right time, but that H.K. had specifically requested he bring a condom and a particular brand of soda pop and he brought neither item with him. Nadeem points out that an officer testified that it was important that

Nadeem bring these items because it would show his intent to follow through on the sexual acts discussed in the telephone call. Therefore, Nadeem argues that the jury lacked sufficient evidence to find him guilty beyond a reasonable doubt because his actions did not strongly corroborate an intent to sexually penetrate H.K. or to have other sexual contact with H.K.

The State responds that Nadeem is attempting to change the standard of review. The State points out that the jury was instructed that "conduct shall not be considered a substantial step unless it is strongly corroborative of . . . Nadeem's criminal intent" pursuant to § 28-201. The jury was correctly instructed on what constitutes a substantial step in the context of an attempt charge. The State argues that the controlled call which involved discussion of both sexual contact and penetration, taken together with Nadeem's hurried arrival to the library at approximately the same time as he agreed to meet with H.K., evidenced his intent to perform both sexual contact and sexual penetration upon H.K. The jury clearly accepted that argument, and as stated in the "Standard of Review" section of this opinion, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. This is what Nadeem's argument asks us to do. Under our standard of review, we cannot say that the jury's decision in this regard was clearly erroneous when we view the evidence most favorably to the State. This assignment of error is without merit.

Ineffective Assistance of Counsel.

Nadeem argues the following acts or omissions by trial counsel demonstrate that he did not receive effective assistance of counsel: (1) failure to preserve the record and object to the anonymous jury; (2) failure to preserve the record during voir dire and "to raise a *Batson* challenge" when the State struck prospective juror No. 16, the only African-American male on the panel, brief for appellant at 39; (3) failure to object or renew the objection to evidence concerning prior bad acts under rule 404(2); and (4) failure to object to and request a motion in limine regarding the State's eliciting information about H.K.'s religion and to prohibit H.K. from referring to Nadeem as of "'Muslim de[s]cent' or 'Eastern race,'" brief for appellant at 39. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2051, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). In order to show prejudice as an element of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*.

A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal; rather, the determining factor is whether the record is sufficient to adequately review the questions. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009). The law is that trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). As such, when reviewing an ineffective assistance of

counsel claim, we will not second-guess reasonable strategic decisions made by counsel. *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

After our review of the record, we find that the record before us is inadequate to review two of the claims of ineffective assistance of counsel. With respect to the claim that counsel failed "to raise a *Batson* challenge" to juror No. 16, the sole African-American on the panel that the State struck, brief for appellant at 39, there could be any number of plausible tactical reasons not contained in our record for not making such a challenge. With reference to the claim that trial counsel did not object or otherwise challenge testimony about Nadeem's being of "'Muslim de[s]cent'" or "'Eastern race,'" brief for appellant at 39, we note that this was volunteered testimony, and counsel could have strategically concluded that such was obvious, and thus harmless, or that making an objection would only unduly emphasize the issue. Thus, we do not decide these two claims of ineffectiveness as such cannot be decided on the record that we have before us.

Failure to Object to Use of Numbers Jury.

While the assigned error claims an anonymous jury was used, and we said in *Nadeem I* that it was plain error to use an anonymous jury, the Nebraska Supreme Court found in *Nadeem II* that this jury instead was a numbers jury, a finding we are bound to follow here. The difference between these two types of juries was explained in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), although we note that *Sandoval* was decided shortly after Nadeem's trial. An anonymous jury is one in which a broad spectrum of information about jurors is withheld, and thus identifying information is withheld from the public and the parties. *Id.* A numbers jury is a situation where jurors are assigned numbers and are referred to as such during the trial. *Id.* The court's opinion in *Sandoval* explains that because of the high potential for prejudice to the defendant and its adverse impact on the presumption of innocence, an anonymous jury should only be used where the trial court makes findings that the jury needs the protection of anonymity and takes steps to protect the defendant from prejudice from the use of such a jury. The *Sandoval* court said of jury anonymity:

> Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence. . . . During jury selection, a lack of information could prevent the defense from making intelligent decisions regarding peremptory strikes. . . . Additionally, there is a risk that potential jurors will interpret the anonymity as an indication that the court believes the defendant is dangerous.

280 Neb. at 327, 788 N.W.2d at 195 (citations omitted).

Nadeem's jury was deemed by the Supreme Court in *Nadeem II* to be a less severe or less restrictive numbers jury rather than an anonymous jury, and that finding impacts our analysis of the ineffectiveness claim for trial counsel's failure to object to the use of such a jury. As a

general proposition, we would readily find on direct appeal that trial counsel was ineffective for failing to make an objection on the record to an anonymous jury because of the high danger of prejudice to the defendant from the use of such a jury, as was fully articulated in *Sandoval*. However, with respect to a numbers jury, as was used here, we cannot conjure up a plausible tactical reason not to register an objection out of the hearing of the potential jurors, given our view that a numbers jury also carries the potential of the same adverse consequences to the defendant as an anonymous jury, but perhaps only to a lesser degree. Therefore, in the end, on the record before us, we find that trial counsel performed deficiently by failing to object to, and thereby preserve for appellate review, the use of a numbers jury and that such failure was prejudicial to Nadeem. We noted in *Nadeem I* that the record contained nothing to enlighten us about how and why this type of jury was used, which serves to highlight trial counsel's duty to make a record for appellate review.

Rule 404 Prior Acts Evidence and
Failure to Object at Trial.

Prior to trial, a rule 404 motion hearing was held concerning observations of Nadeem's prior behavior by the library personnel and their characterization thereof. The district court entered an order overruling Nadeem's objection and allowing evidence regarding Nadeem's "unusual behavior" at the library in the months leading up to the incident as testified to by library personnel. Summarized, the behavior recounted by these witnesses was that Nadeem was following teenage and preteen girls in the library and looking at them, while in the librarians' minds he was only pretending to read a book, magazine, or newspaper. At trial, counsel for Nadeem did not make any objection to this evidence or renew his objection to the rule 404(2) evidence from the library personnel that was the basis for the pretrial 404 hearing. The law is that such an objection must be renewed at trial when the evidence involved in the rule 404(2) hearing is actually offered. This must be done in order for the issue to be preserved for appellate review because the rule 404(2) hearing by itself is insufficient. See *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009). Therefore, our analysis of the admission of this evidence is in the context of the claim of ineffective assistance of counsel which Nadeem asserts in his brief.

Rule 404(2) 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.

The admissibility of other crimes evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Before the prosecution may offer other crimes evidence pursuant to rule 404(2) in a criminal case, it must first prove to the trial court, out of the presence of the jury, "by clear and convincing evidence that the accused committed the crime, wrong, or act." *Sanchez, supra*. It is axiomatic that only relevant evidence is admissible. *Id.* Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. See *Sanchez, supra*. However, rule 404(2) prohibits the admissibility of

relevant evidence for the purpose of proving "the character of a person in order to show that he or she acted in conformity therewith." *Sanchez, supra*. Stated another way, rule 404(2) "'prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.'" *Sanchez*, 257 Neb. at 305, 597 N.W.2d at 372. The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis. *Id*. The exclusion of other crimes or acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence. *Id*. However, evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *Sanchez, supra*. "'Evidence that is offered for a proper purpose is often referred to as having "special" or "independent relevance," which means its relevance does not depend on its tendency to show propensity.'" *Sanchez*, 257 Neb. at 305, 597 N.W.2d at 373.

A rule 404(2) analysis considers whether (1) the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *Sanchez, supra*.

The *Sanchez* court cites to *U.S. v. Murray*, 103 F.3d 310 (3d Cir. 1997), in which a similar ambiguity of purpose was addressed by the court when other crimes evidence was offered and received pursuant to Fed. R. Evid. 404(b), which is substantially similar to Nebraska's rule 404(2), without a clear statement of its purpose. The U.S. Court of Appeals found that trial judges should "exercise particular care" in admitting other crimes evidence for two reasons:

> First, the line between what is permitted and what is prohibited under Rule 404(b) is sometimes quite subtle. Second, Rule 404(b) evidence sometimes carries a substantial danger of unfair prejudice and thus raises serious questions under Fed.R.Evid. 403. Therefore, it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact "that is of consequence to the determination of the action." . . . And it is likewise advisable for the trial court to place on the record a clear explanation of the basis for its ruling on the admission of the evidence. Not only do these procedures help to ensure that sensitive Rule 404(b) rulings are made with care (and thus to diminish the likelihood that these rulings will result in reversals), but these procedures greatly assist the process of appellate review.

U.S. v. Murray, 103 F.3d at 316. After citing Sixth Circuit authority which requires that the specific purpose of other crimes evidence be stated by its proponent so that the trial court can make a determination of its materiality, the Nebraska Supreme Court held:

> We agree with these authorities and therefore hold that henceforth, the proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court shall similarly state the purpose or purposes for which such evidence is received. . . . Any limiting instruction given upon receipt of such

> evidence should likewise identify only those specific purposes for which the evidence was received.

State v. Sanchez, 257 Neb. 291, 308, 597 N.W.2d 361, 374 (1999).

In this case, the State's notice of intent to offer evidence of other crimes, wrongs, or acts under rule 404 asserted that acts of Nadeem "watching, following, and/or conversing in a sexual manner with teenage and/or college-aged females at the . . . library in 2008 and 2009 show proof of intent, attraction, sexual arousal, sexual gratification, motive, opportunity, preparation, plan, knowledge, identity, and/or absence of mistake or accident with respect to the charged offenses." In the trial court's "Order Re: 404 Evidence," the court noted that the evidence the State wished to offer under rule 404 consists essentially of two types: "First, there was an incident which occurred in the fall of 2008 involving [J.D.]" We note that J.D. was not a minor at the time, that J.D. was the only female library patron with whom Nadeem actually conversed, and that it was only to J.D. that Nadeem made comments of a sexual nature. The trial court then continued: "The second is a series of observations by library staff of [Nadeem's] conduct at the library leading up to the event with H.K." The court found that the 2008 evidence concerning J.D. was not relevant evidence and thus inadmissible. Regarding the 2009 observations of the library staff, the court found that the evidence was that from February or March 2009 until the incident with H.K., several library staff members testified that they observed Nadeem at the library in the youth area pretending to read a book or periodical, but in reality, he was watching a young girl in the 12- to 15-year-old age range. The State wanted to offer this evidence to establish identity, intent, motive, plan, absence of mistake, and method of operation in the H.K. incident. The court found the evidence was relevant to prove identity, intent, plan, and method of operation in the H.K. incident, specifically because the method of contact of H.K. by Nadeem was similar to his pattern of behavior observed by the library staff. The district court noted that under rule 404, it is not necessary that the evidence sought to be adduced is a crime. Rather, it is only necessary that it is relevant for a permitted purpose. The court found the proposed evidence of library staff observations of Nadeem during 2009 was relevant for the permitted purposes of proving identity, intent, plan, and method of operation.

The State now argues in its brief that the evidence was admissible for the purposes of *plan and method of operation*, apparently abandoning any claim that the evidence was relevant to prove identity or intent. Even if the State had not abandoned any claim that the evidence in question tended to prove identity or intent, we would conclude that the evidence was not proper for such purposes. First, Nadeem's identity was never an issue. Second, Nadeem's interaction with H.K. at the library as recounted earlier had absolutely no sexual component, unless such is conjured up by mind reading or pure speculation. Thus, we confine our analysis to the two purposes that the State now argues: that the offered evidence is relevant to prove plan or method of operation.

In evaluating other crimes evidence, the Supreme Court has stated that it must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Where there are an overwhelming number of significant similarities, evidence of prior acts may be admitted. *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).

Nadeem argues that the prior acts were not similar enough to the contact with H.K. to have any probative value. As Nadeem correctly points out, the prior "bad acts" consist, at most, of him watching girls in the library. He did not talk to them or have any contact with them. There is no evidence whether the girls were similar to H.K. in age or appearance. The librarians could not give specific details about any of the prior incidents, such as dates, the names of the girls, or what exactly Nadeem was doing in each situation. Unlike those prior acts, in the situation with H.K., Nadeem did not follow H.K. around the library watching her, but actually approached her at her table, while standing a few feet away, and attempted to initiate a conversation. He then left a piece of paper with his telephone number and the name "John Nadeem" written on it. Clearly, the prior acts of merely looking at young girls were very different than his actual contact with H.K. Thus, the prior acts were not related in time and circumstance to the offenses charged so as to have probative value.

Moreover, even if it could be said that the prior acts had some probative value, they do not meet the now argued specified purposes of showing plan or method of operation, i.e., modus operandi. Modus operandi is a characteristic method employed by a defendant in the performance of repeated criminal acts. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). "'*Modus operandi* means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.'" *Id*. at 77, 361 N.W.2d at 213. Although modus operandi is often useful in showing that an accused is the perpetrator of a particular crime, the evidentiary function of modus operandi is not restricted to establishing identity. *Craig, supra*. Here, identity was never at issue. One of the permissible purposes of other acts is to prove that other crimes or acts by the accused are so nearly identical in method as to earmark them as the handiwork of the accused. *Id*. The pattern and characteristics of the crimes or acts at issue must be so unusual and distinctive as to be like a signature. *Id*. Consequently, if there is a distinctive pattern or procedure utilized in separate crimes or acts, the separate act or acts may have probative value in determining the guilt of the defendant. *Id*.

In *Craig*, the defendant, Calvin L. Craig, admitted there were at least 15 separate occasions on which he removed the victim's panties. Each of these occasions commenced with a "'wrestling match' in the family residence in the presence of the victim's mother, during which the victim's jeans or nighty and panties were removed and the victim's genitalia fondled." *Craig*, 219 Neb. at 78, 361 N.W.2d at 213. The court found that these various "'wrestling matches'" demonstrated a definite pattern utilized by Craig to disrobe his victim and gain access to her genitalia. *Id*. Each such event was a link in a specific chain, not isolated occurrences but a history of unusual and distinctive misconduct tending to prove Craig's guilt of the offense charged. The *Craig* court reasoned:

> Craig claims that his disrobing of the victim on Christmas resulted when the victim attempted to extricate herself from Craig's playful, well-intentioned grasp. Thus, while admitting that he accidentally or unintentionally disrobed the victim on the date of the alleged offense, Craig simultaneously denies the elements of criminal intent and sexual penetration. The antecedent incidents of disrobing the victim tend to negate any

> plausible theory of statistical probability that Craig's disrobing the victim on Christmas was an accident. Moreover, the several occasions involving Craig's digital penetration of the victim have probative value that such intrusion likewise occurred as a part of Craig's Christmas contact with the victim. . . . The evidence of other acts was relevant in prosecuting Craig, because those incidents showed a pattern of deliberate acts, sexually motivated or intended and culminating in digital penetration of the victim. Consequently, such other acts were not offered to show any propensity or disposition on Craig's part to commit the crime charged.

219 Neb. at 78-79, 361 N.W.2d at 213-14.

The State claims that Nadeem's prior acts in the library of watching young girls has probative value in demonstrating his modus operandi, or method of working, making it more likely that he attempted to sexually assault H.K. This is a specious argument, given that in none of the prior incidents testified to by library personnel did Nadeem make contact with the females he looked at, let alone say anything to any of them that was sexual in nature. We note that even his approach to H.K. at the library did not have an overtly sexual component. Unlike in *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985), there was no distinctive pattern in the prior acts that involved actually contacting the females he was observing, whereas he actually approached and spoke to H.K. and identified himself by his actual surname and telephone number, which is very different behavior than the prior behavior. As Nadeem points out, the "similarity of the offered bad acts is tenuous at best," as the only commonality is the location and the fact that Nadeem was looking at the girls, and of course, he also looked at H.K. Brief for appellant at 24. Moreover, as Nadeem points out, unlike *Craig*, he was not arguing that his conduct with H.K. was an accident or mistake, and thus there is no need to rebut such defense as there was in *Craig*.

The State claims that the only difference in method between the prior bad acts and the situation with H.K. is that this time, Nadeem had the courage to approach and contact H.K. But, that difference is not easily dismissed as insignificant. The State cites to *State v. Phelps*, 241 Neb. 707, 722, 490 N.W.2d 676, 688 (1992), for the proposition that

> the prior acts need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value.

In *Phelps*, the court identified "[t]he thread which ties the prior acts to the crime in question" as the defendant's prior "use of young girls to achieve sexual gratification." *Id.* However, as explained above, there simply is no common thread tying the prior acts to the charged crimes in this case. Further, it goes without saying that "looking at girls" (without something more) is undoubtedly common and normal behavior for a young man 22 years of age.

Therefore, we conclude that the trial court should not have admitted the prior acts evidence for the purpose of showing plan or method of operation because Nadeem's prior behavior was not so unique, unusual, or distinctive so as to constitute an earmark that would be probative of the fact that he had a plan or method of operation to engage in sexual conduct with underage girls.

Furthermore, it is important to recall that rule 404(2) evidence is subject to the overriding protection of rule 403. *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006). As such, even if the rule 404(2) evidence in this case could be said to be probative, such evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403. See *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). Here, the probative value of Nadeem's prior behavior of simply looking at girls in the library of varying ages, without more, is outweighed by the danger of unfair prejudice, for all of the reasons recited above in *Yager, supra.* At the core of our conclusion is the simple fact that if the crimes of which Nadeem was convicted are proved, they are proved solely by the combination of (1) the telephone conversation and (2) his "timely" arrival at the library. Merely looking at girls in a public place is not a crime, and it is not unusual behavior for a young man of Nadeem's age. Nor is looking at girls in a public place the same as, or even similar to, Nadeem's acts of approaching and speaking with H.K., giving her his name and telephone number, and asking her to call him. This prior acts evidence invites the jury to see Nadeem as evil--as a stalker or a predator. If the prior acts evidence proves anything, it is simply that Nadeem had an interest in girls, which is quite natural for a 22-year-old male. Yet, the telephone conversation itself with H.K. proves that he had such an interest, and thus, to that extent, the evidence suffers from the flaw of also being cumulative. In summary, the rule 404(2) evidence was redundant, a waste of time, probative of nothing, tending to prove the commission of the charged crimes, and smacks of propensity evidence, and its extremely tenuous probative value, if any, is outweighed by its likelihood of prejudice to Nadeem. However, defense counsel did not object to the evidence at trial, meaning that our analysis of this evidentiary issue now shifts to whether such failure was ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2051, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). We cannot think of a strategic reason not to object to evidence that is really nothing but propensity evidence and which tends to paint the client in a negative light. Thus, we find counsel's performance in this regard was deficient. Therefore, the question remains as to whether this failure to object at trial prejudiced Nadeem's defense.

At oral argument in this case, the State argued that while letting in the rule 404 evidence may have been in error, it was harmless because Nadeem's convictions were based upon the controlled call rather than on the prior bad acts. While this seems like a tacit admission that the evidence was unnecessary and cumulative, as we found above, we think the argument might have some validity if there was overwhelming evidence of guilt, but that is hardly true of the State's case against Nadeem. The prior acts evidence was unnecessary, and its minimal, if any, probative value was outweighed by its clearly prejudicial effect. Unfair prejudice means a tendency to suggest a decision on an improper basis. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). Nadeem's appellate counsel argues that the rule 404(2) evidence served only to paint Nadeem as a "pervert" or "creep." Thus, Nadeem argues that the evidence was extremely prejudicial to him and suggested that the jury should return a verdict because, when coupled with

his interaction with H.K. shown via the telephone call, the prior acts evidence shows that he is a dangerous stalker of young girls. We agree and conclude that not only was counsel deficient in failing to object to inadmissible evidence, but that such failure was prejudicial to Nadeem.

Should Entrapment Instruction Have
Been Given on Both Counts?

Trial counsel for Nadeem submitted proposed jury instruction No. 2, which would have submitted the defense of entrapment to the jury on both counts. The starting point for analysis of a claim of entrapment is comprehensively set forth in *State v. Pischel*, 277 Neb. 412, 424, 762 N.W.2d 595, 605 (2009):

> In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). The burden of going forward with evidence of government inducement is on the defendant. *Id*. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *Id*. This determination is made as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden. *Id*. A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.

"When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact. . . . The burden is then on the State to prove beyond a reasonable doubt that the defendant was not entrapped." *State v. Canaday*, 263 Neb. 566, 582, 641 N.W.2d 13, 26 (2002). Thus, *Pischel* and *Canaday* provide our basic analytical framework for this assignment of error. In Nadeem's trial, the instruction conference was on the record. It appears that the trial court originally was going to submit the defense on both counts in its instruction No. 6 as Nadeem's counsel had suggested, but the State objected. After a very lengthy discussion between the trial court judge and counsel, which we will not try to summarize, the trial judge said that he was "more concerned with regard to Count II than with regard to Count I" due to the age restrictions under the statute for each count. The judge said:

> I don't think it [the entrapment instruction] applies to Count I [attempted first degree sexual assault], but it does -- it simply does -- I think a jury -- a reasonable jury could conclude by doing that [telling H.K. to say she was 15 years old during the controlled call], that was persuasive with regard to Count II. So that's my -- And I think what I'm going to do with Instruction No. 6 is, I'm going to strike from it the attempted first-degree sexual assault but give it with respect to the attempted third-degree sexual assault of a child [which became instruction No. 5].

In response to Nadeem's claim that entrapment should have been given on both counts, the State asserts that Nadeem has not shown "why the jury would have found that he was entrapped as to the offense of attempted first degree sexual assault" when the jury found that he was not entrapped as to attempted third degree assault. Brief for appellee at 29. This response

ignores which party has varying aspects of the burden of proof with respect to entrapment as set forth in *Pischel, supra*, and *Canaday, supra*. That said, we believe that the proper focus is on whether the jury was correctly instructed. To establish reversible error from a court's refusal to give a requested instruction, a defendant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the defendant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

The State argues generally that it was proper not to give the instruction on both counts because there was no evidence of inducement so as to warrant the instruction. The instruction at issue, Nadeem's requested instruction No. 2, which became instruction No. 6 (applicable to both counts) but then instruction No. 5 (applicable only to count II, attempted third degree sexual assault), was a fundamentally correct statement of the defense which imposed the burden on the State to show that Nadeem was not entrapped.

Clearly, if the jury did not need to be instructed on entrapment with respect to the charge of first degree sexual assault, then no prejudice could result from trial counsel's failure to object. Thus, we turn to whether the evidence warranted the instruction. The predicate question is whether Nadeem produced more than a scintilla of evidence of inducement. To be more than a scintilla, evidence cannot be vague, conjectural, or mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction that there was inducement. *State v. Murphy*, 14 Neb. App. 804, 716 N.W.2d 453 (2006). It is important to note that H.K becomes, in effect, "the police" when she placed the recorded call to Nadeem. After reviewing the transcript of that call, as well as the actual recording, we find that there is more than a scintilla of evidence of inducement to commit the crime of attempted first degree sexual assault.

Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). Inducement requires something more than a government agent or informant suggesting the crime and providing the occasion for it. *Id.* For example, it has been held that a government agent's simple offer to purchase a controlled substance or inquiry about its availability for sale does not constitute an inducement of the person to whom the offer or inquiry was made. *Id.* Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive. *Id.*

In *Heitman, supra*, the court found that the State went beyond simply providing Gary E. Heitman with the opportunity to commit the crime. In *Heitman*, an officer, posing as underage girl nicknamed "Rodeo Queen," sent Heitman numerous e-mail messages aimed at affecting his emotions and desires. The officer indicated to Heitman that Heitman was one of the few people who seemed to understand Rodeo Queen and indicated that Rodeo Queen wanted Heitman to be her sexual teacher. The officer then mirrored Heitman's expressions of love for her by signing some of Rodeo Queen's letters with the word "love." Rodeo Queen specifically requested that Heitman provide a description of how he would engage in sexual activity with her and encouraged him to continue writing such descriptions. The court noted that it was Rodeo Queen,

not Heitman, who first suggested meeting at the motel. Further, the court emphasized that it was Rodeo Queen who created a sense of urgency for the meeting to occur through letters from Rodeo Queen to Heitman in which she stated that she was going out of town for a period of time. During the second telephone call with Rodeo Queen, when Heitman suggested they meet some place more innocent than a motel, Rodeo Queen reminded him that there was not much time. Thus, the court concluded that the State went beyond merely providing an opportunity to commit the crime, but instead encouraged Heitman to respond to Rodeo Queen's e-mail messages in a sexual manner and urged him to continue to think of her sexually. *Id.*

The similarities in the present case to *Heitman, supra,* are striking and constitute sufficient evidence of inducement to require an entrapment instruction applicable to the crime of attempted first degree sexual assault. However, the State claims the inducement in this case was drastically different than in *Heitman*, arguing that "the State merely provided Nadeem with an opportunity to explain his intentions toward H.K., albeit sexual in nature or not." Brief for appellee at 31. As evidenced by the entire controlled call, the prompting of Nadeem to discuss matters of a sexual nature clearly originated with the State, by its agent H.K. She was the first one to mention sex, by indicating she was a virgin. The conversation can be described as being quickly directed by H.K. to focus on sex, with H.K. leading Nadeem to "educate" her on various sexual activities and asking him whether he would do those activities with her. H.K.'s questioning of Nadeem about these sexual matters seemed to generate confusion, uncertainty, and hesitancy on Nadeem's part. It was H.K. who first introduced the subject of sexual intercourse into the conversation by directly asking Nadeem not once, but three times, "are we going to have sexual intercourse?" Finally, when it appeared Nadeem might not understand the meaning of intercourse, or his answer of "it depends, it depends on how ready you are" was insufficient, H.K. put the question to him explicitly when she said "are you going to put your penis in my vagina?" When he responded, "yeah, I can stimulate you." H.K. then made the matter urgent by asking if he wanted to meet at the library in "like a half hour" adding that her mother would be home in 3 hours, clearly injecting the sense of urgency into the exchange, as was condemned in *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). The foregoing evidence from the controlled call is more than a scintilla of inducement by the State, through its agent H.K.

Moreover, it is of some import that Nadeem's initial contact with H.K. was objectively innocent and nonsexual, as opposed to what occurred in *Heitman.* In that case, the first contact was when Heitman handed the victim an envelope containing a sexually explicit letter and condoms through the drive-through window where the girl was working. In contrast, here Nadeem merely gave H.K. his telephone number with an "Americanized" name, "John Nadeem," rather than "Mohammed Nadeem," but nonetheless providing his true surname and actual telephone number. Further, when the officers went to the library, hardly a place for sexual activity, Nadeem arrived as requested but did not show up with a condom as H.K. requested. As in *Heitman*, it was the police, via H.K., who suggested three times that they meet at the library on the day of the call. H.K. injected the topic of intercourse as well as a sense of urgency into the conversation.

After our review of the transcript of the conversation, as well as listening to the actual recording thereof, we find that the State went beyond merely providing an opportunity for such

crimes. We observe that in *State v. Connely*, 243 Neb. 319, 332, 499 N.W.2d 65, 74 (1993), when discussing the entrapment defense and the question of the defendant's predisposition to sell illegal steroids, the court described the defendant as "ready and willing" to make the sale. In this case, the recorded conversation is riddled with equivocation and uncertainty on Nadeem's part, and he hardly could be described as "ready and willing" to commit sexual assault. When one listens to the actual conversation, it is H.K. who is clearly the assertive and aggressive participant, who actively prompts Nadeem to talk about sex, to explain sexual matters to her, and then she injects having intercourse that very day into the conversation.

For these reasons, we find that there was more than a scintilla of evidence of inducement and that as a result, the entrapment defense was applicable to both counts. Nadeem was obviously prejudiced because the jury should have viewed the controlled call, the heart of the prosecution's case, through the lens of an entrapment instruction.

CONCLUSION

Nadeem's trial counsel performed deficiently in several respects which resulted in prejudice to Nadeem. The court employed an unusual numbers jury, which permits the inference that Nadeem's prosecution is a special case and that Nadeem was someone that jurors needed to be protected from through the process of identifying them only by number. There is a substantial risk of undermining the presumption of innocence, and this process seems fundamentally at odds with the notion of public trials by one's peers. Trial counsel did not object to or request any sort of instruction which would explain why the trial was being conducted in this manner. Trial counsel also failed to make an objection to the rule 404 prior acts evidence, which he had moved to exclude pretrial. Thus, the error in receiving this evidence, which had little or no probative value but was clearly more prejudicial than probative, was not preserved for our review by an objection at trial. Nadeem was entitled to an instruction on the defense of entrapment on the charge of attempted first degree sexual assault, which instruction Nadeem's trial counsel had asked for via his proposed instruction No. 2.

In summary, at critical points in the trial, counsel failed to act to protect and advocate for Nadeem, to Nadeem's prejudice. Moreover, the court failed to instruct the jury on the defense of entrapment on the charge of attempted first degree sexual assault when it had been requested and Nadeem was entitled to it. Because of the deficient performance of trial counsel, coupled with the failure to properly instruct the jury, neither conviction can stand.

As to whether Nadeem can be retried, the rule is that the Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). We find that the sum of the evidence is sufficient to sustain the convictions when viewed most favorably to the State, and therefore, Nadeem may be retried if the State so elects.

However, Nadeem was sentenced on September 10, 2010, no appeal bond was set, and thus he has been incarcerated since that time while this case has been before this court three times (our first opinion was vacated on his motion for rehearing) and before the Nebraska Supreme Court once. His sentence was 3 to 6 years' incarceration for the attempted first degree sexual assault conviction and to 1 to 1 year's incarceration for the attempted third degree sexual

assault conviction, the sentences to run concurrently, with credit for 162 days served awaiting trial. Thus, with good time, he would have to serve 1½ years, which with credit for his time previously served means a term of incarceration of approximately 1 year and 18 days. Therefore, he is now on the cusp of having served his entire sentence, if he has not already done so.

Therefore, justice demands that he be immediately released from incarceration upon a reasonable bond if he has not already been released when our mandate issues. Finally, the requirement that he register under the Nebraska Sex Offender Registration Act is also reversed because the convictions which form the basis for that requirement are reversed.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.