district court's order in which it rejected the entirety of the Hendersons' claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

---

STATE OF NEBRASKA, APPELLEE, V.
JERRY WATSON, APPELLANT.

___ N.W.2d ___

Filed March 15, 2013. No. S-11-912.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
2. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **Criminal Law: Due Process: Time.** A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.
5. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
6. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
7. **Constitutional Law: Witnesses: Appeal and Error.** The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.
8. **Criminal Law: Constitutional Law.** The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
9. **Constitutional Law: Criminal Law: Due Process: Time.** The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay.

10. ____: ____: ____: ____. Dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.
11. **Trial: Prosecuting Attorneys: Appeal and Error.** When a prosecutor's conduct was improper, an appellate court considers the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.
12. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

WRIGHT, J.

## NATURE OF CASE

In November 2010, Jerry Watson was charged with the 1978 murder of Carroll Bonnet. The prosecution was the result of an investigation by the Omaha Police Department's "cold case" homicide unit. A jury found Watson guilty of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment for the first degree murder conviction and 10 to 20 years' imprisonment for the conviction of use of a deadly weapon to commit a felony.

Because roughly 33 years had passed since the murder, Watson claims that he was denied his right to confront witnesses and present a complete defense. Many of the alleged original witnesses were dead or unavailable. He also claims that there was insufficient evidence to convict him and that

prosecutorial misconduct during the questioning of a witness required the district court to sustain his motion for mistrial. We affirm.

## SCOPE OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error. *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

[2,3] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id*.

[4] A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). When reviewing a trial court's determination of a claim of denial of due process resulting from preindictment delay, an appellate court will review determinations of historical fact for clear error, but will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial. *Id*.

[5] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

[6] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court

abused its discretion. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

## FACTS

The victim, Bonnet, was a 61-year-old male living alone in an Omaha, Nebraska, apartment. On October 17, 1978, Bonnet had failed to report for work 2 days in a row. A friend called the manager of Bonnet's apartment complex to check on him. When Bonnet did not answer his door, the manager looked through the mailslot in the door and saw Bonnet lying on the floor. He appeared to be sick or injured. The manager called an ambulance.

The Omaha Fire Department responded to the call. They entered the apartment forcibly after they were initially unable to gain access. The fire team found Bonnet naked and lying face down in his apartment. He had suffered one stab wound to his abdomen. An autopsy revealed he died from the stab wound.

After Bonnet was discovered, Omaha police secured the area and began processing the apartment as a crime scene. The apartment was described as being "orderly and neat" before the crimes. Crime scene investigators collected evidence from the apartment and photographed the scene. They found that the telephone cord had been severed, and there were newspapers on a coffee table and on the floor. Three towels were found near the victim that contained fecal matter and hair. Beer cans were taken from a trash can and the kitchen sink. There was a note claiming to have been written by the killer that stated one piece of evidence had been left at the crime scene. The note ended with a derogatory statement to the police. Crime scene investigators were unable to find Bonnet's wallet or any cash inside the apartment.

Fingerprints and palmprints were found on the bathroom door, the medicine cabinet, beer cans, the coffee table, and the telephone. Some of those fingerprints were eventually matched to Watson. Other fingerprints found at the scene were never matched to a particular person.

On October 19, 1978, Bonnet's car was discovered abandoned in Cicero, Illinois. Stolen Illinois license plates were on

the car. On October 16, the license plates had been reported stolen. Illinois police collected evidence from inside the car, including cigarette butts. Only two fingerprints were identifiable, and one of them belonged to Bonnet. The other print was not identified.

Police conducted interviews and investigated a suspect, but in 1978, no one was charged with the crimes. In March 2009, Officer Douglas Herout of the Omaha Police Department was assigned to the case while working in the cold case homicide unit. Shortly before Herout was assigned the case, the crime laboratory had reviewed the fingerprints taken in 1978 from the crime scene. Using technology that was not available in 1978, one of the fingerprints was matched to Watson.

Herout examined the physical evidence obtained from the crime scene in 1978. Certain items were taken to the University of Nebraska Medical Center for DNA testing that was not available in 1978. These items included a beer can, cigarette butts, the contents of the living room wastebasket, the contents of the kitchen wastebasket, and the severed telephone cord. The three towels found near Bonnet that contained fecal matter attributed to Bonnet, as well as hair fibers, were also tested.

Herout's investigation disclosed that Watson grew up in Cicero and had moved many times as an adult. He had a relative who lived in Omaha that he visited sometime in the fall of 1978. After the murder, Watson lived in Missouri and in Florida under alias names.

On December 2, 2009, Herout and another officer traveled to Illinois to obtain DNA evidence, fingerprints, and palmprints from Watson. They also conducted interviews with family members, including Watson's mother.

On November 15, 2010, Watson was charged with first degree murder and use of a deadly weapon to commit a felony. An amended information was filed on July 11, 2011, charging Watson with first degree murder, either premeditated or as a felony murder during the attempt or commission of a robbery, and use of a deadly weapon to commit a felony.

A jury trial was held August 16 through 25, 2011. Because of the length of time that had passed from the commission of

the crimes in 1978 to the date of trial, only a few witnesses were available who were directly connected with the case. An Omaha firefighter who was on the rescue squad called to Bonnet's apartment had observed Bonnet lying naked on the living room floor. The rescue squad determined that Bonnet was dead, and thinking that the apartment could be a crime scene, they called the police. An Omaha Police Department crime laboratory technician photographed and recovered items at the scene, including empty beer cans, several towels, and a note taunting police that was apparently left by the killer. The technician lifted a number of fingerprints from various areas in the apartment.

The pathologist who had performed the autopsy on Bonnet's body determined that the cause of death was a single stab wound to the abdomen. The pathologist opined that at the time of the autopsy, Bonnet had been dead for over 48 hours. An evidence technician employed by the Cicero Police Department in 1978 testified that he had been assigned to collect evidence from a car recovered with stolen license plates. The car belonged to Bonnet and was found abandoned in Cicero. He collected items from the car, including several cigarette butts and fingerprints from inside the car. One fingerprint belonged to Bonnet, and the other was unidentified. It did not match the Omaha Police Department's chief suspect at the time.

The remainder of the State's evidence was circumstantial. The State called witnesses regarding the DNA and fingerprint evidence and its chain of custody. A senior crime laboratory technician with the Omaha Police Department testified that seven fingerprints were found at Bonnet's apartment and searched through the department's fingerprint system. Two belonged to Watson, while the other prints were identified as Bonnet's or remained unidentified. One of Watson's prints was on the bathroom door, and the other was on the bathroom medicine cabinet. No prints attributable to Watson were found in Bonnet's car.

A forensic DNA analyst at the University of Nebraska Medical Center testified that DNA found on some of the cigarette butts located in the apartment and in Bonnet's car

was from Watson. She also testified that a hair found on one of the towels located near Bonnet's body was from Watson. The DNA profile from the hair could be found in 1 in 37.6 million Caucasians, 1 in 87.4 million African-Americans, and 1 in 17.5 million American Hispanics. The State argued that the DNA and fingerprint evidence indicated the likelihood that Watson was in Bonnet's apartment and car at some point in time.

Herout testified that he began to investigate Watson as a suspect in 2009. A crime laboratory technician with the Omaha Police Department informed him that fingerprints from the crime scene matched Watson's prints. Herout traced Watson's background and discovered that he grew up in Illinois, lived in Mississippi in 1977, and lived in Florida in 1979 under alias names. It was stipulated that Watson's only tie to Nebraska was a relative who lived in Omaha "at some point" and that Watson had visited in the fall of 1978.

As part of the 2009 investigation, Herout reviewed all evidence assigned to the Bonnet homicide that was retained in the police property room. This included reopening and re-marking all evidence taken from Bonnet's apartment and car at the time of the murder. Herout testified about some of the problems inherent in preservation of cold case physical evidence. For example, the taunting note written by the killer left at the scene had been sent to the U.S. Secret Service for handwriting analysis. The property logs and a Secret Service report indicated that it was returned, but at the time of trial, the note was missing. Packaged with a couch cushion from Bonnet's apartment were also pieces of evidence, including sheets, a pillowcase, and a "Def Leppard" T-shirt, that were not consistent with evidence collected from the crime scene in 1978.

All the purported defense witnesses were either deceased or unavailable. Eleven police reports from witnesses who were interviewed by police in 1978 were read into evidence by defense counsel. These police reports indicated that Bonnet frequented local bars and would often bring men back to his apartment after buying them drinks. Sometimes he allowed these men to stay with him for periods of time, and he would let them use his car.

The police had several suspects in the early stages of the investigation, but no charges were filed against them. Two suspects had lived in Bonnet's apartment for a time before his death, and one of them had a key to Bonnet's car at the time of Bonnet's death. The defense argued that because these two individuals had access to Bonnet's apartment and car, there was no evidence that Watson was ever in the apartment or car at the same time as Bonnet and that Watson's DNA could have been left in the apartment or car while he was with either of the two suspects.

The jury found Watson guilty of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment for the first degree murder conviction and 10 to 20 years' imprisonment for the conviction of use of a deadly weapon to commit a felony.

## ASSIGNMENTS OF ERROR

Watson claims, summarized and restated, that (1) the district court erred when it overruled his motion to dismiss the charges because, due to the 33-year delay in prosecuting this case, the trial violated his right to confrontation, right to present a complete defense, and right to a fair trial with due process of law; (2) there was insufficient evidence to support the verdicts as a matter of law; and (3) the district court erred by overruling his motion for mistrial based on misconduct of the prosecutor during the examination of one of the witnesses.

## ANALYSIS

### CONFRONTATION CLAUSE

[7] Watson claims the 33-year delay in bringing the charges against him violated his right to confront the witnesses against him and denied him due process and a fair trial. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination. *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012). Watson had the opportunity to cross-examine all the State's witnesses, and he did so extensively. He attempted

to bring out problems with chain of custody and credibility of the evidence. He has not shown that he was denied the right to confront the witnesses the State presented against him.

### FAIR TRIAL WITH DUE PROCESS OF LAW

[8] The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011). The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id*.

[9,10] The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). But dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant. *State v. Glazebrook, supra*.

We have stated that a defendant bears the burden to show actual prejudice, and not just prejudice due to dimmed memories, inaccessible witnesses, and lost evidence. See *id*. Watson argues that he suffered prejudice because he was deprived of the ability to call witnesses who may have had specific facts, because those individuals are now deceased. This is not enough to show that he was actually prejudiced.

Watson has not shown that the unavailability of certain witnesses was caused by the State's not bringing the charges sooner. He read into the record police testimony from 11 witnesses interviewed shortly after the murder. Those witnesses told police Bonnet often had male visitors at his apartment, and they identified the two possible suspects discussed above. Both men were interviewed by police about their relationships with Bonnet, but no charges were brought against them. At the

time of Watson's trial, the 11 witnesses who talked to police in 1978 were either deceased or otherwise unavailable. However, they did not become unavailable due to the prosecution's delay in bringing charges after it gathered enough evidence to charge Watson with murder.

Watson's argument rests on the fact that over 30 years have passed since the time that the crimes were committed. As expected, because of the passage of time, many of the witnesses were deceased or unavailable. But the length of time before Watson was charged with murder was largely caused by the fact that the technology used to link Watson with the murder was not available in 1978 when the crimes were committed. The lack of the availability of Watson's purported witnesses was not caused by the failure of the State to timely bring the charge against Watson. Watson was permitted to read into evidence police reports from witnesses given to police shortly after the crimes. Watson cannot blame the State because of the passage of time.

Equally important, Watson cannot satisfy the second prong of the test, because he cannot show that the State intentionally caused the delay to gain a tactical advantage. The record shows that the State prosecuted Watson shortly after it gathered DNA and fingerprint evidence. Police had no evidence against Watson until DNA evidence linked him to the murder. His DNA was found on a hair in the fecal material on one of the towels next to Bonnet's naked body. The DNA evidence was tested in 2009 and determined to match Watson's DNA profile. He was charged in 2010. The time between the investigation into the DNA evidence and bringing Watson to trial was not intentionally caused by the State to gain a tactical advantage.

The defendant cites *People v. Morris*, 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119 (1988), *disapproved on other grounds, In re Sassounian*, 9 Cal. 4th 535, 887 P.2d 527, 37 Cal. Rptr. 2d 446 (1995), in support of his claim that a preindictment delay may violate a defendant's right to a fair trial and due process. In *Morris*, police had ample evidence linking the defendant to the murder in 1979 but did not file charges until

May 1982. The court weighed the prejudice the delay caused the defendant against the justification for the delay. The court concluded that there was no prejudice to the defendant. *Morris* does not support Watson's claim.

Watson cannot show the delay was caused intentionally by the prosecuting authority's failure to file charges. The State brought charges against Watson as soon as it had sufficient evidence. The use of DNA evidence was not available in 1978, and Watson has not shown that the State purposefully waited to bring charges in order to prevent him from calling witnesses. Because Watson cannot show the State intentionally waited to bring charges to gain an unfair tactical advantage, he cannot show his due process rights were violated. This assignment of error is without merit.

### SUFFICIENCY OF EVIDENCE

Watson claims the evidence was insufficient to sustain his convictions. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

A rational jury could find beyond a reasonable doubt that Watson murdered Bonnet either with premeditation or in the commission of a robbery. Police were unable to find Bonnet's wallet or any cash in his apartment. His body was lying on his apartment floor, naked and face down. Bonnet died from a stab wound to his abdomen, and he had been dead for at least 48 hours before the time of the autopsy performed on October 18, 1978.

Watson lived in Cicero in his youth, but stayed with a relative in Omaha for a brief time in the fall of 1978. Police recovered Bonnet's car in Cicero on October 19, 1978. The car had

a stolen license plate obtained from a local vehicle. The plate had been reported stolen on October 16.

The State's evidence showed that Watson's DNA was found on a beer can in Bonnet's kitchen wastebasket, on cigarette butts in the ashtray of Bonnet's car, and on two cigarette butts in Bonnet's living room wastebasket. Watson's palmprint and a fingerprint were found on Bonnet's medicine cabinet and bathroom door. This evidence would permit a rational trier of fact to find beyond a reasonable doubt that Watson had been in Bonnet's car and apartment. However, this evidence does not establish when Watson was in Bonnet's car or apartment.

Watson's DNA was on a hair that was on a towel next to Bonnet's body. The hair was in the fecal matter found on the towel. While the other DNA evidence and fingerprints would establish that Watson had been in Bonnet's apartment, the DNA from the hair on the towel would permit the jury to find beyond a reasonable doubt that Watson was in the apartment at the time of the murder.

The only logical explanation for the location of the hair in the fecal matter is that Watson was present at the time Bonnet was murdered. Evidence of Watson's hair placed him next to the naked body of the victim. The DNA from the hair established that only 1 in 37.6 million Caucasians would fit this DNA profile. The reasonable inference from this evidence is that Watson was in Bonnet's apartment at the time of the murder, because he left his DNA on the towel found next to Bonnet's body. This placed him next to Bonnet at the time of the murder.

An autopsy concluded that Bonnet died from a stab wound to the left upper quadrant of the abdomen, which resulted in exsanguinating hemorrhage. The stab wound had to be inflicted by a sharp object that could penetrate the abdomen. The telephone cord had been cut, which would have prevented Bonnet from calling for help. A reasonable jury could also find beyond a reasonable doubt that Watson used a deadly weapon to stab Bonnet. Giving the benefit of such reasonable inferences to the State, we conclude that a jury could have found beyond a reasonable doubt that Watson was guilty of first degree murder.

PROSECUTORIAL MISCONDUCT

Watson claims that the prosecutor's misconduct during Watson's cross-examination of Herout should have resulted in a mistrial. During cross-examination, Watson attempted to show problems with the integrity of the evidence based on the passage of time. An evidence bag contained a bloodstained sofa cushion from Bonnet's living room, several sheets from an Omaha area hospital, a green pillowcase and blanket, and a Def Leppard T-shirt from a 1983 concert tour. Herout admitted that other than the sofa cushion, the items were not consistent with his review of the photographs from the crime scene and the property inventory reports. And the 1983 concert clearly occurred after the 1978 murder.

On cross-examination, Herout admitted that the only explanation he had for the problem of intermingled evidence came from talking to the property room manager for the Omaha Police Department. The following colloquy occurred:

> [Defense counsel:] [D]o you know personally how it [Def Leppard T-shirt] got in there?
>
> [Herout:] Yes.
>
> [Defense counsel:] How? From whom?
>
> [Herout:] Based on the conversation with [the property room manager].
>
> [Defense counsel:] So [the property room manager] is the one that knows?
>
> [Herout:] Yes.
>
> [Defense counsel:] Not you. All you know is what [the property room manager] told you?
>
> [Herout:] Correct.
>
> [Prosecutor]: Well, I'm going to object, he says he does know.
>
> [Defense counsel]: All you know is that [the property room manager] —
>
> [Prosecutor]: He just asked do you know.
>
> [Court]: Overruled. That's what he said that's how he knows it from [the property room manager].
>
> [Prosecutor]: And he knows now.
>
> [Second prosecutor]: The question was yes or no.
>
> [Prosecutor]: That's the question.

> [Defense counsel]: And he said yes. And I said —
> [Prosecutor]: He just doesn't want to hear the answer.
> [Court]: Just a minute, counsel.
> [Defense counsel]: Wait a minute. I want to approach the bench, please.

A bench conference was then held out of the hearing of the jury. Defense counsel moved for a mistrial on the ground of prosecutorial misconduct because the prosecutor had stated that defense counsel did not want to know the answer to his question. The court strongly admonished the prosecutor about the improper comment, but overruled the motion for mistrial.

The court resumed trial but stated in the presence of the jury: "All right. The objection by [defense counsel] as to hearsay is sustained. I am asking both counsel just to make your objection as to the objection. No further comments are required nor necessary nor will be allowed by the Court."

[11] When a prosecutor's conduct was improper, this court considers the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction. *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012). Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id*.

[12] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *Id*.

Watson's trial encompassed 7 trial days from opening statements through closing arguments. Twenty-three witnesses testified or had their statements read into the record as testimony. The prosecutor's comment that defense counsel did

not "want to hear the answer" occurred in the middle of the trial. The court, once the sidebar ended, stated in the presence of the jury that counsel should not elaborate beyond making an objection and that the court would not tolerate further elaboration.

The prosecutor's comment, although inappropriate, did not require a mistrial. Watson has not shown that a substantial miscarriage of justice actually occurred or that there was a fundamental failure that prevented him from having a fair trial. The comment made by the prosecutor did not rise to the level of depriving Watson of a fair trial. The answer to the question regarding how the T-shirt printed in 1983 got into the Watson evidence bag in the property room is irrelevant to the convictions. Watson's DNA on the hair found on the towel next to Bonnet is the relevant evidence supporting Watson's convictions. The district court did not abuse its discretion when it denied the motion for mistrial based on the prosecutor's comment.

## CONCLUSION

The district court did not abuse its discretion when it overruled Watson's motion to dismiss because the charges were brought 33 years after the commission of the crimes. There was sufficient evidence for a jury to find beyond a reasonable doubt that Watson was guilty of the crimes of first degree murder and use of a deadly weapon to commit a felony. The district court did not abuse its discretion in overruling Watson's motion for mistrial based on prosecutorial misconduct. We affirm the judgment and sentences of the district court.

AFFIRMED.