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on review and remand the cause to the review panel for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JEREMY RAY ERICKSON, APPELLANT.
793 N.W.2d 155

Filed January 28, 2011. No. S-09-1152.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant 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 appellant was prejudiced by the court's refusal to give the tendered instruction.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
8. **Lesser-Included Offenses.** To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.
9. **Lesser-Included Offenses: Jury Instructions.** Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions.
10. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.

11. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
12. **Venue: Proof.** In order for a defendant to successfully move for a change of venue based on pretrial publicity, he must show that the publicity has made it impossible to secure a fair and impartial jury. A number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn.
13. **Venue: Appeal and Error.** A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury.
14. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
15. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
16. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
17. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
18. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
19. ____. Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing.

Appeal from the District Court for Kimball County: DEREK C. WEIMER, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Jeremy Ray Erickson (Erickson) was convicted by a jury of intentional child abuse resulting in the death of his 15-month-old son, Tristen Erickson (Tristen). Erickson was sentenced to a term of 90 years to life in prison. He appeals.

SCOPE OF REVIEW

[1-3] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009). Whether jury instructions given by a trial court are correct is a question of law. *Id.* When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions. *Id.*

[4] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[5] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

FACTS

On December 9, 2008, at 5:30 p.m., the Kimball County sheriff's office received a 911 emergency dispatch call from Erickson, who requested an ambulance because his son, Tristen, was turning blue. The 911 dispatcher gave Erickson instructions on how to provide cardiopulmonary resuscitation (CPR) for an infant.

An ambulance was dispatched from Kimball, Nebraska, to Erickson's home in Dix, Nebraska, at 5:31 p.m. At about the same time, Ericka Wittrock, Tristen's mother, called 911 and reported that Erickson had telephoned her and stated that there was something wrong with Tristen.

Sam Gingrich, an emergency medical technician, arrived at Erickson's home at 5:35 p.m. and found Tristen on the floor of the living room. Erickson was kneeling next to the child. Tristen was not breathing and had no pulse.

Erickson told Gingrich that the child had been ill for about a week and had been vomiting and exhibiting flu-like symptoms. Erickson said that Tristen had been in his crib and that he picked up Tristen and shook him to try to get him to respond. Gingrich began CPR, but Tristen did not start breathing on his own.

On the way to the hospital in Kimball, the ambulance was intercepted by Dr. James Platte, who took over the respiratory care of Tristen while Gingrich continued cardiac compressions. At the hospital, Platte intubated Tristen and his heart began beating. Tristen had no spontaneous respirations, and his pupils did not react to light, which indicated a lack of brain function. Tristen was subsequently taken by helicopter to a hospital in Denver, Colorado.

Tristen arrived in Denver in "very critical condition." Dr. Katherine Wells, a pediatrician who specializes in child abuse and neglect, stated that Tristen was being entirely supported by machines. Wells stated, to a reasonable degree of medical certainty, that the constellation of injuries sustained by Tristen was not consistent with an accident. On December 11, 2008, after a series of examinations determined that Tristen was brain dead, the decision was made to remove him from life support.

An autopsy revealed that Tristen's cause of death was blunt trauma to the head and neck. Dr. Michael Arnall, a forensic pathologist, stated that there were no external signs of bruising or other injury to the back of Tristen's head but that the internal examination showed two contusions to the middle of his scalp and a 4½-inch-long complex fracture to the back of the skull. Arnall stated that injuries to Tristen's neck muscles were from severe flexion and extension of the neck. The muscles were stretched sufficiently to tear the blood vessels and cause hemorrhage. The neck injuries were consistent with a baby's head being shaken or moved back and forth violently. There was evidence of extensive bleeding, including subarachnoid,

subdural, and epidural hemorrhages on Tristen's head. Arnall opined that blunt trauma caused the complex skull fracture, contusions to the scalp, subdural hematomas, injury to the spinal column, and contusions on the back. He said the blunt trauma came from more than one direction.

Erickson was the only adult present when Tristen stopped breathing. Wittrock testified she left the house between 3:30 and 4 p.m. to pick up prescriptions for Tristen and get dinner. Between 5 and 5:10 p.m., she sent Erickson a text message asking him to give the children a snack because they had had a light lunch and telling him she would not be home until 5:30 p.m. Erickson responded by text message. A short time later, Erickson called Wittrock and told her something was wrong with Tristen. Wittrock told Erickson to hang up and call 911.

According to Wittrock, Erickson claimed that when he picked up Tristen from his playpen, "his neck turned to the side like he was having a seizure." Erickson told a deputy sheriff that as he picked up Tristen to change his diaper, Tristen had a "panic attack or something and then he went limp." Erickson tried to get a response by shaking Tristen, rubbing him, and biting him, but the child did not respond.

Erickson testified that as he approached the playpen, he noticed vomit on Tristen's pillow. Erickson started to pick up Tristen, but he was not responsive. Erickson said he panicked and tried to do a couple of chest compressions. Tristen did not respond. Erickson shook Tristen, and when he still did not respond, Erickson bit him on the chest. Erickson testified that he panicked and ran out to his car with Tristen to try to drive him to the hospital. The car's windshield was frosted over with ice, and Erickson did not think it was safe to drive with poor visibility.

Erickson called Wittrock and told her something was wrong with Tristen, and she told Erickson to call 911. As he ran back into the house, Erickson dialed 911. The 911 operator gave him instructions on CPR, and Gingrich arrived shortly thereafter. Erickson admitted to shaking Tristen "pretty violently" and biting him, but claimed he was trying to see if Tristen would respond.

A few weeks earlier, on the Saturday after Thanksgiving 2008, Erickson called Wittrock at work and told her that Tristen had fallen and reportedly had a "knot" on the back of his head. Wittrock said she found no lump on Tristen's head when she arrived home.

Around December 1, 2008, Tristen had trouble keeping food down and Wittrock called the emergency room. She was advised to give him Pedialyte and Benadryl. He had been vomiting and had had diarrhea for about 2 weeks before the December 9 incident.

Tristen was seen for his 15-month checkup on December 8, 2008, by Dr. Brandon Taylor. According to Taylor, Tristen was developmentally "on track." Taylor saw no evidence of any kind of head injury or any bruising or abrasions. Wittrock discussed with Taylor the possibility of Tristen's having an asthma problem, because she was concerned about Tristen's breathing. He seemed "raspy," and his lips were blue.

Following a jury trial, Erickson was found guilty of intentional child abuse resulting in the death of Tristen, in violation of Neb. Rev. Stat. § 28-707 (Reissue 2008). He was sentenced to a term of 90 years to life in prison, with credit given for 313 days previously served.

ASSIGNMENTS OF ERROR

Erickson assigns as error the trial court's failure to instruct the jury on the lesser-included offense of manslaughter and its denial of his motion to change venue. He also claims that his sentence is excessive.

ANALYSIS

Jury Instructions

[6] Erickson argues that the trial court erred in failing to instruct the jury on the lesser-included offense of manslaughter. To establish reversible error from a court's refusal to give a requested instruction, an appellant 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 appellant was prejudiced by the court's refusal to

give the tendered instruction. *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009).

[7,8] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *Id*. To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case. *Id*.

In the case at bar, the jury was instructed that it could return one of three verdicts: guilty of intentional child abuse resulting in the death of a minor child, guilty of negligent child abuse, or not guilty. The jury instructions defined the elements of intentional child abuse resulting in death as placing Tristen in a situation that endangered his life or physical health "knowingly or intentionally, that is willfully, or purposely and not accidentally or involuntarily" and that such conduct was the proximate cause of Tristen's death. The elements of the lesser-included crime of negligent child abuse were defined as placing Tristen in a situation that endangered his life or physical health negligently.

The jury was also given a step instruction. It was instructed to first consider the crime of intentional child abuse resulting in death. If it found that the State proved each element beyond a reasonable doubt, then the jury was to end its deliberations. If the jury found the State did not prove each element, then it was to consider the elements of negligent child abuse.

Erickson objected to the instruction defining the elements of intentional child abuse resulting in death and argued that the trial court should also instruct upon the lesser-included offenses of manslaughter and knowing infliction of child abuse resulting in serious bodily injury. The objection was overruled.

Erickson claims that the trial court should have instructed the jury that manslaughter is a lesser-included offense of intentional child abuse. We agree. In *Sinica, supra*, we concluded

that manslaughter is a lesser-included offense of intentional child abuse resulting in death and that the trial court erred in failing to instruct the jury on the lesser-included offense. However, we determined that the step instruction given in that case did not prejudice the defendant.

In *Sinica, supra*, the jury was specifically instructed that if it determined the State had proved each element of intentional child abuse resulting in death beyond a reasonable doubt, it must find the defendant guilty of that offense and proceed no further. "When such a step instruction is given, we presume that the jury followed the instruction and did not consider any of the purported lesser-included offenses after finding that the defendant was guilty of the charged offense." *Id.* at 640, 764 N.W.2d at 119. Because the jury specifically found that the defendant acted intentionally, it could not have found that he committed negligent child abuse and acted without intent.

The case at bar is similar to *Sinica, supra*. The jury was given a step instruction and was told to first consider the crime of intentional child abuse resulting in death. If it found that the State had proved each element beyond a reasonable doubt, it was to end its deliberations.

[9] The trial court erred in refusing to give a manslaughter instruction; however, the error was harmless. "Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions." *Id.* at 639, 764 N.W.2d at 119.

Pursuant to the step instruction, the jury found that Erickson knowingly and intentionally placed Tristen in a situation that endangered his life and that such conduct was the proximate cause of Tristen's death. The jury then ended its deliberations.

The medical experts testified that Tristen's injuries were not accidental. Wells stated, to a reasonable degree of medical certainty, that the constellation of injuries sustained by Tristen was not consistent with an accident. The autopsy showed that Tristen's cause of death was blunt trauma to the head and neck. He had two contusions to the middle of his scalp and a 4½-inch-long complex skull fracture. Arnall stated, to a reasonable

degree of medical certainty, that the injuries to Tristen's neck muscles were consistent with a baby's head being shaken or moved back and forth violently. Tristen also sustained subarachnoid, subdural, and epidural hemorrhages to the head.

Erickson was the only adult present when Tristen stopped breathing. Erickson admitted that he shook Tristen "pretty violently" in an attempt to get a response. Wells opined that the injuries sustained by Tristen were not those that any reasonable person would have caused in trying to revive a baby. Tristen had been seen by a physician the day before the incident, and there were no indications of head injury or abrasions.

[10] The jury first considered the elements of intentional child abuse resulting in death, and once it determined that all elements had been proved, it ended its deliberations. As in *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009), the step instruction was not prejudicial even though it did not include manslaughter. Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

The trial court's failure to instruct the jury that manslaughter is a lesser-included offense of intentional child abuse resulting in death was error, but it was not prejudicial to Erickson. He is not entitled to relief because of this error.

VENUE

Erickson argues that the trial court erred in denying his motion to change venue for the trial. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

The record shows that voir dire was conducted with a pool of 90 potential jury members. Of the 90 potential jurors, 41 were excused for cause.

During voir dire, Erickson's counsel made an oral motion for a change of venue. He claimed that there were a "vast number of people that have expressed an inability to decide this case and to be impartial," which indicated a likelihood that there was "an undercurrent of animus and [bias] against" Erickson.

Counsel conceded there had not been a great amount of publicity about the case, but he asserted there had been a good deal of discussion by word of mouth. The trial court took the matter under advisement and reserved ruling until questioning of the panel had been completed.

Erickson's counsel renewed the motion for change of venue at the conclusion of voir dire. The trial court reviewed the factors to be considered in moving a trial, as identified in *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992). It then overruled Erickson's motion for change of venue. After 41 persons had been excused for cause, 49 potential jurors remained. Peremptory strikes were exercised, and a 12-member jury, including 2 alternates, was seated.

Erickson does not challenge the participation of any particular juror. Instead, he argues that in a small community with no large media outlets, the residents are subject to "'coffee shop talk,'" including hearsay, rumor, innuendo, and gossip. See brief for appellant at 9. He suggests that the majority of the community had formed or expressed an opinion concerning Erickson's guilt, as reflected by the fact that a large percentage of the jury panel was struck for cause.

[11] We have stated that under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue. *Schroeder, supra*.

> Due process does not require that a defendant be granted a change of venue whenever there is a "'reasonable likelihood'" that prejudicial news prior to trial would prevent a fair trial. Rather, a change of venue is mandated when a fair and impartial trial "cannot" be had in the county where the offense was committed.

Id. at 211, 777 N.W.2d at 804, quoting *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). See, also, Neb. Rev. Stat. § 29-1301 (Reissue 2008).

The motion for a change of venue was made orally during voir dire. Erickson did not offer any evidence or affidavits in support of the motion. This is similar to the factual situation in *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007), in which the defendant based his argument in favor of changing venue on voir dire of potential jurors. There, the defendant

argued that a large number of potential jurors had seen or heard reports of the crime and had formed opinions regarding his guilt. We determined that the defendant had not shown a change of venue was necessary, because an impartial jury was selected, and that he therefore failed to show he could not receive a fair trial in the county in which the trial was held. We found no abuse of discretion in the trial court's denial of his motion for change of venue.

[12] Erickson cites the factors that can be used to determine whether a defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. The factors include:

> (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which the publicity circulated in areas to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn.

State v. Strohl, 255 Neb. 918, 931-32, 587 N.W.2d 675, 685 (1999).

The first four factors concern publicity about a trial: its nature, its circulation both in the community where the trial is scheduled and in areas to which venue might be changed, and the timespan between the publicity and the trial. Erickson has provided no evidence to suggest that publicity required a change of venue. He did not offer articles or news stories from any media outlet to demonstrate the nature of pretrial publicity. He did not provide any affidavits to support the need to move the trial to another venue.

While adverse pretrial publicity can create a presumption of prejudice in a community, making it difficult to believe the jurors' claims that they can be impartial, "'juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive[] the defendant of due

process.'" *State v. Galindo*, 278 Neb. 599, 637, 774 N.W.2d 190, 224 (2009), quoting *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). Nothing in the record suggests that Erickson was deprived of due process by pretrial publicity.

Erickson argues that the last four factors from *Strohl, supra*, weigh in favor of a change in venue: difficulty in seating a jury, majority of panel struck for cause, serious nature of the case, and the small size of the community. The record does not support a finding that the trial court had difficulty in seating the jury or that a majority of the panel was struck for cause. Ninety potential jurors were called and questioned as to their feelings about the case; 41 were dismissed for cause. Additional voir dire was conducted with 40 of the potential jurors. None of those individuals expressed that they had formed an opinion about the case. A number of the potential jurors had heard of the case through a newspaper, "gossip," or "hearsay," but most stated that they could be fair and make a decision based solely on the evidence presented at trial.

"[T]he law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence." *State v. Rodriguez*, 272 Neb. 930, 942, 726 N.W.2d 157, 170 (2007). The trial court was able to seat a fair and impartial jury. Erickson did not present any evidence to suggest otherwise.

This case involved the death of a child. During voir dire, jurors were informed as to the subject of the trial and were asked whether the serious nature of the charges affected their opinion. Any prospective juror who indicated a concern about the case because it involved the death of a child was removed from the panel. This factor does not weigh in favor of a change of venue.

The final factor from *Strohl, supra*, is the small size of the community. Erickson offered no evidence concerning the size of Kimball or of any venue to which the trial could have been moved.

[13] A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions

and pretrial publicity make it impossible to secure a fair and impartial jury. *Galindo, supra*. Erickson did not establish the need for a change of venue, and the trial court did not abuse its discretion in overruling his motion.

Excessive Sentence

Erickson asserts that the trial court abused its discretion in imposing an excessive sentence. Erickson was convicted of intentional child abuse resulting in death, a Class IB felony under § 28-707(6). He was sentenced to a minimum term of 90 years' imprisonment and a maximum term of life in prison. A Class IB felony is punishable by a minimum of 20 years in prison and a maximum of life in prison. Neb. Rev. Stat. § 28-105 (Reissue 2008).

[14,15] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[16-19] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the

defendant's life. *Id*. Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

Erickson was 24 years old at the time of the presentence investigation. He had completed the 10th grade at Kimball High School. He and Wittrock had three children together, including Tristen. All were under the age of 3. Erickson had another child as the result of a short-term relationship, but he had no contact with the child.

Erickson's criminal history shows that as a juvenile, he was charged with criminal mischief, unauthorized use of a motor vehicle, and being an uncontrollable child. As an adult, he has been charged with assault by mutual consent, minor in possession of liquor on three occasions, motor vehicle theft, third degree assault on two occasions, third degree domestic assault, and possession of a controlled substance.

On a risk assessment tool, Erickson was found to be in the high-risk range to reoffend. He has a history of using methamphetamine, and when using the drug, he has anger control problems. The assessment also indicated that Erickson is at high risk to exhibit antisocial behaviors. He scored in the problem-risk range for alcohol and in the maximum-risk range for drugs, violence, antisocial behavior, aggressiveness, and coping with stress. He also scored in the high-risk range to assault an intimate partner.

The trial court considered a number of factors, including Erickson's age, mentality, educational and work history, and cultural background. It also considered the nature and circumstances of the offense, the motivation for the offense, whether the offense involved violence, and whether there was any excuse or justification for the offense. It found Erickson's prior criminal and juvenile record troubling for a person his age. He had been convicted of assaultive behavior both inside and outside the home.

There is no evidence that the trial court abused its discretion in sentencing Erickson. The sentence is within the statutory limits and reflects the serious nature of the crime.

CONCLUSION

Erickson was not prejudiced by the trial court's error in failing to instruct the jury that manslaughter is a lesser-included offense of intentional child abuse resulting in death. The trial court did not err in denying Erickson's motion to change venue, and his sentence is not excessive. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

CHARLES F. ROBINSON, APPELLANT, V. DUSTROL, INC., A FOREIGN CORPORATION DOING BUSINESS IN NEBRASKA, APPELLEE.

793 N.W.2d 338

Filed January 28, 2011. No. S-10-045.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
4. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
5. **Negligence.** One is not negligent simply by failing to anticipate the negligence of another.
6. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Adam J. Sipple, of Johnson & Mock, for appellant.

Stephen G. Olson II and Kristina J. Kamler, of Engles, Ketcham, Olson & Keith, P.C., for appellee.