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an attorney, Neb. Rev. Stat. § 7-104. It is the judgment of this court that respondent should be and is hereby placed on probation commencing on the filing of this opinion and that respondent is ordered to submit a probation plan for approval by this court within 30 days of the date of filing of this opinion. The probation plan must show supervision of respondent by a monitoring lawyer licensed in the State of Nebraska on the terms listed previously in this opinion, with compliance reports to be submitted quarterly to relator by respondent and approved by the monitoring lawyer. Respondent's probation shall terminate 2 years after this court approves the submitted probation plan. Further, respondent must submit to an audit of his trust account by a certified public accountant at his own expense, to be conducted at the end of each year during respondent's term of probation. We also direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-115(2) (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PROBATION.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TERENCE W. NERO, APPELLANT.
798 N.W.2d 597

Filed June 3, 2011. No. S-10-457.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **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.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, 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.

4. **Burglary: Intent.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
5. **Criminal Law: Constitutional Law.** The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
6. **Appeal and Error.** Whether an assigned error was prejudicial, requiring reversal, is at issue in every appeal.
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.
8. **Burglary: Intent: Convictions.** Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, Joseph D. Nigro, and Matthew F. Meyerle, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Terence W. Nero appeals his conviction of burglary, a Class III felony, under Neb. Rev. Stat. § 28-507 (Reissue 2008), which states: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate . . . with intent to commit any felony or with intent to steal property of any value." Nero entered a plea of not guilty, and a bench trial was held in the Lancaster County District Court. The district court declined to make a specific finding regarding which felony it determined Nero had intended to commit to support the charge of burglary. The court found Nero guilty of burglary and sentenced him to 24 to 40 months' imprisonment. Nero appeals the conviction. The issues presented in this appeal are whether the State is

required to specify the underlying felony or felonies it seeks to prove to support a charge of burglary and whether the evidence presented at trial was sufficient to sustain the conviction. For the following reasons, we reverse, and remand for a new trial.

BACKGROUND

Nero was charged with burglary, a Class III felony. An information was filed in the district court on May 8, 2009. Nero filed a written waiver of his right to appear at arraignment and entered a plea of not guilty. Nero waived his right to a jury trial, and a bench trial followed.

Evidence Presented at Trial

The evidence adduced at trial was as follows: On February 25, 2009, Jennifer McDonald was at home in her apartment, which she shared with two roommates, including Katie Huenink. The apartment was located on the second floor of a house converted to apartments. The main door to the apartment was at the top of a flight of stairs, at the bottom of which the outside door to the house was located. The door at the bottom of the stairs automatically locked when shut; however, the door to McDonald's apartment needed to be manually locked, and McDonald never locked it.

At approximately 4 a.m., McDonald was lying down on the couch in the living room, and Huenink was asleep in her bedroom. McDonald was half asleep, but she heard the outside door and then the apartment door open and someone enter and walk over to where she lay on the couch. After looking at the man who had entered, McDonald realized she did not recognize him. He carried a magazine, and sat down next to McDonald. When she asked him what he was doing in her house, he said that he just wanted to talk to her. He said that his name was "Steve" and continued repeating that he just wanted to talk to her.

McDonald stood up and offered the man some water, but he pulled her back down to the couch by her hips and said he did not want any. She asked him whether he wanted a cigarette, and he said he did. When McDonald stood to get him

a cigarette, he pulled her back down to the couch and said he would get it. After being pulled down to the couch twice, McDonald again asked whether he would like a cigarette. The man "finally" let McDonald go get him a cigarette, which she then gave him. She told the man she had to go to the bathroom and went instead into Huenink's room. McDonald woke up Huenink and told her there was a man in the apartment that she had never seen before. Huenink went into the living room, yelled at the man, and told him to get out of the apartment. The man repeated that he just wanted to talk to McDonald, and Huenink told him no and again told him to leave. The man then left the apartment.

McDonald called the police to report what had happened. McDonald noticed that the man had left the magazine he had been carrying—which was a pornographic magazine containing photographs of nude men. McDonald and Huenink observed that the downstairs door was damaged where a piece of wood appeared to be "busted out," and on the stairs leading up to the apartment, they found an ice scraper that did not belong to them. Huenink testified that the damage to the door had not been present prior to the man's entering their apartment.

Officers Andrew Nichols and Jeffrey Hanson responded to McDonald's call. Hanson had the magazine processed for fingerprints, and a print belonging to Nero was identified. No other usable prints were found on the scene. The officers issued a broadcast to interview or pick up Nero.

On April 7, 2009, Officer Robert Brenner stopped Nero for a traffic violation. Brenner ran a check of police traffic charges and found that Nero was flagged for a broadcast for burglary. Brenner told Nero he needed to be interviewed regarding a burglary for entering a female's apartment. Nero told Brenner that he had not entered anybody's apartment, and then said that he did not touch anyone and did not hurt anyone. Brenner took Nero to the police station for questioning. Nero was taken to an interview room and read the *Miranda* warnings, to which Nero waived his rights. Nero consented to a search of his apartment, and following the search, he was arrested for burglary. After Nero was arrested, Nichols showed McDonald and

Huenink a photographic lineup which included Nero; neither woman identified any of the suspects as the man who entered their apartment.

Procedural Background

Prior to the filing of the information in district court, Nero initially appeared in county court for a preliminary hearing. After hearing testimony from Nichols, the court heard argument on whether there was probable cause to believe a felony had occurred. Nero conceded that his behavior in the apartment was inappropriate and disturbing, and he stated that the circumstances of the case might support a charge of trespass,[1] misdemeanor false imprisonment,[2] disturbing the peace,[3] or criminal mischief.[4] However, he maintained that there was no evidence that he intended to commit any felony or steal any property. Upon the court's request, the State provided the elements of false imprisonment. The court stated that the circumstances of the case were consistent with the crime of false imprisonment in the first degree and bound the case over to district court.

Nero filed a plea in abatement in district court, arguing that there was insufficient evidence to bind over the case. At the hearing on Nero's plea in abatement, Nero maintained that there was no evidence of any underlying felony. The State argued that it was not required to prove what underlying felony Nero intended to commit. The State admitted that it did not have a clear theory as to exactly what underlying felony it might seek to prove. The State offered the possible felonies of terroristic threats, sexual assault, and false imprisonment. The district court found that the case was appropriately bound over and denied Nero's plea in abatement.

Nero next filed a pretrial motion for a bill of particulars, requesting that the court require the State to specify Nero's alleged intent at the time he entered the apartment relating to

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[1] Neb. Rev. Stat. § 28-520 (Reissue 2008).

[2] Neb. Rev. Stat. § 28-315 (Reissue 2008).

[3] Neb. Rev. Stat. § 28-1322 (Reissue 2008).

[4] Neb. Rev. Stat. § 28-519 (Reissue 2008).

the charge of burglary. At the hearing on Nero's motion for a bill of particulars, Nero again argued that the State must specify the underlying felony that supported the charge of burglary. Nero further stated that without being informed of the underlying felony, his ability to defend against the burglary charge was hampered. The State asserted that it is required only to allege crimes in the language of the statute.

At the hearing, the State noted that if the case were tried to a jury, it would request instructions on sexual assault, false imprisonment, and terroristic threats, but argued: "[B]ased on the fact that obviously you [the judge] have the knowledge of all the potential felonies out there, [you] could come to your own conclusion without the State specifically saying what felony was believed to be committed." However, the State was unwilling to limit its theory of the case to the underlying felonies it named. The State argued that the bill of particulars should be overruled:

> [I]t's premature to be able to say because, depending on how the evidence comes in, I may or may not prove up the requisite things to have the trier of fact believe that [Nero] was — what felony he may have been entering the residence to commit.
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> . . . .
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> It's, in effect, simpler with the court because with a jury, obviously, we have to define every single one of them and that is something that should be done at the close of the evidence and arguably — obviously, I'll argue my theory on which felonies and it may change if he testifies.

The district court overruled Nero's motion for a bill of particulars.

At trial, the State presented its theory that Nero intended to commit first or second degree false imprisonment and that his plans were interrupted by Huenink's presence in the apartment. After the State rested, Nero moved for a directed verdict on the ground that the State had failed to establish a prima facie case. The court heard argument on the motion, found that the State had met its burden, and overruled Nero's motion for directed verdict. Nero offered no evidence. In closing

argument, Nero argued that the State failed to adduce evidence to show that Nero intended to commit a felony to support the charge of burglary.

On January 15, 2010, the district court found that the evidence presented against Nero supported a finding of guilt beyond a reasonable doubt. After the court's pronouncement of guilt, Nero inquired as to what underlying felony the court determined Nero tried to commit. Nero argued that if the case had been heard by a jury, the court would have instructed the jury on a specific felony, and that due process required the court to inform him of the basis on which he was convicted. The State objected, and the court denied Nero's request that it announce a finding of what underlying felony supported the conviction. Nero was sentenced to 24 to 40 months' imprisonment. Nero now appeals.

ASSIGNMENTS OF ERROR

Nero assigns that (1) the district court erred in failing to require the State to specify at any stage of the proceedings what underlying felony Nero intended to commit when prosecuting him for burglary under § 28-507 and (2) the evidence adduced at trial was insufficient to sustain a conviction for burglary.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[5]

[2,3] 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] 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

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[5] *State v. Peterson*, 280 Neb. 641, 788 N.W.2d 560 (2010).

[6] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

found the essential elements of the crime beyond a reasonable doubt.[7]

ANALYSIS

Failure to Specify Underlying Felony

[4] Section 28-507(1) defines burglary: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Nero does not contest that he entered McDonald's apartment unlawfully. However, there is no allegation that Nero stole or intended to steal any property from the apartment he entered. Therefore, the basis for charging Nero with burglary rests on the proposition that Nero unlawfully entered the apartment with the intent to commit a felony. We must determine whether the State is required to specify the underlying felony upon which the charge of burglary is based in order to sustain a conviction under § 28-507. This presents a question of law for which we have an obligation to reach an independent conclusion irrespective of the decision of the court below.[8]

Nero asserts that the district court's failure to require the State to specify an underlying felony to support the charge of burglary violated his rights to due process and a fair trial.[9] Nero contends that the State must specify which felony or felonies he allegedly intended to commit when breaking and entering. Failure to specify the intended felony, he maintains, forces the defendant to defend himself against "'the entire criminal code.'"[10]

The State argues that in the information, it is not obligated to include anything other than the applicable statutory language, and that Nero was adequately apprised of the State's theories of guilt during the pretrial proceedings. The State concedes that,

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[7] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

[8] See *State v. Peterson, supra* note 5.

[9] See *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

[10] Brief for appellant at 24.

were this case tried to a jury, it would be required to instruct on the underlying felonies it sought to prove.

At the hearing on Nero's motion for a bill of particulars, the State argued that the judge, based on his knowledge "of all the potential felonies out there," could come to his own conclusion without the State specifically saying what felony was believed to be committed. But the issue is whether Nero had an opportunity to prepare an adequate defense, not whether the court had a proper knowledge of the law to analyze the State's theory on what underlying felony Nero intended to commit.

[5] The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.[11] This is no less true should a defendant choose to waive his right to a jury, as Nero did in this case. We agree that unless we require the State to specify the underlying felony or felonies supporting a burglary charge, defendants may be convicted on nothing more than speculation as to what might have happened. We determine that the State is required to specify the felony or felonies that the defendant intended to commit after the breaking and entering. Here, the district court erred in denying Nero's motion for a bill of particulars specifying any underlying felonies the State sought to establish. Unless the State limits its prosecution to establishing that the defendant intended to steal property as encompassed in our burglary statute,[12] the State must specify which felony or felonies it believes a defendant intended to commit.

The jurisdictions that have addressed this issue are split, but the relevant statutory language accounts for the difference in treatment. In states where the burglary statute requires only intent to commit "an offense," "a crime," or "any crime," specific intent to commit a particular crime upon entry is not a material element of the offense.[13] Thus, in these jurisdictions,

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[11] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[12] See § 28-507(1).

[13] See, *De Vonish v. Keane*, 19 F.3d 107 (2d Cir. 1994); *State v. Robinson*, 289 N.J. Super. 447, 673 A.2d 1372 (1996); *Com. v. Alston*, 539 Pa. 202, 651 A.2d 1092 (1994); *State v. Bergeron*, 105 Wash. 2d 1, 711 P.2d 1000 (1985) (en banc).

the State need prove only general intent, which may be inferred from the circumstances of the break-in itself.[14] Such statutes are much broader than the common-law definition of burglary where one of the elements was that the breaking and entering be "with intent to commit any felony" therein.[15]

In those states where the burglary statute is in terms of "intent to commit a felony" or "intent to commit any felony or steal property," such intent is considered an essential element of the offense, and the State must specify the particular felony that the defendant intended to commit after the breaking and entering.[16] These courts reason that the particular crime intended must be specified because, if anything other than a felony was intended, the breaking and entering did not constitute burglary.[17]

Nebraska's burglary statute is comparable to the common-law definition of burglary and those statutes in jurisdictions which require the State to specify an underlying felony.[18] In keeping with the common-law definition, the intent to commit a felony or to steal property is an element of burglary under § 28-507. The State is therefore required to specify the felony or felonies that the defendant intended to commit after the breaking and entering.

The jurisdictions that have adopted this reasoning have generally done so in the context of a jury trial.[19] But we do not find the present case to be distinguishable simply because Nero was convicted by a judge. And, in either instance, it

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[14] See, *De Vonish v. Keane, supra* note 13; *Com. v. Alston, supra* note 13.

[15] See *id.*

[16] See, e.g., *State v. Mesch*, 574 N.W.2d 10 (Iowa 1997); *Com. v. Walter*, 40 Mass. App. 907, 661 N.E.2d 942 (1996); *State v. Rush*, 255 Kan. 672, 877 P.2d 386 (1994); *People v. Palmer*, 83 Ill. App. 3d 732, 404 N.E.2d 853, 39 Ill. Dec. 262 (1980); *People v. Failla*, 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966).

[17] See *State v. Mesch, supra* note 16.

[18] See, e.g., Cal. Penal Code § 459 (West 2010); 720 Ill. Comp. Stat. Ann. 5/19-1 (LexisNexis 2008); Iowa Code Ann. § 713.1 (West 2003); Kan. Stat. Ann. § 21-3715 (2007) (see § 21-5807, effective July 1, 2011); Mass. Gen. Laws. Ann. ch. 266, § 18 (West 2008).

[19] See, e.g., *State v. Mesch, supra* note 16.

remains that "[r]equiring the State to specify the felony is not onerous. While the State may not know what the defendant *actually* intended to do inside the dwelling, the State knows very well what *evidence* of intent it has."[20] Throughout the preliminary proceedings, the State did refer to underlying felonies it believed Nero may have intended to commit. However, the State was clear that it was unwilling to limit its theory of guilt. We agree that this placed Nero in a position where he was forced to prepare a broad defense in an attempt to rebut all possible underlying felonies.

The issue is whether Nero had such an opportunity, not whether the court had a proper knowledge of the law to analyze the State's theory on what underlying felony Nero intended to commit. Nero was made to speculate as to the State's apparently limitless theory of guilt. This did not provide Nero an opportunity to prepare an adequate defense. The federal Constitution guarantees Nero an opportunity to prepare an adequate defense,[21] regardless of the identity of the trier of fact. A jury must be instructed on such underlying felonies, and when a defendant requests such information during a bench trial, it is error to deny it.

Harmless Error

[6] We therefore conclude that it was error for the district court to deny Nero's motion for a bill of particulars. Still, whether an assigned error was prejudicial, requiring reversal, is at issue in every appeal.[22] We consider whether the court's failure to require the State to specify the underlying felonies was harmless error.

In *Stirone v. United States*,[23] the U.S. Supreme Court stated that under the Fifth Amendment's right to a grand jury indictment, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." The Court

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[20] *Id.* at 14 (emphasis in original).

[21] See *State v. Poe, supra* note 11.

[22] *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

[23] *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

characterized a variance between the charges contained in the indictment and the evidence presented during trial as "fatal error,"[24] because it "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."[25] The Eighth Circuit has also noted such error can be harmless only if a defendant's right to notice is not prejudiced.[26] We find this rule to be persuasive in Nero's case.

Nero was not charged by indictment, but by information. However, analogous to the right recognized in *Stirone*, this court has determined that a defendant must be given notice of information vital to the preparation of a defense.[27] An information may sufficiently allege the statutory elements of a criminal offense, yet fail to state with sufficient particularity information about the alleged crime which is vital to the preparation of a defense.[28] The court failed to give Nero notice of the alleged underlying felonies with sufficient particularity. The court's failure to require the State to specify the underlying felonies prejudiced Nero's right to notice and denied Nero a meaningful opportunity to present a complete defense. Because Nero's right to notice was prejudiced, we cannot determine such prejudice to be "harmless." Accordingly, the judgment should be reversed.

Sufficiency of Evidence

[7] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Nero's conviction. If it was not,

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[24] *Id.*, 361 U.S. at 219.

[25] *Id.*, 361 U.S. at 217. See, also, *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007).

[26] See, *U.S. v. Whirlwind Soldier*, 499 F.3d 862 (8th Cir. 2007); *U.S. v. Harris*, 344 F.3d 803 (8th Cir. 2003); *U.S. v. Stuckey*, 220 F.3d 976 (8th Cir. 2000).

[27] See *State v. Beermann, supra* note 9.

[28] *Id.*

then concepts of double jeopardy would not allow a remand for a new trial.[29] The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.[30] We determine that the circumstantial evidence against Nero was sufficient to sustain the verdict. We therefore reverse the conviction and remand the cause for a new trial.

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.[31] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, 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.[32]

[8] Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry.[33] Viewing the evidence in the light most favorable to the prosecution, we determine intent to commit a felony could be inferred from the circumstances surrounding Nero's entry and subsequent actions in the apartment. We determine that a rational trier of fact could have found the underlying felony element proved beyond a reasonable doubt. Accordingly, we remand for a new trial.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

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[29] See *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[30] *Id.*

[31] *State v. Edwards, supra* note 6.

[32] *State v. Lamb, supra* note 7.

[33] *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987).