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Neb. 74, 776 N.W.2d 493 (2009) (to extent there is conflict between two statutes on same subject, specific statute controls over general statute).

[8] In sum, we hold that the exceptions found in § 43-283.01 which relieve the State from its obligation to provide reasonable efforts when aggravating circumstances are present do not extend to the State's obligation to provide "active efforts" pursuant to § 43-1505. Since there were no exceptions relieving the State of its obligation to provide "active efforts" in this case and we have found that it did not provide those "active efforts," the order of termination is reversed, and this cause is remanded for further proceedings.

CONCLUSION

Having found that "active efforts" were required in this case and were not provided, we need not address the remaining assignments of error raised by the parents. The juvenile court's order of termination is reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. SONNY D. BALVIN, APPELLANT.

791 N.W.2d 352

Filed December 7, 2010. No. A-09-1089.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.

3. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor in assessing admissibility, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
4. ____: ____. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
6. **Rules of Evidence: Witnesses.** Determinations regarding cross-examination of a witness on specific instances of conduct, pursuant to Neb. Evid. R. 608(2), are specifically entrusted to the discretion of the trial court.
7. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution.
8. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
9. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
10. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
11. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
12. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion.
13. **Motions for Mistrial.** A motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice.
14. **Trial: Motions to Strike: Appeal and Error.** The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
15. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.

16. **Motions to Strike: Motions for Mistrial: Appeal and Error.** If an objection or motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily, error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted.
17. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
18. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
19. **Sentences: Juries: Appeal and Error.** Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard of review is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.
20. **Convicted Sex Offender: Sentences: Juries.** Because lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an aggravated offense where such facts are not specifically included in the elements of the offense of which the defendant is convicted.
21. **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.
22. **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.
23. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
24. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
25. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Sonny D. Balvin was convicted by a jury of first degree sexual assault. The district court subsequently sentenced Balvin to 24 to 36 years' imprisonment. Balvin appeals from his conviction and sentence here. On appeal, Balvin assigns numerous errors, including that there was insufficient evidence to support his conviction, that the district court erred in making certain evidentiary rulings, and that the district court erred in finding that he was subject to lifetime community supervision and erred in imposing an excessive sentence. Balvin also alleges that he received ineffective assistance of trial counsel.

Upon our review, we find that the district court erred in determining that Balvin committed an aggravated offense and was, as a result, subject to lifetime community supervision. We find that the jury should have determined whether Balvin committed an aggravated offense. We reverse, and remand with directions to conduct an evidentiary hearing so that a jury may make a finding regarding whether Balvin's offense was aggravated and, thus, whether he was subject to lifetime community supervision. We affirm the conviction and sentence, and find no merit to all other assigned errors.

II. BACKGROUND

The State filed a criminal complaint charging Balvin with first degree sexual assault pursuant to Neb. Rev. Stat. § 28-319 (Reissue 2008). The charge against Balvin stems from an incident which occurred in March 2009. Evidence adduced at trial revealed that on the night of March 9, 2009, Balvin offered a ride to A.R., who had been walking from a friend's house to the home of her cousin. Although A.R. did not know Balvin, she accepted a ride. She and Balvin proceeded to drive to a liquor store where Balvin bought bottles of beer. They continued to drive around the city of Lincoln, Nebraska, drinking beer and talking. Eventually, Balvin drove

to a secluded, rural area, where he parked his car on the side of a dirt road.

The events that transpired after Balvin parked the car on the side of the road were disputed at trial. A.R. testified that Balvin asked her to have sex with him. When she told him that she did not want to, he told her that she was either "going to give it to him or he was going to take it." He then lunged toward her. She testified that she was scared and was unable to run away because there was nowhere to go. She testified that she had no choice but to do what he asked of her. A.R. testified that Balvin forced her to engage in numerous sexual acts. She testified that after approximately 45 minutes, Balvin drove her to her cousin's house. When she arrived, she told her cousin what happened and called the police.

Balvin did not testify at trial, nor did he offer any evidence in his defense. However, throughout the cross-examination of the State's witnesses and during closing arguments, Balvin's counsel indicated that Balvin did not dispute that he and A.R. engaged in sexual intercourse on the night in question. Balvin contended that he had picked up A.R. on March 9, 2009, because she was a prostitute. He argued that A.R. consented to having sexual intercourse with him and reported a sexual assault to the police only because Balvin refused to pay her after the incident.

After hearing all of the evidence, the jury convicted Balvin of first degree sexual assault. The district court subsequently sentenced Balvin to 24 to 36 years' imprisonment. In addition, the district court found that Balvin committed an aggravated offense and sentenced him to lifetime community supervision.

Balvin appeals his conviction and sentence here.

III. ASSIGNMENTS OF ERROR

On appeal, Balvin assigns eight errors, which we consolidate to six errors for our review. Balvin first argues that the evidence was insufficient to support his conviction. He also argues that the district court erred in making certain evidentiary rulings, failing to grant his motions for a mistrial due to the State's violations of a motion in limine and failing to grant a mistrial

due to prosecutorial misconduct during closing arguments, finding that he is subject to lifetime community supervision, and imposing an excessive sentence. Finally, Balvin argues that he received ineffective assistance of trial counsel.

IV. ANALYSIS

1. Sufficiency of Evidence

Balvin alleges that the State presented insufficient evidence to prove his guilt beyond a reasonable doubt. Upon our review, we conclude that the evidence was sufficient to support the conviction.

(a) Standard of Review

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

(b) Analysis

Balvin was charged with and convicted of first degree sexual assault pursuant to § 28-319. Section 28-319(1) provides in pertinent part, "Any person who subjects another person to sexual penetration . . . without the consent of the victim . . . is guilty of sexual assault in the first degree." In Neb. Rev. Stat. § 28-318(8)(a) (Reissue 2008), "[w]ithout consent" is defined to mean, inter alia, that "[t]he victim was compelled to submit due to the use of force or threat of force or coercion, or . . . the victim expressed a lack of consent through words . . . ."

Balvin does not dispute that he engaged in sexual intercourse with A.R. on the night in question. As such, the primary issue is whether A.R. consented. In his brief, Balvin argues that

A.R.'s testimony was inconsistent and not believable and that, in contrast, his version of the events was "conceivable." Brief for appellant at 19. Essentially, Balvin's arguments focus on witness credibility.

The testimony of A.R., if believed by the jury, could establish that the sexual penetration was "without consent" as defined in § 28-318(8)(a). A.R. testified that Balvin drove her to a deserted, dark road outside the city and asked her to have sex with him. When she told him that she did not want to, he told her that she was either "going to give it to him or he was going to take it." He then lunged toward her. She testified that she was scared and was unable to run away because there was nowhere to go. She testified that she had no choice but to do what he asked of her. At one point during the encounter, Balvin asked A.R. whether she was scared. When she responded that she was scared, Balvin told her that "you better do everything I tell you to." Balvin then slapped A.R. across her face. A.R. testified that she repeatedly told him "no" and that "we don't have to do this."

A.R.'s testimony indicates that Balvin used force, the threat of force, or coercion to compel her to submit to sexual penetration and, additionally, that she expressed her lack of consent through words by telling him she did not want to have sex. Balvin's sole argument is that A.R.'s testimony was not credible; however, the jury, as a fact finder, found her testimony to be credible. When reviewing a criminal conviction for sufficiency of the evidence, we, as an appellate court, do not pass on the credibility of witnesses. See *State v. France, supra*.

Because the jury as the trier of fact could have found the essential elements of first degree sexual assault beyond a reasonable doubt based on A.R.'s testimony, the evidence was sufficient to support Balvin's conviction. Balvin's assertions to the contrary have no merit.

2. Evidentiary Rulings

Balvin alleges that the district court erred in making certain evidentiary rulings. Specifically, he alleges the court erred in (1) prohibiting him from questioning A.R. regarding a prior false accusation of sexual assault and (2) admitting into

evidence testimony regarding a telephone conversation between Balvin, his fiance, and his mother.

(a) Standard of Review

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). When judicial discretion is not a factor in assessing admissibility, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review. See *id*. But where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. See *id.*

(b) Evidence of Prior False Report of Sexual Assault

Prior to trial, the State filed a motion in limine seeking to preclude Balvin from offering evidence that A.R. allegedly had previously made a false report that she had been sexually assaulted. This previous false report occurred approximately 11 years prior to trial, when A.R. was 10 years old. The district court granted the State's motion, but indicated that it would revisit the issue prior to A.R.'s testimony at trial.

Prior to A.R.'s testimony, the court indicated, "I'm inclined to allow [Balvin] to inquire into whether [A.R.] had made such an allegation and that it turned out it was not true . . . ." The court later clarified its ruling by informing Balvin's counsel, "[I]f you ask [A.R.] if she has made a prior allegation of attempted sexual contact when she was ten years old and she says, no, . . . that ends it."

During Balvin's cross-examination of A.R., counsel asked her, "[A]s we sit here today, do you recall that you reported that you had been sexually assaulted during that incident?" A.R. responded that she did not remember such a report. Counsel was not permitted to ask further questions regarding the prior false report in the presence of the jury.

Outside the presence of the jury, counsel made an offer of proof. Counsel questioned A.R. further about the prior false report. A.R. continually indicated that she did not remember making such a report. When counsel referred to a police report concerning the incident, A.R. testified that because she did not remember reporting that she had been sexually assaulted, she could not agree or disagree with anything written in the police report. Counsel then called A.R.'s mother to testify regarding the prior false report. A.R.'s mother testified she did not remember that A.R. had reported being sexually assaulted or that such report was false.

On appeal, Balvin alleges that the district court erred in prohibiting him from submitting evidence concerning the prior false report during his cross-examination of A.R. Balvin argues that excluding such evidence "is a denial of [his] right to confrontation." Brief for appellant at 23. Upon our review of the record, we conclude that the district court did not abuse its discretion in excluding evidence of the prior false report.

[5,6] In his brief to this court, Balvin concedes that evidence regarding A.R.'s prior false report of a sexual assault is relevant only to demonstrate her credibility as a witness. When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error. *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). And determinations regarding cross-examination of a witness on specific instances of conduct, pursuant to Neb. Evid. R. 608(2), are specifically entrusted to the discretion of the trial court. *State v. Schreiner, supra.*

Rule 608(2) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character

> for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

From the foregoing rule, it is apparent that specific instances of conduct, relating only to the credibility of a witness, may not be established by extrinsic evidence.

During the cross-examination of A.R., Balvin's counsel was permitted to ask A.R. whether she remembered making a prior report that she was sexually assaulted when she was 10 years old. A.R. responded that she did not remember such a report. Counsel wanted to use the police reports from the prior incident to assist A.R. in remembering and to prove that such report was, in fact, false. However, rule 608(2) explicitly prohibits such an attack on the credibility of a witness through extrinsic evidence of specific instances of the witness' conduct. As such, the district court did not err in prohibiting counsel from further questioning A.R. about the prior false report after she indicated she did not remember or in failing to admit into evidence copies of the police report regarding the prior false report.

[7] Balvin argues that his right to confrontation was violated because he was not allowed to demonstrate to the jury that A.R. had previously falsely reported that she was sexually assaulted. The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination. *State v. Stark, supra.*

[8,9] An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility

had counsel been permitted to pursue his or her proposed line of cross-examination. *Id*. The right of cross-examination is not unlimited. *Id.* The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *Id.*

Balvin alleges that the jury would have received a significantly different impression of A.R.'s credibility had he been allowed to question her about the prior false report. We disagree. The alleged false report involved an event that happened 11 years prior to the trial, when A.R. was only 10 years old. The circumstances of the prior report were significantly different from the incident between Balvin and A.R. We do not find that the district court abused its discretion in excluding evidence of the prior false report.

(c) Evidence of Telephone Conversation Between Balvin, Balvin's Fiance, and Balvin's Mother

At trial, the State called Tiffany Blaker (Tiffany) to testify. Tiffany was Balvin's fiance at the time of the incident. Sometime after Balvin was arrested, Tiffany ended her relationship with Balvin. However, prior to the end of their relationship, Balvin telephoned Tiffany from jail on numerous occasions. These telephone conversations were recorded by jail personnel. During Tiffany's testimony, the State offered into evidence a recording of six of the telephone conversations between Balvin and Tiffany. Before any of the recordings were played for the jury, Balvin's counsel objected generally to the admission of the recordings, arguing, "I believe the CD in question does contain hearsay and does contain statements other than that of . . . Balvin." The district court overruled the objection.

During the second telephone conversation played for the jury, Tiffany telephoned Balvin's mother on another telephone line so that Tiffany was able to talk to both Balvin and his mother. Tiffany then relayed to Balvin his mother's questions and comments. As a part of this dialog, Tiffany told Balvin that his mother wanted to know whether the girl he picked up

on the night in question was a prostitute who was angry that she did not get paid. Balvin responded, "That is really close." Balvin did not make any objections at the time this recording was played for the jury.

After the second telephone conversation was played for the jury, the State questioned Tiffany about the content of the recording as follows:

> Q. And you are trying to relay what [Balvin's mother] says to . . . Balvin, her son?
>
> A. Yes.
>
> Q. And it was [his mother] that brought up the possibility that he had picked up a prostitute.
>
> A. Yes.

After this line of questioning, Balvin's counsel objected to the form of the question, because counsel did not "think that's what was said" on the recording and because "the tape speaks for itself." The court overruled the objection.

On appeal, Balvin argues that Tiffany's testimony about the substance of the conversation between herself, Balvin's mother, and Balvin included inadmissible hearsay statements. Such hearsay statements include Tiffany's testimony that Balvin's mother was the one who initially suggested to Balvin that A.R. was a prostitute. We do not read Balvin's argument to suggest that the admission of the recording, itself, was in any way erroneous.

[10,11] At trial, Balvin did not object to Tiffany's testimony on the basis of hearsay. Rather, he objected only to the form of the State's question. On appeal, a defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

Because Balvin has raised a different ground for his objection to Tiffany's testimony than was presented to the trial court, he has not preserved this issue for appellate review and we decline to address his assertions further.

3. Motions for Mistrial

Balvin alleges that the district court erred by failing to declare a mistrial because of the State's use of prohibited terms during the trial. Balvin also alleges that certain comments made during the State's closing argument amounted to prosecutorial misconduct and that the court erred in failing to grant a mistrial as a result of such comments.

(a) Standard of Review

[12] The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion. *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

(b) Use of Prohibited Terms

Prior to trial, Balvin filed a motion in limine seeking to preclude the State from using the terms "victim," "sexual assault kit," "rape," "assailant," or "attack" during its opening statement or its presentation of evidence. The district court sustained the motion in limine except as to the use of the term "sexual assault kit." On multiple occasions during the trial, Balvin moved for a mistrial based upon the motion in limine. Specifically, Balvin argued that the State and its witnesses had repeatedly used certain terms in violation of the motion in limine. The district court denied each of Balvin's motions for a mistrial.

On appeal, Balvin asserts that the district court erred in denying his motions for a mistrial. Balvin alleges that the use of the prohibited terms "tainted the testimony and the evidence presented" and that "[t]his is a denial of [his] fundamental right to a fair trial free from . . . prejudice." Brief for appellant at 26.

[13] A motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). "Actual prejudice" means a real probability, or a probability existing in fact, sufficient to undermine confidence in the outcome or uphold a conclusion

that the result of the proceeding would have been different. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case. *Id*.

[14,15] Balvin alleges that the State violated the motion in limine 12 times during the trial. We have reviewed each instance cited by Balvin. Initially, we note that Balvin failed to make any objection or move for a mistrial after six of the alleged violations of the motion in limine. The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). In order to be timely, an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Moreover, when a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. See *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Id.*

Balvin did not properly object or make a timely motion for a mistrial after six of the alleged violations. As such, we find that these instances are not preserved for appellate review. We now review the remaining six alleged violations.

During the State's direct examination of a deputy with the Lancaster County sheriff's office, the deputy testified that A.R. reported to him that she had been "raped." Balvin objected to this testimony as hearsay. The district court sustained the objection and instructed the jury to "disregard the comment."

[16] On appeal, Balvin alleges that the deputy violated the motion in limine by using the term "rape." While it is clear that the deputy did utilize a term prohibited by Balvin's motion in limine, it is also clear that the entire statement was stricken from the record because it was hearsay. If an objection or

motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily, error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted. *State v. Archbold, supra*.

The remaining five alleged violations of the motion in limine involve the testimony of Melissa Kreikemeier, a forensic scientist for the Nebraska State Patrol crime laboratory. Kreikemeier testified about testing she had done on various pieces of evidence involved in the case. Specifically, Kreikemeier testified about a report she had completed during the criminal investigation.

During the State's direct examination, it asked Kreikemeier to describe the various sections of the report to the jury. As a part of this discussion, Kreikemeier indicated that on the first page of the report, she had listed the offense as sexual assault and then listed the names of the victim and suspect. In response to Kreikemeier's testimony, the State asked her about her use of the terms "sexual assault" and "victim" as follows:

> Q. On the right-hand side you mentioned that you list the offense and then you have the name of it. Is that just the allegation of the case that you are working on?
>
> A. Yes. It's the alleged offense.
>
> Q. You are not making any conclusions with respect to the guilt or innocence of the party, is that correct?
>
> A. No.
>
> Q. Okay. And is that just how you commonly list it, what type of case?
>
> A. Yes.
>
> Q. All right. And the same with your victim and the suspect. Those are simple — your lab's way of making those notations. They are not in any way determinative as to whether or not those parties are in fact the victim or the suspect, is that right?
>
> A. That's correct.

The State then continued its examination of Kreikemeier by questioning her about specific tests she had completed on evidence obtained during A.R.'s medical examination after the

incident. Kreikemeier testified that she tested cells from A.R.'s vaginal area for the presence of sperm. She indicated that such test is conducted with a "vaginal smear slide." Kreikemeier explained to the jury what a vaginal smear slide is and where it comes from as follows:

> When the alleged victim goes to the hospital for the exam, the nurse will take swabs of the vaginal area. She will . . . take that swab and smear it on a slide and then she will also save that same swab and put it into a swab container and what we do with the smear slide is we do our staining techniques on that and we look at it under the microscope.

Shortly after Kreikemeier provided this testimony, the court took a brief recess. During this recess, Balvin's counsel made an oral motion for a mistrial "based on the Court's previous order and motion in limine instructing no one to use" terms such as "victim." The court overruled the motion.

When trial resumed, the State continued questioning Kreikemeier. Kreikemeier testified about specific evidence contained within A.R.'s sexual assault kit. Kreikemeier opened the kit in front of the jury and read from the label of each envelope contained in the kit. Two such envelopes were labeled "panties from victim."

After the court recessed for the day, Balvin's counsel again motioned for a mistrial based on Kreikemeier's repeated use of the word "victim." Counsel argued, "There is a cumulative effect and obviously I filed this motion in limine and the Court grants it for a reason." The court overruled the motion for a mistrial.

As discussed above, Balvin must prove that the alleged violations of the motion in limine actually prejudiced him, rather than creating only the possibility of prejudice. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). He has failed to do so. While Kreikemeier did use some of the prohibited terms during her testimony, her use of such terms was, for the most part, generic in nature and not specific to the parties in this case. Moreover, during the State's direct examination of Kreikemeier, it questioned her about her

use of the prohibited terms and she indicated that the terms in her report and on her evidentiary labels were merely the laboratory's way of generically referring to the parties involved and in no way reflected on the guilt or innocence of the accused party. Because there is no indication that Kreikemeier's use of the prohibited terms resulted in any prejudice, we cannot say that the court abused its discretion in denying Balvin's motions for a mistrial.

(c) Closing Argument

The State began its closing argument to the jury with the following description of the events on the night in question:

> Casting himself in the role of a chivalrous gentleman, . . . Balvin, offered a young woman a ride on a dark, cold and damp evening, a ride to a nearby destination. But Balvin had ulterior motives as almost immediately would be seen and he, as [A.R.] would found [sic] out later, was most certainly no gentleman. Contrary to the actions of an individual simply providing a ride to the destination just blocks away, Balvin within minutes if not seconds offers [A.R.] alcohol and the possibility of some marijuana if he'll go driving around with her. Who does this? Who makes such an offer to a stranger, particularly a female at night unless he has an ulterior motive?
>
> It was certainly no coincidence that his actions mirrored the age-old attempts of men providing alcohol or attempting to provide alcohol to the women — to a woman in the hopes of loosening her inhibitions. And driving around in the country pretending to be looking for a friend's house, as . . . Balvin did, while feeding [A.R.] more alcohol was just another part of that age-old plan. The only thing missing from . . . Balvin's plan that night was his Mustang mysteriously running out of gas in the middle of nowhere.

In his brief to this court, Balvin argues that the State's comments were "only remotely based on evidence adduced and seemed to be based on some urban myth." Brief for appellant at 28. In addition, Balvin asserts that the comments were "nothing more than a play on stereotypical images of sinister, predatory

men and weak, wafish [sic], maidens." *Id*. Balvin argues that such remarks had a prejudicial effect on the members of the jury and constituted prosecutorial misconduct. Balvin assigns as error the district court's failure to grant a mistrial as a result of these comments.

[17] We first note that Balvin did not request a mistrial or move to have the court admonish the jury when the prosecutor made these remarks. A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[18] Even so, we conclude that the prosecutor's remarks in closing argument did not constitute prosecutorial misconduct. Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *Id.* A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

In light of the evidence presented at trial, we cannot say that the prosecutor's comments during closing argument were based only "remotely" on the evidence or that such comments were so prejudicial as to prevent a fair trial. Balvin's assignment of error has no merit.

4. Lifetime Community Supervision

Balvin argues that the district court erred in finding that he committed an aggravated offense, making him subject to lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008). Balvin contends that the factual finding of an aggravated offense must be made by a jury, rather than by the court.

(a) Standard of Review

[19] Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard of review is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor. See *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

(b) Analysis

At the sentencing hearing, the district court found that "this is an aggravated offense" and that therefore Balvin "is subject to lifetime community supervision by the Office of Parole Administration upon release from incarceration or a civil commitment as provided by law." Balvin argues that the court erred in making this determination. He asserts that such a finding should have been made by the jury. We agree.

Section 83-174.03 details which sex offenders are subject to lifetime community supervision. This section was revised by the legislature, operative January 1, 2010. However, at the time of Balvin's offense and trial, § 83-174.03 read:

> Any individual who, on or after July 14, 2006, . . . is convicted of or completes a term of incarceration for an aggravated offense as defined in section 29-4005, shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life.

At the time of Balvin's offense and trial, Neb. Rev. Stat. § 29-4005(4)(a) (Reissue 2008) defined "aggravated offense" as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years."

[20] In *State v. Payan, supra*, the Nebraska Supreme Court addressed the imposition of lifetime community supervision pursuant to § 83-174.03. In *Payan*, the court held that lifetime community supervision is akin to "parole," and is, as a result,

an additional form of punishment for certain sex offenders. The court also held that because lifetime community supervision is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an "aggravated offense" where such facts are not specifically included in the elements of the offense of which the defendant is convicted. See *State v. Payan, supra.*

In this case, there is no question that A.R. was over the age of 12. As such, a finding that Balvin committed an aggravated offense as defined in § 29-4005(4)(a) had to be based on whether the offense included penetration through the use of force or the threat of serious violence. Balvin was convicted of first degree sexual assault pursuant to § 28-319. Section 28-319(1) provides in pertinent part, "Any person who subjects another person to sexual penetration . . . without the consent of the victim . . . is guilty of sexual assault in the first degree."

While penetration is a fact specifically included as an element of first degree sexual assault, "the use of force or the threat of serious violence" is not a fact specifically included as an element of the offense. Pursuant to the Supreme Court's holding in *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009), Balvin was entitled to a jury determination regarding whether the offense included the use of force or the threat of serious violence. Because the jury did not make such a determination, the district court erred in finding that Balvin committed an aggravated offense.

Although the district court erred in finding that Balvin committed an aggravated offense, such error may be harmless. See *id*. The appropriate harmless error standard in this circumstance is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor. See *id.*

In *Payan*, the Supreme Court concluded that the trial court committed harmless error in finding that the defendant committed an aggravated offense. There, the jury heard two different material versions of the events. In the State's evidence, the victim and a witness testified that the victim was sexually

assaulted and that the defendant threatened the victim with a knife. In the defendant's defense, he and his supporting witness claimed that no assault took place whatsoever. The *Payan* court found there was no evidence that if the assault occurred, it was done without violence or the threat thereof. Accordingly, the *Payan* court concluded:

> On this record, any rational jury which convicted [the defendant] of the sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Accordingly, we conclude that the making of this finding by the trial judge instead of the jury was harmless error.

277 Neb. at 677, 765 N.W.2d at 204-05.

Here, A.R. testified that Balvin drove her to a deserted, dark road outside the city and asked her to have sex with him. When she told him that she did not want to, he told her that she was either "going to give it to him or he was going to take it." He then lunged toward her. She testified that she was scared and was unable to run away because there was nowhere to go. She testified that she had no choice but to do what he asked of her. At one point during the encounter, Balvin asked A.R. whether she was scared. When she responded that she was scared, Balvin told her that "you better do everything I tell you to." Balvin then slapped A.R. across her face. A.R. testified that she repeatedly told him "no" and that "we don't have to do this."

Based on this evidence, we cannot say beyond a reasonable doubt that the jury would have found that Balvin used force or the threat of serious violence in compelling A.R. to engage in sexual intercourse with him. First degree sexual assault involves sexual penetration without the consent of the victim. The jury was instructed "without consent" means that A.R. was compelled to submit due to the use of force or the threat of force or coercion, that A.R. expressed a lack of consent through words, or that A.R. expressed a lack of consent through conduct. It is not clear whether the jury found that Balvin committed first degree sexual assault because he compelled A.R. to submit through force or the threat of force or whether the jury found that Balvin committed first

degree sexual assault because A.R. expressed a lack of consent through her words or actions.

Because we cannot say beyond a reasonable doubt that the jury would have found that Balvin used force or the threat of serious violence in compelling A.R. to engage in sexual intercourse with him, we cannot say that the district court's error in making the determination that Balvin committed an aggravated offense was harmless. We reverse, and remand with directions to conduct an evidentiary hearing for a jury to determine whether Balvin used force or the threat of serious violence in sexually assaulting A.R. and, thus, whether Balvin committed an aggravated offense and is subject to lifetime community supervision.

5. Excessive Sentence

(a) Standard of Review

[21,22] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (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.*

(b) Analysis

The district court sentenced Balvin to 24 to 36 years' imprisonment. On appeal, Balvin argues that this sentence is excessive because the court placed too much weight on Balvin's criminal history and did not consider the numerous positive character letters submitted by his family and friends. We find that the district court did not abuse its discretion in imposing a sentence of 24 to 36 years' imprisonment.

[23] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). 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.* In imposing a sentence, a

judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

Balvin was convicted of first degree sexual assault, a Class II felony. See § 28-319. A Class II felony is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 2008). Balvin's sentence of 24 to 36 years' imprisonment is well within the statutory limits.

At the sentencing hearing, the district court indicated that it had reviewed the presentence report, including all of the letters submitted by Balvin's family and friends. The court also noted that Balvin has a "somewhat extensive prior criminal record," which includes convictions for attempted burglary, terroristic threats, fleeing to avoid arrest, hindering an arrest, and driving under the influence. The court went on to find that "[t]he offense here is extremely serious."

Contrary to Balvin's assertions in his brief to this court, there is no evidence that the district court did not properly consider all of the relevant factors in imposing a sentence. Rather, it appears that the court considered all of the information in the presentence report as well as the nature and circumstances of the current offense. Given the serious nature of this offense and Balvin's criminal history, the district court did not abuse its discretion in sentencing Balvin to 24 to 36 years' imprisonment.

6. Ineffective Assistance of Trial Counsel

[24] Balvin asserts that his trial counsel was ineffective in a number of respects. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The two-prong ineffective assistance of counsel test need not be

addressed in order. *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010).

When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *Id.* Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.*

[25] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young, supra*. The determining factor is whether the record is sufficient to adequately review the question. *Id.*

Because Balvin has different counsel in this appeal from trial counsel, Balvin can make a claim for ineffective assistance of trial counsel on direct appeal. See *State v. York*, 273 Neb. 660, 664, 731 N.W.2d 597, 602 (2007) ("where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review").

We now turn to Balvin's specific claims.

Balvin alleges that trial counsel was ineffective in preparing for trial in that counsel did not depose witnesses and did not complete a "proper investigation." Brief for appellant at 41. The record is not sufficient to address this claim, because it does not indicate whether counsel deposed any witnesses or whether there were any further witnesses to depose, nor does the record disclose trial counsel's strategy in trial preparation.

Balvin alleges that trial counsel was ineffective in keeping him informed of the progress of the case prior to trial. Specifically, Balvin alleges that trial counsel did not provide him with any paperwork, including statements made against him or copies of depositions of witnesses; did not answer his telephone calls; did not inform him of the evidence the State planned to use against him; and informed him that "the [S]tate had evidence that would prove him not guilty and

that he should sit back and relax and that he did not need to have copies of statements or paperwork and it would only waste money." *Id.* The record is not sufficient to address these claims, because it does not contain any indication of the communication that transpired between Balvin and his counsel prior to trial.

Balvin alleges that trial counsel was ineffective because he failed to appear at a pretrial hearing and had another attorney from his office appear on his behalf. Balvin indicates that during this hearing, the State endorsed additional witnesses; Balvin waived his right to a speedy trial; and the court granted, only in part, Balvin's motion to preclude the use of certain terms at trial. It is not clear from Balvin's assertions how he was prejudiced by the presence of substitute counsel during this hearing. Balvin does not allege that the outcome of the hearing would have been different had his counsel attended, nor does he argue that the substitute counsel's representation was in any way deficient. As such, we find that Balvin did not allege sufficient facts to demonstrate any prejudice and we determine this allegation to be without merit.

Balvin alleges that trial counsel was ineffective in failing to call certain witnesses or to present evidence of certain facts. Balvin alleges that trial counsel was ineffective for failing to "call witnesses on his behalf at trial, including character witnesses." *Id.* at 42. Balvin also alleges that counsel was ineffective in failing "to adequately cross-examine the [S]tate's witnesses and/or ask question[s] that . . . Balvin wanted him to ask." *Id.* at 43. As a part of this argument, Balvin alleges that counsel failed to adequately cross-examine the State's DNA expert. The record is not sufficient to address these claims, because it does not disclose whether any additional witnesses were available to testify, what their testimony would have been, what other questions counsel could have asked the State's witnesses, or counsel's reasoning for not having other witnesses testify or not conducting further cross-examination.

Balvin also alleges that trial counsel was ineffective in failing to call him to testify in his own defense. The record does not disclose why counsel did not call Balvin to testify in his

own defense. However, the record does reflect that Balvin freely and voluntarily waived his right to testify. After the State rested, the following dialog occurred between the court and Balvin:

> THE COURT: Okay. And is it your decision to not testify?
>
> [Balvin]: Yes.
>
> THE COURT: And is that being done by you freely and voluntarily?
>
> [Balvin]: Yes.
>
> THE COURT: Has anyone made any promises to you or threats against you or any inducements to get you to make this decision?
>
> [Balvin]: No.

Balvin does not allege any facts to suggest that counsel improperly advised him to waive such right or to suggest that Balvin's waiver was not freely and voluntarily given. Nonetheless, upon our review, we conclude that the record is not sufficient to address this claim, because it does not contain any indication of the communication between Balvin and counsel concerning whether Balvin should testify in his own defense or any indication of counsel's reason for not calling Balvin to testify.

Balvin alleges trial counsel was ineffective in failing to offer evidence to demonstrate that A.R. was a prostitute and that A.R. used drugs. Included in Balvin's argument are specific assertions that trial counsel failed to oppose certain motions in limine filed by the State which requested that evidence of A.R.'s past sexual behavior and drug use be prohibited at trial. The record is not sufficient to address these claims, because it does not disclose what evidence counsel failed to present at trial, nor does it disclose counsel's reasons for failing to object to the State's motions in limine.

Balvin alleges that trial counsel was ineffective in failing "to refresh, or attempt to refresh, [A.R.'s] recollection as to her inability to remember whether she had falsely reported a sexual assault earlier in her life." Brief for appellant at 43. We addressed this topic in detail above. As a part of our discussion, we examined counsel's extensive efforts to admit into

evidence proof that A.R. had previously falsely reported that she was sexually assaulted. We then concluded that pursuant to rule 608(2), counsel could not utilize extrinsic evidence, including copies of police reports, to prove that A.R. had previously made a false report. Based on our analysis, we find that counsel's performance in cross-examining A.R. about whether she had previously falsely reported she was sexually assaulted was not deficient.

Balvin also alleges that trial counsel was ineffective in failing to file motions to suppress or to object to the admissibility of certain evidence. Specifically, Balvin alleges that trial counsel did not file a motion to suppress evidence of letters Balvin wrote and telephone calls he made while incarcerated. Balvin argues that counsel "aided" the State by stipulating to the foundational admissibility of the telephone calls. Brief for appellant at 43. Balvin further alleges that counsel failed to object to the admission of a particular telephone call during which Balvin asked Tiffany to take his computer to his mother's house. The record is not sufficient to address these claims, because it does not disclose counsel's reasons for not filing motions to suppress or not objecting to the admission of certain evidence.

Balvin alleges that counsel was ineffective in failing to "adequately argue against" the State's motion in limine requesting that the district court prohibit Balvin from offering evidence to demonstrate that the State's witness, Tiffany, had a motive to cooperate with the State and to testify against Balvin. *Id.* at 42. The record is not sufficient to address this claim, because it does not disclose what further arguments counsel could have made in opposing the State's motion.

Balvin alleges that counsel was ineffective in failing to make a motion for dismissal of the case against him after the State completed its case in chief and in failing to make a motion for a directed verdict of not guilty when the evidence was completed. Contrary to Balvin's allegations, counsel did make a motion to dismiss the case after the State rested. The court denied the motion. Balvin did not offer any witness testimony or evidence in his defense. As such, counsel's motion to dismiss was made at the close of all of the evidence. Counsel did not make a

specific motion for a directed verdict, but such a motion would have been futile. The standard for granting a motion to dismiss and a motion for directed verdict is essentially the same. The relevant question is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. See *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001). Because the district court denied counsel's motion to dismiss, it would have also denied a motion for a directed verdict. Balvin's claim has no merit.

Balvin alleges that trial counsel was ineffective in failing to object during the State's "improper closing argument." Brief for appellant at 45. We discussed this topic thoroughly above. We concluded that although counsel failed to object to certain remarks during the State's closing argument, the prosecutor's remarks did not constitute prosecutorial misconduct. We also concluded that the prosecutor's comments during closing argument were based on the evidence and were not so prejudicial as to prevent a fair trial. Based on our conclusions above, we find that Balvin was not prejudiced by counsel's failure to object to the State's closing argument.

Balvin alleges that trial counsel was ineffective in failing to argue effectively during closing arguments, in failing to file a motion for new trial, and in failing to argue and convince the district court that he deserved a lesser sentence than the one he received. The record is not sufficient to address these claims, because it does not disclose what further arguments counsel could have made and what grounds existed as bases for a motion for new trial.

Balvin alleges that trial counsel was ineffective in failing to request that the jury make a specific finding concerning whether he was subject to lifetime community supervision. We discussed this topic thoroughly above and concluded that the district court erred in not permitting the jury to make the factual findings necessary to impose lifetime community supervision. We reversed, and remanded with directions to conduct an evidentiary hearing so that a jury could make such factual findings. In light of our decision, we decline to address Balvin's assertion in the context of postconviction relief.

V. CONCLUSION

Upon our review, we find that the district court erred in determining that Balvin committed an aggravated offense and was, as a result, subject to lifetime community supervision. We find that the jury should have determined whether Balvin committed an aggravated offense. We reverse, and remand with directions to conduct an evidentiary hearing so that a jury may make a finding regarding whether Balvin's offense was aggravated and, thus, whether he was subject to lifetime community supervision. We affirm the conviction and sentence in all other respects.

As to Balvin's claims of ineffective assistance of counsel, we find that he was not denied effective assistance of counsel when substitute counsel appeared on Balvin's behalf during a pretrial hearing, when counsel failed to refresh A.R.'s memory about a prior false report that she had been sexually assaulted, when counsel made a motion to dismiss at the close of the evidence, or when counsel failed to object to the State's closing argument. We find that the record is insufficient to review the remaining grounds for Balvin's ineffective assistance of counsel.

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

IN RE INTEREST OF JUSTIN H. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. TONYA S., APPELLANT, AND JEFFREY H. AND MICHAEL F., APPELLEES AND CROSS-APPELLANTS.

791 N.W.2d 765

Filed December 7, 2010. No. A-10-094.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.