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a child, second offense, was a Class II felony offense, not a Class IB felony offense.

Finally, Summerville also asserts that the district court erred in crediting his time served on the third degree sexual assault of a child conviction instead of on the first degree sexual assault of a child conviction. Summerville has not demonstrated why it was an abuse of discretion for the court to order his credit applicable to the third degree sexual assault of a child conviction. We find no merit to this argument.

V. CONCLUSION

We find no merit to the assertions raised by Summerville on appeal. The district court did not commit reversible error in admitting prior bad acts evidence, did not abuse its discretion in overruling Summerville's motions for new trial, and did not impose excessive sentences. We amend the sentencing order to remedy a clerical error concerning the proper classification of Summerville's conviction for first degree sexual assault of a child, second offense.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
BRAD CARNICLE, APPELLANT.
792 N.W.2d 893

Filed December 14, 2010. No. A-10-074.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Investigative Stops: Appeal and Error.** The ultimate determination of reasonable suspicion to conduct an investigatory stop is reviewed de novo.
3. **Motor Vehicles.** Under Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), any motor vehicle may be equipped with not to exceed two auxiliary driving lights mounted on the front at a height not less than 12 inches nor more than 42 inches above the level surface on which the vehicle stands, and every such auxiliary driving light shall meet the requirements and limitations set forth in Neb. Rev. Stat. § 60-6,221 (Reissue 2004).

4. ____. Under Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), auxiliary driving lights shall be turned off at the same time a motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear.
5. ____. Neb. Rev. Stat. § 60-6,221(1) (Reissue 2004) provides that headlights shall produce a driving light sufficient to render clearly discernible a person 200 feet ahead, but that the headlights shall not project a glaring or dazzling light to persons in front of such headlights.
6. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** The question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when an officer has probable cause to believe that a traffic violation has occurred.
7. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant.
9. **Police Officers and Sheriffs: Probable Cause: Appeal and Error.** In reviewing a determination of probable cause, an appellate court focuses on the facts known to law enforcement officers, not the conclusions the officers drew from those facts.
10. **Investigative Stops: Police Officers and Sheriffs: Motor Vehicles.** A vehicle's lights, of whatever kind, could, subjectively, be so glaring or dazzling as to provide a law enforcement officer with reasonable suspicion to make a traffic stop for a violation of the statutes governing lighting equipment on vehicles.
11. **Criminal Law: Motor Vehicles: Words and Phrases.** While Nebraska law does not make it illegal to drive with statutory auxiliary driving lights per se, such lights must comply with certain requirements in order to be lawful. Auxiliary driving lights are defined by Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), and under that subsection, if they do not meet the criteria for headlights set forth in Neb. Rev. Stat. § 60-6,221 (Reissue 2004), it is a Class III misdemeanor under Neb. Rev. Stat. § 60-6,222 (Reissue 2004).
12. **Criminal Law: Motor Vehicles.** Neb. Rev. Stat. § 60-6,224(1) (Reissue 2004) provides that whenever any person operating a motor vehicle on any highway in Nebraska meets another person operating a motor vehicle, proceeding in the opposite direction and equipped with headlights constructed and adjusted to project glaring or dazzling light to persons in front of such headlights, upon signal of either person, the other shall dim the headlights of his or her motor vehicle or tilt the beams of glaring or dazzling light projecting therefrom downward so as not to blind or confuse the vision of the operator in front of such headlights. Violation of § 60-6,224 is a Class V misdemeanor.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, GERALD E. ROUSE and LAURIE YARDLEY,

Judges. Judgment of District Court reversed, and cause remanded with directions.

Matthew K. Kosmicki, of Brennan & Nielsen Law Offices, P.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

A Nebraska state trooper stopped Brad Carnicle's vehicle on U.S. Highway 34 because Carnicle failed to dim his "auxiliary driving lights," and the stop led to his arrest for driving while under the influence (DUI) and ultimately his conviction of that crime. The undisputed evidence is that Carnicle's vehicle was equipped with factory-installed fog lamps, which Carnicle argues are not within the purview of Neb. Rev. Stat. § 60-6,225 (Reissue 2004), defining auxiliary driving lights, and Carnicle argues that as a result, the trooper did not have probable cause for the stop. We conclude there is no evidence whatsoever that Carnicle violated the statute which determines when he must dim his vehicle's headlights. Moreover, Carnicle's fog lamps are not auxiliary driving lights under Nebraska statutes, and, in any event, there was no probable cause for the trooper to believe that the fog lamps were illegal or had to be dimmed. Therefore, Carnicle's motion to suppress evidence should have been sustained, and we reverse, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The stop at issue occurred at approximately 11 p.m. on April 4, 2008, as Trooper Caleb Bruggeman was proceeding eastbound, and Carnicle westbound, on Highway 34 in Lancaster County. Bruggeman observed two vehicles approaching him, and the second vehicle, which turned out to be Carnicle's, was, according to Bruggeman, 25 feet behind the first vehicle. Bruggeman did not flash his cruiser's headlights or otherwise "signal" the approaching drivers to dim their vehicles'

lights. Carnicle's vehicle had its headlights on low beam when Bruggeman passed by, and its fog lamps were also then illuminated. Bruggeman referred to these lights as "auxiliary lights," which he defined as "any lights mounted on the front of the vehicle other than headlights." Bruggeman admitted that the lights he was referring to were fog lamps and that after he made the stop, he could discern that they were "factory installed."

Carnicle testified that his vehicle's fog lamps were factory installed and that they are controlled by a separate switch on the dashboard. He testified that when the fog lamps are turned on, they automatically turn off when the headlights are switched to bright and then come back on when the driver dims the headlights to low beam. Portions of the vehicle's operator's manual were received in evidence, and the manual's contents mirrored Carnicle's testimony as to how the fog lamps operate.

After passing the approaching vehicles, Bruggeman turned around, caught up to the second vehicle in line, and stopped it. Upon contact with the driver, Carnicle, Bruggeman informed him that he was stopped for failing to "dim the auxiliary driving lights"—the factory-installed fog lamps. A DUI investigation ensued, and an Intoxilyzer breath test was obtained yielding a result of .10 of 1 gram of alcohol per 210 liters of breath. No challenge is made to the conduct of such test or the result. Upon being charged with first-offense DUI in Lancaster County Court, Carnicle filed a motion to suppress on the ground that there was no probable cause for the stop.

The county court granted Carnicle's motion to suppress, finding that the fog lamps were manufactured with the vehicle, were not "add-ons" and thus not auxiliary driving lights, and were not within the contemplation of the statutory language of § 60-6,225(2). Therefore, the court found that there was no probable cause for the stop and suppressed the evidence of DUI.

The State appealed the county court's decision on the motion to suppress to the district court, which reversed the suppression order and remanded the matter for trial. The district court reasoned, summarized, that the question was not

whether the fog lamps on Carnicle's vehicle actually violated § 60-6,225, but whether Bruggeman had an objectively reasonable basis to believe that they violated the statute when they were not dimmed. The district court found such reasonable basis, therefore deciding that Bruggeman had probable cause to stop the vehicle. After remand back to county court and a stipulated trial which preserved the suppression issue, Carnicle was found guilty of DUI, first offense, and placed on probation. Another appeal followed to the district court, which affirmed the conviction, and now Carnicle appeals to this court.

ASSIGNMENTS OF ERROR

We reduce Carnicle's several assignments of error to their essence: Did the district court err in reversing the county court's ruling on the motion to suppress and, after the conviction in county court, again err by affirming the county court's overruling of the motion to suppress during the trial after the district court's remand?

STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). The ultimate determination of reasonable suspicion to conduct an investigatory stop is reviewed de novo. See *State v. Konfrst, supra.*

ANALYSIS

[3-5] The facts are not disputed, and thus, we approach the appeal as involving only questions of law. We begin our analysis with the statute allowing vehicles to be equipped with "auxiliary driving lights" and defining such, § 60-6,225(2), which provides in pertinent part:

> Any motor vehicle may be equipped with not to exceed two auxiliary driving lights mounted on the front at a

> height not less than twelve inches nor more than forty-two inches above the level surface on which the vehicle stands, and every such auxiliary driving light shall meet the requirements and limitations set forth in section 60-6,221. . . . Auxiliary driving lights shall be turned off at the same time the motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear.

The terms of the above statute require that we refer to Neb. Rev. Stat. § 60-6,221 (Reissue 2004). Section 60-6,221(1) provides that headlights shall "produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but the headlights shall not project a glaring or dazzling light to persons in front of such headlights." Section 60-6,221(2) then provides:

> Headlights shall be deemed to comply with the provisions prohibiting glaring and dazzling lights if none of the main bright portion of the headlight beam rises above a horizontal plane passing through the light centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

The lights on Carnicle's vehicle with which we are concerned are referenced in the owner's manual as "fog lamps." They are controlled by a separate switch. Once the "fog lamps" are switched on by the driver, they operate in the following manner as described in the owner's manual for Carnicle's vehicle: "The fog lamps will go off whenever your high-beam headlamps come on. When the high beams go off, the fog lamps will come on again." However, we note that this operating sequence is the opposite of how § 60-6,225(2) requires that "auxiliary driving lights" operate. That statute provides: "Auxiliary driving lights shall be turned off at the same time the motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear." The statutory provision allowing for a vehicle to be equipped with "two auxiliary driving lamps" has been part of Nebraska law since 1931. See Comp. Stat. § 39-1175(b) (Supp. 1931). Given that under the statutes just discussed,

"auxiliary driving lights" have the same operating attributes as "headlights," and given that there is no evidence that the "fog lamps" on Carnicle's vehicle have such attributes, we agree with the county court's conclusion that "fog lamps" are not statutorily defined auxiliary driving lights. However, we agree with the district court that such conclusion is not necessarily determinative with respect to whether there was probable cause for the stop.

[6-8] As said, the county court sustained the motion to suppress on the basis that the fog lamps were not auxiliary driving lights. In contrast, the district court undertook an analysis of whether it was objectively reasonable for Bruggeman to believe that Carnicle's failure to turn off what turned out to be fog lamps was a law violation, which would in turn provide probable cause for the traffic stop that led to the DUI investigation and arrest. The district court's approach was fundamentally correct because the determinative issue is whether there was probable cause for the traffic stop, not whether Carnicle was actually in violation of the statutes regarding headlights and auxiliary driving lights. In this regard, we recall the fundamental proposition that "the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred." *State v. Draganescu*, 276 Neb. 448, 459, 755 N.W.2d 57, 73 (2008). A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant. *Id.* Put another way, in the context of determining whether there was probable cause for a traffic stop, "objectively reasonable" equates to probable cause.

[9] Our determination of probable cause is made de novo. Importantly, the validity of an arrest hinges on the existence of probable cause, not the officer's knowledge that probable cause exists. *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006). See, also, *State v. Vermuele*, 234 Neb. 973, 453

N.W.2d 441 (1990). In *State v. Ball*, the court quoted from the Seventh Circuit:

> "Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest."

271 Neb. at 154, 710 N.W.2d at 605, quoting *Williams v. Jaglowski*, 269 F.3d 778 (7th Cir. 2001). Thus, the *Ball* court said that "we focus on the facts known to the officers, not the conclusions the officers drew from those facts." 271 Neb. at 154, 710 N.W.2d at 605. The *Ball* court's observation just quoted is another way of pointing out that appellate courts review determinations of probable cause de novo and reach independent conclusions of law.

What Bruggeman knew and observed is derived from his report and testimony at the suppression hearing—all of which is undisputed. We quote from Bruggeman's report:

> Bruggeman observed two westbound vehicles and noted the second vehicle was following the first vehicle by approximately 25′. . . . Bruggeman also noted the second vehicle was driving with its auxiliary driving lights on. The second vehicle failed to dim its lights when it met . . . Bruggeman. . . . Bruggeman turned around behind the vehicle and performed a traffic stop.

[10] When asked why he stopped the vehicle, Bruggeman testified, "For failing to dim the auxiliary driving lights." However, given the undisputed evidence about the way Carnicle's factory-installed fog lamps operated, it is clear that Carnicle had his headlights dimmed when Bruggeman passed by him; otherwise, the fog lamps would not have been on. Bruggeman answered in the affirmative when asked whether these lights "provide[d] any glare [in his] direction," but that affirmative answer to an arguably leading question is the sum total of the evidence about glare or its severity. And, it was not until after the vehicle was stopped that Bruggeman knew that the lights were "fog lamps." However, as outlined above, whether a vehicle's front lights are unlawfully "glaring" or

"dazzling" requires, at least for a conviction of the associated crime, an objective measurement under § 60-6,221(2), which was not performed in this case. However, even absent such measurement, we recognize the possibility that a vehicle's lights, of whatever kind, could, subjectively, be so "glaring" or "dazzling" as to provide a law enforcement officer with reasonable suspicion to make a traffic stop for a violation of the statutes governing lighting equipment on vehicles. However, in the case before us, Bruggeman provided no testimony so as to justify the stop on that basis—his reason was solely "failing to dim the auxiliary driving lights." The State argues that these lights were auxiliary lights that had to be dimmed, directing us initially to Black's Law Dictionary 155 (9th ed. 2009), which defines auxiliary as "**1.** Aiding or supporting. **2.** Subsidiary." As part of its argument, the State notes that the owner's manual in evidence says, "Your parking lamps and/or low-beam headlamps must be on for your fog lamps to work." The owner's manual also states, "Remember, fog lamps alone will not give off as much light as your headlamps"; "Never use your fog lamps in the dark without turning on your headlamps"; and "Use the fog lamps for better vision in foggy or misty conditions." Thus, the State contends that fog lamps are clearly "aiding or supporting" lights and, therefore, are properly described from a grammatical standpoint by the adjective "auxiliary." Brief for appellee at 7. But, that is different from whether the fog lamps are "auxiliary driving lights," as defined by § 60-6,225(2), that might have to be dimmed for an oncoming vehicle.

[11] While Nebraska law does not make it illegal to drive with statutory auxiliary driving lights per se, such lights must comply with certain requirements in order to be lawful. Auxiliary driving lights are defined by § 60-6,225(2), and under that subsection, if they do not meet the criteria for headlights set forth in § 60-6,221, it is a Class III misdemeanor under Neb. Rev. Stat. § 60-6,222 (Reissue 2004). The standard for a lawful headlight, and, by extension, a lawful auxiliary driving light, is found in § 60-6,221:

> (1) The headlights of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided

> in subsection (2) of this section, they will at all times mentioned in section 60-6,219 produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but the headlights shall not project a glaring or dazzling light to persons in front of such headlights.
>
> (2) Headlights shall be deemed to comply with the provisions prohibiting glaring and dazzling lights if none of the main bright portion of the headlight beam rises above a horizontal plane passing through the light centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

Therefore, what violates the prohibition against "glaring" and "dazzling" that applies to headlights and auxiliary driving lights is determined by precise measurements delineated by statute. Such measurements simply would not be feasible through mere visual observation by a state trooper driving toward an oncoming vehicle in the dark when both vehicles are traveling at highway speeds. As stated above, where a headlight or auxiliary driving light is so "glaring" or "dazzling" that an officer reasonably believes the light violates § 60-6,221, such subjective belief could provide probable cause for a traffic stop. However, there is no evidence to that effect in the instant case, as the testimony elicited from Bruggeman was merely that Carnicle's fog lamps provided a glare in his direction. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). We find upon our de novo review that under the reasonably objective standard, probable cause to believe that Carnicle's oncoming vehicle was equipped with illegal auxiliary driving lights, or, for that matter, legal auxiliary driving lights that had to be dimmed but were not, was not present.

[12] Moreover, there is another aspect of this case that appears to have escaped analysis, or at least comment, by either

the county or the district court. According to Bruggeman's testimony, the stop was for "failing to dim the auxiliary driving lights," which basis is also stated in Bruggeman's written report of these events prepared shortly after they occurred. The specific duty of a driver such as Carnicle to dim a vehicle's lights in response to a signal from Bruggeman's oncoming cruiser is set forth in § 60-6,224 (Reissue 2004), which provides:

> (1) Whenever any person operating a motor vehicle on any highway in this state meets another person operating a motor vehicle, proceeding in the opposite direction and equipped with headlights constructed and adjusted to project glaring or dazzling light to persons in front of such headlights, upon signal of either person, the other shall dim the headlights of his or her motor vehicle or tilt the beams of glaring or dazzling light projecting therefrom downward so as not to blind or confuse the vision of the operator in front of such headlights[.]

Violation of this statute is a Class V misdemeanor. *Id.* But, the evidence is undisputed that Bruggeman did not flash his cruiser's headlights or otherwise signal at Carnicle as he approached—which would be the appropriate action to take if Carnicle's vehicle's lights were truly "glaring" or "dazzling." See *id.* Therefore, because Bruggeman did not do so, the predicate facts for a violation of § 60-6,224 are simply absent, and thus, there was no probable cause to stop Carnicle for failure to dim his vehicle's lights on that ground. And this is true irrespective of whether the "fog lamps" are considered headlights, auxiliary driving lights, or some other kind of lights.

And, we note, if fog lamps are contemplated under § 60-6,225(4) as "[a]ny device, other than headlights, spotlights, or auxiliary driving lights, which projects a beam of light of an intensity greater than twenty-five candlepower," then such fog lamps must be "so directed that no part of the beam will strike the level of the surface on which the vehicle stands at a distance of more than fifty feet from the vehicle." *Id.* There is no evidence Bruggeman's stop was based on a reasonable suspicion that Carnicle's fog lamps

violated § 60-6,225(4). Bruggeman's police report, in evidence, referred to such fog lamps as "auxiliary driving lights" that Carnicle failed to dim, not lights in excess of 25 candlepower which struck the surface of the ground more than 50 feet ahead of his vehicle.

CONCLUSION

Therefore, in the end, we find after our de novo review that there was no probable cause for the traffic stop of Carnicle, and as a result, the evidence of his DUI must be suppressed. Accordingly, we remand the cause to the district court for Lancaster County with directions to reverse the conviction and remand the matter to the Lancaster County Court with directions to sustain Carnicle's motion to suppress.

REVERSED AND REMANDED WITH DIRECTIONS.