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STATE OF NEBRASKA, APPELLEE, V. JASON MEDUNA, APPELLANT.

794 N.W.2d 160

Filed January 11, 2011. No. A-10-185.

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. ____: ____. In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place.
4. ____: ____. To determine whether an individual has a legitimate or justifiable expectation of privacy in the invaded place, ordinarily, two inquiries are required: First, the individual must have exhibited an actual, or subjective, expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.

5. ____: ____. Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.
6. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
7. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.
8. **Courts: Expert Witnesses.** Under the framework of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1984), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the burden to weed out unreliable expert testimony is placed directly on the trial court.
9. ____: ____. Before admitting any expert opinion testimony, the trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid.
10. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
11. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.
12. **Courts: Expert Witnesses.** A court performing a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), inquiry should not require absolute certainty. Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.
13. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
14. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Venue: Juror Qualifications: Presumptions.** A court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage.

16. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
17. **Expert Witnesses.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him or her at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
18. **Evidence: Words and Phrases.** Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered.
19. **Evidence: Proof.** A document may be authenticated by testimony by one with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents; a showing of specific authorship is not always necessary.
20. **Criminal Law: Statutes: Sentences.** Because all crimes in Nebraska are statutory in nature, so, too, are the sentences imposed upon the persons convicted of such crimes.
21. **Criminal Law: Sentences: Animals.** Under Neb. Rev. Stat. § 28-1019 (Reissue 2008), if a person is convicted of a Class IV felony under Neb. Rev. Stat. § 28-1009 (Reissue 2008), the sentencing court shall order such person not to own, possess, or reside with any animal for at least 5 and no more than 15 years after the date of conviction.
22. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
23. **Constitutional Law: Courts: Jurisdiction.** The Nebraska Court of Appeals has jurisdiction to determine whether a constitutional question has been properly raised, when necessary to a decision in the case before it.
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. ____: ____. In order to show prejudice as an element of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
26. **Effectiveness of Counsel: Records: 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.
27. **Effectiveness of Counsel: Appeal and Error.** When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
28. **Effectiveness of Counsel: Proof.** If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.

29. **Effectiveness of Counsel: Words and Phrases.** Prejudice means that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

Appeal from the District Court for Morrill County: LEO DOBROVOLNY, Judge. Affirmed.

Lyle J. Koenig for appellant.

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

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

This appeal stems from a jury's conviction of Jason Meduna on 145 counts of cruel neglect of an animal pursuant to Neb. Rev. Stat. § 28-1009(1) (Reissue 2008), a Class IV felony. The charges arose after feral horses and burros acquired by Meduna were discovered in extremely poor conditions at his "3-Strikes Ranch Mustang Outpost" (3-Strikes Ranch) near Alliance, Nebraska. Upon Meduna's convictions, the district court for Morrill County sentenced him to two consecutive terms of 20 to 60 months' imprisonment and ordered him not to own, possess, or reside with any animal for a total of 30 years. Meduna assigns error to the district court's denial of several of his motions, receipt of certain evidence, and imposition of excessive sentences. He also alleges that he received ineffective assistance of counsel at trial. Because we find that any claimed error by the trial court was harmless, we affirm Meduna's convictions. We should point out that we had earlier released an opinion in this case on January 4, 2011, but that opinion was incorrect with respect to its treatment of the claim that the sentences imposed were excessive. Therefore, that earlier opinion is withdrawn and is of no force and effect, and this opinion shall supersede and replace our earlier opinion.

FACTUAL BACKGROUND

Meduna was the owner of the now-defunct 3-Strikes Ranch, formerly located in Morrill County. The ranch spanned approximately 1,900 acres and was a home to feral horses, i.e., "mustangs," and burros acquired by Meduna for training and

eventual sale. Meduna adopted several mustangs and burros through the Bureau of Land Management (BLM) adoption program and purchased approximately 213 additional mustangs from the BLM pursuant to its sale authority. In addition, Meduna's ranch took in mustangs and burros from rescue organizations and private individuals.

In April 2009, the Morrill County sheriff, John Edens, received several complaints about the conditions on 3-Strikes Ranch. As a result, on April 17, Edens executed an affidavit for a warrant authorizing the inspection and care of the animals at the ranch. According to the affidavit, Edens was informed by a law enforcement officer with the BLM that four of the five mustangs adopted by Meduna from the BLM had died and that the fifth was removed due to health concerns. The affidavit states that a veterinarian from Overton, Nebraska, examined the removed mustang and opined that her poor health condition was due to starvation. In addition, the affidavit recites that a specialist with the BLM inspected other mustangs at the ranch and reported that they needed five to six times the amount of feed they were receiving and that the pastures were severely overgrazed. The affidavit was accompanied by photographs of the mustang removed from the ranch and the BLM "Adopter Compliance Report" prepared by the specialist after a BLM inspection team toured the ranch. The summary section of that report states:

> Based on my 20 years of experience working in wild horse management for the BLM, it is my opinion that 3 Strikes Ranch is not providing appropriate or adequate care for the horses and burros on the ranch. A significant number of these animals are in an emaciated condition and may not be able to be saved. The BLM needs to take the necessary actions to address their [private maintenance and care agreement] violations and prohibit the Medunas from adopting or purchasing horses or burros from the BLM in the future.

Finding cause to believe animals were being cruelly neglected at 3-Strikes Ranch, a district court judge issued a warrant on April 17. The warrant authorized entry on the ranch "to inspect and care for the animals."

On April 18, 2009, Edens executed that warrant, and a warrant for Meduna's arrest, and entered 3-Strikes Ranch together with his deputy sheriffs, officers of the Nebraska State Patrol, and a veterinarian from Alliance. At that time, Edens claimed to have observed two dead mustangs and approximately 170 emaciated mustangs in the corrals. Necropsies were performed on the two animals that had died within the previous 24 hours, and symptoms of starvation and parasitic infestation were found. Over the course of the next 9 days, Edens learned that Meduna had relinquished all of his mustangs and burros to representatives of "Habitat for Horses" and "Lifesavers," and that the animals were moved to the Morrill County fairgrounds to be watered, fed, and administered medical treatment.

Veterinarian David Hardin, director of the School of Veterinary Medicine and Biomedical Sciences at the University of Nebraska-Lincoln and associate dean at Iowa State University College of Veterinary Medicine, traveled to the Morrill County fairgrounds to help oversee the processing of the mustangs and burros. At trial, Hardin explained the procedure that was employed. He testified that after the animals were assigned identifying numbers, they were run through a "chute" system, wherein blood was drawn and they were dewormed, vaccinated, and then assigned a "Henneke" body condition score—based on a system of assessing equine body condition originally published in the Equine Veterinary Journal in 1983. The Henneke system has been peer reviewed and is generally accepted within veterinary practices for equines. Henneke scoring involves evaluating a horse's neck, withers, shoulders, loins, tail, head, and ribs, and is considered a good measure of the equine's energy intake versus its energy expenditure. After such evaluation, a score of "1" (extremely emaciated) to "9" (extremely obese) is assigned to the animal. Hardin explained on direct examination:

> [E]ssentially, you are looking at kind of body cover over the horse, the optimum condition is considered a five, in the middle . . . . [A] body condition score of three is considered that there is little or no body fat left on the animal . . . . [I]f you go below a three, . . . they are actually metabolized or are using up their muscle mass. . . .

> . . . .
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> [At a score of one or two,] they will lose the muscle mass. At some point in time they lose enough muscle mass that they can't stand up any more. . . . [T]he internal muscles like the heart muscle, the muscles that affect the digestive tract would, also, be metabolized. And, so lots of things can go awry and so getting those additional stressors that come along, they are just not in a position to handle.
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> . . . .
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> . . . [T]hey will use muscle for energy. . . . And, then at some point there is no muscle there and they would die.

Hardin explained that the Henneke assessments have been found to be "very repeatable" and "adaptable" to various breeds of horses under various management conditions. We note that there are Henneke body scores of "1" or "2" in evidence for 110 mustangs and burros. Of those 110 animals, 15 were assigned a score of "1" and the remaining 95 were assigned a score of "2." The prosecution for cruel neglect was based on these 110 animals that were scored "1" or "2" (as well as 4 additional animals deemed seriously injured or ill without Henneke scores); the remaining 35 counts were for horses and burros that died or were euthanized on Meduna's ranch, and thus no Henneke scores were assigned to them.

On April 21, 2009, Edens executed an affidavit in support of a search warrant with respect to 3-Strikes Ranch. The affidavit contains much of the same information used to secure the prior warrant to inspect and care for the mustangs and burros, as well as a description of certain property on the ranch to be searched, including, inter alia, "[g]rass clippings." With regard to the grass clippings, the affidavit explains, "Affiant observed that the pastures had been grazed to the point that the sand was noticeably exposed. Affiant states that stocking rates for the pastures can be determined by the grass species and condition." On that same date, a Morrill County clerk magistrate issued the search warrant, which authorized Edens, "with the necessary and proper assistance," to search all of the property described in his supporting affidavit and further authorized the "viewing, photographing and mapping of [3-Strikes Ranch]

for location of fences, horse and burro carcasses and skeletal remains."

After the issuance of this search warrant, Edens asked a rangeland management specialist, David Cook, to accompany him to the ranch. Cook had been employed by the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service for 21 years and was then serving in the position of rangeland management specialist in Oshkosh, Nebraska. At a deposition taken on August 24, 2009, Cook testified that he was not acting within the scope of his USDA employment when he visited 3-Strikes Ranch. Cook's narrative report of what occurred during the search is included in evidence. The report states, in pertinent part:

> The original plan was to use a 1.92 square foot hoop to clip standing plant material to estimate forage production for each site. This method was soon abandoned for two reasons: 1. the growing season is just beginning and very little growth has occurred and 2. there was little, if any, previous year forage left standing on the ranch. The method I chose was to visually estimate plant residue on the soil surface and standing forage utilization levels, take photographs, and record the GPS reading of each location. At each observation point, the clipping hoop was thrown in the air and the observations made at the point it landed.

In the conclusion section of his report, Cook explained that a preliminary stocking rate—an estimation of the number of livestock the range at 3-Strikes Ranch could support for grazing purposes—was calculated. That rate was based on the assumption that the range was in "good" condition, because such was the condition of neighboring ranches and no previous range study had been conducted on Meduna's ranch to determine its condition. Cook testified at trial that conditions of "poor," "fair," "good," and "excellent" are assigned to a range based on the amount of forage available for grazing. Cook concluded that if the animals on 3-Strikes Ranch were to graze year round with no added hay, the stocking rate on the ranch would be 74 animal units, but less during dry years. And, if the animals were to graze 8 months out of the year and were "hayed"

4 months, the stocking rate would be 111 animal units. Cook testified that the number of animal units would be greater if the ranch was in "excellent" condition and less if the condition was "poor" or "fair." Meduna, however, kept in excess of 200 mustangs and burros on his ranch.

Cook's report also recites that one animal unit is equal to one 1,000-pound animal. Cook testified that although mustangs weigh an average of 850 pounds, it is standard practice to use the 1,000-pound animal unit, and that his calculation could easily be converted by dividing the stocking rate figure by .85. Such calculations aside, Cook stated, "[I]n my 20 years as a Rangeland Management Specialist in the Nebraska Panhandle, I have never seen a ranch overgrazed to the extent that the 3-Strikes Ranch is."

PROCEDURAL BACKGROUND

On July 10, 2009, an information was filed by the State alleging 149 counts of cruel neglect of an animal pursuant to § 28-1009(1), a Class IV felony, against Meduna. On November 10, a hearing was held before the trial court on various motions, including Meduna's motion to suppress evidence obtained by Cook, his motion in limine to exclude Cook's expert testimony, and his motion for a supplemental juror questionnaire. The trial court denied each of those motions. A jury trial was held on January 11, 2010, and, after hearing all of the evidence, the jury found Meduna guilty on 145 counts of cruel neglect of an animal, all Class IV felonies.

With regard to sentencing, the trial court divided the 145 convictions into two groups—one related to the 31 deceased animals and the other to the 114 animals with malnourishment and health problems. For each group, Meduna was sentenced to a term of 20 to 60 months' imprisonment and ordered not to own, possess, or reside with any animal for a period of 15 years. The trial judge ordered that the two 20- to 60-month terms would run consecutively and that each individual conviction within the group would run concurrently. As for the portion of the sentence prohibiting owning, possessing, or residing with any animal for 15 years, the court ordered that the two 15-year periods would run consecutively, for a total of

30 years. Meduna was also ordered to pay costs in the amount of $3,813.64. He now appeals.

ASSIGNMENTS OF ERROR

Meduna alleges that the trial court erred in (1) denying his motion to suppress evidence illegally seized by Cook, (2) denying his motion in limine to exclude testimony under Nebraska's expert testimony rule, (3) denying his motion for a supplemental juror questionnaire, (4) receiving evidence of the Henneke body scores of the mustangs, and (5) imposing excessive sentences. Finally, Meduna alleges that he received ineffective assistance of counsel at trial.

STANDARD OF REVIEW

[1,2] 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. *State v. Anderson*, 279 Neb. 631, 781 N.W.2d 55 (2010). In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

Motion to Suppress.

Initially, Meduna alleges that the trial court erred in denying his motion to suppress evidence illegally seized by Cook, the State's rangeland management specialist. He argues that although Cook's duty was to seize grass clippings as specified in the warrant, Cook decided to change course and attempted to determine the amount of cover on the land and the amount of utilization of the grasses. Meduna claims that this "data gathering" by Cook "far exceeded the scope of the warrant" and that, consequently, Meduna's right to be free from unreasonable searches and seizures was violated. Brief for appellant at 8. We disagree for a number of reasons.

[3,4] The U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Accord Neb. Const. art. I, § 7. To determine whether an individual has an interest protected by the Fourth Amendment, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. See *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). To determine whether an individual has a legitimate or justifiable expectation of privacy in the invaded place, ordinarily, two inquiries are required: First, the individual must have exhibited an actual, or subjective, expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. See *id*.

In the present case, Meduna does not contend that probable cause was lacking for the issuance of the search warrant; thus, he concedes that Cook had a legal right to be on his ranch. The search warrant permitted "Morrill County Sheriff . . . Edens or Any Peace Officer" to search 3-Strikes Ranch and seize certain items, which items included "grass clippings." However, as it turned out, the range was in a very poor state, such that Cook could not use this method to assess its condition and stocking rate. Thus, he employed a method which did not result in a seizure of anything, and which did not run afoul of the Fourth Amendment's limitations on searches.

As Cook explained in his report on the range condition inventory at 3-Strikes Ranch, the original intention was to "clip standing plant material to estimate forage production for each site." However, Cook was unable to do so because the grasses on the range were extremely sparse. Forced to improvise under the circumstances, Cook employed a different methodology. Instead of clipping grass, Cook tossed a hoop onto the ground at six different locations throughout Meduna's ranch. He visually estimated the plant levels within the hoop at each site, took a "GPS reading" of his precise location, and photographed each observation point.

Meduna asserts that Cook's visual estimation "far exceeded the scope of the warrant." However, the affidavit in support

of that warrant recites, as stated above, that "stocking rates for the pastures can be determined by the grass species and condition." Thus, not only did Cook engage in less invasive activity than the warrant authorized because he did not seize any items from the ranch, his assessment as to the stocking rate for the range was contemplated by the affidavit upon which, Meduna does not dispute, probable cause for the search was established.

[5] Moreover, under the open fields doctrine, Meduna had no reasonable expectation of privacy on the range. Pursuant to that well-settled legal principle, open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. See *State v. Ramaekers*, 257 Neb. 391, 597 N.W.2d 608 (1999). Here, aside from the curtilage—that area so intimately tied to the home that an individual reasonably may expect that the area in question will be treated as the home itself—the range at 3-Strikes Ranch is an open field and is thus not protected from government inspection. See *id*. There is uncontroverted testimony from Edens at the November 10, 2009, suppression hearing that none of the six sites observed by Cook during his inventory of 3-Strikes Ranch are within the curtilage of Meduna's home.

[6,7] We additionally agree with the State that Cook's observations were clearly admissible under the plain view doctrine. A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

Here, Cook indisputably had a legal right to be on Meduna's ranch, from which location the sparse ground cover was plainly visible. The poor condition of the grasses on Meduna's ranch is clearly associated with criminal activity, i.e., neglect of the

animals, because that condition tends to show that the mustangs and burros were not being provided with adequate sustenance. Thus, Cook's observations also fall within the purview of the plain view doctrine. For these several reasons, there is no merit to this assignment of error.

Motion in Limine to Exclude Cook's Testimony.

Meduna next asserts that the trial court erred in denying his motion in limine to exclude Cook's expert testimony under the framework of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Meduna's claim is essentially that the methodology behind Cook's estimation of the stocking rate on 3-Strikes Ranch was inaccurate and unreliable and thus should have been excluded. We find that the trial court did not abuse its discretion in admitting Cook's expert testimony, but, even if it did, such admission would amount to harmless error.

[8,9] Under the *Daubert*/*Schafersman* framework, the burden to weed out unreliable expert testimony is placed directly on the trial court. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). Before admitting any expert opinion testimony, the trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. *Id.* If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid. *Id.* In order to properly conduct appellate review, it is the duty of the trial court to adequately demonstrate by specific findings on the record that it has performed its gatekeeping functions. *Id.*

[10,11] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Id.* 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.* We review the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony. *Id.*

In his motion in limine requesting a *Daubert*/*Schafersman* hearing, Meduna alleged that the factual basis, data, and method behind Cook's range estimate (regarding the stocking rate at 3-Strikes Ranch) were unreliable, essentially because the sample of land was too small and the data was speculative in nature. A *Daubert*/*Schafersman* hearing was held on November 10, 2009, and, after receiving argument from both parties, the court took the matter under advisement. The trial court overruled Meduna's motion in limine in a December 14 journal entry. That journal entry recites Cook's credentials—he has a bachelor's degree in agronomy with a "'range management option,'" and he is a "'rangeland management specialist'" who has been employed by the USDA Natural Resources Conservation Service for 21 years. The court then explains Cook's methodology, which included visual observation of six sites on Meduna's ranch accessible by vehicle. The court details that the individual sites were 1.92-square-foot circles of ground within a hoop which Cook tossed into the air and which landed randomly on the ground. Based on this observation method, Cook's "preliminary stocking rate," i.e., the number of animals Meduna's ranch could support for grazing purposes, was 74 to 111 animal units. Meduna concedes that he maintained in excess of 200 mustangs and burros on the ranch.

[12] The trial court's journal entry recites:

> [Cook] testified the method used was not the most accurate, but other methods were not possible either because there was insufficient foliage to "clip" vegetation, or other methods require multiple visits to the land over a period of time, and Cook only had one visit. Cook testified the method he used was "an accepted method", which he learned while attending the University of Nebraska.

Citing *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009), the journal entry goes on to set forth the following propositions of law:

> A trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gate-keeping function entails a preliminary assessment whether the reasoning or methodology underlying the

> testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
>
> In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gate-keeping determination. These factors include whether a theory or technique can [be] (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.
>
> A court performing a *Daubert* and *Schafersman* inquiry should not require absolute certainty. Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.

The trial court found the reasoning and methodology underlying Cook's testimony valid and properly applied to the facts in issue. The court explained that the allegation against Meduna was that he "'intentionally, knowingly, or recklessly abandon[ed] or cruelly neglect[ed] an animal resulting in serious injury or illness or death of the animal . . . .'" See § 28-1009(1). And, the court further explained that abandonment or neglect could be proved by showing that the appropriate stocking rate was exceeded on the rangeland where the animals were located. While Cook testified the method he used to determine stocking rate was an "'accepted' method," the court acknowledged there was little evidence offered by either party of whether the method used had been tested, whether it had been subjected to peer review and publication, whether it had a high rate of potential error, or whether there were standards controlling the operation of the technique. However, because those factors are "neither exclusive nor binding," see *State v. Daly, supra*, the court found that Cook's opinion regarding

stocking rates was admissible on the evidence submitted and that "[i]ssues of size of sample, different weight of the animals, and the number and location of samples affect the weight, but not the admissibility, of the opinion." We find no error or abuse of discretion in the trial court's analysis and ultimate admission of this evidence.

[13,14] However, even if we were to conclude that the trial court committed error by allowing Cook's testimony with regard to the estimated stocking rate on 3-Strikes Ranch, such error was harmless because there was ample other evidence to support Meduna's convictions aside from Cook's rangeland assessment. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

In this case, even though the stocking rate testimony was presented as scientific evidence, it was but a small part of the State's evidence leading to Meduna's convictions—which evidence Meduna implicitly concedes was sufficient, given that he does not assign error on the basis that the evidence was insufficient to sustain the convictions. The record contains voluminous testimony from the State's 19 witnesses, including a great deal of evidence on the dismal condition of the range and of the animals on 3-Strikes Ranch. For example, various individuals—such as Steve Trent, who runs a privately funded horse rescue facility and spent five nights at Meduna's ranch beginning April 9, 2010, and Steve Lattin, a Morrill County deputy sheriff who flew over 3-Strikes Ranch on two different occasions—testified that the pastures were in very poor condition with no vegetation for the animals to graze. Photographs of Lattin's "flyover" are in evidence and show a sandy, sparsely

covered range. Trent also testified that the only food source for the mustangs and burros during his five-night stay was hay brought in from an outside source and that the mustangs required 1½ times the amount of feed provided by the hay. A veterinarian from Overton examined a sickly mustang removed from 3-Strikes Ranch on April 15. He testified that his medical diagnosis of that mustang was chronic weight loss due to starvation. A veterinarian from Alliance testified that he examined another mustang removed from Meduna's ranch, and his diagnosis was malnourishment and parasitic infestation. Henneke body scores, which we discuss in length below, were assigned to the living animals, and those scores reflect dangerously low veterinary health ratings. Photographs in evidence depict each of the animals Meduna was convicted of cruelly neglecting (other than the animals that were already dead), and from the photographs, their emaciated and sickly appearance is obvious, to say nothing of the inferences a jury could draw from the fact that there were numerous deceased mustangs found on the ranch. The jury determined that 31 of those deaths were attributable to Meduna, and Meduna testified that many of those animals had been "euthanized" by him with a gunshot to the head, and then dumped in a pile on the range for coyotes to consume.

In sum, we find there is sufficient evidence in the record to support Meduna's convictions without the inclusion of Cook's expert testimony regarding the stocking rate on 3-Strikes Ranch. Thus, even if the trial court erred in admitting Cook's rangeland estimation, any such error was harmless. As a result, there is no merit to this claim.

Motion for Supplemental Juror Questionnaire.

Meduna's next assertion is that his motion for a supplemental juror questionnaire should have been granted. In his brief, Meduna points out that prior to trial, he moved for a change of venue based on the "extensive pre-trial publicity the case garnered." Brief for appellant at 11. He contends that the supplemental juror questionnaire "would have substantiated whether the considerable publicity in this small community had compromised the ability of jurors to be impartial." *Id.* However,

because Meduna had ample opportunity to uncover juror bias during voir dire, and there is no assignment of error that a change of venue should have been granted, the supplemental juror questionnaire was essentially superfluous.

The record reflects that a pretrial hearing was held on a number of motions, including Meduna's motions for a change of venue and for a supplemental juror questionnaire. At that hearing, Meduna's trial counsel conceded, with regard to the change of venue, that he was unable to meet his burden; however, he stated that he wanted to bring the issue to the court's attention because there had been "a lot of publicity" in this case. Meduna's trial counsel stated:

> I do not know whether this will reach the point where I will feel compelled during voir dire to ask for a change of venue based on the answers we get . . . and I'd ask not to address it today but perhaps to be able to address it at a later date and probably wait through voir dire . . . .

Thus, the trial court "deferred" the motion and announced that it would not be heard "unless the defense [brought] it back up and ask[ed] it to be ruled on." The record reflects that Meduna never revisited or revived the motion for a change of venue.

With respect to the supplemental juror questionnaire, Meduna's trial counsel argued at the pretrial hearing that such questionnaire would maximize juror candor and increase efficiency in that it would eliminate repetitive questions during voir dire. The State's position, on the other hand, was that the court's standard questionnaire was sufficient and that using the additional juror questionnaire would have the effect of placing undue weight on Meduna's voir dire questions. After reviewing the proposed supplemental questions, the court denied Meduna's motion, finding that the additional questionnaire was unnecessary. The court reasoned that the supplemental questions appeared to be in large part matters that could be handled orally with the jury panel. In addition, the court wanted to avoid a situation where biased questions were inadvertently selected for the questionnaire.

[15,16] We review the trial court's denial of Meduna's motion for the use of the supplemental questionnaire for an

abuse of discretion. We note that a court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010). Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue. *Id.*

Because Meduna was free to ask the jurors questions from the proposed supplemental juror questionnaire during voir dire, he had sufficient opportunity to uncover "whether the considerable publicity in this small community had compromised the ability of jurors to be impartial." Brief for appellant at 11. Yet, after voir dire, Meduna was still unable to make a viable argument for a change of venue, because his pretrial motion was deferred and never again mentioned. It is evident the supplemental juror questionnaire would not have affected the outcome of this case in any way. We find that the trial court did not abuse its discretion when it denied the motion for use of a supplemental questionnaire. Accordingly, there is no merit to this claim.

Henneke Body Score.

Next, Meduna assigns error "in receiving evidence of the Henneke body score of the mustangs." *Id.* The Henneke scores were handwritten on a form designed to record a "Coggins" test for infectious equine anemia, for which the animal had blood drawn. Separate forms were used for each animal, and offered and received in evidence as separate exhibits. Additionally, there are two distinct photographs of each horse (head and body shots) in evidence that correspond to the sheet containing the Henneke scores. For ease of reference, we will refer to the sheets with the Henneke scores as "Coggins reports" in order to differentiate the pieces of paper received in evidence from the actual Henneke scores assigned to each animal and recorded on the Coggins reports. Meduna argues that the Coggins reports on which the Henneke body scores were recorded "are hearsay in its purest form," because a veterinarian verbally called out

the scores after examining each animal and a veterinary student then recorded the score on a form. *Id.* at 12. The objections made at trial were hearsay and foundation. The foundational argument made in this appeal is that the Coggins reports were not authenticated.

The State argues that the forms were admissible under the exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment. See Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008) (hearsay exception for statements made to treating physician for diagnosis or treatment). It is clear that the exception extends to statements made to medical personnel other than physicians. See *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994). In *Vacanti*, the court said that the heart of § 27-803(3) is statements made to the medical provider—but mustangs cannot make the verbal statements the exception intends to admit in evidence. Accordingly, we reject the notion that the Henneke scores were properly received as an exception to the hearsay rule under § 27-803(3).

The State also argues that the Coggins reports were admissible "for a non hearsay purpose; that is, to supply the basis for the doctors' opinions as to the condition of the horses." Brief for appellee at 17. We conclude that the issue is not really the admissibility of the Henneke scores, but, rather, the admissibility of Hardin's opinion that the Henneke body condition scores of "1" and "2" meant that those horses or burros "were at risk of death or prolonged impairment of health, or prolonged loss or impairment of function of any bodily organ," as Hardin testified. The Henneke scores of the animals from Meduna's ranch were a basis for the veterinarians' expert opinions that the animals were in such condition that they were at risk of serious bodily injury or death.

[17] The evidence shows that the Henneke scores were "perceived by" or "made known to" the two veterinarians, Hardin and Arden Wohlers, who testified as experts. And, the evidence shows that the Henneke scores were "facts or data" upon which they relied, and such were a type of fact or data reasonably relied upon by experts, such as veterinarians, to assess the health of equines. Thus, we turn to Neb.

Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2008), which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Accordingly, while the Henneke scores were admitted over objection, any error in doing so was harmless, given that under the foregoing evidentiary rule, the veterinarians could, and did, testify about such—even if the scores were not admissible in evidence.

[18] Moreover, the veterinarians responsible for assigning the body scores—Hardin and Wohlers—testified that they had reviewed the photographs of each animal and compared such to the score on the form, and, to a reasonable degree of medical certainty, determined that the forms in evidence truly and accurately reflected the Henneke scores given to each animal on the date it was examined by them. Thus, despite the fact that the handwritten body scores found on the Coggins reports may have been hearsay, they were nonetheless cumulative of the testimony given by Hardin and Wohlers regarding the body condition of the animals, and their admission at trial was therefore harmless. See, *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000) (where evidence is cumulative and other competent evidence supports conviction, improper admission or exclusion of evidence is harmless beyond reasonable doubt); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996) (cumulative evidence means evidence tending to prove same point of which other evidence has been offered). In this case, the poor state of the range, the horrible condition of the animals testified to by a number of witnesses, and simply the photographs of each animal provided what can only be characterized as overwhelming evidence to sustain the convictions. Thus, the evidence of the Henneke body scores was cumulative, and of no real prejudice to Meduna.

[19] With respect to Meduna's assertion that the forms lack foundation because they were not authenticated, Hardin and Wohlers testified that the forms were what they purported to be—Coggins reports used to record identifying and health-related information about each of the animals examined at the fairgrounds. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 2008). A document may be authenticated by testimony by one with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents; a showing of specific authorship is not always necessary. *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007). We find that the authentication requirement was satisfied by the trial testimony of Hardin and Wohlers. For the foregoing reasons, there is no merit to this claim, and there was no prejudicial error in the admission of the exhibits containing the handwritten Henneke body scores for the mustangs.

Excessive Sentences.

Meduna next alleges that the trial court imposed excessive sentences. More specifically, Meduna takes issue with the court's order that he not own, possess, or reside with any animal for a period of 30 years. Without citing any authority whatsoever, Meduna contends that "[s]uch a condition is a form of custody that is an unconstitutional restraint upon his liberty subsequent to the completion of his sentence and is a violation of [his] right to be free from cruel and unusual punishment under the U.S. Eighth and Fourteenth Amendments and Nebraska Constitution." Brief for appellant at 13-14. This argument spans a sum total of 13 lines in Meduna's brief. The State briefly responds that Meduna's argument is merely an assertion that is not presented to this court "in a manner that permits resolution of the issue, and it is therefore defaulted." Brief for appellee at 20, citing *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). We take the State's response to be simply that the claim of error is procedurally barred—and we agree.

[20] When considering sentences imposed by the trial court, the law is clear that, absent an abuse of discretion by the trial court in sentencing within statutory limits, this court will not disturb the action of the trial court on appeal. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). And, because all crimes in Nebraska are statutory in nature, so, too, are the sentences imposed upon the persons convicted of such crimes. See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). The sentence restricting Meduna's ownership of or residence with animals is specifically authorized by the Legislature. Under § 28-1009(1), a person who intentionally, knowingly, or recklessly abandons or cruelly neglects an animal is guilty of a Class I misdemeanor, unless the abandonment or cruel neglect results in serious injury or illness or death of the animal, in which case it is a Class IV felony. Here, Meduna was convicted of 145 counts of cruel neglect of an animal resulting in serious injury or illness or death, all Class IV felonies. Meduna does not challenge the incarceration portion of his sentences.

[21] Under Neb. Rev. Stat. § 28-1019 (Reissue 2008), if a person is convicted of a Class IV felony under § 28-1009, as Meduna was 145 times, the sentencing court shall order such person not to own, possess, or reside with any animal for at least 5 and no more than 15 years after the date of conviction. At sentencing, the trial judge explained that Meduna's 145 convictions would be broken down into two groups—one for the deceased animals and another for those animals that were seriously injured or ill. For each group, Meduna was sentenced to a term of 20 to 60 months' imprisonment and also ordered not to own, possess, or reside with any animal for a period of 15 years. The court ordered that each of the two 15-year terms would run consecutively, for a total of 30 years. Thus, Meduna's sentences are statutorily authorized and not in excess of the statutory limit.

[22,23] Although Meduna's assignment of error is that his sentences are excessive, his only argument is simply that the portion of his sentences prohibiting him from owning, possessing, or residing with any animal for a total of 30 years runs afoul of his constitutional right to be free from cruel and

unusual punishment. This argument does not match his assignment of error because there is no assignment that § 28-1019 provides for an unconstitutional penalty. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). Thus, we cannot consider the constitutional claim Meduna attempts to raise in his brief for this reason. In addition to that deficiency, we note that while this court cannot determine the constitutionality of a statute, we do have jurisdiction to determine whether a constitutional question has been properly raised, when necessary to a decision in the case before us. See, *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003); *Harvey v. Harvey*, 6 Neb. App. 524, 575 N.W.2d 167 (1998). The Nebraska Supreme Court insists upon strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) before it will consider a constitutional challenge. See *Harvey v. Harvey, supra*. Section 2-109(E) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief. This was not done, and thus, there is another deficiency that also constitutes a procedural bar to Meduna's claim of unconstitutionality of the district court's sentence imposed under the authority of § 28-1019. Thus, for these reasons, we do not consider the assignment of error of excessive sentences any further because it is procedurally barred.

Ineffective Assistance of Counsel.

Because Meduna has new counsel for the present appeal, his final assignment of error includes nine individual claims of ineffective assistance by his trial counsel. In his brief, Meduna asserts that "[f]or each claim asserted in this section, the record is absent or incomplete." Brief for appellant at 14. However, he raises the issues to preserve them for postconviction review. Meduna's specific claims are that trial counsel failed to (1) timely advise him of the particulars of an offer of plea agreement by the State; (2) seek a change of venue; (3) move to suppress evidence derived from the illegal seizure of 16 of his

mustangs removed from his property on April 22, 2009, without his permission or consent and without a warrant authorizing the seizure; (4) conduct a proper pretrial investigation; (5) present exculpatory evidence known to the defense at trial; (6) obtain exculpatory evidence after he was granted a motion to compel discovery of the evidence; (7) call experts for the defense; (8) cross-examine the witnesses effectively; and (9) subject the State's case to meaningful adversarial testing.

[24,25] 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. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Counsel's performance is deficient if counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. Sandoval, supra*. In order to show prejudice as an element of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. McGhee, supra.*

[26,27] 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. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. See *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009). While we find that the record is insufficient to address the majority of Meduna's claims of ineffective assistance of trial counsel, and thus we decline to address them, there are two such claims that can be disposed of presently.

First, there is no merit to Meduna's claim that trial counsel was deficient for failing to move for a change of venue

subsequent to the pretrial hearing when the motion was initiated. In his brief, Meduna argues that trial counsel "could have adduced copious evidence" of the pretrial publicity in this case. Brief for appellant at 16. Meduna's brief recites that "[t]he jury was admonished at one point to ignore 'demonstrators' outside the court house." *Id.* These allegations are simply insufficient to overcome the high hurdle required for a change of venue.

Juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged does not alone presumptively deprive the defendant of due process. *State v. Galindo*, 278 Neb. 599, 744 N.W.2d 190 (2009) (massive publicity of five murders committed during attempted bank robbery insufficient for change of venue). A court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[28,29] There is no allegation that the community where these crimes occurred and Meduna was tried was subjected to a barrage of inflammatory publicity creating a wave of public passion or a corrupted trial atmosphere. Meduna's trial counsel acknowledged at the pretrial hearing that he could not meet the burden required for a change of venue, and the competency of counsel is presumed. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). The fact that trial counsel never reasserted the motion shows that, even after voir dire, he was unable to do so—and we again presume that decision to be a competent decision. Defense counsel is not ineffective for failing to raise an argument that has no merit. See *State v. Young, supra.* In this case, the allegations on this point are plainly insufficient, and moreover, given the overwhelming evidence against Meduna, there could be no prejudice in any event. See *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002) (defendant must show that his or her counsel's performance was deficient and that this deficient

performance actually prejudiced his or her defense). If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *Id.* Prejudice means that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Thus, in this case, prejudice means that but for the failure to file a motion for a change of venue, Meduna would have been acquitted—a result that is closer to impossible rather than probable, given the evidence arrayed against Meduna.

Meduna also argues that his trial counsel was ineffective for failing to subject the State's case to meaningful adversarial testing. He argues that "each action and inaction of trial counsel is questionable; viewed in their entirety, the actions and inactions are inexcusable." Brief for appellant at 30. In his brief, Meduna cites to *United States v. Cronic*, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), for the following proposition:

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." . . . The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Without further analysis or explanation, Meduna's brief then recites, "There simply was ***no*** adversarial testing at . . . Meduna's trial." Brief for appellant at 31.

Having reviewed the trial record, we can say that such does not support the claim that Meduna's trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. On the contrary, the record contains volumes of evidence documenting the cross-examination by Meduna's trial counsel

of the State's 19 witnesses. A "confrontation between adversaries" clearly occurred at trial. See *Untied States v. Cronic, supra*. There is thus no merit to this claim.

CONCLUSION

Because we find that Meduna's assigned errors are without merit or were not prejudicial to him or are procedurally barred, we affirm Meduna's convictions and sentences.

AFFIRMED.

IN RE INTEREST OF EMILY R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. EMILY R., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

793 N.W.2d 762

Filed January 11, 2011. No. A-10-374.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Reversed and remanded for further proceedings.

Sarah E. Sujith, Special Assistant Attorney General, of Department of Health and Human Services, for appellant.

No appearance for appellees.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.