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The district court erred when it concluded that the doctrine of in loco parentis did not apply and dismissed the case. Latham has standing to seek custody and visitation of P.S., but there remain genuine issues of material fact bearing on whether she should be granted relief and whether the relief she seeks is in the best interests of P.S. Accordingly, we reverse the ruling granting summary judgment in favor of Schwerdtfeger and the order of dismissal, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
KARNELL D. BURTON, APPELLANT.
802 N.W.2d 127

Filed September 2, 2011. No. S-10-143.

1. **Pleadings.** Deciding to grant or deny an amendment to a pleading is a matter entrusted to the discretion of the trial court.
2. **Motions for Mistrial.** Deciding whether to grant a motion for mistrial is a matter entrusted to the discretion of the trial court.
3. **Evidence.** Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.
4. **Sentences.** Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 2008) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.
7. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.
8. **Speedy Trial: Waiver.** It is incumbent upon a defendant to file a timely motion for discharge in order to avoid the waiver provided for by Neb. Rev. Stat. § 29-1209 (Reissue 2008).

9. ____: ____. A defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before trial begins.
10. **Rules of Evidence: Witnesses: Prior Statements.** The rule against offering extrinsic evidence of a prior inconsistent statement of a witness does not apply to admissions of a party-opponent.
11. **Evidence: Prior Statements.** A statement is admissible as substantive evidence if it is offered against a party and is the party's own statement.
12. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
13. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.
14. **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.
15. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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.
16. ____. In imposing a sentence, a sentencing 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.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

GERRARD, J.

The defendant, Karnell D. Burton, was convicted of manslaughter, attempted second degree murder, first degree assault, and two counts of use of a deadly weapon to commit a felony. He appeals, claiming that his statutory right to a speedy trial

was violated, that the State committed misconduct during closing statements, that the court erred in excluding evidence that two of the State's witnesses belonged to a gang, and that the sentences imposed were excessive. But we affirm Burton's convictions and sentences.

I. BACKGROUND

Because the issues presented on appeal are relatively narrow, a detailed recitation of all the evidence presented at trial is unnecessary. Rather, it will be more helpful to relate a general summary of the evidence, followed below by a more detailed examination of the facts relevant to each issue.

This case arises out of the shootings of Timothy Thomas and his cousin Marshall Turner, which left Thomas dead and Turner seriously wounded. Generally, the State accused Burton and his alleged accomplice, Thunder Collins, of shooting Thomas and Turner in an attempt to steal cocaine from them. In connection with those shootings, Burton was charged with first degree murder, attempted second degree murder, first degree assault, and three counts of use of a deadly weapon to commit a felony.

The State's evidence at trial, taken in the light most favorable to the State,[1] established that Collins, Turner, and Thomas had been engaged in transporting cocaine from Los Angeles, California, to sell in Omaha, Nebraska. On the trip that culminated in the shootings at issue in this case, Turner and Thomas had driven to Omaha from California in a sports utility vehicle (SUV), accompanied by Turner's girlfriend and another man, Darryl Reed. The cocaine they were transporting had been hidden in the body of the SUV.

Collins contacted his friend Ahmad Johnson, who testified at trial that Collins asked him to help Collins "get these guys." Collins told Johnson that they needed a secure location to get the drugs out of the SUV. Johnson asked his friend Karl Patterson whether they could use Patterson's automotive repair shop. Patterson refused, but, according to Johnson, agreed to give Collins a gun. Collins and Johnson then tried to contact

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[1] See *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

Burton, but failed. So, Collins told Turner and Thomas to follow Collins in their SUV to Johnson's house, to use Johnson's garage to remove the drugs from the SUV.

Burton called Collins back, and Collins told him to come to Johnson's house, so he did. Johnson took the gun that they had gotten from Patterson and placed it in the kitchen. Burton and Johnson were in the house talking when Collins came in and asked for a gun Burton had brought with him, which was smaller. Johnson said he told Burton to "watch [Collins'] back," then went outside and sat in his car, listening to music.

Turner and Thomas were still in the garage, and Turner was watching Thomas work to remove the drugs from the SUV, when Turner was suddenly shot in the neck. Turner fell to the ground and crawled under the SUV. When he got up, he saw Burton pointing a gun at him and Collins holding Thomas by the hair. Turner tried to get between Collins and Thomas, so Burton shot Turner in the buttocks. Collins then shot Thomas in the head. Burton went to help Collins move Thomas' body, and Turner heard Burton say, "Let me make sure this nigger dead." Another shot was fired, grazing Turner's head. Turner heard Collins and Burton go out the back door of the garage, so he got into the SUV, drove it through the closed garage door, and fled.

Burton was convicted of manslaughter, attempted second degree murder, first degree assault, and two counts of use of a deadly weapon to commit a felony, and he was sentenced to a total of 80 to 130 years' imprisonment. He appeals.

II. ASSIGNMENTS OF ERROR

Burton assigns that the district court (1) violated his statutory right to a speedy trial when it granted the State's motion to file an amended information which added the charges of first degree assault and use of a deadly weapon to commit a felony, over his objection; (2) committed reversible error when it denied his motion for mistrial based on prosecutorial misconduct during the State's rebuttal in final argument; (3) committed reversible error when it refused to allow him to present evidence that two of the State's witnesses, Reed and Turner, were

members of a violent street gang; and (4) abused its discretion by imposing excessive sentences.

III. STANDARD OF REVIEW

[1-5] Deciding to grant or deny an amendment to a pleading,[2] deciding whether to grant a motion for mistrial,[3] determining the relevancy of evidence,[4] and imposing a sentence within statutory limits,[5] are all matters entrusted to the discretion of the trial court. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[6]

IV. ANALYSIS

1. Speedy Trial

(a) Background

Burton was initially charged on November 10, 2008, with four counts: first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. About 3 months before trial was scheduled to begin, the State moved for leave to file an amended information, adding a charge of first degree assault and an additional charge of use of a deadly weapon to commit a felony, both arising out of the same set of facts as the original charges. Burton objected, arguing that the "six-month statutory requirement for speedy trial would be, in its spirit, violated." Burton argued that while he had waived his statutory speedy trial right with respect to the charges that were already pending, he had not waived it with respect to the charges the State was proposing to add. But over Burton's objection, the motion for leave to file an amended information was sustained, and the amended information was filed on July 28, 2009.

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[2] See *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

[3] See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[4] See *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

[5] See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[6] *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

(b) Analysis

[6,7] Neb. Rev. Stat. § 29-1207 (Reissue 2008) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.[7] And if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.[8]

Burton argues that his statutory right to a speedy trial was violated in this case. Burton concedes that the statutory right to a speedy trial can be waived[9] and that he waived his speedy trial right with respect to the charges originally brought against him. But, he contends, that waiver was not effective against the charges that were added before trial—the first degree assault charge and the associated weapons charge.

[8,9] However, Burton never filed a motion to discharge those counts. And Neb. Rev. Stat. § 29-1209 (Reissue 2008) clearly provides that the "[f]ailure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial." We have explained that it is incumbent upon a defendant to file a timely motion for discharge in order to avoid the waiver provided for by § 29-1209[10] and that a defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before trial begins.[11]

Burton's appellate brief characterizes the question presented as whether he was required to file a notice of appeal within 30 days of the court's order granting the State's leave to amend, as he would have been required to do had a motion to discharge been made and overruled.[12] We agree that Burton

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[7] *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

[8] See, Neb. Rev. Stat. § 29-1208 (Reissue 2008); *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

[9] See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[10] *State v. Kearns*, 245 Neb. 728, 514 N.W.2d 844 (1994), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

[11] See *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007).

[12] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

could not have appealed from the order granting leave to file an amended information. But that is not precisely the question. Rather, given the specific provision of § 29-1209, the question is whether Burton waived his speedy trial right by not moving for discharge.

Obviously, pursuant to § 29-1209, the answer is that he did. Burton contends that the objection to the amended information was not a motion to discharge, "because the complained[-]of additional counts were not pending and there was nothing from which he could be 'discharged.'"[13] That may have been the case, but there was nothing preventing Burton from making his motion to discharge after the amended information was filed.

Burton argues at length that procedural problems would ensue if a defendant were required to appeal when a speedy trial claim was presented with respect to some, but not all, of the charges pending. But we are not faced in this appeal with whether a defendant whose motion to discharge is overruled with respect to some but not all of the charges should be required to appeal, or what effect that would have on the charges that remained. Instead, the only question is whether Burton had to file a motion to discharge to preserve his speedy trial claim. And § 29-1209 answers that question.

Burton waived any violation of his right to speedy trial by not moving for discharge before trial. His first assignment of error is without merit.

2. Prosecutorial Misconduct

(a) Background

Burton had been taken into police custody at the scene of the crime and gave a statement to police that was not admitted into evidence at trial. But, when Burton testified at trial, his statement was used as the basis for impeachment on cross-examination.

Turner and Johnson testified at trial, and their accounts of events are essentially set forth above—that Turner and Thomas were in the garage at Johnson's house when Collins and Burton

[13] Brief for appellant at 22.

came into the garage and attacked them. Specifically, Turner said that Collins shot him, then Burton shot at him two more times, while Collins killed Thomas.

Burton gave a different account. Burton testified at trial that he and Johnson had both been in the kitchen at Johnson's house, when they heard a scuffle in the garage and the sound of a gunshot. Burton said that he grabbed a gun off the stove and that he and Johnson both ran into the garage. According to Burton, he shot Turner in the buttocks because Collins, fighting with Turner and Thomas, had said that Turner had a gun. Burton said that after he shot Turner in the buttocks, Collins took the gun from him and Burton left the garage. Burton said he did not know whether Johnson also left the garage. Then, Burton heard more gunshots, and was leaving when he saw the SUV crash through the garage door and speed away.

But on cross-examination, Burton admitted initially telling police that neither he nor Johnson had been in the garage at all. Then, eventually, Burton had admitted to police that he had shot Turner. Specifically, Burton did not deny telling police that he and Johnson had been in the garage watching the removal of the drugs, then gone into the kitchen, where he had been given a gun to take back into the garage. Burton admitted telling police, contrary to his trial testimony, that he and Collins had been in the garage, but not Johnson. Nor did Burton deny telling police that, contrary to his trial testimony, he had been present when Collins shot Turner and Thomas and that Collins had shot both men before Burton shot Turner.

Burton's responses to the State's impeachment were somewhat evasive, and it was not always clear whether Burton was admitting the statements he made to police or simply claiming not to recall whether or not he had made them. Most of the time, Burton simply did not "deny" making the statements with which he was confronted by the State. But at various other points, Burton seemed to concede at least making those statements to police, although he claimed that he had been lying to them at the time. Some examples of these colloquies will illustrate the ambiguity:

> [Prosecutor:] Now, there was some testimony that you've been asked about, you were there . . . when . . .

Turner [was asked] about saying to take it and just keep it; is that correct?

[Burton:] I didn't hear it.

Q. You didn't hear any of that?

A. No.

Q. Didn't you, in fact, tell the police that you did hear him begging in the garage to just take it, just leave us alone and take it?

A. I could have said it.

Q. Okay. So —

A. I don't deny I said it.

. . . .

Q. . . . Did you hear . . . Turner at the time saying to just take it, just leave us alone?

A. No.

Q. You never heard that?

A. No.

Q. And if you told the police that . . . then that would be mistaken? You didn't say that?

A. I probably did say it.

. . . .

Q. And isn't it true that in that same conversation that when Officer Spencer is talking to you about that, that based on the tape, you say that the purpose was to scare them and jack them?

A. I don't recall it.

Q. Once again, do you deny saying that on the tape?

A. No, I don't deny saying it.

Q. Okay. So this is, once again, a little different about what you actually knew before you went into the garage, is that correct, from what you said today?

A. I did know. I was making it up.

Q. Once again, that's all made up here, too, with Officer Spencer's reporting; is that right?

A. It's not made up. I said it, but it is made up.

Q. I appreciate the difference as well, sir. You're right. You made it up but you certainly said it?

A. Yes.

. . . .

Q. Do you recall telling Officer Spencer that while you were in the garage you heard [Collins] say, Yeah, here it is — referring to the drugs — and give it up?

A. No, I don't remember that.

Q. Okay. Do you recall — Once again, if you said it to Officer Spencer — are you denying you said that to Officer Spencer?

A. I'm not denying it. I just don't recall it, sir.

Q. But if you said that to Officer Spencer — or if you said that to Officer Spencer and he reported that, you're not denying that; correct?

A. No, I'm not denying it.

Q. And that's different from today as well. You actually were in there to hear . . . Collins say that; correct? Those two statements are different?

A. I made it up, sir.

. . . .

Q. Do you remember saying this to Officer Spencer: You stated that [Collins] begins to shoot at which point Burton states that he shoots and then gets scared and runs out of the back of the garage. Did you say that to Officer Spencer?

A. I could have. I don't deny it, though.

Q. Once again, you don't deny it if he reported it; is that right?

A. Yes.

Q. So, in fact, that's different from you walking in and just shooting. You actually said to Officer Spencer that you saw . . . Collins shoot first; correct?

A. Yes.

. . . .

Q. Well, at the time that you — time that you were inside, you were asked by Officer Spencer — once again, he asked you who shot at which time, and you told him that [Collins] fired the first shot, hitting the dark-skinned male; [Collins] fired the second shot, shooting the guy with the ponytail; and you claim you fired a third shot, which hit the dark-skinned guy. Do you recall saying that?

A. I don't remember saying it.

Q. You don't deny it, though. Is that fair to say?

A. No, I don't deny it.

Q. So, once again, that indicates, with what you're saying to Officer Spencer, that you were in there knowing what . . . Collins was doing in this shooting. That's what that sounds like; correct?

A. Yes.

. . . .

Q. Well, certainly if you were — if one or two shots had already been fired and the two victims were scrambling or scuffling, being physical, isn't it — based on what you told Officer Spencer, isn't it likely that they were scuffling or scrambling because they had just been shot at?

A. I don't know.

Q. Okay. Although you told Officer Spencer that you saw [Collins] shoot at both of them?

A. I told you that was a lie.

Q. But here's my question, sir: Although you told Officer Spencer that you saw [Collins] shoot at both of them, that wouldn't be a reason for a scuffle. Maybe trying to get away?

A. Yeah, I told you it was a lie, so I don't know.

This ambiguity led to some confusion during closing statements. Defense counsel conceded, during his closing statement, that Burton had initially lied to police. But, he argued, so had Johnson and Turner. Defense counsel contended that Burton was more credible, because he had quickly acknowledged his involvement and was "[t]he only one that takes any responsibility at all from the first day."

The State replied to that in its rebuttal statement, remarking that "the defense counsel wants to talk a little bit about day one and what [Burton] said on day one. Well, let's talk about what [Burton] said on day one . . . ." The State argued that unlike Burton's testimony at trial, Burton's initial statement to police had mirrored the statements that Turner was making to police at the same time in the hospital where he was being treated. The State's argument, essentially, was that Burton's

trial testimony was not credible, but that Turner's testimony was credible, because the statements that Turner and Burton had given to police just after the shootings were far more consistent with each other.

Burton objected, asserting that there was "no evidence as to what the statement was other than the testimony from [Burton]." So, Burton argued, the State was making "improper rebuttal." The State contended that it had "asked these questions of [Burton] at the time he was on the stand and went through his entire statement," so it was in the record. Essentially, the State contended that Burton had admitted making the statements. Burton's counsel replied that Burton had "said he didn't remember and he doesn't deny he said those things" but that the State could not "come up here and say here's what the statement was," because the statement itself was not in evidence.

The court agreed that while the State could point out inconsistency between Burton's testimony and his statement to police, the State could not refer to parts of the statement to police that were not in evidence. The State continued its rebuttal. Then, after another reference by the State to the consistency of Burton's statement to police with Turner's, Burton reasserted his objection and moved for a mistrial. Although the court cautioned the State that "you need to stay away from the body of the statement that's not in," the motion for mistrial was overruled.

(b) Analysis

Burton's argument is twofold: First, he contends that his statements to police were not in evidence, and second, he contends that his statements can be used only for impeachment, not as substantive evidence. Burton concludes, therefore, that the State's rebuttal was improper to the extent that the State's argument relied on the substance of Burton's statement.

We begin with Burton's second point: Even assuming, for the moment, that Burton's statement to police was available only for impeachment, Burton has not clearly explained what was improper about the State's argument. Burton contends that the impropriety was in using it to show that Turner's testimony was credible, as opposed to showing that Burton's was

incredible. But it is hard to separate the two. The fundamental issue at trial was whether the jury should believe Burton or believe Johnson and Turner. The credibility of each witness was not being judged in a vacuum, and it was hardly improper for the State to point out that Burton's statement to police was more consistent with Turner's statements than with Burton's own trial testimony. That this would have the effect of bolstering Turner's credibility at the expense of Burton's was simply a result of the context of this trial, not any impropriety in the argument. In short, in this case, it would have been hard to make any argument about the credibility of any of the witnesses that did not implicate the credibility of the others.

[10,11] But more fundamentally, it is not clear upon what legal basis Burton contends that his statement to police was not available as substantive evidence. The rule against offering extrinsic evidence of a prior inconsistent statement of a witness does not apply to admissions of a party-opponent, and a statement is admissible as substantive evidence if it is offered against a party and is the party's own statement.[14] The question is really whether Burton's statements to police were in evidence through his testimony—in other words, not whether evidence of Burton's statements to police was admissible, but whether such evidence was even offered at all. Burton argues that it was not.

But evidence of Burton's statements to police was offered through Burton's own testimony, and although his testimony was not always clear, he implicitly acknowledged that the statements with which he was confronted were things he had actually said to police. We have said, in the context of impeachment, that the trial court has "considerable discretion" in determining whether testimony is inconsistent with prior statements and that a court may find inconsistency in evasive answers, inability to recall, silence, or changes of position.[15] The same

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[14] See Neb. Evid. R. 613(2) and 801(4)(b)(i), Neb. Rev. Stat. §§ 27-613(2) and 27-801(4)(b)(i) (Reissue 2008).

[15] See *State v. Marco*, 220 Neb. 96, 100, 368 N.W.2d 470, 473 (1985). See, also, e.g., *McAlinney v. Marion Merrell Dow, Inc.*, 992 F.2d 839 (8th Cir. 1993); *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976).

discretion applies here, where the issue was not whether Burton denied the prior statements, but whether he admitted them. The trial court's considerable discretion extended to determining whether Burton's testimony was sufficiently affirmative to constitute admissions that he actually made the statements to police about which he was cross-examined.

As noted above, Burton was evasive when confronted with his alleged statements to police. But Burton concedes that, at the very least, he did not deny making those statements. And eventually, he at least implicitly acknowledged them. Burton was trying to do two contradictory things during cross-examination: "not deny" making the statements to police, then also assert that he had been lying when he made them. But in making the second assertion, he contradicted the first, and tacitly admitted that the statements had been made. It was Burton's decision to play cat and mouse with the State during cross-examination, but it was the court's job to decide who won. It would certainly not be an abuse of discretion to conclude that Burton's rather carefully worded "non-denials" were, in fact, acknowledgments. Nor would it be an abuse of discretion to conclude that, when Burton's entire testimony is considered, he effectively acknowledged giving the police the account of events with which he was confronted on cross-examination. And it was certainly not an abuse of discretion not to grant a mistrial.

[12,13] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[16] And a defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.[17] Here, no admonition was requested, nor has any prejudice been shown, particularly given the state of the record and our standard of review. We conclude that the court did not abuse

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[16] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[17] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

its discretion in overruling Burton's motion for mistrial. His second assignment of error is without merit.

3. Gang Membership Evidence

(a) Background

The State filed a motion in limine for an order precluding Burton from adducing evidence that, among other things, any witness had been a member of a street gang. The State argued at the pretrial hearing on the motion that such evidence should be excluded under Neb. Evid. R. 401 and 404.[18] Burton persuaded the court to wait and hear the State's evidence at trial before making a decision on the motion. But the court cautioned Burton that he should not bring the issue up before the jury without first approaching the bench and making an offer of proof, because the court "want[ed] to know the relevancy before it goes in front of the jury."

Reed testified at trial, and although he acknowledged that he was a drug dealer, he neither testified to nor was asked about gang membership, and no offer of proof was made in that regard. Turner also acknowledged that he was a drug dealer and, on cross-examination, was asked about the tattoo on his right arm. The State objected to the question based on relevance, and the objection was sustained. Outside the presence of the jury, Turner explained that the tattoo represented the 52 Hoover Crips. But, Turner said, his drug dealing was not related to gang membership.

Burton made an offer of proof, arguing that Turner's gang ties went to his credibility and background. And, Burton argued, it was unlikely that members of the 52 Hoover Crips would transport cocaine from California without firearms or protection, so Burton asserted that Turner's gang membership was also relevant to the possible source of the guns used in the killing. And because Burton was not a gang member, but Collins allegedly was (although Burton conceded there was no evidence of that), Burton argued that Turner's gang membership went to show the participants' ties to one another.

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[18] Neb. Rev. Stat. §§ 27-401 and 27-404 (Reissue 2008).

The State objected on several grounds, including Neb. Evid. R. 401, 404, 607, 608, and 609.[19] Burton agreed to withdraw the question without a ruling from the court and to provide the court later that day with what he promised would be relevant case law. The next day, after reviewing Burton's submission, the court sustained the State's motion in limine, based on relevance. The court noted that there was nothing to preclude Burton from arguing "that the witness was a drug dealer, that drug dealers are bad guys, that — you know, that whole thing. You're perfectly — you got a lot of latitude there, you just . . . don't get to say gang."

Later, Burton also made an offer of proof with respect to a statement Turner had made to police shortly after the shooting, in which he said that the shooting would not have happened to him in Los Angeles because, as a member of the 52 Hoover Crips, he was respected. The court refused the offer of proof, declining to change its ruling on the motion in limine.

(b) Analysis

Although the State objected on several grounds, the primary issue is whether the proffered evidence was relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[20] Here, Burton's argument on appeal is primarily that Turner's and Reed's gang affiliation would have tended to show that Turner or Thomas, not Burton, brought guns to the scene of the crime.

We are not persuaded by this argument. To begin with, there is no basis in the record to conclude that gang members are substantially more likely (as opposed to drug dealers generally) to be carrying weapons. Nor is it clear how Burton would have been prejudiced in that regard. Burton argues that he "was trying to prove the possibility that one of the two guns involved in the shooting was brought to the scene by Turner

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[19] §§ 27-401 and 27-404; Neb. Rev. Stat. §§ 27-607 to 27-609 (Reissue 2008).

[20] Rule 401, § 27-401.

or Thomas."[21] In other words, Burton wanted to suggest that, contrary to Johnson's testimony, he had not brought a gun to the scene. But the issue to which that might have been relevant was Burton's premeditation—and Burton was acquitted of first degree murder. Burton was convicted of manslaughter, attempted second degree murder, first degree assault, and two weapons charges, and his failure to bring his own gun to the scene would not mitigate his guilt on any of these counts.

Burton also argues that the gang membership evidence was relevant to establish the relationship of Turner, Thomas, Reed, and Collins. But, as noted above, no offer of proof was made with respect to Reed or Collins. That leaves Turner and Thomas, who were *actually* related, because they were cousins. And the drug-dealing conspiracy was well explained. Burton also argues that if Collins was aware of Turner's and Thomas' gang membership, he would have told Burton, and that would have heightened Burton's apprehension and strengthened his argument that he fired on Turner in defense of Collins. However, that argument depends not only on Turner's gang membership, but upon Collins' knowledge of it, Burton's knowledge of it, and Burton's fear of it—none of which were established by Burton's offer of proof.

In short, if Burton wanted to argue that it was unlikely that Turner and Thomas, as drug dealers, were unarmed, he could have done so. And given that Burton's offer of proof was limited to Turner, his remaining arguments for how the evidence was relevant are purely speculative and depend on other evidence that he neither adduced nor offered to prove. The district court did not abuse its discretion in concluding that evidence of gang membership was not relevant. Burton's third assignment of error is without merit.

4. Excessive Sentences

(a) Background

The jury found Burton guilty of attempted second degree murder and first degree assault, and corresponding weapons

[21] Brief for appellant at 29.

charges. The jury did not find Burton guilty of murder, instead finding that he committed the lesser-included offense of manslaughter and a corresponding weapons charge. The court granted Burton's motion for judgment notwithstanding the verdict on that weapons charge, because the underlying offense was unintentional.[22]

At sentencing, the court acknowledged Burton's relative youth and lack of a particularly substantial criminal record. But, the court explained, even if Burton's testimony were believed, "you hear that scuffle, and you grab your gun and you run out there. Out of some misplaced sense of loyalty for a guy that you hardly know, you're willing to shoot at someone you don't know." And, the court noted, Turner easily could have died. So, the court concluded, "there were any number of times in that process . . . that you could have turned back, and you didn't. And as a result, I have to weight [sic] the fact that one person died and one person was very seriously injured."

Burton was sentenced on each count as follows: 20 to 20 years' imprisonment for manslaughter, 20 to 40 years' imprisonment for attempted second degree murder, 20 to 30 years' imprisonment for first degree assault, and 10 to 20 years' imprisonment for each of the two weapons convictions. All the sentences were to be served consecutively, resulting in a total sentence of 80 to 130 years' imprisonment.

(b) Analysis

[14] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[23] All of the sentences imposed upon Burton were within the statutory limits,[24] and he does not contend otherwise.

Rather, Burton argues that he was only 20 years old at the time of the offense and that although he had some prior felony arrests, he had no felony convictions. And Burton argues that

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[22] See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

[23] *Erickson, supra* note 5.

[24] See Neb. Rev. Stat. §§ 28-105, 28-201, 28-304, 28-305, and 28-1205 (Reissue 2008).

there is no way of knowing whether the jury believed that he brought his own gun to the crime scene or perhaps believed he was acting in defense of Collins but found that the force he used was excessive. Burton suggests that "it is just as reasonable to believe the latter interpretation," in which case, the sentences are excessive.[25]

[15,16] But in imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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.[26] In imposing a sentence, a sentencing 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.[27]

The record, as set forth above, shows that the court appropriately considered these factors and was persuaded by the nature of the offenses, and the violence involved, to impose lengthy terms of imprisonment. The court did not abuse its discretion in doing so, and we find no merit to Burton's final assignment of error.

V. CONCLUSION

We find no merit to Burton's assignments of error and, for the foregoing reasons, affirm his convictions and sentences.

AFFIRMED.

WRIGHT, J., not participating.

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[25] Brief for appellant at 34.

[26] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

[27] *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).