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[5,6] A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.[10] The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.[11]

The September 16, 2010, order did not terminate the proceedings below, and further action is required to completely dispose of the cause in the district court. The competency order entered by the district court was therefore not a final order as required by § 29-2315.01, and the State's application was premature. The State failed to comply with the jurisdictional requirements of § 29-2315.01. Therefore, we lack jurisdiction over the present appeal.

CONCLUSION

Because the State did not appeal from a final order as required by § 29-2315.01, we lack jurisdiction over this appeal. When an appellate court is without jurisdiction to act, the appeal must be dismissed.[12] Accordingly, the State's appeal is dismissed.

APPEAL DISMISSED.

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[10] *State v. Dunlap, supra* note 6.

[11] *Id.*

[12] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY MCCAVE, APPELLANT.
805 N.W.2d 290

Filed October 14, 2011. No. S-10-232.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.

3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court does not acquire jurisdiction of an appeal unless a party is appealing from a lower tribunal's final order or judgment.
7. **Jurisdiction: Appeal and Error.** If the district court, sitting as an intermediate appellate court, lacked jurisdiction over a party's appeal, a higher appellate court also lacks jurisdiction to decide the merits of the appeal.
8. ____: ____. An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
9. **Criminal Law: Final Orders.** Generally, an order entered during the pendency of a criminal case is final only when no further action is required to completely dispose of the pending case.
10. **Criminal Law: Final Orders: Sentences.** Before a criminal conviction is a final judgment, the trial court must pronounce sentence.
11. **Final Orders: Indictments and Informations: Motions for Mistrial.** No final judgment occurs when a trial court declares a mistrial that applies to every count in the charging instrument.
12. **Constitutional Law: Criminal Law: Appeal and Error.** Neb. Const. art. I, § 23, guarantees the right to appeal in all felony cases.
13. **Constitutional Law: Criminal Law: Due Process: Appeal and Error.** Although the U.S. Constitution does not guarantee the right to appeal a criminal conviction, if a state provides an appeal as a matter of right, its appellate procedures must comport with due process.
14. **Indictments and Informations: Joinder: Motions for Mistrial: Appeal and Error.** When the trial court has declared a mistrial as to one or more counts in a multicount charging instrument, those counts should be treated as severed—to be resolved in a new proceeding. The defendant may appeal his conviction and sentence without waiting until a court enters judgment on every count.
15. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court will uphold its findings of fact unless they are clearly erroneous. But an appellate court reviews de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.
16. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.

17. **Arrests: Search and Seizure: Probable Cause: Words and Phrases.** An arrest is a highly intrusive detention (seizure) of a person that must be justified by probable cause.
18. **Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Probable cause to support a warrantless arrest exists only if the officer has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.
19. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
20. **Probable Cause: Police Officers and Sheriffs.** Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed.
21. ____: ____. Implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.
22. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.
23. **Drunk Driving.** Under Neb. Rev. Stat. § 60-6,108(1) (Reissue 2008), Nebraska's driving under the influence statutes do not apply to a person's operation or control of a vehicle on private property that is not open to public access.
24. **Words and Phrases.** Under Neb. Rev. Stat. § 60-649 (Reissue 2010), a residential driveway is not private property that is open to public access.
25. **Drunk Driving.** Criminal liability under Neb. Rev. Stat. § 60-6,196 (Reissue 2010) does not extend to intoxicated persons in control of a vehicle on a residential driveway, regardless of whether part of the vehicle crosses a sidewalk.
26. **Drunk Driving: Circumstantial Evidence.** In driving under the influence cases, circumstantial evidence can establish a person's operation of a motor vehicle.
27. **Criminal Law: Eyewitnesses: Presumptions.** A citizen informant who has personally observed the commission of a crime is presumptively reliable.
28. **Constitutional Law: Arrests: Police Officers and Sheriffs.** Before officers invoke the power of a warrantless arrest, the Fourth Amendment requires them to investigate the basic evidence for the suspected offense and reasonably question witnesses readily available at the scene, at least when exigent circumstances do not exist. This is particularly true when the circumstances the officers encounter are consistent with lawful conduct.
29. **Arrests: Evidence.** An illegal arrest does not bar the State from prosecuting a defendant for the charged offenses with evidence that was untainted by the illegal arrest.
30. **Evidence: Appeal and Error.** The improper admission of evidence, even tainted evidence, is a trial error subject to harmless error analysis.
31. **Trial: Evidence: Appeal and Error.** An erroneous admission of evidence is prejudicial to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
32. **Verdicts: Juries: Appeal and Error.** 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's verdict adversely to a defendant's substantial right.

33. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, an appellate court generally considers whether the error, in the light of the totality of the record, influenced the outcome of the case.
34. **Evidence: New Trial: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict. If it was not, then double jeopardy forbids a remand for a new trial.
35. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
36. **Arrests: Blood, Breath, and Urine Tests.** The validity of a refusing to submit charge under Neb. Rev. Stat. § 60-6,197(3) (Reissue 2010) depends upon the State's showing a valid arrest under § 60-6,197(2).
37. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Under Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010), a peace officer can require a person to submit to a chemical test of his or her blood, breath, or urine when the following circumstances are present: (1) The officer has arrested the person for committing an offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle and under the influence of alcohol or drugs; and (2) the officer has reasonable grounds to believe that the person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcohol or drugs, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). In addition, the person's conduct must not have occurred on private property that is not open to public access.
38. **Drunk Driving: Probable Cause: Police Officers and Sheriffs.** Law enforcement officers must have probable cause to arrest a person for driving under the influence.
39. **Drunk Driving: Arrests: Probable Cause: Police Officers and Sheriffs: Blood, Breath, and Urine Tests: Convictions.** If law enforcement officers lack probable cause to arrest a person for driving under the influence, they lack authority to require the person to submit to a chemical test and a conviction for refusing to submit to the test is unlawful.
40. **Criminal Law: Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.
41. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

42. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination, whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
43. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
44. **Rules of Evidence: Hearsay.** Apart from statements falling under the definitional exclusions and statutory exceptions, the admissibility of an out-of-court statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case.
45. **Hearsay.** Words that constitute a verbal act are not hearsay even if they appear to be.
46. **Hearsay: Words and Phrases.** A verbal act is a statement that has legal significance, i.e., it brings about a legal consequence simply because it was spoken.
47. **Hearsay.** A statement offered to prove its impact on the listener, instead of its truth, is offered for a valid nonhearsay purpose if the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.
48. **Trespass.** Under Neb. Rev. Stat. § 28-522 (Reissue 2008), a defendant is not required to have believed that every owner or every person empowered to license access would have consented to his presence at the premises.
49. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court reversed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Sarah Newell for appellant.

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

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

CONNOLLY, J.

I. SUMMARY

Jeffrey McCave was in his car, parked in the driveway of his father's house. While he was listening to music on the car radio, his father told him to turn the volume down and leave.

After he refused, his father called the police. The police, after a confrontation, arrested McCave for trespass and driving under the influence of alcohol (DUI). Later, the State additionally charged him with resisting arrest, refusing to submit to a chemical breath test, and possessing an open container of alcohol in a vehicle.

A jury convicted McCave of DUI, refusing to submit, and trespass. It deadlocked on the resisting arrest charge. The county court then convicted him of possessing an open container. It declared a mistrial, however, on the resisting arrest charge. On appeal to the district court, the court affirmed the judgments in all respects.

This appeal presents several interrelated issues:

1. Did the evidence show that McCave had operated or was in actual physical control of his vehicle on a public highway or on private property that is open to public access?

2. Did the evidence show that McCave possessed an open container of alcohol on a public highway or in a public parking area?

3. Does an officer's lack of probable cause for a DUI arrest bar a prosecution for refusing to submit to a chemical test?

4. In the criminal trespass prosecution, was evidence showing that McCave's stepmother had consented to McCave's presence at her house admissible?

II. BACKGROUND

Police officers arrested McCave at his father's house in the early morning hours. The arrest stemmed from a family dispute between McCave and his father, John McCave (John). The officers came to the house at John's request after McCave refused to leave the property as John had requested. The officers initially arrested McCave for trespass; afterward, they informed him that he was under arrest for DUI. He claimed that he had not been driving and refused to submit to a chemical test of his breath.

At the suppression hearing and at trial, McCave argued that the officers lacked probable cause for his arrest. The county court overruled McCave's motion to suppress evidence at both proceedings. At trial, the court sustained the State's hearsay

objections to Ashleigh Kudron's testimony and struck her testimony. Kudron was McCave's girlfriend. Her testimony would have shown that McCave's stepmother, Susan McCave (Susan), had consented to McCave's staying at the house. The court overruled McCave's motion for a directed verdict at the close of the State's case.

The jury found McCave guilty of DUI, refusing to submit to a chemical test, and trespass. It failed to reach a verdict on the resisting arrest charge, and the court declared a mistrial. After dismissing the jury, the court found McCave guilty of possessing an open container in a motor vehicle.

For the DUI and refusing to submit convictions, the county court sentenced him to 30 days in jail and 2 years of probation, and to pay a $1,000 fine. The court ordered him not to operate a vehicle as a term of his probation. For the trespassing conviction, the court sentenced him to 10 days in jail. The court fined him $50 for the open container conviction.

III. ASSIGNMENTS OF ERROR

McCave assigns, restated and renumbered, that the district court erred in affirming the county court's judgment because the county court improperly (1) overruled his motion to suppress evidence, (2) excluded as hearsay testimony intended to show that he was or believed that he was licensed to remain on the property, (3) overruled his motion for a directed verdict, (4) instructed the jury, and (5) imposed excessive sentences.

IV. STANDARD OF REVIEW

[1,2] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[1] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[2]

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[1] See, *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010).

[2] See *Lamb, supra* note 1.

[3-5] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] But we independently review questions of law in appeals from the county court.[4] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[5]

V. ANALYSIS

1. Jurisdiction

We first address the district court's conclusion that McCave had appealed from a final order. Despite the pending charge for resisting arrest, the court concluded that because the county court had sentenced McCave on his three convictions for DUI, trespass, and open container violations, there was a final judgment for those charges.

[6-8] We do not acquire jurisdiction of an appeal unless a party is appealing from a lower tribunal's final order or judgment.[6] And if the district court, sitting as an intermediate appellate court, lacked jurisdiction over a party's appeal, we also lack jurisdiction to decide the merits of the appeal.[7] We determine jurisdictional questions that do not involve a factual dispute as a matter of law.[8] Although the State does not dispute

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[3] *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

[4] See, *Lamb, supra* note 1; *Prescott, supra* note 1; *Royer, supra* note 3.

[5] See, *Lamb, supra* note 1; *Prescott, supra note* 1; *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008); *Royer, supra* note 3.

[6] See *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007).

[7] See, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *MBNA America Bank v. Hansen*, 16 Neb. App. 536, 745 N.W.2d 609 (2008); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

[8] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

our jurisdiction to decide this appeal, we must determine whether we have jurisdiction over the matter before us.[9]

[9-11] Generally, an order entered during the pendency of a criminal case is final only when no further action is required to completely dispose of the pending case.[10] And before a criminal conviction is a final judgment, the trial court must pronounce sentence.[11] So no final judgment occurs when a trial court declares a mistrial that applies to every count in the charging instrument.[12] But here, the trial court declared a mistrial for only the charge on which the jury deadlocked. So the question is whether a conviction and sentence for some counts of a multicount complaint or information can be final and appealable when the court declares a mistrial on one of the counts, leaving that count still pending. It appears that we have not decided this issue.

The district court relied on two federal appellate decisions to conclude that it had jurisdiction: *U.S. v. Abrams*[13] and *U.S. v. King*.[14] In *Abrams*, a jury convicted the defendant of three counts in a 13-count indictment. But the trial court declared a mistrial on the remaining 10 counts for which the jurors failed to reach a unanimous decision. The government represented that it did not intend to retry those counts if the three convictions were affirmed. The Second Circuit concluded that it had jurisdiction over a final judgment. It relied on the general rule that a judgment of conviction which includes the sentence is final. It reasoned that even if "the litigation as framed in the indictment may not yet have run its course, the counts of conviction have been resolved and the sentence is ready for execution. The unresolved counts have in effect been severed, and will be resolved another time in a separate judgment."[15]

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[9] See *id.*

[10] See *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

[11] *Id.*

[12] See *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

[13] *U.S. v. Abrams*, 137 F.3d 704 (2d Cir. 1998).

[14] *U.S. v. King*, 257 F.3d 1013 (9th Cir. 2001).

[15] *Abrams, supra* note 13, 137 F.3d at 707.

The Second Circuit in *Abrams* concluded that requiring a defendant to delay an appeal until a court renders judgment for every count would result in one of two undesirable outcomes. First, if the trial court executed the sentence, then a defendant would be serving the sentence with no right to appeal the judgment. Alternatively, a trial court's stay of a sentence's execution pending an appeal would "substantially delay the execution of a valid conviction and sentence, force trials that may never be needed, and impose expense and burden on the prosecution and the defense."[16]

In *King*, the defendant pleaded guilty to, and the court sentenced him on, 19 counts of a 50-count indictment. The Ninth Circuit concluded that it had jurisdiction over his appeal even though the remaining counts were still pending. The Ninth Circuit concluded that the defendant's guilty pleas to a subset of the charges had created a de facto severance of the case. It concluded that permitting a defendant to begin serving a sentence before obtaining the right to appeal would violate due process. It determined that "the court's interest in ensuring a defendant has the right to appeal a sentence when he begins serving it outweighs the government's concerns about piecemeal appellate review."[17]

In contrast, the minority rule generally depends upon a stay of the execution of sentence. The First Circuit's decision in *U.S. v. Leichter*[18] is illustrative. The trial court had, on its own, severed a conspiracy charge from over 390 other counts against the three defendants. After a jury convicted them, the government dismissed all but 38 of the remaining counts. The court then stayed execution of the sentence pending the defendants' appeal. The First Circuit concluded that the trial court had not formally severed the cases and reasoned that in that circumstance, "[t]he prevailing practice has been to treat 'the case'

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[16] *Id.*

[17] *King, supra* note 14, 257 F.3d at 1021. See, also, *U.S. v. Richardson*, 817 F.2d 886 (D.C. Cir. 1987).

[18] *U.S. v. Leichter*, 160 F.3d 33 (1st Cir. 1998). But see *U.S. v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20 (1st Cir. 1989).

as the basic unit for an appeal."[19] In concluding that it lacked jurisdiction, the court emphasized that the trial court had stayed execution of the sentences.

The other leading federal case adopting the minority rule also depended upon a stay of execution. In *U.S. v. Kaufman*,[20] the jury convicted the defendant of one count, acquitted him of two counts, and deadlocked on two counts. The trial court granted a mistrial as to the deadlocked counts and sentenced the defendant for his conviction, but stayed execution of the sentence. The Seventh Circuit determined that the unresolved counts prevented it from exercising jurisdiction over the defendant's appeal because the litigation was not terminated until there was a judgment on every count. It reasoned that exercising jurisdiction would encourage piecemeal appellate review. But it also held that the trial court could not execute the sentence for the defendant's one conviction until there was a final judgment on all counts of the indictment: "A judgment which lacks finality cannot authorize the imprisonment of a defendant."[21]

[12,13] The majority approach is more persuasive and more consistent with Nebraska law. As stated, a conviction is a final judgment for appeal purposes after the trial court pronounces the sentence.[22] More important, Neb. Const. art. I, § 23, guarantees the right to appeal in all felony cases.[23] Although the U.S. Constitution does not guarantee the right to appeal a criminal conviction, if a state provides an appeal as a matter of right, its appellate procedures must comport with due process.[24] We believe that requiring a defendant to delay an appeal until the State retries a remaining count (assuming that the State intends to retry the remaining count) could unnecessarily

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[19] *Leichter, supra* note 18, 160 F.3d at 36.

[20] *U.S. v. Kaufman*, 951 F.2d 793 (7th Cir. 1992).

[21] *Id.* at 795.

[22] See *Vela, supra* note 10.

[23] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

[24] See, *id.*, citing *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

interfere with a defendant's right to appeal while he or she is serving a sentence.[25]

Moreover, the majority approach also avoids trial management issues. The potential for delays could pressure the State to dismiss those counts on which the jury has deadlocked.[26] Conversely, as the Second Circuit noted, even if a prolonged delay because of a retrial is not a concern, staying execution of the sentence could result in unnecessary trials.[27] From the State's perspective, future proceedings may be unnecessary if a court affirms the conviction on appeal.[28]

[14] We conclude that when the trial court has declared a mistrial as to one or more counts in a multicount charging instrument, the better course is to treat those counts as severed—to be resolved in a new proceeding. This rule will permit a defendant to appeal his conviction and sentence rather than waiting until a court enters judgment on every count. The district court did not err in exercising jurisdiction over McCave's appeal. We now turn to the merits of his appeal.

2. County Court Erred in Failing to Suppress Evidence

(a) Parties' Contentions

McCave argues that the county court erred in failing to suppress evidence derived from his DUI arrest. He argues that the officers lacked probable cause to believe that he had operated or been in actual physical control of a vehicle while intoxicated. He argues that he was not on property open to public access because he was sitting in a car which was parked on a residential driveway with its motor not running.

The State views it differently. It argues that McCave was in physical control of the vehicle and that the vehicle was not entirely on private property. Relying on *State v. Prater*,[29] the

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[25] Compare *Kaba v. Fox*, 213 Neb. 656, 330 N.W.2d 749 (1983).

[26] Compare *U.S. v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993).

[27] See *Abrams, supra* note 13.

[28] See *Leichter, supra* note 18 (Campbell, J., dissenting).

[29] *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004).

State also argues that an officer should not have to wait until a driver enters a public highway before stopping the driver to determine whether the driver is impaired. It argues that Officer Benjamin Faz testified that McCave had his hand on the ignition switch and was about to start the vehicle after stating that he was leaving.

(b) Standard of Review

[15] In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, we will uphold its findings of fact unless they are clearly erroneous.[30] But we review de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.[31]

(c) Facts

Two officers responded to John's complaint. Faz testified at the suppression hearing. He stated John told him that McCave was intoxicated and causing a disturbance and that he wanted the officers to remove him. Faz stated that John said that McCave had been at his house earlier, left, and then returned intoxicated and caused a disturbance. After speaking to John, the officers walked around to the side of the house, where the detached garage and driveway abutted a side street. Faz stated that the vehicle was parked in the driveway, straddling the sidewalk.

Faz recognized McCave from previous complaints and saw him sitting in the driver's seat. The motor was not running, but the keys were in the ignition. Faz saw a beer can in the console. When Faz asked McCave what he was doing, he first responded, "'Nothing,'" but then stated that he was leaving. Faz stated that McCave was about to start the engine, but he never turned the motor on, and he stepped out of the car when asked to do so.

In exiting the car, McCave backed away from the officers, yelling that they had no right to contact him on private

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[30] *State v. Sharp*, 281 Neb. 130, 795 N.W.2d 638 (2011).

[31] *Id.*

property. The officers believed that he was intoxicated and arrested him for trespass. From his conversation with John, Faz did not know how long McCave had been in the vehicle on the driveway. He also did not know the means by which McCave had left the house or whether he was driving. Faz saw Kudron and knew that she was McCave's girlfriend. But he did not speak to her or ask whether she had driven the vehicle.

After arresting McCave for trespass, Faz returned and spoke to John and Susan. John stated that he had been asleep. Susan stated that McCave had returned about a half-hour to an hour before John woke up. Faz did not ask Susan whether she had allowed McCave to be on the property. Later, Faz read McCave the postarrest advisement form for DUI. McCave refused to submit to a chemical breath test.

The county court concluded that the circumstantial evidence was sufficient to show that McCave had been driving. It reasoned that the officers could infer that he had been driving because he had stated that he was leaving when the officers first approached him.

(d) Analysis

Under Neb. Rev. Stat. § 60-6,196(1) (Reissue 2010), it is unlawful for a person to operate or be in the actual physical control of any motor vehicle while under the influence of alcohol or a drug. Here, the police initially arrested McCave for trespass. But the postarrest chemical test advisement form that Faz later read to McCave informed him that he was also under arrest for DUI.

(i) Probable Cause Standard

[16-18] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[32] An arrest is a highly intrusive detention (seizure) of a person that must be justified by probable cause.[33] Probable cause to support a warrantless arrest exists only if the officer

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[32] *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[33] See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[34]

[19-22] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[35] Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed.[36] But implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.[37] We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[38]

(ii) McCave Was Not in Actual Control of a Vehicle on Private Property Open to Public Access

[23] Under Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010), Nebraska's DUI statutes do not apply to a person's operation or control of a vehicle on private property that is not open to public access. So we first address whether McCave was in actual physical control of a vehicle on private property with public access when he was sitting in a parked vehicle which was on a residential driveway but overhanging a public sidewalk.

In *Prater*,[39] we affirmed the trial court's ruling that an apartment building parking lot was private property with public access. We defined "open to public access" as follows:

> The word "access" is defined as "permission, liberty, or ability to enter, approach . . . or pass to and from,"

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[34] See, *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006), citing *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[35] See, *Smith, supra* note 32; *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

[36] See *Smith, supra* note 32.

[37] See *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

[38] See *Smith, supra* note 32.

[39] *Prater, supra* note 29.

> "a way by which a thing or place may be approached or reached," and "the action of going to or reaching . . . passage to and from." . . . Thus, the phrase "open to public access" means that the public has permission or the ability to enter.[40]

We concluded that whether the apartment building parking lot was open to public access was "primarily a question of fact."[41] Although in *Prater*, a sign warned motorists that unauthorized vehicles would be towed, the residents' testimony established that the lot was available to guests, workers, and delivery people. We cited cases from other jurisdictions in which the courts upheld DUI convictions when the public was permitted to use a private parking lot. We concluded, "Public safety requires that DUI statutes and ordinances apply to any property to which the public has access. The purpose of these laws is to protect the public—not to provide a safe harbor for the intoxicated driver in a private parking lot."[42]

But *Prater* is not controlling here. When §§ 60-6,108 and 60-6,196 are read consistently, they show that the Legislature intended to prohibit intoxicated persons from operating or being in control of a vehicle even on private property if other motorists might access that property and be endangered by their conduct. But Neb. Rev. Stat. § 60-649 (Reissue 2010) defines a private road or driveway to mean "every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons."

[24] So, unlike the question presented in *Prater*, the public access question here presents a question of statutory interpretation. As a matter of law, we conclude that under § 60-649, a residential driveway is not private property that is open to public access.[43] Members of the general public have no right or implied permission to use a private residential driveway.

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[40] *Id.* at 657-58, 686 N.W.2d at 898.

[41] *Id.* at 658, 686 N.W.2d at 898.

[42] *Id.* at 660, 686 N.W.2d at 900.

[43] See *State v. Haws*, 869 P.2d 849 (Okla. Crim. App. 1994). Compare *State v. Day*, 96 Wash. 2d 646, 638 P.2d 546 (1981) (en banc).

Nor do they have the "ability to enter" the driveway in the same sense that a member of the public might drive through or use a private parking lot by custom.[44] So neither a property owner nor the owner's guest would reasonably expect that the public might use the owner's driveway. To extend *Prater* to these facts would render the limitation on the statute's reach meaningless.

Nor do we think that the driveway's characterization as private property without public access changed just because McCave's vehicle overhung the sidewalk. Neb. Rev. Stat. § 60-662 (Reissue 2010) defines a sidewalk as "that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians." Because a sidewalk is not intended for use by vehicles, an intoxicated person in a parked vehicle on a private driveway does not endanger other motorists merely because the vehicle overhangs the sidewalk. We do not believe the Legislature intended to make a citizen drinking a beer while cleaning out his vehicle parked in his driveway guilty of a crime because the vehicle is overhanging the sidewalk.

[25] We reject the State's argument that criminal liability under § 60-6,196 extends to intoxicated persons in control of a vehicle parked on a residential driveway, regardless of whether part of the vehicle crosses a sidewalk. Accordingly, the arresting officers did not have probable cause to believe that McCave was an intoxicated person in actual control of a vehicle on private property open to public access. We next address the county court's conclusion that based on circumstantial evidence, the officers had probable cause to believe that McCave had been driving while intoxicated.

(iii) Officers Did Not Have Probable Cause to Believe McCave Had Driven a Vehicle on a Public Highway While Intoxicated

The county court concluded that because McCave had stated that he was leaving while he was in his vehicle with the keys in the ignition and the motor off, the officers could infer that

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[44] See *Prater, supra* note 29, 268 Neb. at 658, 686 N.W.2d at 898.

McCave drove to John and Susan's house intoxicated. We disagree. Obviously, if McCave had committed an offense in front of the officers, they would have had grounds for an arrest. But his statement that he was leaving, even if his hand was on the key in the ignition, showed only that he had considered driving but changed his mind.

[26] These facts are distinguishable from the majority of cases in which an officer stops a motorist for a traffic violation or driving erratically and then observes physical signs of intoxication. It is true that in DUI cases, circumstantial evidence can establish a person's operation of a motor vehicle.[45] But the evidence here falls short of the evidence presented in the few cases where the officer did not see the defendant operating a motor vehicle but the circumstantial evidence was sufficient to show that the defendant had been driving while intoxicated.

In most of those cases, the facts showed that the defendant, who exhibited signs of intoxication, was found alone in a vehicle in a place where the vehicle could not have been unless the defendant drove it there.[46] In a case relevant for its contrasting facts, we reversed the Court of Appeals' decision that the circumstantial evidence was insufficient to support a DUI conviction.[47] There, an officer arrested the defendant, whom he had found in the ditch of a rural road, lying beside his motorcycle. The defendant claimed that he had lost control of his motorcycle when another vehicle passed him. The Court of Appeals agreed that the officer had found the defendant in an intoxicated state but concluded that there was no evidence to indicate how long the defendant had been in the ditch. It concluded the evidence failed to show that the defendant had been intoxicated and driving at the same time.

In reversing, we emphasized the circumstances that precluded an inference that the defendant became intoxicated after the accident, when he was no longer driving:

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[45] See *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970).

[46] See, *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986); *Eckert, supra* note 45. Compare *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996).

[47] See *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

> There is no evidence in the record of other persons, liquor, or liquor containers in the area where [the defendant] was found by the officer, nor is there any other evidence which would support an inference that [the defendant] had the means or opportunity of ingesting alcohol from the time he lost control of the motorcycle until the officer found him lying beside it in the ditch.[48]

It is true that the circumstances the officers encountered when they arrested McCave gave them probable cause to believe that he was intoxicated. According to Faz, when the officers arrived, John told them that McCave was intoxicated and causing a disturbance. When the officers approached McCave in the vehicle, his conduct and a beer in the vehicle's console supported a reasonable belief that he was intoxicated. But unlike in our earlier cases, the facts known to the officers were insufficient to support a conclusion that McCave had operated his vehicle while intoxicated.

[27] A citizen informant who has personally observed the commission of a crime is presumptively reliable.[49] But John did not state that he had seen McCave driving while intoxicated or driving at all. He told the officers only that McCave had been at his house earlier, had left, and later returned intoxicated. Moreover, the officers should have known that John was not a reliable source of information for concluding that McCave had returned intoxicated. John was asleep when McCave returned. He told Faz this, and Susan told Faz that McCave came back about a half-hour to an hour before John woke up.

[28] More important, the fact that John and Susan told the officers that McCave had left the house and returned did not indicate the means by which he had left or returned. No witness reported that McCave was driving a vehicle at any time, and the officers did not pose this critical question to McCave or any witness. Before officers invoke the power of a warrantless arrest, the Fourth Amendment requires them to investigate the basic evidence for the suspected offense and reasonably question witnesses readily available at the scene, at least when

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[48] *Id.* at 949, 580 N.W.2d at 551.

[49] *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010).

exigent circumstances do not exist.[50] This is particularly true when the circumstances the officers encounter are consistent with lawful conduct.[51] As previously discussed, it is not unlawful for a person to be intoxicated in a vehicle on private property not open to public access.

John's statement that McCave had left and returned to the house and the officer's observation of McCave in his vehicle gave the officers reasonable suspicion to temporarily detain McCave while they investigated whether he had been driving while intoxicated. But the officers did not attempt to determine the relevant facts. They did not ask McCave or the witnesses how he had left the house or returned; they saw Kudron but did not speak to her; and they did not attempt to discover from a reliable source whether McCave was intoxicated when he returned to the house or if he had been drinking alcohol after he returned to the house. Instead, Faz stated, "I guess I just inferred with the beer being in the car that him and the beer got there by the vehicle."

But the facts did not support this inference when two other possibilities were equally plausible. McCave could have left and returned to the house intoxicated without driving. Or he could have become intoxicated after returning to the house. In contrast to events in our previous cases, the officers did not encounter a suspect in his or her vehicle who admitted to driving at some point before the encounter[52]; no citizen informant had reported that the suspect was driving while intoxicated[53] or driving erratically; no witness at the scene reported that the suspect had driven the vehicle immediately before the police

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[50] See, *Kuehl v. Burtis*, 173 F.3d 646 (8th Cir. 1999); *Romero v. Fay*, 45 F.3d 1472 (10th Cir. 1995); *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988); *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988); *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *vacated on other grounds sub nom. City of Lawton, Okla. v. Lusby*, 474 U.S. 805, 106 S. Ct. 40, 88 L. Ed. 2d 33 (1985).

[51] See *BeVier, supra* note 50.

[52] See, e.g., *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). Compare *Blackman, supra* note 47.

[53] See *Wollam, supra* note 49.

arrived[54]; and the officers did not encounter the suspect in a location where the suspect could not have been unless the suspect had driven the vehicle while intoxicated.[55] Finally, no exigent circumstance existed because the police had already arrested McCave for trespassing.

Instead, the evidence shows that the officers focused on removing McCave from the property because of his alleged trespass. Their arrest of McCave for DUI appears to have been an afterthought to the trespass arrest because they did not investigate the relevant facts that were readily available. As stated, officers do not lack probable cause because in hindsight they were wrong about a suspect's unlawful conduct. But here, because the circumstances that the officers encountered were consistent with lawful conduct, the officers unreasonably failed to gather more facts from a reliable source before arresting McCave for DUI. So the arrest was unlawful, and the court erred in failing to suppress as fruit of an unreasonable seizure any evidence or statements tainted by the arrest.[56]

(iv) Failure to Suppress Tainted Evidence Was Not Harmless Error

[29,30] McCave's illegal arrest did not bar the State from prosecuting him for the charged offenses with evidence that was untainted by the illegal arrest.[57] But the improper admission of evidence, even tainted evidence, is a trial error subject to harmless error analysis.[58] Because the court failed to suppress the tainted evidence, we consider whether the error was harmless.

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[54] See *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992).

[55] See cases cited *supra* note 46.

[56] See, *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

[57] See, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), citing *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991).

[58] See, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003).

The State contends that suppressing tainted evidence would not have made a difference in the outcome. It argues that the only improperly admitted evidence would have consisted of the beer can that the police seized from McCave's vehicle. But the evidence that the court should have suppressed also included McCave's statements to officers after his arrest and his refusal to take the chemical breath test.[59] The State used this evidence at trial to cast McCave in an unfavorable light.

[31-33] An erroneous admission of evidence is prejudicial to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[60] 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's verdict adversely to a defendant's substantial right.[61] When determining whether an alleged error is so prejudicial as to justify reversal, we generally consider whether the error, in the light of the totality of the record, influenced the outcome of the case.[62]

Here, we cannot conclude that the admission of this evidence did not materially influence the outcome of the case. Because the county court did not suppress this evidence, we reverse the judgment of conviction for the DUI charge.[63]

3. Evidence Was Insufficient to Support Conviction for DUI

[34] Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict.[64] If it was not, then double jeopardy forbids a remand for a new trial.[65]

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[59] See *Tingle, supra* note 57.

[60] See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[61] See *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

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

[63] See *Tingle, supra* note 57.

[64] See, *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011); *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[65] See *Nero, supra* note 64.

(a) Facts

At trial, the direct evidence established that McCave never drove his vehicle after arriving at John and Susan's house in the afternoon before his arrest. Kudron had been staying with McCave at his mother's house, where he lived. She testified that Susan invited her and McCave to come over for a visit in the afternoon. John and Susan lived a couple of blocks from McCave's mother. McCave drove his vehicle over and parked in John and Susan's driveway. The witnesses disputed whether or by how much the vehicle hung over the sidewalk while parked in the driveway. Only the officers testified that the vehicle was straddling the sidewalk.

McCave did not consume any alcohol during the day, before or after arriving at John's house. Soon after arriving at John and Susan's house, he gave Kudron his car keys. She testified that he frequently did this so he would not be tempted to drive if he drank a couple of beers. At some point, McCave's mother came over to visit also. Close to evening, McCave walked her home and stated that he was going out with his friends afterward to a bar about five blocks away. John told McCave not to come back if he was intoxicated. Kudron stayed at the house, visiting Susan.

McCave was gone until around 11:30 p.m. or midnight, and John had retired to his room before McCave returned. Kudron did not believe that McCave was intoxicated when he returned. McCave told her that he was going to the "bottle shop" to get a couple of beers and some cigarettes and that he did not know whether he would walk or get a ride. Kudron stated that she still had his car keys. When he returned, McCave told Kudron that he had gotten a ride to the bottle shop and walked back. He had purchased two cans of beer.

McCave drank one beer in the house while watching television with Susan and Kudron. At some point, John observed McCave drinking a beer in the house and argued with Susan, but then went back to his room. After an hour or so of watching television, McCave, Kudron, and Susan went outside to listen to music from McCave's car stereo. Kudron stated that she put the keys in the ignition so they could listen to the radio while they stood outside the car. After about 45 minutes, Kudron and Susan went inside to get cigarettes.

John testified that he went outside and asked McCave to turn the music off and walk home. John stated that the motor was not running, the lights were off, and no one was in the vehicle with McCave. He also stated that McCave turned the music up louder after he went in, so he went back out to say that he would call the police if McCave did not turn it off and go home. John called the police around 1 or 1:30 a.m. He testified that he told the officers that he thought McCave had been drinking but did not say that he was drunk. He never saw McCave drinking any alcohol until after McCave had returned to the house.

The officers testified to basically the same facts that the State presented at the suppression hearing. They arrested McCave for trespass. Because they smelled alcohol on his breath and he was belligerent, they did not perform field sobriety tests. Faz testified that they were afraid that if they took McCave's handcuffs off, he would hurt someone. Instead, they took him to the police station for a chemical breath test. During the transport, McCave continually yelled at them, called them names, and insisted that he had not been driving. Faz read McCave the postarrest chemical test advisement form at the police station. McCave refused to submit to the test because he was still insisting that he had not been driving.

(b) Analysis

[35] In reviewing the sufficiency of the evidence for this conviction, we consider whether the evidence would have been sufficient if the court had properly admitted evidence of the beer seized from McCave's vehicle and his subsequent statements to the officers. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[66] We conclude that this condition is met here.

First, McCave was on private property as a matter of law, not on a public highway and not on private property open to public access. The State spent considerable time establishing the position of the vehicle on the driveway. But as discussed, even if

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[66] *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

the officers were correct that the vehicle completely crossed the sidewalk, the sidewalk did not change the private character of the residential driveway. So the State could not support the DUI conviction by showing that McCave was in actual control of a vehicle on a public highway or private property that was open to public access.

Moreover, the State offered no new evidence that McCave had been operating a vehicle on a public highway while intoxicated. We have already determined that the circumstantial evidence failed to give the officers probable cause for his arrest for this charge. So without any new evidence offered at trial establishing that he had driven his vehicle, we also conclude that the State's circumstantial evidence failed as a matter of law to establish McCave's operation of vehicle on a public highway. Thus, double jeopardy does not permit a retrial on this charge.

4. McCave Was Unlawfully Convicted of Refusing to Submit to a Chemical Breath Test

At the start of the suppression hearing, McCave tied the "refusing to submit" charge to whether the officers had probable cause for an arrest. He argued that the issue was whether the private driveway was open to public access and "whether or not they had probable cause to arrest him for a DUI and make him submit to a chemical test." The court overruled the motion but agreed that if the officers did not have probable cause for an arrest, then McCave's refusal to submit to a test would not be at issue. We interpret McCave's argument, under his failure to suppress assignment of error, to be that the officers lacked authority to require him to submit to a chemical test because they lacked probable cause for the DUI arrest.

[36] We agree that the unlawful arrest barred the State from prosecuting McCave for refusing to submit to a chemical breath test, in violation of Neb. Rev. Stat. § 60-6,197(3) (Reissue 2010). To be prosecuted for refusing to submit to a chemical test under § 60-6,197(3), the person must be an arrestee as described in subsection (2):

> Any person arrested as described in subsection (2) of this section may, upon the direction of a peace officer,

> be required to submit to a chemical test or tests of his or her blood, breath, or urine for a determination of the concentration of alcohol or the presence of drugs. . . . Any person who refuses to submit to such test or tests required pursuant to this section shall be subject to the administrative revocation procedures . . . and shall be guilty of a crime . . . .[67]

So the validity of a refusing to submit charge under § 60-6,197(3) depends upon the State's showing a valid arrest under § 60-6,197(2).

[37] Under § 60-6,197(2), a peace officer can require a person to submit to a chemical test of his or her blood, breath, or urine when the following circumstances are present: (1) The officer has arrested the person for committing an offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle and under the influence of alcohol or drugs; and (2) the officer has reasonable grounds to believe that the person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcohol or drugs, in violation of § 60-6,196. In addition, the person's conduct must not have occurred on "private property which is not open to public access."[68]

[38,39] Law enforcement officers must have probable cause to arrest a person for driving under the influence.[69] A valid arrest was a condition precedent to requiring McCave to submit to a chemical breath test.[70] We have determined that the officers' arrest of McCave for DUI was unlawful because they lacked probable cause. So one of the statutory conditions for requiring McCave to submit to a chemical breath test was not satisfied. Therefore, the officers lacked authority to take this action and McCave's conviction for refusing to submit to a chemical test was unlawful. We reverse this conviction.

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[67] § 60-6,197(3).

[68] See § 60-6,108(1).

[69] See *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[70] See *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986).

5. Evidence Was Insufficient to Support Conviction for Possessing an Open Container

[40] McCave assigns that the trial court erred in failing to sustain his motion for a directed verdict. In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.[71]

[41] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[72] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[73]

Nebraska's open container statute provides in part that "[i]t is unlawful for any person in the passenger area of a motor vehicle to possess an open alcoholic beverage container while the motor vehicle is located in a public parking area or on any highway in this state."[74] For this statute, "[h]ighway means a road or street including the entire area within the right-of-way."[75]

The State concedes that the evidence did not support this conviction. It submits that there is no evidence that McCave's vehicle was located in a public parking area or on a public highway as required by the open container statute. We agree.

After the jury found McCave guilty of the DUI charge, the county court separately convicted him of possessing an open container. We agree with the State that a public sidewalk is

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[71] See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

[72] *Nero, supra* note 64.

[73] *Id.*

[74] Neb. Rev. Stat. § 60-6,211.08(2) (Reissue 2010).

[75] § 60-6,211.08(1)(b).

not a public parking area. The county court apparently relied on the DUI conviction to conclude that the circumstantial evidence was sufficient to show that McCave had possessed an open container while on a public highway. But the jury instruction permitted the jury to convict McCave because it found that he had operated or been in control of a vehicle on a highway or private property open to public access. Thus, the verdict failed to show that the jury believed that McCave had operated a vehicle on a highway. Under the State's arguments, it could have concluded that a residential driveway was private property open to public access.

We need not reach here, however, the issue whether circumstantial evidence can support an open container conviction. We have already determined that the circumstantial evidence was insufficient as a matter of law to prove that McCave had driven his vehicle on a public highway. Obviously, it necessarily follows that the State's circumstantial evidence could not have proved that he had possessed an open container of alcohol on a public highway. We also reverse this conviction.

6. County Court Erred in Failing to Admit Susan's Out-of-Court Statements Giving McCave Permission to Be on the Property

(a) Parties' Contentions

McCave assigns that the district court erred in affirming the county court's ruling that Susan's statements were inadmissible hearsay. McCave argues that her statements, permitting him to be at the house, were offered not for the truth of the matter asserted but to show the effect that they had on him. That is, the statements explain why he reasonably believed he was licensed to be at the property. He also argues that proof of Susan's consent would have negated the knowledge and communication elements of the trespass charge.

McCave relies on the withdrawn portion of our opinion in *State v. Parker*[76] and a concurrence to that opinion.[77] He argues

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[76] See *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), *modified* 276 Neb. 965, 767 N.W.2d 68 (2009).

[77] See *id.* (Gerrard, J., concurring).

that the authorities cited in these opinions show that statements which are admissible to show their effect on a listener include statements relevant to explain the course of events or to provide context to the evidence presented.

The State contends that the withdrawn portion of *Parker* is not authority for any subsequent case. It also contends that Susan's statements were offered for the truth of the matter asserted—to show that she had licensed McCave to be on the premises. The State argues that because McCave offered Susan's statements for their truth, only Susan could have testified to what she said to McCave without the statements' being inadmissible as hearsay. The State also contends that Susan's statements were not authority for McCave to be on the property after John revoked it by telling McCave to leave.

We agree that the county court's hearsay ruling excluding Susan's statements involved the knowledge element of the trespass charge and the "reasonable belief" component of the statutory defense.

(b) Relevant Statutes

The State could convict McCave of second degree criminal trespass only if it proved that he knew he was not licensed or privileged to be at John and Susan's residence: "A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by: (a) Actual communication to the actor . . . ."[78]

Neb. Rev. Stat. § 28-522(3) (Reissue 2008) provides an affirmative defense against a prosecution for this trespass charge if "[t]he actor reasonably believed that the owner of the premises or other person empowered to license access thereto would have licensed him to enter or remain."

(c) Facts

At trial, Kudron testified that close to evening, McCave told her that he was going to walk his mother, Patricia, home and then go to the bar. Kudron stated that he gave her his car keys

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[78] Neb. Rev. Stat. § 28-521(1) (Reissue 2008).

and was gone for a couple of hours. She did not believe that he was intoxicated when he returned. Upon his return, he had told her that he was going to walk or get a ride to the bottle shop to get beer. But the court sustained the State's hearsay objection to Kudron's testimony that Susan told McCave that he could have only a couple of beers. Kudron then testified that McCave returned after 25 minutes with two cans of beer. At this point, John came out of his bedroom and became upset when he saw McCave drinking a beer. When Kudron stated that Susan told John that she had given McCave permission to be there, the court sustained the State's motion to strike the statement.

Later, McCave made an offer of proof, asserting that if the court had permitted Kudron to testify, she would have stated the following: When McCave returned from the bar, he asked Susan for permission to go to the bottle shop and buy a couple of beers. Susan stated that he could do that, but that he could have only two beers. When John came downstairs and was angry because McCave was drinking a beer, Susan told him that she had given McCave permission to stay there.

McCave argued that Susan's statement was not hearsay because it had legal significance and was relevant to whether he reasonably believed he was licensed to remain on the property. But the court again sustained the State's objection. It concluded that the purpose for offering the statements was blurred but that, to some extent, the statements were offered for the truth of the matter asserted.

The district court affirmed the ruling. It did not specifically address whether Susan's statements had legal significance apart from whether they were relevant to showing that McCave reasonably believed he was licensed to remain on the property. But it concluded that in other cases where we had affirmed the admission of out-of-court statements to show their impact on the listener, the truth of the matter asserted could be separated from the statement itself. It did not believe that was true in this case. It also reasoned that unlike some of our other cases, Susan's statements were not necessary to explain why Kudron and McCave had stayed at the house when Susan had socialized with them. Finally, the court concluded that even if the county court's ruling was incorrect, it was harmless error. It

reasoned that John had revoked Susan's consent for McCave to enter or remain on the property.

(d) Standard of Review

[42] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.[79] But our reasoning for adopting a de novo standard applies equally to a court's exclusion of evidence on hearsay grounds. That is, whether the underlying facts satisfy the legal rules governing the admissibility of out-of-court statements presents a question of law.[80] So we clarify our standard of review to include both types of rulings: Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination, whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.

(e) Analysis

(i) A Witness' Out-of-Court Statements Can Be Hearsay

We first address the State's argument that because Susan's statements were offered for the truth of the matter asserted, only Susan could have testified to what she had previously stated without raising a hearsay problem. The State's argument is inconsistent with Nebraska's statutory definition of hearsay: "Hearsay is a statement, other than one made by the declarant *while testifying* at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[81]

Susan's previous statements to McCave and John were a declarant's out-of-court statements, not statements that Susan made while she was testifying as a witness. And she was not a party. Thus, if the State were correct that her statements were

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[79] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[80] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[81] Neb. Rev. Stat. § 27-801(3) (Reissue 2008) (emphasis supplied).

offered for the truth of the matter asserted, then—even if she had testified to her previous statements—they would have been hearsay unless they fell within a definitional exclusion under § 27-801(4)(a) or a statutory exception.[82] We conclude, however, that the statements were not hearsay because they were not offered for the truth of the matter asserted.

(ii) Susan's Statements Were Admissible for Nonhearsay Purposes

[43,44] If an out-of-court statement is not offered for proving the truth of the facts asserted, it is not hearsay.[83] But it does not necessarily follow that such a statement is admissible in a particular case. Apart from statements falling under the definitional exclusions and statutory exceptions, the admissibility of an out-of-court statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case.[84] McCave correctly contends that Susan's statements had legal significance for the trespass charge independent of the truth of the matter asserted. But we clarify that the statements fell within the recognized nonhearsay purpose of showing a "verbal act."

[45,46] We have previously explained that words that constitute a verbal act are not hearsay even if they appear to be.[85] A verbal act is a statement that has legal significance, i.e., it brings about a legal consequence simply because it was spoken.[86] To explain why such statements are not hearsay, we have previously set forth the advisory committee notes to Fed. R. Evid. 801(c), the federal counterpart to § 27-801(3):

> "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not

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[82] See, *People v. Lawler*, 142 Ill. 2d 548, 568 N.E.2d 895, 154 Ill. Dec. 674 (1991); G. Michael Fenner, The Hearsay Rule ch. 1(II)(C)(3) (2003).

[83] *Baker, supra* note 79.

[84] See *id.*

[85] See *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988).

[86] *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986); *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975).

> hearsay. . . . The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[87]

We stated that "where testimony is offered to establish [the] existence of a statement rather than to prove [the] truth of that statement, the hearsay rule does not apply."[88]

This statement does not mean that any out-of-court statement is admissible to show that it was made.[89] But a nonhearsay purpose for offering a statement does exist when a statement has legal significance because it was spoken, independent of the truth of the matter asserted.

So the county court and district court incorrectly reasoned that Susan's statements were inadmissible because offering them to show her consent could not be separated from the truth of the matter asserted. Common examples of verbal acts are words that constitute contractual agreements or terms, or words that establish an agency relationship.[90] Whether such words have a legal effect does not depend upon the out-of-court declarant's credibility.[91] And whether the trier of fact finds that the words were spoken depends upon the in-court witness' credibility. But that finding is a separate issue from whether the words had legal significance independent of their truth.

Additionally, the district court erred in concluding that a verbal act can be admitted only to clarify a defendant's or witness' ambiguous acts or statements. McCave did not offer Susan's statements to clarify circumstantial evidence that Susan had impliedly consented to McCave's presence by socializing with him. Instead, he offered her statements to show that she had

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[87] *Alliance Nat. Bank, supra* note 86, 223 Neb. at 409, 390 N.W.2d at 491-92.

[88] *Id.* at 409, 390 N.W.2d at 492.

[89] See *Baker, supra* note 79.

[90] See, e.g., R. Collin Mangrum, Mangrum on Nebraska Evidence 707-08 (2011); 2 McCormick on Evidence § 249 (Kenneth S. Broun et al. eds., 6th ed. 2006).

[91] See Fenner, *supra* note 82, ch. 1(III)(A)(10).

explicitly consented to his presence at the premises. Because her statements were a license for him to be on the premises, they had a legal significance because they were spoken, independent of any other conduct or statements.

Susan's statements were obviously relevant to the central issues. Remember, the State could convict McCave of second degree criminal trespass only if it proved that he intended to be on the property knowing that he was not licensed or privileged to do so. If the trier of fact had believed that Susan had made the offered statement, it would have negated the State's claim that McCave knew he was not licensed to be on the property. Because her statements to McCave were verbal acts that were relevant to the central issue in the case, they were not inadmissible as hearsay.

Similarly, Susan's statements authorizing McCave to be at the residence and informing John that she had done so were relevant under § 28-522 (the statutory affirmative defense) to determine whether McCave reasonably believed that she would have licensed him to enter or remain on the premises. Section 28-522 appears to apply mainly when a defendant cannot show an explicit license to be on the premises. But there is obviously an overlap between negating the knowledge element of the trespass charge and proving the affirmative defense, and McCave was entitled to assert both defenses. So in addition to showing that she consented to McCave's presence at her residence, Susan's statements were also relevant to show the effect that they had on McCave: i.e., to show that because of her statements, he reasonably believed that she would have licensed him to remain.

[47] We agree with the State that the withdrawn portion of our decision in *Parker*[92] is not authority for any purpose. But the implicit holdings of other cases in which we have admitted statements to show their impact on the listener are summed in the following rule, which is applicable here: A statement offered to prove its impact on the listener, instead of its truth, is offered for a valid nonhearsay purpose if the listener's

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[92] *Parker, supra* note 76.

knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.[93]

Because this recognized rule applies, we decline McCave's invitation to consider whether or when the "impact on the listener" category of nonhearsay statements should include more general statements to explain the course of events or to provide context to the evidence presented.[94] It is sufficient here that we hold that Susan's statements were relevant for more than one nonhearsay purpose independent of the truth of the matter asserted. In addition to being admissible as a verbal act, they were admissible to show why McCave reasonably believed he was licensed to be at the premises. We conclude that the district court erred in affirming the county court's exclusion of Susan's statements as hearsay.

(iii) John's Statements Did Not Revoke Susan's Authorization

As noted, the district court also concluded that even if the county court's hearsay ruling was incorrect, it was harmless error. The district court reasoned that John had revoked Susan's authorization of McCave to enter or remain on the property. We disagree because this conclusion is inconsistent with the plain language of the affirmative defense under § 28-522.

[48] Under § 28-521(1)(a), an actor must know that he is not licensed or privileged to enter because of an actual communication to the actor. But the statute does not specify who must make the communication. In contrast, the affirmative defense under § 28-522 applies if the defendant reasonably believed that "*the owner* of the premises *or other person* empowered to license access thereto would have licensed him to enter or remain."[95] It does not require the defendant to have believed

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[93] See, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977). See, also, Mangrum, *supra* note 90, 709-11.

[94] See, *Parker, supra* note 76 (Gerrard, J., concurring); 2 McCormick on Evidence, *supra* note 90.

[95] § 28-522(3) (emphasis supplied).

that *every* owner or *every* person authorized to license access would have consented to his presence. And § 28-522 anticipates that more than one person will have authority to license access to a property. That is frequently the case, so we construe the statute to mean that license from "the owner" to access the premises is satisfied by showing license from "any owner" or other person authorized to license access to the premises.[96]

[49] Moreover, allowing one owner to revoke the consent of another co-owner is inconsistent with cotenancy principles that permit a cotenant to license access to the property without the consent of another cotenant, at least absent an agreement to the contrary.[97] Finally, a rule that a person entering a property must have consent from every owner or every person authorized to license access to the property to avoid a trespass prosecution would obviously lead to absurd results.[98] And when possible, we will try to avoid a statutory construction that would lead to an absurd result.[99] We conclude that the district court erred in concluding that Susan's consent, if proved, was revoked by John's subsequent statement telling McCave to leave.

In sum, both the county court and the district court erred in concluding that Susan's statements were inadmissible hearsay. And we cannot conclude that the improper exclusion of evidence central to the knowledge element of the trespass charge and McCave's reasonable belief under the affirmative defense did not prejudice his right to a meaningful opportunity to present a complete defense.[100]

7. Double Jeopardy Does Not Preclude a Retrial for Trespass

Because we have found that the county court's exclusion of Susan's statements was reversible error, we must also consider

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[96] See *Kapler v. Kapler*, 755 A.2d 502 (Me. 2000).

[97] See *Kresha v. Kresha*, 220 Neb. 598, 371 N.W.2d 280 (1985). See, also, *Verdier v. Verdier*, 152 Cal. App. 2d 348, 313 P.2d 123 (1957).

[98] See *Kapler, supra* note 96.

[99] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[100] See *Nero, supra* note 64.

whether the admitted evidence was sufficient to sustain the guilty verdict for the trespass charge. The same sufficiency of the evidence principles apply in determining whether double jeopardy permits a retrial of this charge.[101]

The State presented evidence that John had told McCave to leave the premises twice. As discussed, John's statements did not revoke Susan's license to McCave to be on the premises if proved. But John told McCave to leave, and Susan's statements were not admitted into evidence. Moreover, the State may have rebutted evidence of Susan's statements if the court had admitted them. So we conclude that double jeopardy does not preclude a remand for a new trial on the trespass charge.

8. Remaining Assignments of Error

Because we have reversed McCave's DUI conviction, we need not reach his assignment that the county court erred in failing to instruct the jury on the definition of a driveway. Because we have reversed his convictions and remanded for a new trial on the only remaining charge, second degree trespass, we need not reach his assignment that the sentences for his convictions were excessive.

VI. CONCLUSION

We conclude that the lower courts erred in failing to determine that the officers lacked probable cause to arrest McCave for DUI. Because they lacked probable cause, McCave's arrest for DUI was unlawful and the county court erred in failing to suppress evidence derived from the arrest. This error was not harmless. And because the evidence was insufficient as a matter of law to support the guilty verdict, double jeopardy precludes a retrial on this charge. The unlawful arrest also rendered McCave's conviction for refusing to submit to a chemical test unlawful.

We conclude that the evidence was insufficient as a matter of law to sustain McCave's conviction for possessing alcohol in an open container.

Finally, the county court erred in excluding evidence relevant to the second degree trespass charge and the statutory

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[101] See *id.*

defense to that charge. Although the evidence was sufficient to support the guilty verdict, the erroneous evidentiary ruling was not harmless. We reverse this conviction and remand for a new trial only on that charge.

We reverse the judgments of conviction for DUI, refusing to submit to a chemical test, and possessing an open container. We remand the cause with directions to vacate these convictions and sentences and to dismiss the charges.

REVERSED AND REMANDED WITH DIRECTIONS.

REBECCA L. DRESSER AND KRISTA A. ROSENCRANS, APPELLANTS, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

809 N.W.2d 713

Filed October 14, 2011. No. S-10-645.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.
3. **Railroads: Motor Vehicles: Right-of-Way.** Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision. At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.
4. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
6. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.