Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
01/25/2017 07:04 PM CST

sentencing proceedings. Based upon our review of the record, we conclude that these findings are not clearly erroneous.

VI. CONCLUSION

For the reasons discussed above, we conclude that the district court did not err in denying Dunkin's motion for postconviction relief, and we affirm its judgment.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA W. NOLAN, APPELLANT.

807 N.W.2d 520

Filed January 20, 2012. No. S-10-1011.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motive on the officer's part is irrelevant.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle has been lawfully detained for a traffic violation, police officers may order the driver out of the vehicle.
5. ____: ____: ____. In order to justify a pat-down of a person during a traffic stop, the police must still harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.
6. **Identification Procedures: Due Process: Appeal and Error.** A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
7. **Constitutional Law: Identification Procedures: Due Process.** The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.
8. **Identification Procedures: Police Officers and Sheriffs: Motions to Suppress.** Suppression of identification evidence on the basis of undue suggestion is

appropriate only where the witness' ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct.

9. **Trial: Identification Procedures.** When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.
10. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
11. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
12. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
13. **Criminal Law: Evidence.** Intrinsic evidence, or evidence necessary to tell a complete story of the crime, is admissible to provide the context in which the crime occurred.
14. **Rules of Evidence: Presumptions.** All evidence offered by the State is presumably prejudicial to the defendant; otherwise, it would be irrelevant, and would be inadmissible. But, in order for evidence to be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), the objecting party must prove that the danger of unfair prejudice substantially outweighs any probative value.
15. **Trial: Evidence: Appeal and Error.** A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
16. **Rules of Evidence: Hearsay: Presumptions.** Evidence admitted pursuant to the business records exception to the rule against hearsay is presumed to be trustworthy.
17. **Rules of Evidence: Hearsay.** If foundation is laid for the business records exception, then the authentication requirements of Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008), are also met.
18. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
19. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
20. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

21. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
22. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, 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.
23. ____: ____: ____. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.
24. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
25. **Homicide: Intent: Time: Words and Phrases.** The term "premeditated" means to have formed a design to commit an act before it is done. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
26. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
27. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
28. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
29. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Brian S. Munnelly 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.

Joshua W. Nolan, the appellant, was charged with first degree murder and use of a deadly weapon to commit a felony in connection with the killing of Justin Gaines. At trial, the State contended that Gaines had been visiting with a family friend in the driveway of an Omaha, Nebraska, home when Nolan and Trevelle J. Taylor, Nolan's accomplice, shot and killed him. Nolan, relying primarily on inconsistencies among the statements and testimony of the State's witnesses, argued that there was a reasonable doubt as to whether Nolan had shot and killed Gaines. A jury convicted Nolan of both charges, and he appeals. We find no merit to Nolan's various assignments of error, and affirm his convictions and sentences.

I. BACKGROUND

The events leading up to Gaines' death began on the morning of September 19, 2009, the day of the shooting. Joshua Kercheval testified that at around 11:30 a.m. that day, Taylor and Nolan had shown up at his house and that Kercheval drove Taylor and Nolan around Omaha. Kercheval explained that Taylor asked him to drive, although Kercheval was not told where to go. Kercheval ended up driving them around town for roughly 30 minutes before deciding to drive to a gas station near 72d Street and Ames Avenue. Video surveillance from the gas station places the three of them at the gas station from 1:21 to 1:30 p.m. Kercheval testified that when they left the gas station, he began driving back toward his house. But as they approached the intersection of 45th and Vernon Streets, Taylor told Kercheval to stop the car and Nolan and Taylor both got out. At that point, Kercheval parked the car and was sitting in the car texting on his telephone when he heard a number of gunshots.

Meanwhile, at around 1 p.m., Gaines had driven past a home near 45th Street and Curtis Avenue and had seen Catrice Bryson, a close family friend, in the driveway. Bryson was at the house visiting a friend and her baby, but had stepped outside to smoke a cigarette. Gaines pulled into the driveway, parked right behind Bryson's car, and greeted Bryson with a hug. Bryson and Gaines began talking; Gaines sat back in his

car, on the driver's side, one foot in, one foot out, with the car door open. Bryson, standing with the open car door between her and Gaines, continued talking with Gaines for roughly 10 to 15 minutes. Toward the end of their conversation, Bryson went to get a pen from her car to give Gaines her telephone number.

When Bryson turned back around, she saw two individuals with guns behind Gaines' car and she heard shooting. The two shooters were on each side of Gaines' car, angled toward each other. Bryson described the shooter on the passenger's side of Gaines' car as a black male in his early twenties with a beard and goatee and shoulder-length hair in braids, wearing a "do-rag." Bryson identified the shooter on the passenger's side of Gaines' car as Nolan.

Gaines, while still sitting in the driver's-side seat of his car, was shot in the back. Once Gaines had been hit, the shooters made their escape, each fleeing in opposite directions on Curtis Avenue. At that point, Bryson began screaming for help. Several people responded, and the police arrived quickly thereafter. Gaines was transported to a nearby hospital, but never regained consciousness and was pronounced dead.

Several eyewitnesses to the aftermath of the shooting testified at trial. Heather Riesselman, at the time of the shooting, lived close to the house where the shooting took place. On the day of the shooting, at approximately 1:40 p.m., Riesselman was outside on her porch with her daughter. At that time, Riesselman saw a young black man "jogging down the street." Riesselman described him as being roughly 5 feet 10 inches tall, medium build, medium complexion, with his hair in braids and with a long, thin goatee. Riesselman identified the man, in court, as Nolan.

Carrie Schlabs was Riesselman's next-door neighbor. At approximately 1:30 p.m. on the day of the shooting, Schlabs was at home with her husband and two friends when they heard gunshots and dove to the floor. Once the gunfire ceased, Schlabs heard screaming, so she got to her feet and ran out to her front porch. Once outside, Schlabs started running toward the screams on Curtis Avenue, to the south, and she saw a young man running to the north. Schlabs saw the young man

holding his left side, which made her think that he had been shot. Schlabs ran up to him, getting to within a foot of him, and asked if he needed help. In response, the individual just smiled at Schlabs. At that point, Schlabs continued on toward the screams. While Schlabs could not remember any specific details of the young man's physical appearance or clothing, she remembered his face. Schlabs identified the man, in court, as Nolan.

Kercheval testified that after he had heard the gunshots, he had started the car, getting ready to drive off. But then Kercheval saw Nolan approaching the car and waited until Nolan jumped into the back passenger seat. Once Nolan was in the car, he told Kercheval to "Drive. Go." Kercheval said that he began driving toward his house, but, at Nolan's direction, Kercheval dropped Nolan off near a school. Whether it was Nolan or Taylor who was dropped off near the school was in dispute. Kercheval's next thought was to "go dump the car." But before he was able to do so, he was arrested. Taylor was also arrested that day. Nolan, however, was not taken into custody that day.

Eight days after the shooting, Nolan, driving in his car, was pulled over for making an improper turn. The officers received identification for both the driver and the passenger. The officers knew that Nolan was associated with a local gang. Upon approaching the driver's-side door of the car, the arresting officer noticed bullet holes in the car. After running data checks on both the driver and the passenger, the officer saw that the Omaha police homicide unit had put out a "locate" for Nolan. A "locate" means that an officer wishes to speak with the individual, but it does not give the officers authority to arrest the individual.

At that point, the officer asked Nolan to get out of his car and stand near the back fender area. Instead, Nolan went past that area and sat on the curb. The officer observed that Nolan moved "[v]ery quickly" and was grabbing his waistband. The officer also observed that Nolan's pants were falling down and that it appeared as if there was something heavy in his pants. Finally, when asked if he had any weapons or other dangerous objects on his person, Nolan did not respond. The officer

conducted a pat-down of Nolan, looking for weapons. The pat-down revealed a .44-caliber gun, found in Nolan's waistband. A subsequent search of Nolan's person uncovered live ammunition, and Nolan was placed under arrest at that time. The gun and ammunition were admitted into evidence at trial over objection.

Nolan was charged with one count of murder in the first degree and one count of use of a deadly weapon to commit a felony. Nolan filed several pretrial motions. The motions relevant to this appeal are (1) a motion to suppress the gun and ammunition recovered from Nolan during the traffic stop, (2) a motion to suppress identifications of Nolan by Riesselman and Schlabs, and (3) a motion for the judge to recuse himself from the case. Each of these motions was denied. The case proceeded to a jury trial, and Nolan was convicted of both crimes. Nolan was then sentenced to a term of life imprisonment for the first degree murder conviction, and a consecutive term of 10 years' imprisonment for the use of a weapon conviction. Nolan appeals.

II. ASSIGNMENTS OF ERROR

Nolan assigns, consolidated and restated, that the district court erred in (1) denying his motion to suppress the gun and ammunition resulting from the traffic stop, (2) denying his motion to suppress the identifications of Nolan made by Riesselman and Schlabs, (3) admitting the .44-caliber gun into evidence in violation of Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404 (Cum. Supp. 2010), (4) allowing a cellular telephone company employee to testify regarding telephone records, (5) denying his motion to recuse the trial judge, (6) giving a "step" jury instruction, and (7) concluding that the evidence was sufficient to sustain his convictions. Nolan, as his eighth assignment of error, also claims that he received ineffective assistance of counsel at trial.

III. ANALYSIS

1. Motion to Suppress Gun and Ammunition

During a traffic stop on September 27, 2009, the State recovered a .44-caliber gun and matching ammunition from Nolan.

Nolan filed a motion to suppress that evidence, claiming that the officers lacked reasonable suspicion to conduct the traffic stop and subsequent pat-down and that therefore, evidence regarding the gun and ammunition should have been excluded at trial. We disagree.

(a) Standard of Review

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[1]

(b) Analysis

[2,3] Nolan claims that the officers lacked reasonable suspicion to stop his car. But we have repeatedly held that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[2] Here, the record indicates that the officers observed Nolan commit a traffic infraction when he made an improper turn. The turn was improper because Nolan made a wide right turn, rather than turning into the curbside lane.[3] And, as long as a traffic violation occurred, any purported ulterior motive for the stop is irrelevant.[4] Thus, even though the officers began following Nolan's car because they were aware the car was associated with a local gang, once Nolan committed a traffic violation, the officers had probable cause to stop the car. The initial stop was lawful.

[4,5] Nolan also claims that the officers lacked reasonable suspicion, based on articulable facts, to justify patting down Nolan. That pat-down, of course, led to the discovery of the .44-caliber gun on Nolan's person. There is no question that once a vehicle has been lawfully detained for a traffic violation,

---

[1] *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

[2] See, e.g., *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008).

[3] See Neb. Rev. Stat. § 60-6,159(1) (Reissue 2010).

[4] See *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

police officers may order the driver out of the vehicle.[5] But, in order to justify a pat-down of a person during a traffic stop, the police must still harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.[6]

In *Arizona v. Johnson*,[7] police officers lawfully stopped a vehicle after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation. Upon approaching the vehicle, officers noticed that one of the passengers in the vehicle, the defendant, was wearing a blue bandanna, which was consistent with membership in a particular gang. The defendant also had a police scanner in his pocket and told one of the officers that he had previously spent time in jail for burglary. On these facts, the officer conducted a pat-down of the defendant and felt the butt of a gun, which led to the defendant's arrest. The U.S. Supreme Court found that the officer had a reasonable suspicion that the defendant was armed and dangerous and that therefore, the pat-down was lawful.[8]

The facts here likewise indicate that officers could reasonably suspect that Nolan was armed and dangerous and that a pat-down was necessary to ensure officer safety. As in *Johnson*, officers in this case were aware of Nolan's gang affiliation. When the circumstances are taken together, especially considering that Nolan failed to follow directions and was holding his waistband, the evidence supports a finding of reasonable suspicion that Nolan was armed and dangerous, and a pat-down was warranted. Therefore, Nolan's first assignment of error is without merit.

2. Motion to Suppress Identifications

Nolan also filed a motion to suppress the identifications made by both Riesselman and Schlabs, claiming that the

---

[5] See *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

[6] *Id.*

[7] *Id.*

[8] See *id.*

State's pretrial identification procedure was unduly suggestive and that their in-court identifications of Nolan were irreparably tainted as a result. The identifications made by Riesselman and Schlabs were the subject of a motion to suppress based on a meeting between Riesselman, Schlabs, and the prosecutor that had occurred on March 25, 2010; and the sequence of events at that meeting is essentially undisputed.

At that meeting, approximately 6 months after the shooting, Riesselman met with the prosecutor to go over her testimony in preparation for a hearing. Schlabs, who at that point had not come forward as a witness, accompanied Riesselman for support. While at that meeting, the prosecutor handed a photographic array to Riesselman—the same array consisting of six photographs from which Riesselman had previously identified Nolan. Schlabs saw Nolan's photograph and exclaimed "Oh, my God, that's him. That's who I ran up to."

Although the photographic array contained Riesselman's handwriting identifying the photograph she had picked out of the array previously, Schlabs testified that she saw only Nolan's photograph, which she immediately recognized, but did not see the handwriting. As soon as Schlabs exclaimed that the man she saw on the day of the shooting was in the photographic array, Riesselman and Schlabs were separated. Schlabs felt sick to her stomach, and the prosecutor took her to another room to lie down. Riesselman did not go with Schlabs or the prosecutor to the other room. Schlabs was then questioned by police outside the presence of Riesselman, and she eventually identified Nolan at trial. The record indicates that when she first saw the photographic array, Schlabs did not in any way indicate who she had identified; she made no gesture, hand signal, or other movement which would suggest to Riesselman that Schlabs had identified Nolan specifically. And Riesselman testified that her identification of Nolan was not influenced by Schlabs' exclamation in the prosecuting attorney's office.

(a) Standard of Review

In reviewing motions to suppress identifications based on alleged due process violations, our standard of review has been

less than clear. In *State v. McPherson*,[9] we explained, generally, that a trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous. In *State v. Jacob*,[10] we reviewed the lower court's denial of a motion to suppress an identification, and the subsequent admission of the eyewitness' identification at trial, under an abuse of discretion standard. And, in other cases, we have simply stated that a lower court's factual findings will be upheld unless they are clearly erroneous, but we did not explicitly state the standard of review for the conclusions drawn from those facts.[11]

More recently, in situations involving a motion to suppress based on various other constitutional violations, we have utilized an explicit two-part standard of review, in which findings of fact are reviewed for clear error and questions of law are determined independently. Specifically, this standard of review has been used in situations involving motions to suppress based on an alleged Fourth Amendment violation[12] and when a confession was allegedly involuntary.[13]

There is no principled reason why the same two-part standard of review would not function equally well in a situation such as this, where the motion to suppress is based on a claim that a pretrial identification procedure was unduly suggestive. Indeed, we have already impliedly used this standard of review in our previous cases. In other words, when we have stated that the lower court's findings of fact would be upheld unless clearly erroneous, the implication is that the conclusion to be drawn from those facts—whether the identification procedure is inconsistent with due process—would be reviewed independently.[14]

---

[9] *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

[10] *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[11] See, e.g., *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004).

[12] See *Garcia, supra* note 1.

[13] See, *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010); *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[14] See, e.g., *Tolliver, supra* note 11.

[6] But we take this opportunity to state explicitly what we have previously expressed only through implication. We recognize that the determination of whether a witness' identification should be suppressed is a highly factual inquiry and that, for the most part, a lower court's factual findings will largely determine an appellate court's judgment on appeal. But utilizing the two-prong standard provides a clearer picture of how we make our determinations and is consistent with our approach in reviewing motions to suppress in other contexts. We therefore adopt that standard of review here. We hold that a district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.[15]

(b) Analysis

Our determination on this issue is controlled by the U.S. Supreme Court's recent decision in *Perry v. New Hampshire*.[16] In *Perry*, police had received a call reporting that a man was trying to break into cars in the parking lot of the caller's apartment building. When the officer who responded asked the caller to describe the man, she pointed out her kitchen window and said that the man she had seen was standing in the parking lot next to a police officer. The suspect was arrested and charged, and he made a pretrial motion to suppress the eyewitness identification on the ground that admitting it at trial would violate due process. The trial court overruled the motion, the defendant was convicted of the charge, and the New Hampshire Supreme Court affirmed his conviction.

The U.S. Supreme Court affirmed that decision.[17] The Court acknowledged that, generally, the Due Process Clause places

---

[15] See *U.S. v. Harris*, 281 F.3d 667 (7th Cir. 2002). See, e.g., *U.S. v. Hilario-Hilario*, 529 F.3d 65 (1st Cir. 2008); *U.S. v. Thompson*, 524 F.3d 1126 (10th Cir. 2008); *U.S. v. Saunders*, 501 F.3d 384 (4th Cir. 2007); *U.S. v. Mathis*, 264 F.3d 321 (3d Cir. 2001). Cf. *Sumner v. Mata*, 455 U.S. 591, 102 S. Ct. 1303, 71 L. Ed. 2d 480 (1982).

[16] *Perry v. New Hampshire*, No. 10-8974, 2012 WL 75048 (U.S. Jan. 11, 2012).

[17] See *id.*

a check on the admission of eyewitness identification when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime. And, the Court said, when an identification is infected by improper police influence, the trial judge must screen the evidence, pretrial, for reliability. But the Court, examining its precedent, said that it had not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Instead, the Court's decisions had turned on the presence of state action and the aim to deter police from rigging identification procedures.[18]

The Court reasoned that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."[19] The Court explained that the requirement of a due process check for reliability comes into play only after the defendant establishes police misconduct, because a primary aim of excluding such evidence is to deter law enforcement's use of unduly suggestive identification techniques in the first place.[20] So, the due process check had been limited to improper police arrangement of the circumstances surrounding an identification.[21]

To conclude otherwise, the Court explained, would open the door to "judicial preview, under the banner of due process, of most, if not all, eyewitness identifications," because "[e]xternal suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony."[22] The Court noted, for example, that a witness might identify the defendant to police officers "after seeing a photograph of the defendant in the press captioned 'theft suspect,' or hearing a radio report implicating

---

[18] See *id.*

[19] *Id.*, 2012 WL 75048 at *5.

[20] *Perry, supra* note 16, citing *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[21] *Id.*, citing *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970).

[22] *Id.*, 2012 WL 75048 at *9.

the defendant in the crime."[23] The trial court's involvement in such examinations, however, would "entail a vast enlargement of the reach of due process as a constraint on the admission of evidence."[24] Instead, the Court explained, it is the jury, not the judge, who traditionally determines the reliability of evidence. Other safeguards are built into the adversarial system, such as the right to confront the eyewitness, the right to effective assistance of counsel, the rules of evidence, and the requirement of proof beyond a reasonable doubt. And many of those safeguards were, the Court noted, at work in that case.[25]

[7-9] In sum, the Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances *arranged by law enforcement*."[26] Suppression of identification evidence on the basis of undue suggestion is appropriate only where the witness' ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct.[27] When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.[28]

In this case, Nolan does not allege that the initial photographic array, in which Riesselman had identified Nolan, was impermissibly suggestive. Instead, Nolan's argument is centered around the meeting between Riesselman, Schlabs, and the prosecutor. Based on what occurred at that meeting, Nolan claims that the identification procedure, as a whole, was impermissibly suggestive because the prosecuting attorney failed to

---

[23] *Id.*

[24] *Id.*

[25] See *Perry, supra* note 16.

[26] *Id.*, 2012 WL 75048 at *11 (emphasis supplied).

[27] See *Perry, supra* note 16, citing *Brathwaite, supra* note 20.

[28] See *id.*

take any precautionary measures to prevent the contamination of the witnesses' identifications.

But it is unclear what additional precautionary measures the prosecutor could have taken to prevent the contamination, if any, of the witnesses' identifications. Prior to the meeting, Schlabs had never come forward as an eyewitness capable of identifying Nolan, despite numerous opportunities to speak with police. At the meeting, when Schlabs was asked why she had accompanied Riesselman, she explained she was there only to provide support. Thus, the prosecutor had no reason to suspect that having both women in the room at the same time could compromise future in-court identifications of Nolan. And immediately after Schlabs exclaimed that she recognized one of the photographs as the man she had seen the day of the shooting, the prosecuting attorney took Schlabs out of the office, and no questions were asked of Schlabs in front of Riesselman. Thus, because the prosecutor was unaware that Schlabs was able to identify one of the shooters, it is unclear what the prosecutor could have done to prevent the contamination, if any, of the witnesses' identifications of Nolan.

Obviously, this falls far short of the affirmative police misconduct that, under *Perry*, must be shown in order for pretrial suppression of the evidence to be appropriate. The law enforcement involvement in the identifications at issue here was no more substantial or improper than the police conduct at issue in *Perry*.[29] There is no evidence in the record to support a conclusion, nor does Nolan argue, that police or the prosecutor deliberately arranged the circumstances of the meeting in order to influence either Riesselman's or Schlabs' identification of Nolan. In the absence of such evidence, due process did not require a pretrial inquiry into the reliability of their testimony, or suppression of that evidence.

Thus, the district court did not err in admitting Riesselman's and Schlabs' identifications of Nolan. It was the jury's duty to assess their reliability, and we note, as did the Court in *Perry*,[30] that Nolan's defense was able to utilize, at trial, the procedural

---

[29] See *id.*

[30] See *id.*

tools available to a defendant to test a witness' credibility. Both Riesselman and Schlabs were subject to full cross-examination at trial and were specifically questioned about the circumstances of the March 25, 2010, meeting, and how it affected their identifications of Nolan. The jury determined, based on all factors, whether it would believe their respective identifications. And these are precisely the type of fact-specific disputes, when evidence is properly admitted, that a jury resolves. Nolan's assignment of error is without merit.

3. Admission of .44-Caliber Gun

Nolan objected to the admission of the .44-caliber gun into evidence under §§ 27-404 and 27-403. But the trial court determined that Nolan's possession of a .44-caliber gun, when coupled with the fact that Gaines was killed by a .44-caliber weapon and there was evidence that a .44-caliber gun was discharged at the scene of the crime, was evidence which formed the factual setting of the crime. As such, the trial court determined § 27-404 did not apply. The trial court also overruled Nolan's § 27-403 objection. Because the trial court did not abuse its discretion, we find no merit to this assigned error.

(a) Standard of Review

[10,11] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[31] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[32] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under §§ 27-403 and 27-404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[33]

---

[31] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[32] *Id.*

[33] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

(b) Analysis

Section 27-404(2) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

When evidence is admitted pursuant to § 27-404(2), § 27-404(3) requires that a hearing be held to determine whether the State is able to prove the defendant committed the crime, wrong, or act for which evidence is offered. Nolan argues that, because no § 27-404(3) hearing was held, the gun should not have been admitted into evidence.

[12,13] Here, the question is whether § 27-404(2) applies, and *State v. Robinson*[34] provides the answer. *Robinson* reaffirmed the principle that "[b]ad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under rule 404(2)."[35] *Robinson* explained that "'intrinsic evidence,'" or evidence necessary to tell a complete story of the crime, is admissible to provide the context in which the crime occurred.[36]

Nolan claims that the fact that the State's gun expert could not conclusively tie that specific gun to Gaines' shooting means that it is covered by § 27-404(2). In other words, because the State was unable to prove that Nolan's gun was the murder weapon, it could not be considered intrinsic evidence of the crime. But the key inquiry is whether the evidence is "so closely intertwined with the charged crime that it completes the story or provides a total picture of that crime."[37]

Here, the district court ruled that the .44-caliber gun was intrinsic evidence which formed the factual setting of the crime. While Nolan's weapon could not be definitively labeled

---

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

[35] *Id.* at 713, 715 N.W.2d at 548.

[36] *Id.* at 713, 715 N.W.2d at 549.

[37] *Id.* at 714, 715 N.W.2d at 550.

as the murder weapon, the gun expert did testify that a .44-caliber gun was used to kill Gaines. The fact that Nolan was found in possession of a .44-caliber gun 8 days after the shooting, while not conclusive, arguably provides a clearer picture of the crime. An abuse of discretion occurs when a trial court's decision is based on reasons which are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[38] We cannot say that the trial court abused its discretion in this instance, and therefore, Nolan's claim of error in this regard lacks merit.

Nolan also claims that the district court erred in admitting the gun over Nolan's § 27-403 objection. Nolan's brief does not provide any support for this assigned error. Instead, he merely states, "Clearly, the prejudicial weight of this gun being introduced into this trial outweighs [its] probative value in violation of" § 27-403.[39]

[14] Section 27-403 states, in pertinent part: "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of *unfair* prejudice . . . ." (Emphasis supplied.) All evidence offered by the State is presumably prejudicial to the defendant; otherwise, it would be irrelevant, and would be inadmissible. But, in order for evidence to be excluded under § 27-403, the objecting party must prove that the danger of *unfair* prejudice *substantially* outweighs any probative value. Nolan does not explain what unfair prejudice would result or why it would substantially outweigh the gun's probative value. Therefore, the district court did not abuse its discretion.

4. Foundational Objection to Testimony of Patricia Love

Patricia Love, a technical support supervisor for a cellular telephone company, was called to testify in order to provide foundation for the admission of Nolan's cellular telephone records. Love explained how calls are recorded, how that information is maintained, what information is actually compiled

---

[38] *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008).

[39] Brief for appellant at 37.

with each telephone call, and the retrieval process to access that information following the call. Love also testified that the automated electrical process is maintained and calibrated often, although she could not testify as to how or when those checks were made.

Nolan argues that Love should not have been allowed to testify because she did not know whether and how the electrical equipment which recorded the call information had been calibrated or maintained. In short, Nolan questioned Love's ability to verify the accuracy of the records. But because Love was able to provide testimony sufficient to support a finding that the evidence was what it was claimed to be, Nolan's assignment of error lacks merit.

(a) Standard of Review

[15] A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. We review a trial court's ruling on authentication for abuse of discretion.[40]

(b) Analysis

Nolan's assignment of error is based solely on Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901(1) (Reissue 2008), which states, in relevant part: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is not a particularly high hurdle.[41]

[16,17] We addressed this same situation in *State v. Taylor*,[42] which involved the prosecution of Nolan's accomplice, Taylor, for his role in Gaines' death. In *Taylor*, we explained that evidence admitted pursuant to the business records exception

---

[40] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[41] See, e.g., *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

[42] *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

to the rule against hearsay is presumed to be trustworthy.[43] Moreover, we stated that if foundation is laid for the business records exception, then the authentication requirements of § 27-901 are also met.[44]

The fact that the records custodian did not know how the actual switch functioned, electronically speaking, does not render her unable to testify as to how the records are compiled, what they are used for, and what they mean. Nolan argues that a more in-depth foundational analysis is required and that because Love was unable to answer questions regarding how the network switch was calibrated or maintained, she was unable to provide foundation for the cellular telephone records.[45]

But § 27-901 does not require such explanation; the authentication rule requires only sufficient facts that the evidence is what its proponent claims it to be.[46] The evidence is that these were Nolan's cellular telephone records, and there is no evidence suggesting that the records were inaccurate. Additionally, because the cellular telephone records in this case would meet the business records exception,[47] they are presumed to be trustworthy absent some contrary indication in the record.[48] And, as we explained in *Taylor*, if sufficient foundation is laid to satisfy the business records exception, then the relatively low threshold requirement of § 27-901(1) has also been met.[49] Nolan's assignment of error lacks merit.

5. Motion for Recusal

Nolan claims that the trial judge erred in failing to recuse himself. The basis for Nolan's motion was a statement by the presiding judge at the sentencing of Terrence Hills, who was the passenger in Nolan's car when police stopped Nolan for

---

[43] See *id.*

[44] See *id.*

[45] See *In re Vee Vinhnee*, 336 B.R. 437 (9th Cir. 2005).

[46] See § 27-901(1).

[47] See Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 2008).

[48] *Taylor, supra* note 42.

[49] *Id.*

making an improper turn. A transcript of the relevant portion of the hearing was offered into evidence as an exhibit. The transcript indicates that at Hills' sentencing, the judge stated:

> [O]ne thing you may have and you get unfortunately that some of those other ones do not get is you know that you are getting out and you are getting another chance to decide whether you [are] going to stay in the game and then get what you get or whether you're going to change your ways.

Nolan claims that this statement implies that the judge had already decided that Nolan would not have a chance to get out of jail, even though Nolan had not yet been convicted. Nolan asserts that a reasonable person, knowing the circumstances of this case, might consider the judge to have lost his impartiality.

(a) Standard of Review

[18] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[50] An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[51]

(b) Analysis

[19,20] We have explained that in order to demonstrate that a trial judge should have recused himself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[52] In addition, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[53]

Here, there is absolutely no reason to think that a reasonable person would question the judge's impartiality in this case

---

[50] *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010).

[51] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[52] *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

[53] *Id.*

based on the statement made at Hills' sentencing. The judge made no explicit reference to Nolan, nor is one reasonably implied. The most logical explanation for the judge's comments is that he was telling Hills that, unlike many people who pass through his court to be sentenced, Hills would have an opportunity to get out of jail and change his ways. There is no indication that he had already predetermined the sentence of Nolan, who had not yet been tried or convicted. This assignment of error has no merit.

6. "Step" Jury Instruction

The jury was provided with 18 jury instructions, one of which, No. 4, was a "step" instruction. Essentially, it told the jury to consider the material elements of first degree murder and, if those were not met, to proceed to the elements of the lesser-included offenses of second degree murder and then manslaughter. Nolan argues that the instruction utilized by the court violated his due process rights and that the model jury instruction from the Nebraska Jury Instructions should have been used instead. Because this court has held that the step instruction used in this case is not constitutionally infirm, we find no merit to Nolan's assignment of error.

(a) Standard of Review

[21] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[54]

(b) Analysis

The jury instruction used by the district court is the same jury instruction examined by this court in *State v. Bormann*[55] and *State v. Goodwin*.[56] In both of those cases, this court held that the jury instruction was not constitutionally infirm. Specifically, in *Goodwin*, we stated:

---

[54] *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

[55] *Id.*

[56] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

> Although we find no constitutional infirmity or other error in the step instruction that was given, we conclude that NJI2d Crim. 3.1 provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, and we encourage the trial courts to utilize the current pattern instruction in circumstances where a step instruction on lesser-included homicide offenses is warranted.[57]

Thus, there is no constitutional error in the jury instruction which was provided here.

While not constitutionally infirm, the district court's use of this step instruction is puzzling. The trial in this case occurred in August 2010, long after our decision in *Goodwin*. In *Goodwin*, we stated our preference for the NJI2d Crim. 3.1 jury instruction in situations where a step instruction on lesser-included homicide offenses is needed. We have explained that the model instruction is both clearer and more concise than the instruction used in this case. We iterate that stance now and admonish the trial courts to heed our instruction.

7. Sufficiency of Evidence

Nolan argues that the evidence adduced at trial is insufficient to support a conviction of first degree murder. Specifically, Nolan claims that there was no evidence that the killing was done with deliberate and premeditated malice. Contrary to Nolan's argument, however, there is evidence in the record sufficient to support the jury's verdict in this case.

(a) Standard of Review

[22,23] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, 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.[58] And in our review, we

---

[57] *Id.* at 967, 774 N.W.2d at 749.

[58] *Epp, supra* note 40.

do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.[59]

(b) Analysis

This court imposes a heavy burden on a defendant who claims on appeal that the evidence is insufficient to support a conviction.[60] Because Nolan's conviction for use of a deadly weapon to commit a felony rests solely on his conviction for first degree murder, only the sufficiency of the first degree murder conviction need be analyzed. The applicable statute states, in relevant part: "A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice . . . ."[61] Thus, the three elements which the State must prove beyond a reasonable doubt are that the defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice.

[24,25] There is sufficient evidence to meet each of these elements. The first two elements are satisfied, and Nolan does not argue otherwise. To find a person guilty of first degree murder, however, the State must also show that the defendant acted with deliberate and premeditated malice. In describing that element, we have stated:

> Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. . . . The term "premeditated" means to have formed a design to commit an act before it is done. . . . One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. . . . No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not

---

[59] *Id.*

[60] *Id.*

[61] Neb. Rev. Stat. § 28-303 (Reissue 2008).

> simultaneously with the act that caused the death. . . . A question of premeditation is for the jury to decide.[62]

Given the foregoing principles and remembering that the evidence is viewed in a light most favorable to the State, we determine that there is sufficient evidence to support the jury's finding that Nolan killed Gaines with deliberate and premeditated malice. The act of shooting an individual, at least in the fashion described by Bryson, is inherently a deliberate act. According to Bryson, Nolan had a large gun and repeatedly fired at Gaines. There was also evidence that Nolan "jogged" down the street to the house where Gaines was at; he had time to think over his actions. A rational jury could certainly find that Nolan shot and killed Gaines and that his act was deliberate and premeditated, satisfying the elements of first degree murder. Nolan's assignment of error in this regard lacks merit.

8. Ineffective Assistance of Counsel

Nolan claims, consolidated and restated, that his trial counsel, who was different from appellate counsel, provided ineffective assistance in three respects, by failing to (1) file a motion to suppress evidence retrieved from the investigatory stop of Nolan's car, (2) object to prejudicial statements obtained through custodial interrogation in violation of *Miranda*,[63] and (3) consult and call a fingerprint expert or identification expert to rebut the State's testimony.

(a) Standard of Review

[26-28] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[64] A claim of ineffective assistance of counsel

---

[62] *State v. Robinson*, 272 Neb. 582, 627, 724 N.W.2d 35, 73-74 (2006) (citations omitted), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[63] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[64] See *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.[65]

(b) Analysis

(i) Failing to File Motion to Suppress Evidence Obtained From Investigatory Stop of Nolan's Car

[29] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[66] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[67] Here, the record is sufficient to review Nolan's first claim because, contrary to Nolan's assertion, the record shows that trial counsel did file a motion to suppress evidence obtained from the stop of Nolan's car. Indeed, Nolan's first assignment of error dealt with the trial court's overruling of that motion. Thus, trial counsel's performance could not have been deficient for failing to file a motion to suppress when he did in fact file such a motion.[68]

(ii) Failing to Object to Prejudicial Statements Obtained Through Custodial Interrogation in Violation of Miranda

Trial counsel filed a motion to suppress statements obtained by police through interrogation, claiming that those statements were obtained in violation of *Miranda*. The district court granted the motion in part, excluding all of Nolan's statements except those relating to his basic biographical information and his cellular telephone number. Thus, Nolan's statement identifying his cellular telephone provider was excluded. Nolan claims that his trial counsel provided ineffective assistance by failing to object to the introduction of evidence of the identity

---

[65] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

[66] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[67] *Young, supra* note 65.

[68] See *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

of his cellular telephone provider, which came in through an alternate source; namely, Nolan's cellular telephone provided the same information, which was found in a car which the police impounded and searched.

The exclusionary rule exists to prevent the admission of illegally seized evidence. In *Wong Sun v. United States*,[69] the U.S. Supreme Court explained that the question is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

The record is sufficient to conclude that counsel did not perform deficiently in failing to object to the evidence, for two reasons. First, the evidence which had been suppressed was never offered or admitted into evidence. In other words, the statements which were illegally obtained from Nolan were not admitted at trial. Second, the State had a viable, alternative source for that information, which makes the exclusionary rule inapplicable. One of the police officers who found the telephone testified that the police powered the telephone on to identify its number. The police then powered the telephone off, ran the number through a database to obtain the cellular telephone provider, and then drafted a subpoena and a search warrant to collect data off of the telephone. Nolan does not claim that any part of this procedure was illegal. Thus, counsel's performance was not deficient, because he had no basis to object to evidence regarding the identity of Nolan's cellular telephone provider. Therefore, trial counsel did not perform in a deficient manner.

(iii) Failing to Consult and Call Fingerprint Expert or Identification Expert to Rebut State's Testimony

Finally, Nolan claims that trial counsel should have called expert witnesses in order to rebut aspects of the State's case. In particular, Nolan claims that trial counsel should have

---

[69] *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (citation omitted).

consulted with experts on fingerprint evidence and the reliability of eyewitness identification.[70] But, while we know such rebuttal evidence was not presented at trial, the record does not establish whether trial counsel considered or explored such strategies, what may or may not have led trial counsel not to pursue the strategies, or what such experts would have said had they been retained and called to testify. In other words, from our review of the record, we cannot make any meaningful determination whether expert testimony beneficial to Nolan could have been produced or, if it could have, whether trial counsel made a reasonable strategic decision not to present certain evidence.[71] The record is, therefore, not sufficient to adequately review these claims on direct appeal, and we decline to consider them at this time.[72]

IV. CONCLUSION

For each of the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

---

[70] See, e.g., *People v. Abney*, 13 N.Y.3d 251, 918 N.E.2d 486, 889 N.Y.S.2d 890 (2009); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984), *overruled on other grounds, People v. Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000). See, also, *State v. Clopten*, 223 P.3d 1103 (Utah 2009) (collecting cases).

[71] See *Young, supra* note 65.

[72] See *id.* See, also, *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

PRIME HOME CARE, LLC, APPELLEE AND CROSS-APPELLANT, v. PATHWAYS TO COMPASSION, LLC, APPELLANT AND CROSS-APPELLEE.

809 N.W.2d 751

Filed January 20, 2012. No. S-11-030.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion