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$150,000 amount by which the judgment exceeded the offer. This was error. Accordingly, we reverse the district court's ruling regarding the award of prejudgment interest and set aside the judgment. We remand with instructions to recalculate prejudgment interest on the entire $750,000 jury verdict, commencing on the date of Martensen's offer of settlement which was later exceeded by the judgment.

CONCLUSION

For reasons explained above, we determine that the district court did not err when it accepted the jury verdict and awarded specified costs to Martensen, and we affirm these rulings. However, the district court erred in the manner by which it calculated prejudgment interest. We reverse this ruling and set aside the judgment, and we remand the cause with directions to the district court to recalculate prejudgment interest on the entire $750,000 award and direct that judgment thereafter be entered on the $750,000 award, costs as already determined, plus the recalculated amount of prejudgment interest.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

IN RE INTEREST OF S.C., ALLEGED TO BE A DANGEROUS SEX OFFENDER. S.C., APPELLANT, V. MENTAL HEALTH BOARD OF THE FIFTH JUDICIAL DISTRICT, APPELLEE.

810 N.W.2d 699

Filed February 10, 2012. No. S-11-186.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Mental Health: Judgments: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record. In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.

3. **Due Process.** The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.
4. ____. A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
5. **Prisoners: Statutes.** Where a right may not otherwise have existed, a state may create prisoners' rights through the use of mandatory statutory language.
6. **Due Process.** There is a crucial distinction between being deprived of a liberty one has and being denied a conditional liberty that one desires.
7. **Convicted Sex Offender: Statutes: Intent.** One of the stated purposes of the Sex Offender Commitment Act, Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), is to encourage sex offenders to obtain voluntary treatment, but its primary purpose is the protection of the public from sex offenders who continue to pose a threat.
8. ____: ____: ____. Commitment under the Sex Offender Commitment Act, Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), is not dependent upon a subject's seeking or refusing treatment; instead, the focus is on whether a substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied.
9. **Appeal and Error.** An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Thomas J. Klein and Darren L. Hartman, of Haessler, Sullivan & Klein, Ltd., for appellant.

Jon Bruning, Attorney General, and Stephanie Caldwell for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

S.C. appeals the decision of the Butler County District Court, affirming the decision of the Mental Health Board of the Fifth Judicial District (Board). The Board found S.C. to be

a dangerous sex offender under the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), and ordered him to undergo secure inpatient treatment. S.C. alleges that his due process rights were violated when the State did not allow him to undergo sex offender treatment while still incarcerated. S.C. further alleges that the State did not present clear and convincing evidence that he was a dangerous sex offender or that secure inpatient treatment was the least restrictive treatment alternative. We affirm the decision of the district court.

BACKGROUND

In 2008, S.C. was convicted of sexual assault of a child in Butler County, Nebraska, and was sentenced to 5 years' imprisonment. Near the end of S.C.'s prison term, the State had the option of seeking to commit S.C. under SOCA, utilizing the Board. Dr. Mark Weilage, a licensed psychologist who works for the Department of Correctional Services at the Nebraska State Penitentiary, testified at the hearing before the Board.

Weilage completed his evaluation of S.C. on July 13, 2010, while S.C. was still incarcerated at the Nebraska State Penitentiary, and recommended that S.C. undergo sex offender treatment. S.C. apparently indicated that he was willing to participate in a sex offender treatment program prior to his release. According to Weilage, the treatment program was available only at the Lincoln Correctional Center. However, S.C. had a relative who worked at that facility and, according to Weilage, it is the policy of the Nebraska Department of Correctional Services not to place inmates in a facility at which a relative is employed. As a result, S.C. was not transferred from the Nebraska State Penitentiary to the Lincoln Correctional Center and thus did not receive treatment while incarcerated.

The State filed a petition on August 16, 2010, alleging S.C. to be a dangerous sex offender. A hearing was held before the Board on August 19. At the hearing, the State presented certified copies of S.C.'s prior convictions, which included three convictions for sexual assault of a child and one conviction for attempted kidnapping of a child.

Weilage testified regarding S.C.'s evaluation and stated that the following assessments were completed: the "Static 99R," the "Stable 2007," the "Sex Offender Risk Appraisal Guide," and the "Hare Psychopathy Checklist-Revised." Weilage conducted a clinical interview and a mental status examination, and he also reviewed S.C.'s institutional and mental health and treatment records.

The "Static 99R" assesses the risk of recidivism among sex offenders, and Weilage testified that S.C. scored in the medium-high risk range to reoffend. The "Stable 2007" assessment is a guided clinical interview that looks at relatively stable factors to measure the level of supervision a person would need to reduce the risk of reoffending. Weilage stated that S.C. fell in the highest risk range in that assessment. Weilage testified that S.C. was at high risk for sexual reoffense and had a high need for treatment.

The "Sex Offender Risk Appraisal Guide" measures overall risk of violent reoffending among sex offenders. Weilage testified that S.C. scored in the next-to-highest category for reoffending. Weilage stated that S.C.'s chances for violent reoffending within 7 years is 75 percent, and for reoffending within 10 years is 89 percent. Finally, the "Hare Psychopathy Checklist-Revised" measures a person's level of psychopathy. Weilage stated that S.C. scored 25 out of 40, which puts S.C. in a borderline range for psychopathic traits.

Weilage also diagnosed S.C. with alcohol dependency and stated that S.C. had abused other drugs in the past, including cocaine, amphetamines, and cannabis. Weilage stated that S.C.'s most pressing problem is antisocial personality disorder and that S.C. had not received treatment for that disorder.

Ultimately, Weilage testified that he believed S.C. met the criteria to be considered a dangerous sex offender and recommended that S.C. receive treatment at a secure inpatient facility. Weilage stated that such inpatient treatment was the least restrictive treatment option. Weilage also believed S.C. was substantially unable to control his criminal behavior.

S.C. did not present any evidence at the hearing. The Board found there was clear and convincing evidence that S.C. was a

dangerous sex offender and that secure inpatient treatment was the least restrictive alternative. The Board then committed S.C. to secure inpatient treatment.

S.C. appealed to the district court, and the district court affirmed the decision of the Board. S.C. appeals.

ASSIGNMENTS OF ERROR

S.C. assigns the district court erred when it found that (1) S.C.'s due process rights under the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, § 3, were not violated when the State of Nebraska failed to provide him with sex offender treatment services while he was incarcerated and (2) the Board's factual findings and commitment order were supported by clear and convincing evidence.

STANDARD OF REVIEW

[1] On a question of law, an appellate court reaches a conclusion independent of the court below.[1]

[2] The district court reviews the determination of a mental health board de novo on the record.[2] In reviewing a district court's judgment, we will affirm unless we find, as a matter of law, that clear and convincing evidence does not support the judgment.[3]

ANALYSIS

State Did Not Violate S.C.'s Due Process Rights.

We first note that S.C.'s assignments of error do not clearly state that he is alleging a violation of his substantive due process rights. S.C. does eventually specify that by not providing him treatment while he was still incarcerated, the State violated his right to substantive due process. However, S.C. fails to specify a remedy that would provide redress for the alleged violation.

As discussed below, S.C. must first establish that he has a protected liberty interest before this court can address what

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[1] *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

[2] See *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009).

[3] See *id.*

procedural protections are required.[4] Because we find that S.C. has no protected liberty interest in obtaining sex offender treatment while still incarcerated, S.C.'s substantive due process claim must fail.

[3-5] The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.[5] A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.[6] Where a right may not otherwise have existed, a state may create prisoners' rights through the use of mandatory statutory language.[7]

S.C. points to the stated policy purpose of SOCA, contained in § 71-1202, that "[i]t is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment." S.C. argues that the Nebraska Department of Correctional Services should not have been allowed to deny him treatment while he served his sentence and then commit him civilly upon his release. S.C. claims this was a violation of his substantive due process rights.

The only case S.C. cites in support of his argument is *Beebe v. Heil*,[8] a Colorado federal district court case. Under Colorado law, a sex offender is required to undergo "'appropriate'" treatment, and participation in a treatment program is an

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[4] See, *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012); *State v. Cook*, 236 Neb. 636, 463 N.W.2d 573 (1990).

[5] *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

[6] See, *Norman, supra* note 4; *Cook, supra* note 4.

[7] *Beebe, supra* note 5, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

[8] *Beebe, supra* note 5.

absolute prerequisite for release on parole.[9] The defendant in *Beebe* started treatment, but his participation was terminated without notice or hearing. The federal district court overruled the defendant's motion for judgment on the pleadings, determining that the defendant had stated a claim for violation of his substantive due process rights because the defendant had a liberty interest in obtaining treatment. Without treatment, the defendant would not be eligible for release from prison. And under Colorado law, the State was required to provide treatment.[10]

Beebe is inapplicable here. The Colorado statutes make treatment a mandatory requirement for parole eligibility, and there are due process protections for denial of treatment.[11] In Nebraska, however, treatment is not a condition of release at the end of a criminal sentence, nor is there any statute mandating the State to provide treatment of any kind to inmates. As noted, § 71-1202 states that "[i]t is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment," but that language is merely suggestive. It does not create a liberty interest of which S.C. can claim he was deprived.

[6] Nor does such language create an additional barrier to S.C.'s release from prison, unlike the language in the Colorado statutes which made treatment a condition of release. While S.C. may have desired to begin treatment before being released from prison, he had no absolute right to such treatment. "There is a crucial distinction between being deprived of a liberty one has . . . and being denied a conditional liberty that one desires."[12]

We therefore find that S.C. had no substantive due process right to sex offender treatment while still incarcerated. We

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[9] *Id.* at 1012.

[10] *Id.*

[11] *Id.* See *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). See, also, *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009).

[12] *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

further note that SOCA is nonpunitive in nature and allows the State to seek civil commitment of a dangerous sex offender upon his or her release from incarceration upon a showing that he or she is a dangerous sex offender.[13]

[7] Although S.C. is correct in that one of SOCA's stated purposes is to encourage sex offenders to obtain voluntary treatment, its primary purpose is the protection of the public from sex offenders who continue to pose a threat.[14] As we have stated in the past, the subject of a civil commitment order has a protectable interest in his or her liberty, but procedural due process is satisfied by having a hearing before a mental health board, during which the State must prove that the subject is dangerous and that secure inpatient treatment is the least restrictive treatment alternative.[15] Such a civil commitment under SOCA is completely separate from the terms of incarceration subsequent to a criminal conviction.

[8] Furthermore, commitment under SOCA is not dependent upon a subject's seeking or refusing treatment; instead, the focus is on whether a "substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied."[16] As discussed below, the State provided clear and convincing evidence that S.C. was a dangerous sex offender and that secure inpatient treatment was the least restrictive alternative. We find S.C.'s first assignment of error to be without merit.

District Court Did Not Err in Finding State Had Proved by Clear and Convincing Evidence That S.C. Was Dangerous Sex Offender.

[9] In his second assignment of error, S.C. states that there was not clear and convincing evidence that he was a dangerous sex offender. S.C. offers no other argument, however, nor does he point to any facts that would negate the evidence offered by the State at the hearing. An argument that does little more than

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[13] See *In re Interest of J.R., supra* note 11.

[14] See § 71-1202.

[15] See *In re Interest of J.R., supra* note 11.

[16] *In re Interest of O.S.*, 277 Neb. 577, 584, 763 N.W.2d 723, 729 (2009).

to restate an assignment of error does not support the assignment, and this court will not address it.[17]

And, in any case, S.C.'s contention is without merit. S.C. had several prior convictions for violent sex offenses against children, and the State presented clear and convincing evidence that S.C. was substantially likely to engage in dangerous behavior in the future. Weilage testified that S.C.'s personality disorder, combined with his history of substance abuse and his failure to seek treatment outside of prison, increased the likelihood that S.C. would commit another violent sexual crime.

S.C.'s risk of reoffending was considered to be moderate to very high on the various psychological tests. Weilage testified that it was his opinion that S.C. was a dangerous sex offender and that secure inpatient treatment was the least restrictive alternative. S.C. offered no evidence to rebut that showing. We therefore reject S.C.'s second assignment of error.

CONCLUSION

S.C. offers little support for the argument that his substantive due process rights were violated. Obtaining treatment was not necessary to affect S.C.'s release from prison, and no statutory language exists to create a substantive right to treatment. S.C. was committed under SOCA, which is civil and nonpunitive in nature. The State provided clear and convincing evidence that S.C. is a dangerous sex offender and that secure inpatient treatment is the least restrictive alternative.

We affirm the decision of the district court.

AFFIRMED.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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[17] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).