The trial court's obvious focus on the viciousness of this attack is understandable, as is the sentence the court imposed. We cannot say that the trial court abused its discretion.

IV. CONCLUSION

During Bauldwin's 2009 statement, he clearly invoked his right to remain silent, which the police failed to scrupulously honor. The trial court's admission of Bauldwin's 2009 statement was error, but it was harmless. We find no merit to Bauldwin's other assigned errors, and so we affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
BRANDON D. REINHART, APPELLANT.
811 N.W.2d 258

Filed April 20, 2012. No. S-11-464.

1. **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.
2. **Rules of Evidence: Hearsay: Appeal and Error.** 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.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** Whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
6. **Rules of Evidence: Hearsay: Proof.** 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.
7. **Hearsay.** A statement is not hearsay if it is offered against a party and is his own statement, in either his individual or a representative capacity.

8. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
9. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
10. **Trial: Evidence: Appeal and Error.** Given the strength of other evidence presented by the State, erroneously admitted evidence can be harmless.
11. **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.
12. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
13. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Boone County: MICHAEL J. OWENS, Judge. Affirmed.

Jerrod P. Jaeger, of Jaeger Law Office, P.C., L.L.O., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Brandon D. Reinhart was charged with using a minor to distribute a controlled substance and conspiracy to use a minor to distribute a controlled substance, specifically marijuana. A jury convicted him on both counts, and he was sentenced to 3 to 5 years' imprisonment on each conviction, with the sentences to run concurrently. Reinhart appeals.

SCOPE OF REVIEW

[1] 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. *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012). And in our review, we 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. *Id.*

[2] 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. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[3,4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin, ante* p. 30, 807 N.W.2d 744 (2012). Whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision. See, *id.*; *State v. Gonzalez, ante* p. 1, 807 N.W.2d 759 (2012).

FACTS

In July 2008, State Patrol Trooper Timothy Stopak received a call from Micah Jennings and met Jennings at a cemetery near Albion, Nebraska, to arrange a controlled purchase of marijuana from Reinhart. At the cemetery, Sheriff Dave Spiegel searched Jennings' vehicle and Stopak searched Jennings' person for money and contraband. After Jennings was searched, Stopak placed two recording devices on Jennings and gave him $120 in "recorded buy money."

Jennings told Stopak that he had called B.L., his girlfriend, who was at Reinhart's house and that B.L. had arranged for Jennings to buy marijuana from Reinhart at his house. B.L. was 15 years old at the time. Stopak and Spiegel kept constant visual contact with Jennings' vehicle as they followed him to Reinhart's house. Jennings was in the house for 5 to 10 minutes. He came out the same door through which he had entered, got into his vehicle, and drove past Stopak and Spiegel. While

he was driving, Jennings called B.L. and spoke to Reinhart on B.L.'s telephone.

Reinhart obtained an ounce of marijuana from his bedroom and told B.L. that Jennings would be waiting at a local bike shop. Jennings drove to the far north end of the bike shop parking lot, and Stopak and Spiegel took up a surveillance position. B.L. arrived by car, met Jennings, and gave him the marijuana. Jennings gave B.L. two $50 bills and one $20 bill. Stopak saw B.L. complete the drug deal with Jennings and leave. When B.L. delivered the marijuana to Jennings, she did not know that Jennings was working with Stopak.

Stopak and Spiegel then followed Jennings back to the cemetery, where Jennings gave Stopak the package delivered by B.L. Stopak and Spiegel again searched Jennings and his vehicle for contraband and money, and Stopak recovered the recording devices. Laboratory analysis confirmed the substance in the package was marijuana. Reinhart was charged with using a minor to distribute a controlled substance and conspiracy to use a minor to distribute a controlled substance.

At trial, Reinhart took the stand, and although he admitted to having smoked marijuana, he denied ever selling marijuana or using B.L. to deliver marijuana. He also denied speaking with Jennings on B.L.'s telephone and making an agreement to personally deliver marijuana to Jennings or to deliver marijuana to Jennings through a third person.

The jury convicted Reinhart of both counts. The trial court sentenced Reinhart to 3 to 5 years' imprisonment on each count, with the sentences to run concurrently and credit for 1 day served.

ASSIGNMENTS OF ERROR

On appeal, Reinhart assigns four errors: (1) His convictions and sentences for both use of a minor to distribute a controlled substance and conspiracy to use a minor to distribute a controlled substance violate the double jeopardy provisions of the federal and state Constitutions, (2) there was insufficient evidence to convict him of the charges, (3) the trial court erred in overruling one of Reinhart's hearsay objections, and (4) trial

counsel was ineffective for failing to make appropriate hearsay objections.

ANALYSIS

Double Jeopardy

Reinhart argues that his convictions and sentences for both use of a minor to distribute a controlled substance and conspiracy to commit that offense violate his right to be free from double jeopardy. However, he did not raise this claim in the trial court.

[5] A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010). Because Reinhart failed to raise this issue in the trial court, he has waived his double jeopardy claim and we do not address it.

Sufficiency of Evidence

Reinhart alleges the evidence was insufficient to convict him of the charges. 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. *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012). And in our review, we 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. *Id.*

Reinhart was charged by information with one count of use of a minor to distribute a controlled substance under Neb. Rev. Stat. § 28-416(5)(a) (Reissue 2008) and one count of conspiracy under Neb. Rev. Stat. § 28-202 (Reissue 2008). Section 28-416(5)(a) states:

> Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person eighteen years of age or older to knowingly and intentionally employ, hire, use, cause, persuade, coax, induce, entice, seduce, or coerce any person under the age of eighteen years to manufacture, transport, distribute, carry, deliver, dispense,

> prepare for delivery, offer for delivery, or possess with intent to do the same a controlled substance or a counterfeit controlled substance.

This language requires the State to prove that the defendant is someone (1) who is 18 years of age or older and (2) who knowingly and intentionally (a) used a person under 18 years of age in one of the ways listed (b) to perform one of the listed acts related to drug distribution.

The evidence presented at trial provided a basis for the jury to determine beyond a reasonable doubt that Reinhart was guilty. Stopak testified that Reinhart was 19 years old when the alleged drug transaction involving B.L. and Jennings occurred. B.L. testified that she was 15 years old at the time. Jennings, B.L., and Holly Kelley (who was also at Reinhart's house that day) all testified that B.L. delivered marijuana to Jennings. The testimony of each of these witnesses indicated that B.L. made the delivery at Reinhart's direction. B.L. testified that "[Reinhart] handed me the marijuana and he told me to go to the bike shop because [Jennings] was going to be waiting." There was sufficient evidence for the jury to conclude beyond a reasonable doubt that Reinhart was guilty of violating § 28-416(5)(a).

Secton 28-202(1) states:

> A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

The trial court instructed the jury that to find Reinhart guilty on this count, it had to find (1) that on or about July 25, 2008, Reinhart agreed to sell marijuana to Jennings at Reinhart's house; or (2) that on July 25, Reinhart gave marijuana to a minor, B.L., which she delivered to Jennings; or (3) that on July 25, Jennings gave B.L. money in exchange for marijuana.

The testimony of both B.L. and Kelley established that Reinhart gave B.L. marijuana to deliver to Jennings. The testimony of Jennings and B.L. showed that Jennings gave B.L. money in exchange for marijuana. Thus, the evidence was sufficient to allow the jury to find that one of the acts necessary for a criminal conspiracy had occurred.

The evidence also showed the existence of a felony, as required by statute. The elements of using a minor to distribute a controlled substance were satisfied, and when the controlled substance is marijuana, as it was here, that crime is a felony. See Neb. Rev. Stat. § 28-405(c)(10) [Schedule I] (Reissue 2008) and § 28-416(2) and (5)(c).

Yet for Reinhart to be convicted of conspiracy, the evidence had to show that he conspired with someone, which requires an agreement. See § 28-202(1). The testimony of Jennings, B.L., and Kelley was consistent with B.L.'s willing agreement to deliver marijuana. B.L. testified that she asked Jennings "if he was going to snitch on us," which she stated "he better not do . . . because . . . that would be messed up." This testimony indicated that B.L. willingly participated with Reinhart in the drug deal. Viewing these facts in the light most favorable to the prosecution, which this court does when determining whether the evidence is sufficient to sustain the conviction, see *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011), there was sufficient evidence to convict Reinhart of use of a minor to deliver a controlled substance as well as conspiracy to commit that crime.

We note that at trial, defense counsel argued that witnesses for the State "show[ed] a tremendous amount of bias." He claimed that Jennings was a drug dealer "attempting to work off charges," B.L. was engaged to Jennings at the time of trial, and Kelley, a friend of B.L., had not spoken to Reinhart for over a year. In our review, we 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. *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012). The jury chose to believe Jennings, B.L., and Kelley, and those witnesses provided sufficient evidence to convict Reinhart. This assignment of error has no merit.

ADMISSION OF HEARSAY EVIDENCE

Reinhart alleges that the trial court erred in admitting a portion of Stopak's testimony over a hearsay objection. Stopak testified:

> [Jennings] advised me that he had placed a phone call to [B.L.], and that he then spoke with . . . Reinhart, and that a deal was set up where he would be met downtown, either by . . . Reinhart or by one of the two females located at the residence to complete the drug transaction.

Reinhart alleges that this statement was inadmissible hearsay. His hearsay objection to this statement at trial was overruled.

[6,7] "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." Neb. Rev. Stat. § 27-801(3) (Reissue 2008). Reinhart made a statement to Jennings. Jennings told Stopak about the statement, and then Stopak testified about that statement. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Neb. Rev. Stat. § 27-805 (Reissue 2008). A statement is not hearsay if it is offered against a party and is his own statement, in either his individual or a representative capacity. See § 27-801(4)(b). Reinhart was the defendant, and his statements would not be hearsay. Thus, Reinhart's statement to Jennings was not hearsay.

[8-10] However, Jennings' statement to Stopak about what Reinhart told Jennings was hearsay, and the trial court erred in admitting this evidence. Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). Given the

strength of other evidence presented by the State, we conclude the erroneously admitted evidence was harmless. See *State v. Ellis, supra*.

Stopak testified Jennings told him that "a deal was set up where he would be met downtown, either by . . . Reinhart or by one of the two females located at the residence to complete the drug transaction." Other witnesses testified to these facts. Jennings testified:

> [State's counsel]. At some point when you called [B.L.] after you left the house, did you talk to [Reinhart]?
>
> [Jennings]. Yeah, briefly on the phone.
>
> Q. What was that conversation?
>
> A. Just asking him if I could get that so I could get going back to work.
>
> Q. And what'd he say to you?
>
> A. Yeah, he'd send one of the girls down.

B.L. testified:

> [Jennings] called me and asked me if we would go meet them downtown. And I talked to [Reinhart] about it and then handed the phone to [Reinhart] and they talked about it. And after the conversation was done, [Reinhart] handed me the marijuana and he told me to go to the bike shop because [Jennings] was going to be waiting.

Kelley testified that "[Jennings] was coming to buy from [Reinhart]. [Jennings] said he was coming from work. [Reinhart] wouldn't sell to him, he was paranoid. [Jennings] ended up leaving. And about 30 minutes later, [Reinhart] sent [B.L.] to go deliver it for him."

Stopak testified that a deal was arranged where someone, either Reinhart or "one of the girls," would meet Jennings downtown and complete the drug deal. The testimony of the other witnesses showed that Reinhart was not willing to sell to Jennings at the house, that a conversation subsequently occurred between Reinhart and Jennings on the telephone, and that following the conversation, Reinhart gave B.L. marijuana to deliver to Jennings. Thus, the inadmissible hearsay statement by Stopak did not materially influence the jury to reach a verdict adverse to Reinhart's substantial rights. Its admission was harmless error. This assignment of error has no merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

[11-13] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Gonzalez, ante* p. 1, 807 N.W.2d 759 (2012). To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Deficient performance and prejudice can be addressed in either order. See *id.*

Reinhart argues his trial counsel should have objected to Stopak's statements that (1) Jennings told Stopak that Jennings had a conversation on the telephone with B.L., and a plan was made to buy drugs from Reinhart before Jennings went to the house; (2) Jennings talked with Reinhart on the telephone, and Reinhart agreed to the deal; and (3) there was another person at Reinhart's home who could substantiate that the deal took place.

Trial counsel's failure to object to these statements did not prejudice Reinhart. With respect to the first challenged statement, Stopak testified:

> [State's counsel]. All right. Then what was the next thing that took place?
>
> [Stopak]. Um, prior to leaving, I then conversed again with [Jennings] just to make sure that we were all on the same page with regard to what was to transpire. He indicated that he had made a phone call to B.L. who was located at [Reinhart's] residence, and that [B.L.] had arranged for [Jennings] to arrive at [Reinhart's] residence to purchase the marijuana from [Reinhart]. Once that was clarified, we then departed from the cemetery, and [Jennings] traveled to [Reinhart's] residence in Albion.

Reinhart's trial counsel was not ineffective for failing to object to this statement, because this statement was admissible.

A statement is hearsay only if it is offered to prove the truth of the matter asserted. § 27-801(3). Here, Stopak's statement explained why he, Spiegel, and Jennings went to Reinhart's house. The statement would have been admissible for a nonhearsay purpose even if Reinhart's trial counsel had objected. Reinhart's counsel was not ineffective for failing to object to the admission of admissible evidence. See *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992) (counsel not ineffective for failing to raise constitutional objections to evidence when there was no constitutional violation).

With regard to the second challenged statement, that Jennings spoke with Reinhart on the telephone and agreed to the drug deal, both Jennings and B.L. provided evidence indicating that Jennings spoke with Reinhart on the telephone and that Reinhart agreed to the deal. The third statement by Stopak was that a third person was at Reinhart's house who could substantiate that the deal took place. Jennings, B.L., and Kelley all said that Kelley was at Reinhart's house when Jennings was there, and Kelley's testimony substantiated that a deal took place. Even assuming that the last two statements by Stopak were hearsay, they were repetitive of other testimony. They did not materially influence the jury to reach a verdict adverse to Reinhart's substantial rights, and their admission was, at most, harmless error. If admitting the statements was harmless error, Reinhart was not prejudiced by counsel's failure to object. See *id.*

Because the statements challenged by Reinhart were either admissible or their admission was, at most, harmless error, Reinhart has not shown that he was prejudiced by trial counsel's failure to object to these statements. Reinhart's final assignment of error has no merit.

CONCLUSION

Reinhart did not allege that his convictions and sentences violated his constitutional protection against double jeopardy before the trial court, and that claim is waived on appeal. The evidence was sufficient to support his convictions on both counts. The trial court erred in admitting hearsay testimony by Stopak about what Stopak was told by Jennings that Jennings

heard from Reinhart, but the admission of Stopak's statement was harmless error. Reinhart claims trial counsel should have objected to several other statements, but those statements were either admissible as nonhearsay or their admission was, at most, harmless error, and therefore, the failure to object did not prejudice Reinhart. None of Reinhart's assignments of error have merit. The judgment of the district court is affirmed.

AFFIRMED.

REPUBLIC BANK, INC., APPELLANT, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLEE.

811 N.W.2d 682

Filed April 20, 2012. No. S-11-533.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **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.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
5. **Taxation: Appeal and Error.** Appeals may be taken from a county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act.
6. **Jurisdiction: Time: Appeal and Error.** To acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal.
7. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
8. **Taxation: Statutes.** Neb. Rev. Stat. § 77-1502 (Reissue 2009) describes a process by which a taxpayer files a return and can initiate a protest to challenge an assessed value of real or personal property.
9. **Statutes: Jurisdiction.** Jurisdictional statutes are to be strictly construed.