STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. SMITH, APPELLANT.

811 N.W.2d 720

Filed April 10, 2012. No. A-10-442.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
3. **Effectiveness of Counsel: Records: 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.
4. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. **Motions to Suppress: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.
6. **Trial: Evidence: Waiver: Appeal and Error.** If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
7. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
8. **Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.
9. **Trial: Identification Procedures.** An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures.
10. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence.
11. **Lesser-Included Offenses: Jury Instructions: Notice.** A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the

lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses.

12. **Homicide: Intent.** The distinguishing factor between sudden quarrel manslaughter and second degree murder is that in sudden quarrel manslaughter, the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel.
13. ____: ____. An intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter.
14. ____: ____. An intentional killing can be manslaughter, if it results from a sudden quarrel. Thus, attempted sudden quarrel manslaughter can be considered a crime.
15. **Lesser-Included Offenses.** The determination whether an offense is a lesser-included offense employs a statutory elements approach in which a court looks only to the elements of two criminal offenses to determine whether one cannot commit one of the offenses, the greater offense, without simultaneously committing the other offense, the lesser offense.
16. **Homicide: Lesser-Included Offenses.** Second degree murder and manslaughter are lesser-included offenses of first degree murder.
17. **Lesser-Included Offenses: Jury Instructions: Evidence.** The court should give a lesser-included offense instruction when the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
18. **Homicide: Intent.** A sudden quarrel requires provocation which causes a reasonable person to lose normal self-control.
19. **Homicide: Intent: Time.** If one had enough time between the provocation and the killing, or the attempt, to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder.
20. ____: ____: ____. In determining whether a killing constitutes murder or manslaughter, the question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind.
21. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
22. **Homicide: Jury Instructions: Evidence.** A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.
23. **Constitutional Law: Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
24. **Effectiveness of Counsel.** The failure to anticipate a change in the existing law does not amount to ineffective assistance of counsel.
25. **Criminal Law: Weapons: Words and Phrases.** Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

26. **Self-Defense.** To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force.
27. ____. The force used in self-defense must be immediately necessary and must be justified under the circumstances.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Peter K. Blakeslee for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

I. INTRODUCTION

William E. Smith appeals from the decision of the district court for Lancaster County that, after a jury trial, convicted him of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. Smith challenges the in-court identifications of him as the shooter by four witnesses, the jury instructions, and the effectiveness of his trial counsel. Because we find that the jury should have been instructed on attempted sudden quarrel manslaughter in addition to attempted second degree murder, we reverse, and remand for a new trial on that count of the information.

II. BACKGROUND

LeMarcus Gaskins (Marcus) was shot shortly after midnight on November 13, 2008, outside the Save-Mart grocery store in Lincoln, Nebraska. Immediately before the shooting, Marcus had been in a fistfight with Smith, their second fistfight within an hour. At trial, several witnesses made in-court identifications of Smith as the shooter of Marcus.

We briefly detail the events leading up to the shooting. On November 12, 2008, a surprise 21st birthday party was thrown for Lorenzo Gaskins. The large group of 15 to 20 people—including Tyrone Gaskins, Matthew Weston, Winston Sanniola, Lorenzo, and Marcus—took a limousine

to a "gentlemen's club," then to the Spigot bar in downtown Lincoln. At the Spigot bar, some of the individuals went inside. While inside the Spigot bar, Tyrone exchanged words with Stacey Gant. Smith, an acquaintance of Gant, later approached Tyrone and told him: "'You don't . . . disrespect women like that.'" Tyrone exited the bar, as did Smith and Gant. Outside of the bar, Tyrone got into an altercation with Smith. Marcus stepped in and punched Smith in the mouth. The birthday group retreated to the limousine and left. Smith left with his friend Carlos Helmstadter in Helmstadter's Cadillac Escalade.

The Escalade followed the limousine from the Spigot bar, located at approximately 17th and O Streets, to Save-Mart, located near North 11th Street and Cornhusker Highway—which according to one witness was a 5- to 10-minute drive. At Save-Mart, Smith got out of the passenger side of the Escalade and started yelling. The birthday group ignored Smith, and some of the individuals, including Marcus, went inside the store. When Marcus learned that Smith wanted to fight him, he went outside to engage in a fight. Some of Marcus' group joined in the fight, at which point Smith was outnumbered. The fight ended when Helmstadter fired two or three gunshots into the air. Smith then took Helmstadter's gun and began firing. One of Smith's shots hit Marcus. Helmstadter and Smith fled the scene. Marcus suffered life-threatening injuries, including a rib fracture, a punctured lung, a small kidney laceration, and a grade V liver laceration—the most serious survivable liver laceration, which Marcus did survive.

Witnesses identified Jemaine Sidney as the shooter in the original photographic lineup just hours after the shooting. However, Sidney had an alibi for the time of the shooting and was eliminated as a suspect. Smith was eventually developed as a suspect and identified by several witnesses during a second photographic lineup that took place within 4 days of the shooting.

The State charged Smith with one count of attempted second degree murder, a Class II felony; one count of first degree assault, a Class III felony; and one count of use of a weapon to commit a felony, a Class III felony.

In his amended motion to suppress, Smith sought an order suppressing any evidence or testimony regarding out-of-court or in-court identifications of himself as the "shooter" by Weston, Sanniola, Lorenzo, and Tyrone. Smith alleged that the witnesses were shown two photographic lineups. During the first lineup, all four of the witnesses identified Sidney as the "shooter." Smith further alleged that it was only after an "unduly suggestive" second lineup that three of the witnesses, all but Tyrone, identified Smith as the "shooter."

At the suppression hearing, the evidence revealed that the witnesses were shown the first photographic lineup shortly after the shooting. The first lineup, in which Smith's photograph did not appear, contained photographs of six men, four with some form of "braided" hair, a descriptive factor that the witnesses to the shooting had noted. All four witnesses identified Sidney as the "shooter." Because Sidney had an alibi for the time of the shooting, the investigation continued and Smith was developed as a suspect. Within 4 days of the shooting, the same four witnesses were shown a second photographic lineup, which included a picture of Smith. The second lineup contained photographs of Sidney, Smith, and four other individuals. None of the individuals in the second lineup had braids or "corn rows," except for Sidney and Smith. Looking at the second lineup, Sanniola described the lineup as "a lot tougher" and stated that all of the individuals "look[ed] alike." And while looking at the photographs of Sidney and Smith, Tyrone said, "'[A]ren't they the same guy[?]'" During the second lineup, Weston, Sanniola, and Lorenzo identified Smith as the shooter. However, Tyrone still identified Sidney as the shooter.

In its order on the amended motion to suppress, the district court found that the second photographic lineup, in which Weston and Sanniola identified Smith as the shooter, was unduly suggestive because Sidney and Smith were the only men in the lineup with braids or "corn rows." However, based on the testimony, the district court found that on the night of the shooting,

> Weston had an opportunity to view the person identified as the shooter on the following occasions: Outside the Spigot bar; when the Escalade stopped in the Save-Mart

> parking lot; when the shooter exited the Escalade; when Marcus and the shooter got into a fight in the Save-Mart parking lot; when the shooter secured the handgun; when the shooter began randomly shooting; and when the shooter began shooting specifically at Marcus. During the majority of those observations, the shooter was in a fairly well lit location and Weston was paying close attention to what was going on between Marcus and the shooter. While not identical, Weston's basic descriptions of the shooter were pretty consistent. Although Weston, after viewing the first six-photo lineup shortly after the shooting was 99% sure Sidney was the shooter, within less than two days after the shooting, when he viewed the second six-photo lineup, he was initially 85% and then 100% sure that [Smith] was the shooter.
>
> Sanniola had an opportunity to view the person identified as the shooter on the following occasions: When the man got out of the Escalade in the Save-Mart parking lot; when the shooter was randomly shooting the handgun; and when the shooter was specifically shooting at Marcus. While the shooter was shooting, Sanniola was basically lying prone in fro[nt] of the shooter, watching him shoot. The shooting took place in a fairly well lit parking lot and Sanniola was paying close attention to what was going on. He was even able to identify the shooter as firing a semi-automatic handgun. Although Sanniola, after viewing the first six-photo lineup shortly after the shooting, was 95% sure that Sidney was the shooter, within less than two days after the shooting, when he viewed the second six-photo lineup, he was "positive" that [Smith] was the shooter.

The district court found that based on the totality of the circumstances, the suggestive identification was nonetheless reliable. The district court noted that during the hearing on the amended motion to suppress, Weston and Sanniola each identified Smith as being the shooter, and that "[t]he evidence does not even hint that the in-court identifications made by Weston and Sanniola were in any way tainted by the suggestive nature of the second six-photo lineup." The district court

held that insofar as it related to Weston and Sanniola, Smith's amended motion to suppress was denied. The motion remained "open" with respect to Lorenzo because he was unavailable for the suppression hearing. The district court found that because Tyrone identified Sidney as the shooter in both lineups, the amended motion to suppress was not applicable to him.

At trial, Weston, Sanniola, Lorenzo, and Helmstadter identified Smith as the person who shot Marcus, and we note that Helmstadter was not involved in viewing the two photographic lineups. The jury found Smith guilty of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. Smith was sentenced to 25 to 35 years' imprisonment for attempted second degree murder, 15 to 20 years' imprisonment for first degree assault, and 15 to 20 years' imprisonment for use of a weapon to commit a felony. The sentence for first degree assault was to run concurrently with the sentence for attempted second degree murder. However, the sentence for use of a weapon to commit a felony was to run consecutively to the other sentences. Smith now appeals.

III. ASSIGNMENTS OF ERROR

Smith assigns as error, summarized, that (1) the district court erred in allowing Weston, Sanniola, Lorenzo, and Tyrone to testify as to their in-court identifications of Smith as the "shooter" after they had identified another person as being responsible and were exposed to an unduly suggestive photographic lineup; (2) his trial counsel was ineffective with regard to the eyewitness identifications; (3) the district court erred in failing to instruct the jury on the negative element of "sudden quarrel" in the attempted second degree murder instruction or on the offense of attempted "sudden quarrel" manslaughter as a lesser-included offense of attempted second degree murder; and (4) his trial counsel was ineffective with regard to challenging and requesting jury instructions.

IV. STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. See *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[2] Whether jury instructions are correct is a question of law, which we resolve independently of the lower court's decision. *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[3,4] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The determining factor is whether the record is sufficient to adequately review the question. *Id.* 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. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

V. ANALYSIS

1. Witness Identifications of Smith

(a) Admissibility of In-Court Identifications

Smith argues that the district court erred in allowing Weston, Sanniola, Lorenzo, and Tyrone to testify as to their in-court identifications of Smith as the "shooter" after they had identified another person as being responsible in the first photographic lineup, and then were exposed to an unduly suggestive second photographic lineup. Initially, we note that Tyrone did not identify Smith as the shooter in either lineup, nor did he identify Smith as the shooter during his trial testimony. Thus, we consider Smith's assignment of error and argument as applicable only to the identifications made by Weston, Sanniola, and Lorenzo, given that Tyrone's testimony would generally be favorable to Smith.

(i) Weston and Sanniola

[5,6] Weston and Sanniola made in-court identifications of Smith as the shooter without objection by Smith. Smith objected to Weston's testimony that Smith told Helmstadter to "[g]ive me the gun," but did not object when Weston and Sanniola identified Smith as the person who shot Marcus. When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to

preserve the issue for review on appeal. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007). Thus, Smith waived his right to assert error regarding Weston's and Sanniola's in-court identifications of Smith as the person who shot Marcus.

(ii) Lorenzo

Smith did object to Lorenzo's testimony that Smith was the person who shot Marcus. Because Lorenzo was unavailable at the suppression hearing, the district court addressed Smith's motion to suppress Lorenzo's out-of-court and in-court identifications of Smith as the shooter during the trial. As it did with respect to Weston and Sanniola, the district court found that the second photographic lineup was unduly suggestive, but the district court allowed the in-court identification. Thus, we must now determine whether allowing Lorenzo's in-court identification was error.

[7,8] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Smith, supra*. Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *Id*. The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). Against these factors is to be weighed the corrupting influence of the suggestive identification itself. *Id*.

[9] In-court identifications may be admissible even if there was an illegal pretrial identification procedure.

> "An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. . . . A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint."

State v. Smith, 269 Neb. at 785-86, 696 N.W.2d at 883 (quoting *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978)).

Assuming that the trial court was correct in finding the identification procedure used in this case, i.e., the second photographic lineup, was unduly suggestive, application of the foregoing factors from *State v. Faust, supra*, to the facts in this case demonstrates that Lorenzo's in-court identification was sufficiently reliable to avoid suppression, and therefore such was properly admitted for the jury's consideration. The evidence adduced at trial clearly indicates that Lorenzo's testimony was based upon his observations of November 13, 2008. On the night of the shooting, Lorenzo had an opportunity to view the shooter when the shooter began firing shots toward Marcus in the Save-Mart parking lot. At that time, Lorenzo was approximately 30 feet away from the shooter. Lorenzo was standing in the entryway of Save-Mart (between the two sets of sliding doors), and the sliding doors to the outside were open, giving him a clear view to the outside. Lorenzo testified that he could see "[p]retty good," because the parking lot was "pretty lit up with the lights from the building, streets [sic] lights out there in the parking lot." The shooter was in a fairly well-lit location, and Lorenzo was paying "[v]ery close" attention to what was going on. At trial, Lorenzo described the shooter as a "[b]igger gentleman, six foot, heavier set, African American, with braids." Although Lorenzo, after viewing the first six-photograph lineup shortly after the shooting, was 80- to 90-percent sure that Sidney was the shooter, 4 days after the shooting, when he viewed the second six-photograph lineup, he positively identified Smith as the shooter. We note that our record contains the photographic lineups, and clearly,

Smith's and Sidney's physical appearances in the photographs are similar. At trial, Lorenzo identified Smith with 100-percent certainty as the person who shot Marcus. Lorenzo's in-court identification of Smith as the shooter was independent of the unduly suggestive pretrial identification and thus was properly received into evidence.

(b) Ineffective Assistance of Counsel

Smith argues that his trial counsel was ineffective because (1) in his amended motion to suppress, counsel failed to challenge Weston's and Tyrone's identifications of Smith at the Spigot bar prior to the shooting; (2) at trial, counsel withdrew his objection to Weston's identification of Smith as the person involved in an altercation at the Spigot bar, thereby failing to preserve the issue for appellate review; and (3) counsel failed to object to Weston's, Sanniola's, and Tyrone's identifications of Smith during the trial, thereby failing to preserve the issue for appellate review.

In *State v. Williams*, 269 Neb. 917, 924, 697 N.W.2d 273, 279 (2005), the Nebraska Supreme Court said:

> To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *Id.*

We need not address whether trial counsel was ineffective for the reasons set forth above, because even if trial counsel was ineffective, Smith cannot show prejudice. Smith argues that counsel was ineffective regarding witness identifications

of Smith as the person involved in the altercation at the Spigot bar and as the person involved in the fight at Save-Mart before the shooting started. However, Smith's ineffective assistance claims are limited to witnesses Weston, Sanniola, and Tyrone. Smith overlooks, or perhaps hopes that we overlook, the fact that there were other witness identifications to which he does not assign error, and which involve people who were not shown the photographic lineups. Gant, an acquaintance of Smith, testified that Smith was involved in the altercation at the Spigot bar and that Smith was hit in the mouth during the altercation. And Helmstadter, who testified that Smith was "[l]ike a brother," testified that he saw Smith at the Spigot bar and that Smith said he got hit in the mouth by a "guy . . . in the limo." Furthermore, Helmstadter testified that he and Smith followed the limousine to Save-Mart, where, after Smith got into a fight, Smith grabbed Helmstadter's gun and started shooting. As stated previously, Smith assigns no error regarding the testimony given by Gant and Helmstadter. Thus, there is unchallenged and highly incriminating evidence that Smith had a motive to "get back" at Marcus because Smith was on the "short end" of the fight at the Spigot bar, that he followed Marcus to Save-Mart, and that he fired shots at Marcus at that location—after getting Helmstadter's gun from him. Such other evidence means that Smith cannot demonstrate sufficient prejudice, and therefore, an examination of whether counsel's performance was deficient is not necessary. See *State v. Smith, supra*. Put another way, when the evidence arrayed against a defendant is "overwhelming," prejudice from counsel's alleged errors becomes difficult to prove. See *State v. Lyman*, 241 Neb. 911, 917, 492 N.W.2d 16, 21 (1992) (postconviction relief denied when trial evidence was so "overwhelming," there was no need to consider alleged deficiencies by counsel for alleged failure to investigate and failure to move to suppress confession, because defendant could not show prejudice), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). The evidence against Smith, if not overwhelming, is very close to being so, given the testimony of Helmstadter—Smith's companion throughout the evening.

2. Jury Instructions

(a) "Sudden Quarrel"

Smith argues that his trial counsel was ineffective for failing to request that the district court instruct the jury on the law applicable to the case, including (1) an instruction on the "absence of a sudden quarrel" as an element of attempted second degree murder that must be proved by the State and/or (2) an instruction that the offense of attempted "sudden quarrel" manslaughter is a lesser-included offense of attempted second degree murder. Although trial counsel initially sought a preliminary instruction for attempted second degree murder setting forth the absence of a sudden quarrel as a "negative element," counsel withdrew his request at the final instruction conference. A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[10,11] Smith also argues that the district court erred in failing to give the "sudden quarrel" instructions sua sponte. Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses. *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003).

In their briefs, both parties note that the issue of the "absence of a sudden quarrel" as an element of attempted second degree murder was pending before the Nebraska Supreme Court in an unrelated case—*State v. Smith*, case No. S-09-1107—involving different parties. We have waited for that opinion before deciding the present case. The Nebraska Supreme Court released its opinion in that case on November 18, 2011. See *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). In that case, Ronald G. Smith (Ronald) lived with Terri Harris. Ronald had been drinking and using methamphetamines when he got into an argument with Harris about Ronald's drinking and drug use, money,

and the fact that they both had been recently laid off from their jobs. At some point during the argument, Ronald pushed Harris from her bed. Harris hit the floor hard and lay there motionless with her face up. Ronald took a pillow from the bed and held it over Harris' face for 1 to 2 minutes. Harris did not resist. Ronald took Harris' severance check, cashed it, and left the state. Ronald was charged with and convicted of second degree murder, second degree forgery, and theft by taking. All three charges related to the death of Harris.

The district court gave a pattern second degree murder instruction to the jury. The jury was instructed that to convict Ronald of second degree murder, the State had to prove beyond a reasonable doubt that Ronald killed Harris intentionally but without premeditation. The jury was then instructed that if it found the State had proved each element beyond a reasonable doubt, it was its "'duty to find [Ronald] guilty of the crime of murder in the second degree.'" *Id*. at 723-24, 806 N.W.2d at 387. The jury was instructed that it could proceed to consider whether Ronald committed manslaughter if it found that the State had failed to prove any one or more of the material elements of second degree murder beyond a reasonable doubt. On appeal, Ronald argued that the district court failed to instruct the jury that the distinction between second degree murder and manslaughter is based on whether the specific intent to kill was or was not the result of a "sudden quarrel."

[12,13] In its analysis of Ronald's appeal, the Nebraska Supreme Court focused on one type of manslaughter as defined by Neb. Rev. Stat. § 28-305(1) (Reissue 2008), which the court referred to as "sudden quarrel manslaughter" or "voluntary manslaughter." We will use the term "sudden quarrel manslaughter" in our discussion. After a lengthy and indepth analysis of Nebraska case law and the language that the Legislature used to define manslaughter, the Nebraska Supreme Court stated that the distinguishing factor between sudden quarrel manslaughter and second degree murder is that in sudden quarrel manslaughter, "the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by our jurisprudence." *State v. Smith*,

282 Neb. at 732, 806 N.W.2d at 393. The Nebraska Supreme court further stated: "The holding of [*State v.*] *Jones*[, 245 Neb. 821, 515 N.W.2d 654 (1994),] that an intentional killing cannot constitute sudden quarrel manslaughter is inconsistent not only with the language of § 28-305(1), but also with its common-law roots." *State v. Smith*, 282 Neb. at 732, 806 N.W.2d at 393. The court held:

> [W]e conclude that the analysis and holding of [*State v.*] *Pettit*[, 233 Neb. 436, 445 N.W.2d 890 (1989),] was correct and that the holding of [*State v.*] *Jones*[, 245 Neb. 821, 515 N.W.2d 654 (1994),] that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill" was error. We therefore overrule this holding in *Jones* and reaffirm the holdings of *Pettit* and *Boche* [*v. State*, 84 Neb. 845, 122 N.W. 72 (1909),] that an intentional killing committed without malice upon a "sudden quarrel," as that term is defined by our jurisprudence, constitutes the offense of manslaughter.

State v. Smith, 282 Neb. 720, 734, 806 N.W.2d 383, 394 (2011). The Nebraska Supreme Court found that the jury in Ronald's case should have been given a step instruction requiring the jury to convict on second degree murder if it found that Ronald killed Harris intentionally, without premeditation, but that if the jury acquitted him of that charge, it could consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.

[14,15] Although not discussed by the Nebraska Supreme Court in *State v. Smith, supra*, we have held that the crime of attempted voluntary manslaughter (even upon a sudden quarrel) does not exist in Nebraska. See *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995). See, also, e.g., *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997), *reversed on other grounds* 253 Neb. 357, 570 N.W.2d 713; *State v. George*, 3 Neb. App. 354, 527 N.W.2d 638 (1995). Recognizing that the key element of all attempt crimes under Neb. Rev. Stat. § 28-201 (Reissue 2008) is the taking of a

substantial step toward the crime's commission, which may generally be said to be, by definition, an intentional act, we said that a person cannot perform the same act both intentionally and unintentionally. Though not specifically mentioning or overruling the above cases, we conclude that the Supreme Court's decision in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), has implicitly overruled these cases by virtue of its holding that an intentional killing can, in fact, be manslaughter, if it results from a sudden quarrel. Thus, attempted sudden quarrel manslaughter can now be considered a crime and the jury should have been so instructed if attempted sudden quarrel manslaughter is a lesser-included offense of attempted second degree murder. To determine lesser-included offenses, Nebraska uses the elements test:

> [T]he rule we have adopted for determining whether an offense is a lesser-included offense employs a statutory elements approach in which we look only to the elements of two criminal offenses to determine whether one cannot commit one of the offenses, the "greater offense," without simultaneously committing the other offense, the "lesser offense." Under this approach, the "lesser offense" is the one for which fewer—or in the lesser-included vernacular "less"—elements are required to be proved. The approach focuses on the elements of the offenses, and comparison of the penalties associated with the offenses is not a factor.

State v. Gresham, 276 Neb. 187, 193, 752 N.W.2d 571, 577 (2008).

[16,17] It is clear that second degree murder and manslaughter are lesser-included offenses of first degree murder. See *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011). And the court should give a lesser-included offense instruction when the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009). We note that while such cases speak of "acquitting" of the greater offense before considering

the lesser offenses, the Nebraska Supreme Court in *State v. Goodwin*, 278 Neb. 945, 967, 774 N.W.2d 733, 749 (2009), "encourage[d]" trial courts to use NJI2d Crim. 3.1 because it "provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses" when a step instruction on lesser-included offenses is warranted. This pattern instruction does not direct that the jury must "acquit" of the greater offense before considering the lesser offense. Rather, the instruction informs the jury that if the State did not prove beyond a reasonable doubt "each element" of the greater, then it is to consider the lesser offenses. NJI2d Crim. 3.1.

Therefore, we are at the point of determining whether the evidence provides a rational basis for finding that the State did not prove all of the elements of attempted second degree murder, but did prove the elements of attempted sudden quarrel manslaughter. Clearly, we are dealing only with attempt crimes, because the victim had the good fortune to survive what well could have been a fatal gunshot wound. Because there is no dispute that Smith was the one firing the gun, the proof obviously establishes the substantial step portion of attempt—for second degree murder or for sudden quarrel manslaughter.

[18-20] A sudden quarrel requires provocation which causes a reasonable person to lose normal self-control. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008). If one had enough time between the provocation and the killing, or the attempt in the present case, to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder. See *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

> "The true inquiry appears to be whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation till the very instant of the act producing death [or which was an attempt to produce death] took place, and if, from any circumstances whatever shown in evidence, it appears that the party reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the

> provocation can not be considered by the jury in arriving at their verdict."

Id. at 360, 513 N.W.2d at 300 (quoting *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901)). Or, put another way, the question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind. *State v. Lyle, supra.* "Common examples of this type of manslaughter include [an attempted] killing provoked during a physical altercation in which the participants voluntarily engaged." *State v. Smith*, 282 Neb. 720, 733, 806 N.W.2d 383, 394 (2011).

In the present case, Smith argues:

> [Marcus] committed an unprovoked attack on [Smith] when he punched him in the face at the Spigot Bar. [Marcus] then voluntarily left the Save-Mart grocery store and joined with several others in physically assaulting [Smith] in the Save-Mart parking lot. The evidence was there from which a jury could conclude that [Smith], in response to such treatment, had sufficient provocation that would cause him to lose self-control, cloud his reason, and prevent rational action. The evidence was there from which a jury could conclude that the quarrel was "sudden"—i.e. that there was no reasonable time lapse between the quarrel and the shooting of [Marcus] for [Smith] to regain his reason and self-control.

Brief for appellant at 40. We agree.

Marcus punched Smith in the face at the Spigot bar. Marcus and his friends left the Spigot bar in a limousine. Smith asked Helmstadter whether he had a gun, to which Helmstadter responded that he had a gun in his Escalade. Smith and Helmstadter then got into Helmstadter's Escalade and followed Marcus' limousine to Save-Mart. Outside of Save-Mart, Smith yelled at Marcus to fight. Marcus came out of the Save-Mart and engaged in a fight with Smith. At least two witnesses testified that at least three or four of Marcus' friends joined Marcus in his fight with Smith. Helmstadter testified that after he fired his gun two or three times into the air, Marcus and his friends "backed up, everybody dispersed." After Marcus and his

friends backed away from Smith, Smith grabbed the gun from Helmstadter, fired several shots in the direction of Marcus' friends near the Save-Mart entrance, and fired at Marcus, who was running away from him. Thus, there is "some evidence" of a sudden quarrel, and evidence that the events in the Save-Mart parking lot could inflame Smith's passions and provoke him to the point of losing self-control, particularly when only minutes earlier he was unexpectedly punched in the mouth by Marcus at the Spigot bar. And Smith found himself being "jumped" by Marcus' friends minutes later as Smith apparently sought to "even the score" with Marcus, but instead got involved in a "lopsided" fight with Marcus and three or four of his friends. Whether these facts equate to a sudden quarrel so as to constitute attempted sudden quarrel manslaughter is for the jury's determination—but there is certainly evidence upon which they could so find. Accordingly, the district court erred in failing to instruct the jury on attempted sudden quarrel manslaughter as a lesser offense.

[21] Having identified trial error, we must now consider whether it was prejudicial or harmless. "Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant." *State v. Smith*, 282 Neb. 720, 734-35, 806 N.W.2d 383, 394 (2011). "The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." *Id.* at 735, 806 N.W.2d at 394.

[22] "A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder." *Id*. In this case, it would be that Smith committed attempted sudden quarrel manslaughter rather than attempted second degree murder. In the context of this case, Smith was prejudiced by the district court's failure to give an instruction on attempted sudden quarrel manslaughter, because the jury could reasonably have concluded his intent to kill was the result of a sudden quarrel, and thereby convicted him of the lesser offense. Being deprived of that option is clearly prejudicial to Smith.

In *State v. Smith, supra*, the Nebraska Supreme Court said that the jury could reasonably infer that Ronald and Harris had been arguing and that Ronald had been angry. But there was no evidence explaining how or by whom the argument was started, its duration, or any specific words spoken or actions which were taken before Ronald pushed Harris to the floor. There was no evidence that Harris said or did anything which would have provoked a reasonable person in Ronald's position to push Harris from the bed and smother her with a pillow. The court also said, "Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction." *Id*. at 735, 806 N.W.2d at 395. The Nebraska Supreme Court found that Ronald was not prejudiced by the jury instructions, because there was no evidence in that record upon which the jury could have concluded that Ronald committed sudden quarrel manslaughter instead of second degree murder.

Unlike in *State v. Smith, supra*, the jury in this case could have determined that there was a dispute between Marcus and Smith which suddenly ignited at the Spigot bar when Marcus punched Smith in the mouth, and which consequentially produced another incident of violence at Save-Mart. It is not insignificant that the two locations are in close proximity to one another and only minutes apart. Furthermore, from the evidence at trial, the jury could have determined that when Marcus' friends joined in the fight at Save-Mart, there was an "instant incitement." Accordingly, there was a sufficient showing to warrant an attempted sudden quarrel manslaughter instruction. And the district court's failure to give such an instruction was prejudicial error.

[23] Having found reversible error, we must consider whether Smith can be subjected to a retrial. The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011). We conclude that with regard to

the charges of which Smith was convicted—attempted second degree murder, first degree assault, and use of a weapon to commit a felony—the evidence introduced at the trial, whether erroneously or not, was quite clearly sufficient to sustain the guilty verdicts, and that therefore, Smith can be retried on such charges. We note that Smith does not assign error to the convictions for first degree assault and use of a weapon to commit a felony. Thus, those convictions stand affirmed and the retrial shall encompass only the attempted second degree murder charge.

[24] Given the result we reach concerning attempted sudden quarrel manslaughter and the instructions to the jury, we need only briefly address Smith's claims of ineffectiveness of trial counsel concerning the way the jury was instructed. As stated previously in this opinion, until the recent case of *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), the crime of attempted voluntary manslaughter (including upon a sudden quarrel) did not exist in Nebraska. Given the lack of authority on such point, we cannot say that trial counsel was ineffective for not anticipating how the courts would rule. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002) (failure to anticipate change in existing law does not amount to ineffective assistance of counsel).

(b) Self-Defense

Smith argues that his trial counsel was ineffective because trial counsel did not request a self-defense instruction for all three counts. Smith also argues that the district court erred in failing to give a self-defense instruction sua sponte.

[25-27] Neb. Rev. Stat. § 28-1409 (Reissue 2008) states in relevant part:

> (1) [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force

> is necessary to protect himself against death [or] serious bodily harm, . . . nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Neb. Rev. Stat. § 28-1406(3) (Reissue 2008). Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. *Id.* To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). In addition, the force used in self-defense must be immediately necessary and must be justified under the circumstances. *Id.*

There is no evidence that Smith had a reasonable and good faith belief that he needed to protect himself against death or serious bodily harm, which would justify his use of deadly force. According to the evidence, Smith followed Marcus to the Save-Mart parking lot. Smith then initiated a fight with Marcus at Save-Mart. Apparently, some of Marcus' friends joined the fray and Smith was outnumbered. Helmstadter fired shots into the air, and the fight broke up. Smith then grabbed Helmstadter's gun and fired at Marcus, who was running away from him. There is no evidence that anyone else had a weapon. Smith had two opportunities to retreat: (1) He could have not followed Marcus from the Spigot bar to Save-Mart, and (2) after Helmstadter fired shots into the air and the fight ended, Smith could have gotten into the Escalade and left Save-Mart, or simply not grabbed Helmstadter's gun and begun firing at Marcus. Clearly, Smith's use of deadly

force was not justifiable and a self-defense instruction was not warranted by the evidence. Accordingly, Smith's trial counsel was not ineffective for not requesting a self-defense instruction, and the trial court did not err in failing to give such an instruction.

VI. CONCLUSION

Because we find that the jury should have been instructed on both attempted second degree murder and the lesser-included offense of attempted sudden quarrel manslaughter, we reverse, and remand this cause for a new trial on the charge of attempted second degree murder. Smith's convictions for first degree assault and use of a weapon to commit a felony are affirmed because no error was assigned to such. We find no merit to any of Smith's remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

ABANTE, LLC, DOING BUSINESS AS ABANTE MARKETING AND ABANTE HOLDINGS, LLC, APPELLANT, V. PREMIER FIGHTER, L.L.C., ET AL., APPELLEES.

814 N.W.2d 109

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1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Summary Judgment: Final Orders.** The granting of a summary judgment is a final order where it concludes all issues between the two parties on either side of the motion.