conviction and sentence, and we remand the cause to the district court with directions to dismiss.

JUDGMENT REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WESLEY E. KITT, APPELLANT.
823 N.W.2d 175

Filed November 9, 2012. No. S-11-629.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
6. **Rules of Evidence.** When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
7. **Rules of Evidence: Hearsay: Witnesses: Proof.** For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness under Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 2008), has been shown.

8. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and the evidence.
9. **Trial: Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact 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. **Aiding and Abetting: Jury Instructions.** An aiding and abetting instruction is usually proper where two or more parties are charged with commission of the offense, and an aiding and abetting instruction is proper when warranted by the evidence.
11. **Aiding and Abetting.** Neb. Rev. Stat. § 28-206 (Reissue 2008) does not define aiding and abetting as a separate crime. Instead, aiding and abetting is simply another basis for holding one liable for the underlying crime.
12. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
13. **Aiding and Abetting: Indictments and Informations: Notice.** An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, JAMES T. GLEASON, Judge. Judgment of Court of Appeals affirmed.

Gregory A. Pivovar for appellant.

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

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

MILLER-LERMAN, J.

I. NATURE OF THE CASE

After a jury trial, at which the jury was instructed on aiding and abetting, Wesley E. Kitt was convicted of robbery, attempted robbery, two counts of use of a weapon to commit a felony, and second degree assault. The district court for

Douglas County sentenced him to imprisonment for a total of 10 to 14 years. As postconviction relief, Kitt was granted a new direct appeal. The matter before us involves the direct appeal. In a memorandum opinion, the Nebraska Court of Appeals affirmed Kitt's convictions and sentences. See *State v. Kitt*, No. A-11-629, 2012 WL 1349905 (Neb. App. Apr. 17, 2012) (selected for posting to court Web site).

We granted Kitt's petition for further review. On further review, Kitt claims that the Court of Appeals erred when it affirmed the district court's determination that a witness, Joshua Harrington, was an unavailable witness and also determined that the record showed there was sufficient evidence to find Kitt guilty of all five charges. Unlike the Court of Appeals, we determine that the district court erred when it declared Harrington was unavailable and when it allowed his deposition testimony to be read into the record. However, because we conclude that this error was harmless, it does not require reversal of Kitt's convictions or the Court of Appeals' decision. Finally, we determine that the Court of Appeals did not err when it determined that the evidence supports the convictions. Although our reasoning differs from that of the Court of Appeals, we affirm.

II. FACTS

The Court of Appeals stated the facts, for which there is support in the record, as follows:

> After a jury trial, Kitt was convicted of robbery, attempted robbery, two counts of use of a deadly weapon to commit a felony, and second degree assault. The district court sentenced him to imprisonment for a total period of 10 to 14 years. After postconviction relief was granted to Kitt, he was given a new direct appeal.
>
> The evidence developed at trial showed that Jamie Hann, formerly known as Jamie Hansen, and her boyfriend, now husband, Jacob Hann, had returned to Jamie's apartment in Omaha, Nebraska, shortly after 1:30 a.m. on June 9, 2007, after going out to a bar. Jamie was driving. The parking lot for the apartment complex in which Jamie lived was full, and Jamie had to park the car in an

area that was less well lit than the rest of the parking lot. After Jamie exited the car, a man ran out from a garage area across from where Jamie had parked, stuck a gun in Jamie's face, and told her he wanted money. Jamie was unable to describe her assailant, but she saw a handgun that looked silver to her. She gave him her wallet and identified an exhibit at trial as the wallet that had been taken from her.

After Jamie handed over her wallet, she saw another person run from the middle part of the garages and demand money from Jacob. She could tell this person was male and that he had a black handgun. Jacob appeared confused, and the man who demanded money from Jacob struck him in the head. Jacob fell to the ground, and a few moments later, Jamie observed another vehicle approach and stop very quickly. The driver got out of the vehicle and said, "[P]olice." Jamie observed that he was in uniform, had a "bag," and was carrying a firearm. This individual yelled, "[F]reeze," and the person who had held Jamie at gunpoint swung around and pointed his gun at the officer. The officer started firing, and the two assailants took off running with the officer in pursuit. Jamie ran after them as well and saw the assailants jump into a midsized white car. The officer ran back to his vehicle and pursued the assailants, but he returned a short time later. Other police officers arrived on the scene as well.

Jacob testified that as he was getting out of the car, he saw that someone had Jamie at gunpoint. A moment later, he found himself in the same situation. Jacob was able to see that the man assailing Jamie was black and had most of his face covered by a dark-colored bandanna. Jacob's assailant was slightly shorter than Jamie's assailant and perhaps shorter than Jacob himself. Jacob's assailant was wearing a mask and demanded money from Jacob, who refused. The assailant then hit Jacob in the mouth. Jacob pulled out his money clip to show the man that he had no money, which prompted the man to hit him with the pistol. Jacob described the gun carried by his assailant as

a black handgun. As a result of the blow, Jacob needed to have eight stitches in his head.

After Jacob fell to the ground, he heard a vehicle stop and then the sound of gunshots. Jacob observed the two assailants run away, so he checked on Jamie to see if she was all right. Jacob said he was intoxicated that night but was not so drunk that he could not get himself out of the car. He did state that parts of the night were hazy because of the time of the assault, the fact that he had been drinking, and the fact that the situation itself felt like a bad dream.

Officer Robert Singley with the Omaha Police Department testified that he was on special assignment detail in the early morning hours of June 9, 2007, because of a rash of strong-armed robberies at some of the larger apartment complexes in northwest Omaha. Singley conducted a traffic stop at a particular intersection at about 1 a.m., where he observed a white Pontiac Grand Am sitting in the left turn lane with its blinker on, but not moving, despite the fact that there was no traffic. Upon contacting the occupants of the car, Singley learned that the driver was . . . Harrington and the passenger was Kitt. The men told Singley they were looking for a particular apartment complex to visit a friend and were not sure how to get there. Singley ran a background check on the men, and after finding no warrants, he gave them a verbal warning for impeding traffic, gave them directions, and let them go. We note that the apartment complex the men were seeking directions to was the same complex where Jamie lived and the robbery occurred. Singley identified an exhibit as a photograph of the car he had contacted that night.

Omaha police officer Kevin Vodicka was working off duty as security for the apartment complex in June 2007. Pursuant to police department policy, he was in full uniform, but was driving his own car. His usual schedule was from 10 or 11 p.m. to 12 or 2 a.m. The complex is laid out roughly in a circular pattern, and there is only one entry to the complex. Vodicka would patrol the apartment

complex in his car in a counterclockwise direction, watching for signs of criminal activity.

Around 1:30 a.m. on June 9, 2007, Vodicka was patrolling the apartment complex when he observed an older white Grand Am being driven around the parking lot. Initially, he thought that the car might have been trying to get through the parking lot to another apartment complex. According to Vodicka, a lot of people try to do this, not realizing that the road does not go through. Vodicka watched the car for 20 to 25 minutes while continuing to patrol. He observed the car go to all of the dead ends, back up, drive around, park, and back up. Vodicka found the car's activity to be very suspicious.

Vodicka was able to see two individuals in the car and saw the passenger clearly. As Vodicka passed the car, the passenger had the car window rolled down about three-fourths of the way, and he stuck his head out, trying to get a look through Vodicka's car windows. Vodicka testified that he got a pretty good view of the passenger's face from a distance of about 5 to 7 feet and that the passenger gave Vodicka a look "kind of like the evil eye" as he passed the car. Vodicka identified the passenger as Kitt. Vodicka testified that he paid particular attention to Kitt's face when he stuck his head out of the car because of his observations of the car's suspicious activity.

Not long after Vodicka observed the passenger stick his head out of the car window, Vodicka saw the car parked and no one inside the car. On his next lap of the parking lot, Vodicka saw a black man dressed in black clothing hit a white man. Vodicka also observed a woman and third man. Vodicka accelerated to their location to try and stop the assault. He got out of his vehicle, yelled "Omaha Police," and observed one of the assailants holding a silver revolver and wearing a bandanna. The other assailant, the one who had struck the white man, was wearing a bandanna as well but held a black [semiautomatic] handgun. Vodicka drew his weapon as soon as he got out of his car and told the assailants to drop their weapons. Both

assailants ran, and Vodicka pursued the suspect closest to him. Vodicka testified that this individual, the man with the silver revolver, pointed his gun at Vodicka and that Vodicka fired four or five times. Vodicka stopped pursuit, because the individual went around a corner, and returned to check on the male victim who was bleeding profusely from the head. Vodicka heard a car start its engine and ran back around the corner in time to observe the white Grand Am back out and drive off at a high rate of speed. According to Vodicka, he knew that this was the same vehicle he had observed earlier because he saw it leave the same parking spot where he had last observed it. He also recognized the hubcaps on the car, which he had previously observed.

Harrington was called to testify [by the State] and stated that he resided at "OCC" for a crime he committed involving the robbery and assault of Jamie and Jacob, which he believed occurred on June 9, 2007. When asked if there was an individual with him on that occasion, Harrington stated he was advised not to testify by his attorney. Harrington stated that he was refusing to answer any questions regarding allegations against Kitt. The district court then asked Harrington whether he would refuse to testify if the State asked him any questions relating to what happened on June 9 or any events that related to Kitt. Harrington responded affirmatively. The court dismissed Harrington and told the jury that when an incarcerated witness refused to testify, that witness' prior testimony which had been recorded could be read[,] and that the court believed the State intended to proceed by reading into evidence Harrington's prior recorded testimony.

At this point, Kitt's counsel objected [first] to Harrington's being declared unavailable as a witness and to the State's being allowed to read Harrington's deposition into the record. [Second, Kitt] based his objections on Kitt's constitutional right to confront his accusers as well as the constitutional right to cross-examine witnesses testifying against him. The district court overruled

Kitt's objection[s], stated that Harrington had been found unavailable based on his refusal to testify, and stated that Harrington's prior recorded testimony would be allowed because case law specifically permitted such testimony to be read into the record without running afoul of the hearsay rule.

The district court explained to the jury that Kitt's attorney had taken Harrington's deposition prior to trial and that this deposition would now be read to the jury. Harrington's deposition testimony was then read into the record.

At the time of his deposition, Harrington had already pled guilty to attempted robbery and assault of an officer. He stated that he had known Kitt for several years as an acquaintance and that they had played basketball together on youth teams. On the day before the incident, Kitt called Harrington sometime after 11 p.m. Kitt wanted to hang out. Harrington drove his white Pontiac Grand Am to pick up Kitt, which car he described as having tinted windows . . . that were "legal." Harrington and Kitt stopped at a convenience store to get cigars and/or alcohol and drove around until Kitt said he needed some money. Kitt made it clear that he was not interested in working for money and told Harrington he knew an easy way to get some money, which was to rob someone. According to Harrington, after they decided to do this, Kitt pulled out a ski mask, a bandanna, and a small silver handgun. Kitt gave either the ski mask or the bandanna to Harrington to wear and told Harrington he had stolen the handgun from his grandfather. Later in his deposition, Harrington denied that Kitt had given him either a mask or a bandanna to cover his face. Harrington and Kitt were sitting in the car at an apartment complex in west Omaha when Harrington saw a couple get out of another car. Kitt ran over to the couple, and Harrington followed, knowing that they were there to rob someone. Harrington stated that he and Kitt had been drinking and were not "in the right state of mind."

Harrington did not know whether he spoke to the couple after Kitt approached them and essentially refused to say that Kitt was in the process of robbing the couple. Harrington heard Kitt say something to the person he was robbing but he did not remember what Kitt said. Harrington insisted that both he and Kitt were yelling at the couple they were robbing and demanding money from them. Harrington did not get any money, but Kitt got a wallet. Harrington stated that Kitt hit the person he was robbing, but did not know if it was with his hand or his gun. When asked whether it could have been Harrington who hit the person, he replied that he was really drunk, that he probably did not hit the person, and that if he did so, it was only a chance. When it was suggested to Harrington that he was the primary person responsible for the robbery, he adamantly denied that that was the case as he had a job and did not need the money. Harrington stated that the police arrived, and he and Kitt ran in different directions. After Harrington ran, a police officer started shooting, and Harrington was shot in the back of his leg. Harrington stated he was running with his "fake gun" in his hand but denied pointing this gun at the officer. Harrington stated that he returned to his car, drove off, and did not see Kitt after that.

Harrington called a friend and had her take him to the hospital. Harrington was questioned by police officers at the hospital, but he lied, telling them he had been shot at a different location. Later, after medical personnel finished attending to him, Harrington told the truth and was taken to the police station and arrested.

Harrington denied owning a real gun and stated that if a real gun was found in his car, he did not know how it got there, although he knows people who carry guns and that they have left them in his car before. Eventually, Harrington admitted that there was a real gun in his car but claimed that it was not his and that he did not use it during the robbery. Harrington insisted that during the robbery, he had a black fake gun and Kitt had his silver

> one. Harrington claimed that he threw the fake gun away and that later, when he had a friend remove a gun from his car, she removed the real gun that had been left in his car.
>
> Toward the end of his deposition, when Harrington was clearly getting frustrated with the process, he asked whether he could "plead the Fifth" and Kitt's counsel promptly and firmly told him, "No. There is no Fifth Amendment, sir. You have already been convicted of that crime."
>
> . . . [A] crime laboratory technician with the Omaha Police Department . . . testified that he collected evidence from the scene of the robbery, including a revolver, a dark green bandanna, a blue knit ski mask which was found on the ground in the parking lot of the apartment complex, and a wallet with $4.12 cash and a driver's license belonging to Jamie.
>
> Kitt rested without presenting any evidence. The district court denied Kitt's motion to dismiss at the close of all the evidence. Kitt was then convicted and sentenced as set forth above.

State v. Kitt, No. A-11-629, 2012 WL 1349905 at *1-5 (Neb. App. Apr. 17, 2012) (selected for posting to court Web site).

As noted above, the present appeal to the Court of Appeals is a new direct appeal granted as relief in a related postconviction action. Kitt claimed that the district court erred when it found that Harrington was unavailable as a witness and therefore admitted Harrington's prior deposition testimony. Kitt also asserted that the evidence was insufficient to support his convictions, that he received ineffective assistance of counsel, and that the court imposed excessive sentences. The Court of Appeals rejected Kitt's assignments of error and affirmed his convictions and sentences.

As a general statement, under the hearsay rules in the Nebraska rules of evidence, if a witness is unavailable, the witness' prior deposition may be admitted as testimony. See Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 2008). With respect to its unavailability discussion and the admission of Harrington's deposition, the Court of Appeals

noted that rule 804(1)(b) defines "[u]navailability as a witness" to include situations in which the declarant "[p]ersists in refusing to testify concerning the subject matter of his [or her] statement despite an order of the judge to do so." The Court of Appeals relied on *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996), in which this court determined on the specific facts of that case that the district court's failure to specifically order the witness to testify was not relevant when the witness' persistent refusal to testify was evident from the record. The Court of Appeals concluded that Harrington was unavailable under rule 804(1)(b). The Court of Appeals reasoned that under rule 804(2)(a), his testimony could be presented by the deposition, at which Kitt had had the opportunity to develop Harrington's testimony by direct, cross, or redirect examination.

As general matter, under Confrontation Clause analysis where a witness is unavailable, the deposition of the witness is testimonial evidence which can be received in evidence where the nonproponent has had an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court of Appeals cited *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), for this proposition. The Court of Appeals concluded that the admission of Harrington's deposition was not a Confrontation Clause violation, because the Court of Appeals had determined that Harrington was unavailable under hearsay rule 804(1)(b) and Kitt had had a prior opportunity for cross-examination.

The Court of Appeals also rejected Kitt's assignments of error that he received ineffective assistance of counsel, that there was insufficient evidence to support his convictions, and that the district court abused its discretion by imposing excessive sentences. The Court of Appeals affirmed Kitt's convictions and sentences.

We granted Kitt's petition for further review.

III. ASSIGNMENTS OF ERROR

On further review, Kitt claims that the Court of Appeals erred when it affirmed the district court's rulings in which it

had (1) determined that Harrington was an unavailable witness and admitted Harrington's deposition into evidence and (2) determined that there was sufficient evidence for Kitt's convictions. For completeness, we note that Kitt does not assign as error the Court of Appeals' decisions on ineffective assistance of counsel and excessive sentences.

IV. STANDARDS OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[4] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error. See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

[5] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). 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. *Id*.

V. ANALYSIS

1. Admission of Harrington's Deposition: Unavailability of the Witness

Kitt claims generally that the Court of Appeals erred when it affirmed the district court's determination that Harrington was unavailable for trial and admitted Harrington's prior deposition testimony. Kitt specifically claims that the determination that Harrington was unavailable and the admission of Harrington's deposition were an abuse of discretion under the exception to the hearsay rule found at rule 804(2)(a). Kitt also specifically claims that the admission of Harrington's deposition is of constitutional magnitude as a violation of the Confrontation Clause. The Confrontation Clause, U.S. Const. amend. VI, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, § 11, of the Nebraska Constitution provides in relevant part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."

We find merit to Kitt's argument to the effect that the district court erred when it determined Harrington was unavailable under rule 804(1)(b) and admitted Harrington's deposition and that thus, the Court of Appeals erred when it endorsed this ruling. However, as explained below, we find that the error was harmless. Further, given the necessity of our harmless error review, we determine that although the Confrontation Clause analysis differs from the hearsay analysis, it is not necessary to engage in the Confrontation Clause analysis in this case because an error for Confrontation Clause purposes would likewise be subject to a harmless error review.

(a) Hearsay

Generally, a hearsay statement is not admissible at trial. See Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008). However, rule 804(2)(a) provides an exception to the hearsay rule if the declarant is unavailable as a witness at trial. In such a case, the declarant's prior statement can be used at trial. Rule 804(2)(a) provides in part that if the declarant is

unavailable as a witness, the hearsay rule does not exclude testimony given

> in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

[6] Nebraska's rule 804(2)(a) is similar to rule 804(b)(1)(A) of the Federal Rules of Evidence. At the time of Kitt's trial, Fed. R. Evid. 804(b)(1) provided that if the declarant was unavailable as a witness, the rule against hearsay did not exclude former testimony that was "given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding." When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *State v. Kibbee, ante* p. 72, 815 N.W.2d 872 (2012).

Nebraska's rule 804(1)(b) sets forth the applicable definition of unavailability, stating that a witness is unavailable if he or she "[p]ersists in refusing to testify concerning the subject matter of his [or her] statement despite an order of the judge to do so." Similarly, at the time of Kitt's trial, federal rule 804 provided in relevant part: "**(a) Definition of Unavailability.** 'Unavailability as a witness' includes situations in which the declarant . . . **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so . . . ." The advisory committee note to federal rule 804, as proposed in 1972, provides some guidance on the issue of unavailability, and specifically a declarant's refusal to testify: "**Note to Subdivision (a).** . . . **(2)** A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality."

[7,8] For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness under Nebraska's rule 804 has been shown. See *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and the evidence. *State v. Payne-McCoy, ante* p. 302, 818 N.W.2d 608 (2012).

As set forth in rule 804(1)(b), unavailability is a term of art. See *People v. Bueno*, 358 Ill. App. 3d 143, 829 N.E.2d 402, 293 Ill. Dec. 819 (2005) (commenting on comparable Illinois rule language). Applying the language of rule 804(1)(b), the record shows that Harrington was not unavailable in this case because the judge did not order Harrington to testify before declaring him an unavailable witness. See *Gregory v. Shelby County, Tenn.*, 220 F.3d 433 (6th Cir. 2000). One court has stated: "It is clear . . . that the Rule's requirement of a court order is a necessary prerequisite to a finding of unavailability of a recalcitrant witness under Rule 804. *See United States v. Zappola*, 646 F.2d 48, 54 (2d Cir.1981) (court order essential component in declaration of unavailability) . . . ." *Fowler v. State*, 829 N.E.2d 459, 468 (Ind. 2005), *abrogated in part on other grounds, Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). It has been observed that where a witness "appears at trial but refuses to respond, [the witness] does not become unavailable until the court orders the witness to answer and the refusal persists." *Id.* at 469.

The unavailability of a witness under rule 804 cannot be fully assessed until the judge orders the witness to testify, because in the absence of an order, it is not known what the witness will do. One court identified the obvious possibilities as follows: "1) [T]he witness decides to avoid contempt and repeats the earlier version; 2) the witness claims loss of memory; 3) the witness comes up with a new version; and 4) the witness persists in refusing to answer." *Fowler v. State*, 829 N.E.2d at 470. In this case, there is no way of knowing how Harrington may have responded to an order to testify. Because

the district court did not order Harrington to testify, Harrington was not unavailable under rule 804(1)(b).

The Court of Appeals relied largely upon *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996), when it determined that the district court did not err when it found Harrington unavailable. However, the finding of unavailability in *McHenry* was specific to the facts of that case. In *McHenry*, the district court determined that Frank Ladig, a witness in a murder trial who refused to testify, was unavailable. We affirmed.

The district court in *McHenry* requested Ladig to testify on three separate occasions, but Ladig persistently refused. The district court also asked Ladig if there was any physical safeguard or anything that the court could provide that would change Ladig's mind, and Ladig replied there was not. Furthermore, Ladig refused to take an oath, so he was not competent and could not testify. See Neb. Evid. R. 603, Neb. Rev. Stat. § 27-603 (Reissue 2008). Had the district court threatened to hold Ladig in contempt for refusing to testify, it would have been unavailing because Ladig was already serving a life sentence. See *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995). See, also, *Gregory v. Shelby County, Tenn.*, 220 F.3d at 449 (stating that "any pressure of threat applied to the witness by the trial court would undoubtedly have been unavailing as the witness [was] already serving a life sentence"). The specific facts in *McHenry* were tantamount to the district court's ordering Ladig to testify before finding him unavailable, and we affirmed the rule 804 unavailability ruling.

In the present case, however, the district court did not order Harrington to testify before determining he was unavailable; nor are the facts of this case tantamount to an order. Harrington was present in the courtroom, and unlike Ladig, he took the oath and answered a few questions before he stopped answering questions. After Harrington stated upon examination by the State that he would not answer further questions, the judge asked Harrington once if he was going to refuse to testify before allowing Harrington to step down and excusing him as a witness. We agree with the observation that "the unavailability requirement in Rule 804 contemplates more than a brief or minimal examination by the trial court." *State v. Finney*, 358

N.C. 79, 87, 591 S.E.2d 863, 868 (2004). Furthermore, we cannot say that a threat of contempt would have been unavailing, because unlike Ladig, who was serving a life sentence in the *McHenry* case, Harrington, according to his deposition, was serving an 8- to 12-year sentence.

Because there was no district court order for Harrington to testify followed by persistent refusals, we determine the district court erred under rule 804 when it determined that Harrington was unavailable and when it admitted Harrington's deposition. An incorrect unavailability determination and the consequent admission of improper evidence under rule 804 are subject to a harmless error analysis. See, *Gregory v. Shelby County, Tenn.*, 220 F.3d 433 (6th Cir. 2000) (stating that error in finding witness unavailable under rule 804 was harmless); *State v. Perry*, 144 Idaho 266, 159 P.3d 903 (Idaho App. 2007) (stating that incorrect finding of unavailability under rule 804 is subject to harmless error analysis). Accordingly, later in this opinion, we will conduct a harmless error analysis.

(b) Confrontation Clause

In addition to his claim that the Court of Appeals erred under the statutory rules of evidence relating to hearsay when it approved the district court's order permitting Harrington's deposition to be read to the jury, Kitt also claims that the Court of Appeals erred as a constitutional matter when it concluded that the reading of the deposition was not a violation of the Confrontation Clause. Having found that Harrington was unavailable under the hearsay-related rules of evidence, rule 804(1)(b), the Court of Appeals then considered Kitt's challenge under the Confrontation Clause. The entirety of the Court of Appeals' constitutional analysis was as follows:

> Likewise, we do not find a violation of Kitt's rights under the Confrontation Clause. Where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007) [summarizing *Crawford v. Washington*, 541 U.S. 36, 124

> S. Ct. 1354, 158 L. Ed. 2d 177 (2004)]. Kitt had and took advantage of his opportunity to examine Harrington during the course of Harrington's deposition. Kitt's assignment of error is without merit.

The foregoing analysis appears to assume that "unavailability" under the hearsay evidence rules equates with "unavailability" under Confrontation Clause constitutional principles. To the extent such equation was made, we caution against it.

It is well settled that "cases involving the admission of [an unavailable declarant's prior] out-of-court statements [give] rise to Confrontation Clause issues 'because hearsay evidence was admitted as substantive evidence against the defendant[].'" *Delaware v. Fensterer*, 474 U.S. 15, 18, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (quoting *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)). The U.S. Supreme Court has observed that the "hearsay rules and the Confrontation Clause are generally designed to protect similar values" but has cautioned that the prohibitions of the Confrontation Clause do not "equate . . . with the general rule prohibiting the admission of hearsay statements." *Idaho v. Wright*, 497 U.S. 805, 814, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). The Court in *California v. Green*, 399 U.S. 149, 155-56, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), stated:

> [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber* v. *Page,* 390 U. S. 719[, 88 S. Ct. 1318, 20 L. Ed. 2d 255] (1968); *Pointer* v. *Texas,* 380 U. S. 400[, 85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965). The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

Finally, we note that one court has observed that an unavailability determination may not yield the same result under hearsay analysis as distinguished from Confrontation Clause analysis, stating, in reference to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004): "We therefore cannot import the availability doctrine of [federal] Rule

804(a) wholesale into *Crawford*." *Fowler v. State*, 829 N.E.2d 459, 469 (Ind. 2005), *abrogated in part on other grounds, Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

We are aware that the contours of the post-*Crawford* jurisprudence regarding unavailability for Confrontation Clause purposes—especially as unavailability relates to refusal to testify—are emerging. In one post-*Crawford* case involving a witness who refused to testify, the court observed that "interpretation of the confrontation clause has been anything but consistent since the 2004 *Crawford* decision." *State v. Duncan*, 796 N.W.2d 672, 676 (N.D. 2011). However, we need not resolve the Confrontation Clause unavailability issue herein because resolution will not affect the outcome of this case.

If we determined that the Court of Appeals and district court erred when they determined that Harrington was unavailable for Confrontation Clause purposes, we would need to determine if the admission of the deposition constituted harmless error because of the constitutional error. See *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (stating that Confrontation Clause violations are subject to harmless error analysis). See, also, *Crawford v. Washington*, 541 U.S. at 76 (Rehnquist, C.J., concurring in the judgment) (reading the opinion to "implicit[ly] recogni[ze]" that Confrontation Clause violations continue to be subject to harmless error analysis); *Hernandez v. State*, 124 Nev. 639, 188 P.3d 1126 (2008) (performing harmless error analysis on incorrect finding of unavailability under Confrontation Clause and incorrect admission of prior testimony).

If we determined that the Court of Appeals and the district court were correct that Harrington was unavailable for Confrontation Clause purposes, thus approving of the admission of Harrington's deposition testimony, no action would be required of us based on such determination. However, we are nevertheless required to perform a harmless error analysis because, as explained above, we have determined that it was error to find Harrington unavailable for rule 804 hearsay analysis purposes and to admit his deposition on that basis.

By virtue of our earlier determination, we are already required to perform a harmless error analysis. Therefore, although we have noted that as it relates to a refusal to testify, an unavailability analysis under the hearsay rule of evidence differs from an unavailability analysis under the Confrontation Clause, under the circumstances of this case, it is not necessary for us to perform a Confrontation Clause analysis of availability and consider whether the Court of Appeals erred in relation thereto.

2. Harmless Error: Analysis

[9] We have determined above that it was error to admit Harrington's deposition based on an erroneous determination that Harrington was unavailable under rule 804(1)(b), and we are therefore required to perform a harmless error analysis. Harmless error review looks to the basis on which the trier of fact 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. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). We determine that the jury's verdicts were surely unattributable to the erroneous admission of Harrington's deposition testimony.

At trial, Jamie Hann testified that when she and Jacob Hann returned to Jamie's apartment complex the night of the incident at issue, she exited the car and a man approached her, pointed a silver handgun at her head, and told her to give him her money. Jamie testified that she gave the man her wallet, which she identified as an exhibit at trial. Jamie testified that she then saw a second man, with a black handgun, approach Jacob, demand money from him, and then hit Jacob in the head with the gun. Jamie testified that a black vehicle then quickly approached the scene and that a man in uniform exited the vehicle and said, "'[P]olice.'" The uniformed man had his gun pulled out and next yelled, "'[F]reeze.'" Then the assailant who had the silver gun pointed at Jamie turned and pointed his gun at the uniformed man, and the uniformed man started firing. Jamie testified that the two assailants then ran in the same direction.

The uniformed man chased the two assailants, and Jamie followed. She testified she saw the two men get into a midsized white vehicle and leave the scene.

Jacob testified at trial that on the night in question, he and Jamie returned to Jamie's apartment complex. When Jacob exited the car, he saw that an African-American man wearing a bandanna was pointing a gun at Jamie. Then a second man pointed a black handgun at Jacob's face. Jacob described his assailant as an African-American man wearing a bandanna who was a little shorter than Jamie's assailant and perhaps shorter than Jacob himself. Jacob testified the man demanded money from Jacob, who refused. The man then hit Jacob in the mouth. Jacob pulled out his money clip to show the man that he did not have any money, and the man then hit Jacob with the pistol. Jacob later received eight stitches as a result of the blow. Jacob testified that after he fell to the ground as a result of being hit, he heard a vehicle stop and then heard the sound of gunshots. Jacob observed the two assailants run away and then checked on Jamie to see if she was all right.

Officer Kevin Vodicka testified that on the night of the incident at issue, he was working as an off-duty security person for the apartment complex. He was in full uniform, but driving his own vehicle. Vodicka testified that the apartment complex was laid out in a circle and that he would drive in a counterclockwise direction watching for signs of suspicious activity. Vodicka testified that at approximately 1:30 a.m., he observed an older white Pontiac Grand Am driving around the parking lot. He watched the car for 20 or 25 minutes while he continued to patrol. Vodicka testified that the Grand Am would go to all the dead ends, back up, drive around, park, and back up again. Vodicka testified he thought the activity of the Grand Am was suspicious.

Vodicka testified that he saw two individuals in the Grand Am. As Vodicka passed the Grand Am, the passenger had the window rolled down approximately three-fourths of the way, and the passenger stuck his head out a couple of inches, trying to look through Vodicka's windows. Vodicka testified that he got a pretty good view of the passenger's face and that the passenger gave him a look "kind of like the evil eye." Vodicka

identified the passenger as Kitt. Vodicka testified that he paid attention to the passenger because of the vehicle's suspicious activity.

Vodicka testified that soon after seeing the passenger in the Grand Am, whom at trial he identified as Kitt, he saw the Grand Am parked with no one inside. On his next lap around the parking lot, Vodicka saw a black man dressed in black clothing hit a white man. He also saw a woman and a third man. Vodicka testified that he sped up, trying to stop the assault. He exited his car and announced, "'Omaha Police.'" Vodicka testified that he observed one of the assailants holding a silver revolver and wearing a bandanna. Vodicka described the other assailant, who struck the white man, as wearing a bandanna and holding a black semiautomatic handgun.

Vodicka testified that he drew his weapon as he exited his car and told the two men to drop their weapons. The assailants ran, and Vodicka pursued one of them. Vodicka stated that the assailant he pursued pointed the silver revolver at Vodicka, at which point Vodicka fired his weapon four or five times. After the assailant went around a corner, Vodicka stopped his pursuit and went to check on the male victim. Vodicka testified that he then heard a car start its engine, so he ran around a corner in time to observe the white Grand Am back out and drive off at a high rate of speed. Vodicka testified that he knew it was the same white Grand Am he had seen earlier because he recognized the vehicle's hubcaps and because the vehicle was parked in the same spot where he had last observed it.

Furthermore, Officer Robert Singley testified that he conducted a traffic stop at approximately 1 a.m. because he had observed a white Grand Am sitting in the left-turn lane of an intersection with its turn signal on, but not moving despite the fact that there was no traffic. After contacting the occupants of the vehicle, Singley learned that the driver was Harrington and the passenger was Kitt. Singley testified Harrington and Kitt told him that they were looking for a particular apartment complex to visit a friend and that they were not sure how to get there. The apartment complex Harrington and Kitt stated they were looking for is the same complex where Jamie lived and the crimes occurred. Singley ran a background check on

Harrington and Kitt and, after finding no warrants, gave them a verbal warning and directions and let them go.

This testimony and other evidence adduced at trial indicate that Jamie was robbed by a man with a silver gun and that a man with a black gun assaulted and attempted to rob Jacob. Singley placed Kitt near the scene prior to the crimes and directed him to the apartment complex. Vodicka's testimony placed Kitt at the apartment complex moments before the time the crimes occurred and placed Kitt in the white Grand Am which later sped away from the area of the crimes. Jamie watched one assailant get into a midsized white vehicle. The foregoing evidence supports the convictions, without reference to the content of Harrington's deposition testimony.

In his deposition read to the jury, Harrington testified that he knew Kitt through basketball and socially. He testified that the idea to rob people originated with Kitt and that Harrington had a job and did not need to rob anyone. Harrington stated that Kitt supplied a ski mask and bandanna, and he placed himself and Kitt at the scene of the crimes.

Harrington stated that Kitt had a silver gun. Harrington initially stated that he had only a fake black gun. Harrington stated that he had told people he had bought a real gun, but that that was a lie. However, later in his testimony, Harrington stated that after the incident, he called a friend to remove a real gun from his car. Harrington stated that Kitt hit a victim but later testified that he might have hit the victim.

Harrington testified that both he and Kitt had been drinking the night of the crimes and that he had also smoked marijuana that day. He indicated that as a result, his memory of June 9, 2007, was not good but his "drunkenness and . . . highness kind of left when [he] got shot." Harrington stated that when he was interviewed by the police at the hospital, he did not tell the truth. He stated that he later told the truth to the police but that his recollection of the incident at the time of the deposition was not good.

[10] In this case, the jury was instructed that it could convict Kitt of the crimes with which he was charged either as the principal offender or as an aider and abettor. Under Neb. Rev. Stat. § 28-206 (Reissue 2008), "[a] person who aids, abets, procures,

or causes another to commit any offense may be prosecuted and punished as if he [or she] were the principal offender." We have stated that an aiding and abetting instruction "'is usually proper where two or more parties are charged with commission of the offense'" and that an aiding and abetting instruction is proper when warranted by the evidence. *State v. Contreras*, 268 Neb. 797, 802, 688 N.W.2d 580, 584 (2004) (quoting *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988)).

[11,12] Section 28-206 does not define aiding and abetting as a separate crime. See *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). We have stated that "aiding and abetting is simply another basis for holding one liable for the underlying crime." *Id.* at 295, 802 N.W.2d at 886. By its terms, § 28-206 provides that a person who aids or abets may be prosecuted and punished as if he or she were the principal offender. We have stated that aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *Id.* Mere encouragement or assistance is sufficient. *Id.*

[13] An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. *State v. Contreras, supra*. In the present case, the amended information charged Kitt with six crimes: robbery of Jamie and associated use of a weapon, attempted robbery of Jacob and associated use of a weapon, assault in the second degree of Jacob, and attempted assault of Vodicka, of which Kitt was acquitted. We have stated that one can be convicted of aiding and abetting use of a deadly weapon even if the jury believed that the defendant was unarmed. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). We have also stated that one can be convicted of aiding and abetting an attempted crime. See *State v. Contreras, supra*. The district court provided the jury with an aiding and abetting instruction.

Based on the foregoing law and the evidence we have summarized above, we determine that the jury's verdicts in this case convicting Kitt either as the principal offender or as an aider and abettor were surely unattributable to the erroneous admission of Harrington's deposition testimony. Although we recognize that Harrington placed Kitt at the area of the crime, the testimony of Vodicka did likewise. Harrington's deposition testimony summarized above contains numerous confusing and internally inconsistent statements such that a rational trier of fact would not be particularly inclined to rely on it as he or she evaluated all the evidence. Therefore, the district court's error in declaring Harrington unavailable as a witness under rule 804 and admitting his deposition testimony was harmless. Accordingly, neither the Court of Appeals' affirmance of the district court's ruling nor Kitt's convictions require reversal.

3. Sufficiency of the Evidence

Kitt claims that there was not sufficient evidence to support his convictions. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). 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. *Id*. Our review of the evidence for harmless error recited above shows there is sufficient evidence to support Kitt's convictions under the law applicable to this case. The Court of Appeals did not err when it so determined.

VI. CONCLUSION

Although the district court erred when it declared Harrington unavailable as a witness under rule 804 and admitted Harrington's deposition testimony, we conclude that this was harmless error and does not require reversal of Kitt's

convictions or of the Court of Appeals' affirmance of the district court's rulings. Given the aiding and abetting instruction and the facts, the evidence is sufficient to support the convictions. Although for reasons which differ from the Court of Appeals' reasoning, we affirm.

AFFIRMED.

CASSEL, J., not participating.