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to the additional terms. The McCaulleys were not required to object to the additional terms to prevent them from becoming part of the contract. The McCaulleys did not judicially admit that the additional terms were agreed to. The McCaulleys also did not rescind the contract by failing to retender the deposit to NFM.

Based on the record presented to us, the parties did have an enforceable contract, but the additional terms proposed by NFM, including the pricing error clause, were not ever accepted and made a part of the contract. The district court erred in concluding otherwise. As such, we reverse, and remand for further proceedings.

V. CONCLUSION

The district court erred in finding that the pricing error clause was a part of the contract between the McCaulleys and NFM. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. MATHEW J. HEATH, APPELLANT.

838 N.W.2d 4

Filed August 13, 2013. No. A-12-742.

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 where the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Hearsay: Words and Phrases.** Under the Nebraska Evidence Rules, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
3. **Rules of Evidence: Hearsay.** With certain exceptions, hearsay is generally not admissible.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.

5. **Rules of Evidence: Hearsay: Words and Phrases.** A "statement," for purposes of the Nebraska Evidence Rules, is an oral or written assertion or nonverbal conduct of a person, if it is intended by him or her as an assertion.
6. **Rules of Evidence: Hearsay.** Even if proffered testimony concerns a "statement" under Neb. Rev. Stat. § 27-801(1) (Reissue 2008), it is not excluded as hearsay unless the statement is being offered to prove the truth of the matter asserted. Thus, if there is a nonhearsay purpose for admitting the statement, it is not inadmissible as hearsay.
7. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part, that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her.
8. **Constitutional Law: Trial: Hearsay.** 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.
9. **Constitutional Law: Hearsay.** The Confrontation Clause applies only to testimonial hearsay, because it applies only to witnesses who bear testimony against an accused.
10. ____: ____. The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required.
11. **Trial: Hearsay.** Generally speaking, testimonial statements include ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony); extrajudicial statements contained in formalized testimonial materials (affidavits, depositions, prior testimony, confessions); or those statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.
12. **Constitutional Law: Witnesses: Testimony: Words and Phrases.** The text of the Confrontation Clause applies to those who bear testimony, and testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
13. **Constitutional Law: Hearsay.** The primary objective of the Confrontation Clause is concerned with testimonial hearsay.
14. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
15. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence.
16. **Assault: Police Officers and Sheriffs: Words and Phrases.** A person commits the offense of third degree assault on an officer if (1) he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer and (2) the

offense is committed while such officer is engaged in the performance of his or her official duties.

17. **Arrests: Police Officers and Sheriffs: Words and Phrases.** A person commits the offense of resisting arrest if he or she uses or threatens physical force or violence against a peace officer while intentionally preventing or attempting to prevent the peace officer from effecting an arrest of the actor or another.
18. **Arrests: Words and Phrases.** An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge, and to effect an arrest, there must be actual or constructive seizure or detention of the person arrested.
19. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
20. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
21. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Mathew J. Heath appeals his convictions and sentences on charges of third degree assault on a law enforcement officer and second-offense resisting arrest. The charges arose out of an altercation occurring when a police officer responded to a disturbance call at Heath's residence. Heath asserts that the district court erred in allowing testimony that his mother asked the officer whether the officer was alone, and also challenges the sufficiency of the evidence to support the convictions and the sentences imposed by the court. We find that his mother's

question was not excludable as hearsay and find sufficient evidence to support the convictions. The sentences imposed were not excessive. As such, we find no merit to Heath's appeal, and we affirm.

II. BACKGROUND

The events giving rise to this action occurred on or about January 13, 2012. On that date, Officer Alan Grell of the Lincoln Police Department was on duty and heard a dispatch concerning a "'[d]isturbance, nature unknown,'" at a residence near where he was on patrol. Because he was in the area, he responded to the dispatch and went to the residence.

Officer Grell testified that he approached the residence, looked in the window to see whether he could observe anything going on, and, either before or after he knocked on the door, heard a male voice from inside the residence say, "'Go away. We're cleaning.'" At that point, Officer Grell could not see in any windows, did not hear any loud disturbance, and was unaware of how many people were inside the residence.

Officer Grell testified that he knocked on the door and that a female answered the door. The female asked Officer Grell whether he was alone. Officer Grell was alone, and the female allowed him to enter the residence.

Upon entering the residence, Officer Grell was met by Heath, who immediately directed him to leave the residence and poked him in the chest. Officer Grell testified that Heath was holding a cigarette in the same hand that he used to poke Officer Grell in the chest. Officer Grell directed Heath to stop and to "'get back,'" but Heath ignored the direction. Officer Grell then reached out to grab Heath's hand, and a physical altercation between the two ensued.

1. Officer Grell's Description of Altercation

According to Officer Grell's description of the altercation, Heath was "[o]bviously agitated, [and his] voice inflection was kind of high, kind of raised," as Heath told Officer Grell to leave the residence "several times." Heath reached out and pushed him in the chest area, causing Officer Grell to

take "a side step." Officer Grell testified that he then tried to gain control of Heath's hands and pushed Heath, attempting to knock Heath off balance. As the two were "shoving each other back and forth" and trying to gain control, Heath at one point "reached down with his left hand and [put] his hand on [Officer Grell's] service weapon."

Officer Grell testified that "things escalate[d] quite dramatically" when Heath reached for the service weapon. Officer Grell then continued trying to gain control, while also keeping a hand on his service weapon to try "to keep it in the holster." Heath eventually shoved Officer Grell, and the two tripped over "some large tires and some large rims in the living room of the residence." The two ended up on the ground, with Heath on top of Officer Grell.

Officer Grell testified that the two eventually returned to their feet, still struggling with one another. Eventually, Officer Grell was able to utilize a "strength technique" to gain control, and he "basically grabb[ed Heath] by the throat or the upper neck area . . . and [shoved] him as hard as [Officer Grell could], to knock [Heath] off balance." This was successful in knocking Heath off his feet, causing him to stumble backward and fall. As he fell, Heath's head broke a hole into the drywall on the wall.

Officer Grell got on top of Heath and held him until additional officers arrived. As Officer Grell attempted to hold Heath, Heath kicked him several times in an attempt to knock Officer Grell off. Officer Grell testified that the two were still actively struggling when other officers arrived to assist him. The other officers helped Officer Grell off Heath and took Heath into custody.

Officer Grell testified that during the struggle, he became aware of the presence of two other males in the residence. He also testified that he gave Heath commands to "'[s]top'" or to "'[c]alm down'" or to "'[g]et away'" throughout the altercation. Finally, he testified that by the end of the altercation, he had been approaching exhaustion and nearing his physical limits of where he would have been unable to continue struggling with Heath, at which point the use of deadly force would have been authorized.

Officer Grell testified that as the adrenaline of the altercation wore off, he began to notice pain and discomfort. His leg hurt "pretty significantly." He testified to pain in his upper thigh, hamstring, and knee. This pain lasted for several days.

2. Heath's Description of Altercation

After the State rested, Heath decided that he was not satisfied with the job his defense counsel was doing on his behalf. After being advised against it, Heath indicated a desire to "fire" his attorney and have him appointed as standby counsel, and a desire to represent himself for the remainder of the trial. The court granted this request.

Heath waived his right not to testify and took the stand in his own behalf. Because he was now representing himself, he provided his testimony in the form of a narrative.

Heath testified that on the night in question, he had gone to his mother's house for dinner and had observed "somebody peeking through the window." Heath testified that he told the person, "'Go away. We're cleaning.'"

According to Heath, his mother opened the door. Heath had not expected the person "to be a cop at all," and he began laughing. According to Heath, the officer "barge[d] in the house and he grab[bed] at [Heath] on [Heath's] throat."

Heath testified that he "[w]oke up with [his] head in the wall" and that he did not remember anything. According to Heath, when he awoke, the officer was "on top of [Heath] with his hands around [Heath's] throat." Heath did not know how long the altercation lasted.

Heath testified that the other officers who arrived on the scene placed handcuffs on him and that he told them what had happened. According to Heath, the other officers "ma[d]e little jokes" and put him into a police car. He testified that one of the officers said that Heath was "lucky [he was] not dead."

During cross-examination, Heath denied poking Officer Grell in the chest and denied asking Officer Grell to leave. He also testified that he did not recall ever putting his hand

on Officer Grell's service weapon. According to Heath, he was "submissive."

3. Trial, Verdicts, and Sentences

At trial, Officer Grell testified about the altercation and about his injuries as set forth above. The State also adduced testimony from one of the other officers who arrived to assist Officer Grell and from one of the other males who was present in the residence during the altercation.

Heath's counsel objected on the basis of both hearsay and confrontation grounds when Officer Grell testified that Heath's mother, when responding to his knock on the door, asked whether he was alone. When Heath's counsel cross-examined Officer Grell, he asked Officer Grell whether the female asked "something to the effect of, 'Are you alone[?]'" Then, on redirect examination, the prosecutor again asked Officer Grell whether "[a]ll she said to [him] was, 'Are you alone?'" There was no objection to the testimony this time.

Heath testified in his own behalf, in narrative, as set forth above. He also recalled Officer Grell in an attempt to demonstrate discrepancies between the sequence of some of the events as described in Officer Grell's report and his testimony in court. Heath ultimately moved for a dismissal on the basis of Officer Grell's "lying on the stand." The court overruled this motion.

The jury returned verdicts of guilty on both the charge of third degree assault on an officer and on the charge of resisting arrest. The court sentenced Heath to a term of 4 to 5 years' imprisonment on each conviction, to be served concurrently. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Heath has assigned three errors. First, he challenges the court's admission of testimony about his mother's asking Officer Grell whether he was alone. Second, he asserts that there was insufficient evidence adduced to support the verdicts. Third, he asserts that the sentences imposed were excessive.

IV. ANALYSIS

1. Admission of Testimony

Heath first challenges the district court's admission of testimony that when Officer Grell approached the house, Heath's mother asked, "Are you alone?" Heath asserts that this testimony was inadmissible pursuant to the hearsay rule and pursuant to the Confrontation Clause of the U.S. Constitution. We find that Heath's mother's utterance was not a "statement," was not offered for any truth of any matter, and was therefore not hearsay. It also was not testimonial in nature, and its admission was therefore not a violation of Heath's right to confrontation.

As noted above, Officer Grell testified that he responded to the disturbance call and went to the house. He testified that he approached the house and knocked on the door and that a female (who was later identified as Heath's mother) inquired, "Are you alone?" Heath objected to this testimony on the grounds of hearsay and confrontation. Both objections were overruled.

(a) Hearsay

Heath first asserts that the testimony was inadmissible as hearsay. He argues that the testimony was of an out-of-court statement and was offered for the truth of the matter asserted, that the State argued "the substance of the statement" at trial, and that the State argued it in its closing argument. Brief for appellant at 13. We find that Heath's mother did not make a "statement" for purposes of the hearsay rule, that there was no truth or falsity in her utterance, and that the testimony was not inadmissible as hearsay.

[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 where the rules make such discretion a factor in determining admissibility. *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012). Under the Nebraska Evidence Rules, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

With certain exceptions, hearsay is generally not admissible. See Neb. Rev. Stat. § 27-802 (Reissue 2008).

[4] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[5,6] Section 27-801(1) defines a "statement," for purposes of the Nebraska Evidence Rules, as "an oral or written *assertion*" or "nonverbal conduct of a person, if it is intended by him as an *assertion*." (Emphasis supplied.) Even if proffered testimony concerns a "statement" under § 27-801(1), however, it is not excluded as hearsay unless the "statement" is being offered to prove the truth of the matter asserted. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Thus, if there is a nonhearsay purpose for admitting the "statement," it is not inadmissible as hearsay. See *id*.

In the present case, the challenged testimony fails to satisfy either of the key characteristics of inadmissible hearsay. What Heath's mother said when Officer Grell knocked on the door was not a "statement," because it was not an assertion or declaration; it was an interrogatory seeking information and not asserting any particular fact. In addition, the testimony that Heath's mother asked Officer Grell whether he was alone was not offered to prove the "truth" of any matter being asserted by her—it was not offered to prove he was, in fact, alone, and there was nothing else "asserted" that could be considered true or false.

Although the Nebraska appellate courts have never specifically addressed the subject of whether questions are considered statements for purposes of the hearsay rule, a variety of other courts have done so. See *Harris v. Com.*, 384 S.W.3d 117 (Ky. 2012) (reviewing variety of precedents addressing whether questions are or can be considered statements for hearsay).

In *Harris v. Com., supra*, the Supreme Court of Kentucky recently iterated the various lines of reasoning concerning questions and the hearsay rule. The court noted that other

courts that have considered the issue have reached one of three conclusions: (1) A question can be hearsay if it contains an assertion, (2) a question can be hearsay if the declarant intended to make an assertion, or (3) questions can never be hearsay because they are inherently nonassertive. *Id.*

In *Harris v. Com., supra*, the court noted that courts following the first approach, which finds that questions can be hearsay if they contain an assertion, examine the content of the question and the circumstances surrounding its utterance to determine whether the question contains an explicit or implicit assertion. The court cited a variety of examples of other courts that have used this approach. See, e.g., *U.S. v. Wright*, 343 F.3d 849 (6th Cir. 2003); *Ex parte Hunt*, 744 So. 2d 851 (Ala. 1999); *Powell v. State*, 714 N.E.2d 624 (Ind. 1999); *State v. Rawlings*, 402 N.W.2d 406 (Iowa 1987); *Carlton v. State*, 111 Md. App. 436, 681 A.2d 1181 (1996); *State v. Saunders*, 23 Ohio App. 3d 69, 491 N.E.2d 313 (1984); *Brown v. Com.*, 25 Va. App. 171, 487 S.E.2d 248 (1997); *Kolb v. State*, 930 P.2d 1238 (Wyo. 1996). The court noted that the majority of courts taking this approach are state courts. *Harris v. Com., supra.*

In *Harris v. Com., supra*, the court noted that courts following the second approach, which finds that questions can be hearsay if the declarant intended to make an assertion, focus not on the content of the question, but on the intention of the declarant. Those courts focus on the advisory committee's note to rule 801(a) of the Federal Rules of Evidence in support of the notion that the definition of "statement" is intended to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, that is not intended to be assertive. The court cited a variety of other courts that have used this approach. See, e.g., *U.S. v. Summers*, 414 F.3d 1287 (10th Cir. 2005); *U.S. v. Long*, 905 F.2d 1572 (D.C. Cir. 1990); *U.S. v. Lewis*, 902 F.2d 1176 (5th Cir. 1990). The court noted that the majority of courts taking this approach are federal courts. *Harris v. Com., supra.*

In *Harris v. Com., supra*, the court noted that courts following the third approach simply impose a blanket rule that precludes any out-of-court question from being hearsay on the

ground that inquiries are inherently nonassertive. The court cited a variety of other courts that have used this approach. See, e.g., *U.S. v. Oguns*, 921 F.2d 442 (2d Cir. 1990); *State v. Carter*, 72 Ohio St. 3d 545, 651 N.E.2d 965 (1995); *State v. Collins*, 76 Wash. App. 496, 886 P.2d 243 (1995).

The Kentucky Supreme Court declined to follow the third approach, reasoning that there was no logical reason why the grammatical form of an utterance should conclusively determine whether an utterance is an assertion. Indeed, it seems axiomatic that some utterances not in the form of a declarative sentence may contain an assertion. See *Powell v. State, supra* (recognizing inquiry can in substance contain assertion of fact). The classic example of this line of thinking is illustrated by the following inquiry: "Joe, why did you stab Bill?" See *id*. Such an utterance clearly carries a factual allegation within it, despite being presented in the grammatical form of an interrogatory. See *id*.

In the present case, we need not resolve the ultimate question of what approach the Nebraska appellate courts should take. On the facts of the present case, the utterance by Heath's mother would not be considered hearsay under any of the three approaches. There is no factual content in the question, "Are you alone?" See *Powell v. State, supra* (noting some questions—such as "What is your name?"—have no factual content). It was a request for information, not an assertion of any factual matter.

In addition, the utterance was not being offered for the truth of any matter being asserted in the utterance. As noted, there was no factual content in the utterance that could be considered true or false. The only portion of the utterance that could be assessed for truthfulness is the notion of Officer Grell's being alone, which he was, but the utterance was not being offered for purposes of demonstrating that he was alone. Rather, the statement was offered to present the factual context in which Officer Grell approached the house and eventually engaged in the confrontation with Heath.

The utterance was not inadmissible as hearsay, and the district court did not err in allowing its admission over the hearsay objection. Heath's assertion to the contrary is without merit.

(b) Confrontation Clause

Heath also asserts that testimony that his mother asked Officer Grell whether the officer was alone should not have been admitted because of Heath's right to confrontation. Heath's mother did not testify in court and was not subject to cross-examination about her utterance to Officer Grell. We find that her utterance was not testimonial in nature and that its admission did not violate Heath's right to confrontation.

[7-9] "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 . . . .'" *State v. Fischer*, 272 Neb. 963, 968, 726 N.W.2d 176, 181 (2007). In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that 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, supra*. In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the U.S. Supreme Court expressly held that the Confrontation Clause applies only to testimonial hearsay, because it applies only to witnesses who bear testimony against an accused. *State v. Fischer, supra*.

[10,11] The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required. *State v. Fischer, supra*. Generally speaking, testimonial statements include ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony); extrajudicial statements contained in formalized testimonial materials (affidavits, depositions, prior testimony, confessions); or those statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.*; *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[12,13] In *Crawford v. Washington*, 541 U.S. at 51, quoting 2 N. Webster, An American Dictionary of the English Language (1828), the U.S. Supreme Court expressly recognized that the text of the Confrontation Clause applies to those who "'bear testimony,'" and noted that "'[t]estimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" The Court also noted that the primary objective of the Confrontation Clause is concerned with testimonial hearsay. *Crawford v. Washington, supra*. As already discussed above, the utterance at issue in this case was not hearsay and was not a declaration or affirmation of any fact—it was an inquiry, seeking information.

The utterance in this case, in addition to not being hearsay and not being a declaration or affirmation of fact to make it testimonial in nature, was not comparable to the other types of out-of-court utterances that the U.S. Supreme Court recognized as testimonial statements in *Crawford v. Washington, supra*, and *Davis v. Washington, supra*. The utterance was not ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony); extrajudicial statements contained in formalized testimonial materials (affidavits, depositions, prior testimony, confessions); or those statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. There was no interrogation occurring, and there was no investigation into the crimes for which Heath was ultimately charged. Indeed, those crimes did not even occur until after the utterance at issue.

Heath's mother's inquiry of whether Officer Grell was alone was not the functional equivalent of testimonial hearsay. As such, its admission into evidence was not prohibited by the Confrontation Clause. Heath's assertions to the contrary are without merit.

(c) Closing Arguments

Heath also asserts that it amounted to prosecutorial misconduct for the prosecuting attorney to refer during closing

arguments to the inquiry of whether Officer Grell was alone. We find no merit to this assertion.

As we have already noted, the utterance was properly admitted into evidence. It was not hearsay. It was not testimonial. Its admission violated neither the hearsay rule nor the Confrontation Clause. As such, it was not prosecutorial misconduct to argue the utterance as part of the closing arguments. Heath's assertion to the contrary is meritless.

2. Sufficiency of Evidence

Heath next asserts that the State adduced insufficient evidence to support his convictions. He challenges the sufficiency of the evidence on both counts. Heath's arguments on this assignment of error amount to assertions that there was not "enough" evidence or to credibility questions, rather than clear assertions that any particular element of the crimes was not proven. We find sufficient evidence to support a finding of each required element of the crimes beyond a reasonable doubt, and find this assigned error to lack merit.

[14,15] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence. *Id*.

(a) Third Degree Assault on Officer

Heath first asserts that there was insufficient evidence to support the conviction for third degree assault on an officer. He argues that Officer Grell was the aggressor, that Officer Grell was not able to describe exactly how he was injured, and that he did not seek medical treatment or miss work as a result of the injury. We find that the evidence adduced was sufficient for a rational trier of fact to conclude that Heath intentionally,

knowingly, or recklessly caused bodily injury to Officer Grell while the officer was engaged in the performance of his official duties.

[16] Pursuant to Neb. Rev. Stat. § 28-931 (Cum. Supp. 2010), a person commits the offense of third degree assault on an officer if (1) he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer and (2) the offense is committed while such officer is engaged in the performance of his or her official duties. There is no dispute in this case that Officer Grell was a peace officer and that he was engaged in the performance of his official duties, investigating a reported disturbance, when the events in this case occurred. As such, Heath is challenging the sufficiency of the evidence to support a finding that Heath intentionally, knowingly, or recklessly caused bodily injury to Officer Grell.

Viewing the evidence in a light most favorable to the State, we find the evidence indicates that Officer Grell responded to a disturbance call, was permitted to enter the house, and was immediately confronted by Heath instructing him to leave and poking Officer Grell in the chest with a finger. Despite directions from Officer Grell for Heath to stop and to get back, Heath continued his position and continued to direct Officer Grell to leave. When Officer Grell attempted to remove Heath's hand from the officer's chest area, Heath engaged Officer Grell in a physical altercation. This altercation escalated when Heath placed his hand upon Officer Grell's holstered service weapon. Throughout the altercation, Heath shoved and kicked Officer Grell on a number of occasions, resisting Officer Grell's attempts to gain control.

During the altercation, Heath and Officer Grell tripped over tires and rims in the house, and Officer Grell eventually took Heath to the ground and got on top of him, holding him until other officers arrived to assist. Officer Grell testified to nearing the point of physical exhaustion during the altercation. Officer Grell testified that as the adrenaline of the altercation wore off, he noticed pain and discomfort in his leg and knee and discovered that his knee had been scraped. His leg hurt "pretty significantly." He testified to pain in his upper thigh, hamstring, and knee. This pain lasted for several days.

This evidence, when viewed in a light most favorable to the State, supports a finding beyond a reasonable doubt that Heath intentionally, knowingly, or recklessly caused bodily injury to Officer Grell while the officer was engaged in the performance of his official duties. Heath's arguments that Officer Grell could not precisely identify the moment, during the altercation, when the injuries occurred or that Officer Grell did not seek medical attention or that Heath's own testimony demonstrated that Officer Grell was actually the aggressor amount to challenges to the credibility of Officer Grell that we do not resolve. Indeed, the jury was instructed on self-defense and rejected Heath's defense when finding him guilty of assault. There was sufficient evidence to support the jury's finding of guilt, and Heath's assertions to the contrary are meritless.

(b) Resisting Arrest

Heath next asserts that the evidence was insufficient to support his conviction for resisting arrest. Heath argues that there was no evidence to indicate what he was "being arrested" for during the altercation or when the attempted arrest began, and he also argues that his own testimony indicated that he was unconscious during the altercation and could not have resisted any arrest. We find that the evidence adduced was sufficient for a rational trier of fact to conclude that Heath used or threatened physical force or violence against Officer Grell while intentionally attempting to prevent the officer from arresting Heath.

[17,18] Pursuant to Neb. Rev. Stat. § 28-904(1)(a) (Reissue 2008), a person commits the offense of resisting arrest if he or she uses or threatens physical force or violence against a peace officer while intentionally preventing or attempting to prevent the peace officer from effecting an arrest of the actor or another. An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge, and to effect an arrest, there must be actual or constructive seizure or detention of the person arrested. See *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

Viewing the evidence in a light most favorable to the State, we find the evidence indicates that Heath engaged Officer

Grell in a substantial physical altercation. During the altercation, Heath physically resisted Officer Grell's attempts to gain control, actively attempted to gain physical control of Officer Grell, and placed his hand upon Officer Grell's holstered service weapon. During this altercation, Officer Grell suffered physical injury to his person. Officer Grell testified that during the course of this physical altercation, he felt as if he was physically reaching the point of exhaustion, at which time he believed the use of deadly force would have been appropriate.

Officer Grell acknowledged that he did not, in the midst of this rigorous physical altercation, verbally advise Heath that he was under arrest or that Officer Grell was attempting to arrest him. He testified, however, that once Heath had engaged him in a physical fight, assaulted him, failed to comply with requests to stop, and continued to resist Officer Grell's control, the situation evolved to an arrest situation. He testified that at some point during the altercation, Heath was under arrest.

Heath cites us to no authority, from any jurisdiction, that would require a verbal advisement of an attempted arrest before physical resistance such as that described in the present record could be considered resisting arrest. Indeed, in *State v. Ellingson*, 13 Neb. App. 931, 939, 703 N.W.2d 273, 281 (2005), this court noted that although an officer "did not verbally announce an arrest," by ordering the defendant to exit a vehicle, the officer had "begun to take actions to effectuate physical control over [the defendant], which actions constituted an attempt to arrest." Officer Grell's actions during the altercation in this case similarly evidenced actions to effectuate physical control over Heath and an attempt to arrest.

Heath also argues that "even if Officer Grell had been attempting to arrest . . . Heath at some point in the struggle, . . . Heath explained that he was knocked unconscious after being grabbed by the throat and shoved into the drywall" and that he therefore could not have possessed the requisite mental capacity to resist arrest. Brief for appellant at 20. This argument is another assertion about credibility of the witnesses, which we do not resolve.

Although Heath testified in his narrative that he did nothing wrong and that Officer Grell grabbed him by the throat and pushed his head into the drywall, knocking him unconscious, Officer Grell's testimony was in stark contrast. Officer Grell specifically testified that Heath was never unconscious during the altercation. Additionally, although he acknowledged that Heath's head did strike the drywall and cause a hole in it during the altercation, Officer Grell's description of the events indicated that this occurred only after an already protracted physical struggle between the two.

The evidence adduced, when viewed in a light most favorable to the State, was sufficient to support a rational trier of fact's concluding that Officer Grell attempted to effect an arrest of Heath and that while intentionally attempting to prevent the arrest, Heath used physical force or violence against Officer Grell. Heath's arguments to the contrary are meritless.

3. Excessive Sentences

Finally, Heath asserts that the sentences imposed in this case were excessive. Heath argues that "[d]espite an array of mitigating circumstances," the district court imposed excessive sentences. Brief for appellant at 23. The sentences imposed were well within the statutory range of permissible sentences, and in light of the circumstances of the present offense and Heath's criminal history, the district court committed no abuse of discretion.

Third degree assault on an officer is a Class IIIA felony offense. § 28-931(2). Resisting arrest, second or subsequent offense, is a Class IIIA felony offense. § 28-904(3). The statutory range of permissible sentences for a Class IIIA felony offense is up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012).

[19] In the present case, Heath was sentenced to concurrent terms of 4 to 5 years' imprisonment for each conviction. This is within the permissible statutory range, and Heath does not assert otherwise. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[20,21] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

The record indicates that the trial court, at the time of sentencing, indicated that it "considers a number of factors," including all the comments of Heath and his attorney and all of the information in the presentence report on his behalf. The court also noted that it had "regard for the nature and circumstances of the crimes and the history, character and condition of [Heath]" in determining the appropriate sentences to impose. The court did not specifically enumerate each and every factor that should be considered, but there is no requirement for the court to do so.

Moreover, the nature of the present offenses indicated crimes involving substantial physical force being used against a police officer—Heath's placing his hand on the officer's holstered service weapon, injury to the officer, and testimony from Officer Grell that during the altercation, he felt he was nearing the point of physical exhaustion. Heath's criminal history comprises five pages in the presentence investigation report and includes several prior convictions for assault, resisting arrest, and hindering arrest.

In 2003, Heath was charged with two counts of third degree assault on an officer, although the charges were subsequently amended to third degree assault charges. The presentence investigation report indicates that, on that occasion, an officer responded to a disturbance call at a house, that the officer encountered Heath smoking a cigarette, that Heath began swinging the cigarette around in a reckless manner, and that Heath then engaged the officer in a physical altercation, during which he struck the officer with knees and elbows. In

2006, Heath was convicted of third degree assault on an officer and sentenced to 18 months' to 2 years' imprisonment. He was convicted of a separate assault charge in 2006. In 2008, he was convicted of third degree sexual assault and resisting arrest.

In 2009, Heath was convicted of resisting arrest, subsequent offense. The presentence investigation report indicates that, on that occasion, officers responded to a reported shoplifting and encountered Heath as a suspect. When advised that an officer was going to conduct a pat-down search to make sure Heath did not have any weapons, Heath placed his hands in his pockets and was visibly holding onto something but refused numerous commands to take his hands out of his pockets. In 2011, Heath was convicted of hindering, delaying, or interrupting an arrest.

There was no abuse of discretion by the district court in imposing the sentences in this case. Heath's assertions to the contrary are meritless.

V. CONCLUSION

We find no merit to Heath's assertions on appeal. His mother's inquiry as to whether the responding officer knocking on her door was alone was not hearsay and was not testimonial, and its admission over Heath's objections did not violate either the hearsay rule or the Confrontation Clause. There was sufficient evidence adduced to demonstrate that Heath committed third degree assault on an officer and resisted arrest. The sentences imposed within statutory limits were not an abuse of discretion and were not excessive. We affirm.

AFFIRMED.