State of Nebraska, appellant, v. Breanna N. Kleckner, appellee.

867 N.W.2d 273

Filed August 7, 2015. No. S-14-960.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.
5. **Appeal and Error.** The purpose of appellate review under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) is to provide an authoritative statement of the law to serve as precedent in future cases.
6. **Judgments: Appeal and Error.** Only those issues on which the district court made a ruling are subject to review under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008).
7. **Double Jeopardy.** The Double Jeopardy Clauses of the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
8. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.

9. **Criminal Law: Double Jeopardy.** The *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), or "same elements" test, does not apply if the State charges the defendant with multiple counts of a statutory crime that can be committed in different ways.
10. **Criminal Law: Double Jeopardy: Legislature: Intent.** Absent a contrary legislative intent, multiple counts of assault are the "same offense" for double jeopardy purposes if a break occurred between the alleged assaults that allowed the defendant to form anew the required criminal intent.
11. **Criminal Law: Double Jeopardy: Convictions: Sentences.** Even if the government charges the defendant with multiple counts of the same offense, the multiple punishments prong of the double jeopardy bar is not violated if the jury convicts the defendant of only one count.
12. **Criminal Law: Double Jeopardy: Trial: Convictions.** For double jeopardy purposes, the presence of multiple counts in a single trial does not amount to a second prosecution for the same offense after an acquittal or conviction.
13. **Double Jeopardy.** The application of Neb. Rev. Stat. § 29-2316 (Reissue 2008) turns on whether the trial court placed the defendant in jeopardy, not whether the Double Jeopardy Clause bars further action.

Appeal from the District Court for Sarpy County, William B. Zastera, Judge, on appeal thereto from the County Court for Sarpy County, Stefanie A. Martinez, Judge. Exception sustained.

Philip K. Kleine, Deputy Sarpy County Attorney, for appellant.

Karen S. Nelson, of Shirber & Wagner, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ.

Connolly, J.

SUMMARY

On the day after Thanksgiving, former intimate partners Breanna N. Kleckner and Chase McGee had a dispute about which of them would care for their son over the weekend. The State charged Kleckner in county court with three counts

of third degree domestic assault arising from the dispute. Each count alleged that Kleckner had violated a different subsection of the same statute. The court dismissed one count after the State rested. Of the two remaining counts, the jury convicted Kleckner of one and acquitted her of the other. Kleckner appealed to the district court, arguing that the State could not charge her with multiple counts under a single statute if each count arose from the same incident. The district court agreed with Kleckner and vacated her sentence. The State filed an objection to the district court's judgment under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). Because the State tried and punished Kleckner only once, we sustain the State's objection.

BACKGROUND

Factual Background

Kleckner and McGee had an intimate relationship that lasted more than 2 years. They have a son, T.M., who was about 14 months old at the time of the alleged assault. Kleckner and McGee do not have a "custody agreement" for T.M. Their childcare arrangements are informal.

On the evening of November 29, 2013, McGee was at his mother's house. He called Kleckner and asked her to give him a ride to a shoestore. Kleckner agreed, and she, McGee, and T.M. went to the store together.

On the way back to McGee's mother's house, Kleckner and McGee started to argue about who would have T.M. for the weekend. McGee testified that once they arrived, he carried T.M. to the house while Kleckner trailed behind and pushed McGee. McGee said that once inside, his niece took T.M. away and that Kleckner walked out of the house after making a telephone call.

According to McGee, he looked out the window and saw Kleckner throwing rocks at his car. McGee went outside and called the 911 emergency dispatch service. He testified that Kleckner hit him in his right eye about three times either

before or during the telephone call. McGee recalled that Kleckner drove away while he was on the telephone with the 911 operator.

Kleckner remembered the evening differently. She said that after returning from the shoestore, she walked into the house to speak with McGee's mother, with McGee following her. Kleckner said that after leaving the house, she got into her car, which was parked in the street, and backed it into the driveway. Then she got out, picked up a rock, and cocked her arm in the direction of McGee's vehicle because she "just felt really disrespected." But Kleckner said that she had a change of heart and either "threw [the rock] to the side" or "dropped it."

Kleckner said that at this point, she got into her car again and was prepared to leave. But McGee came out of the house and grabbed the interior of her car through an open window. Kleckner testified that she sidled out of her car and pushed McGee's shoulder to get his arm out of the way. Kleckner said that after she did so, she locked the doors and listened to McGee call 911 before driving away.

Kleckner testified that she did not touch McGee other than to push him from her car. But McGee's sister-in-law, who was at the house, testified that McGee's right eye was swollen and red after Kleckner left. Similarly, the police officer who responded to McGee's 911 call testified that McGee's right eye and cheek were swollen and red.

Kleckner testified that she did not "threaten to hurt" McGee. Neither McGee nor any of the State's other witnesses testified that Kleckner threatened McGee. But the State played a recording of the 911 call for the jury, during which McGee told the operator that Kleckner had "threatened to kill me." In a petition for a domestic abuse protection order, McGee wrote that Kleckner told him while they were in his mother's house that "she was going to have people beat me up and kill me."

County Court

The State filed a criminal complaint in county court charging Kleckner with three counts of third degree domestic assault under Neb. Rev. Stat. § 28-323(1) (Cum. Supp. 2014). Each count alleged that the conduct occurred in Sarpy County, Nebraska, on November 29, 2013; that McGee was the victim; and that McGee was Kleckner's intimate partner. Count I alleged that Kleckner intentionally and knowingly caused McGee bodily injury under § 28-323(1)(a). Count II alleged that Kleckner threatened McGee with imminent bodily injury under § 28-323(1)(b). Count III alleged that Kleckner threatened McGee in a menacing manner under § 28-323(1)(c).

Kleckner filed an omnibus motion to quash, a demurrer, and a motion to elect. In the operative filing, Kleckner asserted that the State "cannot charge [her] with violating all three subsection[s] simultaneously." She alleged that the complaint violated her double jeopardy rights under the federal and Nebraska Constitutions and her due process rights under the federal Constitution.

The county court overruled Kleckner's motion to quash and demurrer but held her motion to elect in abeyance until the close of the State's case.

After the State rested, Kleckner renewed her motion to elect and moved for a directed verdict. The court overruled Kleckner's motion for a directed verdict but sustained her motion to elect as to count III because the State had not made a "prima facie showing" for that count.

The jury returned a verdict finding Kleckner guilty of count I and not guilty of count II. The county court sentenced Kleckner to 1 year of probation.

District Court

Kleckner appealed her conviction to the district court. She assigned, in relevant part, that the county court erred by overruling her motion to quash because the State violated her

double jeopardy and due process rights by charging her with three counts under the same statute.

The district court concluded that § 28-323(1) was "a single offense committable alternative ways" and, without clearly explaining why, assumed that the presence of multiple counts in the information required it to reverse Kleckner's conviction. Because the Double Jeopardy Clause bars a second trial after an acquittal, the court determined that the State could not retry Kleckner.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred by (1) incorrectly interpreting *Blockburger v. United States*[1]; (2) determining that "two charges under the same statute were, for purposes of prosecution, the same as two charges for the same act" under the Double Jeopardy Clause; (3) determining that the state should have elected between multiple counts; and (4) "arbitrarily acquit[ting Kleckner] of all charges."

STANDARD OF REVIEW

[1-3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[2] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary,

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[1] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[2] *State v. Avery*, 288 Neb. 233, 846 N.W.2d 662 (2014).

[3] *Id.*

capricious, nor unreasonable.[4] But we independently review questions of law.[5]

ANALYSIS

[4-6] Before addressing the merits, we note that the State is the appellant. Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.[6] In this case, the State appeals under § 29-2315.01, which allows a county attorney to request appellate review of an adverse ruling by a district court.[7] The purpose of appellate review under § 29-2315.01 is to provide an authoritative statement of the law to serve as precedent in future cases.[8] But we cannot expound the law on whatever question the State might ask. Only those issues on which the district court made a ruling are subject to review.[9]

The State argues that the district court "erred in determining that because the three charges arose from violations of the same statute, that the violations constituted the same act and multiple prosecutions were therefore barred by the Double Jeopardy Clause."[10] The State contends that the three subsections of § 28-323(1) are "multiple offenses because each subsection includes a distinct and separate element that the others do not."[11] So, prosecuting Kleckner on multiple counts did not violate the double jeopardy bar.

Of course, Kleckner disagrees. She argues that third degree domestic assault is "one offense committable in multiple

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[4] *Id.*

[5] *Id.*

[6] See *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[7] See *id.*

[8] *State v. Warner*, 290 Neb. 954, 863 N.W.2d 196 (2015).

[9] *State v. Figeroa, supra* note 6.

[10] Brief for appellant at 19.

[11] *Id.* at 14.

ways."[12] Kleckner asserts that each subsection of § 28-323(1) is but a part of "a single offense," but she is less clear about how this conclusion supports the district court's judgment.[13] As noted, Kleckner argued in her appeal to the district court that the State violated her double jeopardy and due process rights by charging her with multiple counts of the same crime.

[7,8] The Double Jeopardy Clauses of the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[14] The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[15]

Kleckner argues that the information was multiplicitous. That is, the information charged the same offense in multiple counts.[16] Under § 28-323(1), a "person commits the offense of domestic assault in the third degree if he or she: (a) Intentionally and knowingly causes bodily injury to his or her intimate partner; (b) Threatens an intimate partner with imminent bodily injury; or (c) Threatens an intimate partner in a menacing manner."

To decide whether each subsection under § 28-323(1) is a different offense for double jeopardy purposes, the State urges us to apply the test derived from *Blockburger v. United States*.[17] Under the *Blockburger* or "same elements" test, we ask whether each offense has an element that the other does not or, restated, whether each offense requires proof of a fact that the other does not.[18]

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[12] Brief for appellee at 18.

[13] *Id.* at 12.

[14] *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009).

[15] *Id.*

[16] See, e.g., *U.S. v. Chipps*, 410 F.3d 438 (8th Cir. 2005).

[17] *Blockburger v. United States, supra* note 1.

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

We use the *Blockburger* test if the same act or transaction violates two distinct statutory provisions, but it is not appropriate for every double jeopardy question.[19] If the State argues that a course of conduct involves one or more distinct offenses under a single statute, we have instead focused on the allowable unit of prosecution.[20] And we have expressly refused to apply the *Blockburger* test if the State punishes the defendant with multiple counts of violating a single crime that can be committed in different ways.[21]

[9] Here, the *Blockburger* test is not appropriate because third degree domestic assault under § 28-323(1) is one offense that can be committed in different ways.[22] That the statute describes three different actions does not mean that it is three different offenses: "'Simply because the alternative ways for committing a single offense require proof of different acts and even different culpable mental states does not mean that a single offense has not been defined by the statute . . . .'"[23] For example, in *State v. Chavez*,[24] the South Dakota Supreme Court examined a statute that defined aggravated assault as causing serious bodily injury while manifesting extreme indifference to human life or attempting to put another in fear of serious bodily harm through physical menace with a deadly weapon, among other means. The court concluded that despite the different actions and mental states, the statute defined one crime that could be accomplished different ways.[25]

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[19] See *id.*

[20] See, *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004); *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

[21] See, *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007); *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

[22] See *id.*

[23] *Woellhaf v. People*, 105 P.3d 209, 217 (Colo. 2005). See *Brown v. State*, 107 Neb. 120, 185 N.W. 344 (1921).

[24] *State v. Chavez*, 649 N.W.2d 586 (S.D. 2002).

[25] See, also, *State v. Morato*, 619 N.W.2d 655 (S.D. 2000); *State v. Baker*, 440 N.W.2d 284 (S.D. 1989).

The State notes that the Legislature classified subsequent violations of § 28-323(1)(a) and (b) as Class IV felonies, whereas violations of § 28-323(1)(c) are always Class I misdemeanors.[26] We have said, however, that felony classifications have no bearing on whether two statutes are the same offense under *Blockburger* because a crime's classification is not part of its elements.[27] Similarly, we do not think that enhancement is part of third degree domestic assault's unit of prosecution.

[10] But a defendant is not immune from multiple punishments or trials simply because there is only one victim of the defendant's assaultive conduct. Absent a contrary legislative intent,[28] the test for assault offenses is whether a break occurred between the alleged assaults that allowed the defendant to form anew the required criminal intent:

> In assault cases, separate offenses can arise from a single set of facts each time the defendant forms an intent to attack the victim. . . . Thus, when a defendant has time to reconsider his actions, "each assault separated by time" constitutes a separate offense. . . . Factors such as time, place of commission, and the defendant's intent, as evidenced by his conduct and utterances determine whether separate offenses should result from a single incident.[29]

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[26] See § 28-323(4) and (5).

[27] *State v. Dragoo, supra* note 14.

[28] See, e.g., *Vick v. State*, 991 S.W.2d 830 (Tex. Crim. App. 1999).

[29] *State v. Garnett*, 298 S.W.3d 919, 923 (Mo. App. 2009). See, *State v. Baldwin*, 290 S.W.3d 139 (Mo. App. 2009); *Ocasio v. State*, 994 So. 2d 1258 (Fla. App. 2008); *State v. Harris*, 243 S.W.3d 508 (Mo. App. 2008); *Welborn v. Com.*, 157 S.W.3d 608 (Ky. 2005); *State v. Nixon*, 92 Conn. App. 586, 886 A.2d 475 (2005); *State v. Handa*, 120 N.M. 38, 897 P.2d 225 (N.M. App. 1995); *Weatherly v. State*, 733 P.2d 1331 (Okla. Crim. App. 1987). See, also, *People v. Wilson*, 93 Ill. App. 3d 395, 417 N.E.2d 146, 48 Ill. Dec. 744 (1981).

It is therefore not enough for the State to show that the fight moved from the living room to the driveway.[30] Double jeopardy "is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."[31] There must be a break in the action long enough to infer that the defendant stopped, reconsidered his or her actions, and then launched another assault.[32] As the State concedes, it could not, for example, punish a defendant for each repetitive punch to the victim.

But we will not decide whether the State could have punished or prosecuted Kleckner more than once under § 28-323(1) because the State did not in fact do so. Although the purpose of error proceedings is to provide an authoritative statement of the law, our review is limited to those issues on which the district court made a ruling on the facts before it.[33] Here, the district court made its ruling after the jury convicted Kleckner of one count after one trial.

[11,12] So, the district court erred for a basic reason: None of the three evils prohibited by the Double Jeopardy Clause befell Kleckner. Even if the government charges the defendant with multiple counts of the same offense, the multiple punishments prong of the double jeopardy bar is not violated if the jury convicts the defendant of only one count.[34] Nor does the presence of multiple counts in a single trial

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[30] See *U.S. v. Chipps, supra* note 16.

[31] *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

[32] See *State v. Harris, supra* note 29.

[33] See *State v. Figeroa, supra* note 6.

[34] See, *U.S. v. Chilingirian*, 280 F.3d 704 (6th Cir. 2002); *Arnold v. Wyrick*, 646 F.2d 1225 (8th Cir. 1981); *State v. Auch*, 39 Kan. App. 2d 512, 185 P.3d 935 (2008). See, also, *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989).

amount to a second prosecution for the same offense after an acquittal or conviction.[35] One trial on multiple counts is still one trial.

Put simply, Kleckner's conviction of one count after one trial in the county court did not implicate the three distinct abuses that the double jeopardy bar prohibits. There was only one prosecution, and Kleckner received only one punishment. So, the district court should not have reversed Kleckner's conviction to the extent it did so on double jeopardy grounds. And the only reason the court gave for reversing Kleckner's conviction was that the State charged her with multiple counts of the same crime. In her appeal to the district court, Kleckner argued only that charging her with multiple counts violated her double jeopardy and due process rights. She has not elaborated how the State violated her right to due process.

Kleckner's reliance on *State v. Parker*[36] is misplaced. In *Parker*, we held that if one offense can be committed different ways, the jury must be unanimous that the defendant committed the offense but need not be unanimous about which of the alternative means the defendant used. The unanimity of the jury's verdict—the only issue in *Parker*—is not an issue in this case. *Parker* did not involve multiple charges for the same offense.

Having decided that the district court should not have reversed Kleckner's conviction, we turn to the effect of our conclusion. The State argues that we should reverse, and remand with directions to reinstate Kleckner's conviction and sentence. But our power to reverse the judgment of the district court is limited. Specifically, Neb. Rev. Stat. § 29-2316 (Reissue 2008) provides: "The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy . . . ."

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[35] See, e.g., *U.S. v. Sharpe*, 996 F.2d 125 (6th Cir. 1993).

[36] *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986).

[13] Nearly a decade ago, we said in *State v. Vasquez*[37] that the application of § 29-2316 turns on whether the trial court placed the defendant in jeopardy, not whether the Double Jeopardy Clause bars further action. That is, § 29-2316 is not a gratuitous reference to the Double Jeopardy Clause. *Vasquez* broke with the approach of some of our earlier cases,[38] but we have since adhered to its reading of the statute's plain language.[39] In § 29-2316, the Legislature chose to prohibit reversal if the defendant was "placed legally in jeopardy," not if the Double Jeopardy Clause would prohibit reversal. The wisdom of that decision, of course, rests with the Legislature.

Here, Kleckner tried the case to a jury. Jeopardy therefore attached when the jury was impaneled and sworn.[40] Because the trial court placed Kleckner legally in jeopardy before the district court's erroneous ruling, we cannot reverse the district court's judgment.

The State argues that the posture of this case distinguishes it from *Vasquez* and its progeny. But, in *State v. Figeroa*,[41] we applied § 29-2316 in a case where a district court, like the district court here, erroneously reversed a county court's judgment. The conviction in *Figeroa* resulted from a guilty plea, and Kleckner's conviction resulted from a jury verdict, but that does not change matters. The district court entered a "judgment" after Kleckner was "placed legally in jeopardy." Under § 29-2316, we must let the judgment stand.

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[37] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[38] See, *State v. Figeroa*, *supra* note 6 (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join); *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join); *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[39] See, *State v. Figeroa, supra* note 6; *State v. Head, supra* note 38; *State v. Hense, supra* note 38.

[40] See *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

[41] See *State v. Figeroa, supra* note 6.

CONCLUSION

The State did not punish Kleckner multiple times for the same offense or subject her to multiple prosecutions. So, the district court erred by reversing her conviction on the ground that the State charged her with the same offense in several counts. But § 29-2316 prevents us from reversing the district court's judgment because Kleckner has been placed in jeopardy.

EXCEPTION SUSTAINED.

STEPHAN, J., not participating.

CASSEL, J., concurring in part, and in part dissenting.

I entirely agree that the district court erred in reversing the county court conviction. And to that extent, I concur in the majority opinion.

But I dissent from the majority's conclusion that the county court conviction and sentence cannot be reinstated. Justice Gerrard's dissents in *State v. Hense*,[1] *State v. Head*,[2] and *State v. Figeroa*[3] powerfully articulate the error that the majority today perpetuates. As he aptly pointed out, "[u]nder this court's construction of the statute,[4] a district court's reversal of a lower court's judgment has become '"tantamount to a verdict of acquittal at the hands of the jury, not subject to review."'"[5]

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[1] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[2] *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[3] *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[4] Neb. Rev. Stat. § 29-2316 (Reissue 2008).

[5] *State v. Figeroa, supra* note 3, 278 Neb. at 108, 767 N.W.2d at 783 (Gerrard, J., dissenting) (quoting *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975)).

Legislative acquiescence does not mandate adherence to the error that began in 2008. As Justice Gerrard noted, for nearly 20 years before the *Hense* decision, "we had held—without amendment from the Legislature—that the Legislature intended for errors to be correctible through error proceedings consistent with double jeopardy principles."[6] Only 7 years have passed since this court veered off course, and the Legislature's later silence commands no greater deference than its earlier silence.

A jury of Breanna N. Kleckner's peers convicted her of third degree domestic assault. The county court imposed a permissible sentence. She appealed to the district court, as she was entitled to do. But the district court's erroneous reversal, coupled with this court's incorrect statutory interpretation, allows her to escape any consequences for her crime. I can imagine the reaction of Kleckner's jury to this absurd result. It can only promote disrespect for the law. We should correct our own mistake before the public's patience runs out.

HEAVICAN, C.J., joins in this concurrence and dissent.

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[6] *State v. Figeroa, supra* note 3, 278 Neb. at 106, 767 N.W.2d at 782 (Gerrard, J., dissenting).