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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 14, 2020 and JUNE 4, 2020

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCCV

PEGGY POLACEK
OFFICIAL REPORTER

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TABLE OF CONTENTS
For this Volume

Members of the Appellate Courts v

Judicial Districts and District Judges vi

Judicial Districts and County Judges viii

Separate Juvenile Courts and Judges x

Workers' Compensation Court and Judges x

Attorneys Admitted xi

Table of Cases Reported xiii

List of Cases Disposed of by Filed Memorandum Opinion xvii

List of Cases Disposed of Without Opinion xix

List of Cases on Petition for Further Review xxi

Cases Reported 1

Headnotes Contained in this Volume 995

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Jeffrey J. Funke, Associate Justice
Jonathan J. Papik, Associate Justice
John R. Freudenberg, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge
Lawrence E. Welch, Jr., Associate Judge

Peggy Polacek . . . . . Reporter
Wendy Wussow . . . . . Clerk
Corey Steel . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

First District

Counties in District: Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice
Julie D. Smith	Tecumseh

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
George A. Thompson	Papillion
Michael A. Smith	Plattsmouth
Stefanie A. Martinez	Papillion
Nathan B. Cox	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
John A. Colborn	Lincoln
Jodi L. Nelson	Lincoln
Robert R. Otte	Lincoln
Andrew R. Jacobsen	Lincoln
Lori A. Maret	Lincoln
Susan I. Strong	Lincoln
Darla S. Ideus	Lincoln
Kevin R. McManaman	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Gary B. Randall	Omaha
J. Michael Coffey	Omaha
Peter C. Bataillon	Omaha
Gregory M. Schatz	Omaha
J Russell Derr	Omaha
James T. Gleason	Omaha
Thomas A. Otepka	Omaha
Marlon A. Polk	Omaha
W. Russell Bowie III	Omaha
Leigh Ann Retelsdorf	Omaha
Timothy P. Burns	Omaha
Duane C. Dougherty	Omaha
Kimberly Miller Pankonin	Omaha
Shelly R. Stratman	Omaha
Horacio J. Wheelock	Omaha
James M. Masteller	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Robert R. Steinke	Columbus
James C. Stecker	Seward
Rachel A. Daugherty	Aurora
Christina M. Marroquin	Wahoo

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
John E. Samson	Blair
Geoffrey C. Hall	Fremont
Bryan C. Meismer	Hartington

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
James G. Kube	Madison
Mark A. Johnson	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
Mark D. Kozisek	Ainsworth
Karin L. Noakes	St. Paul

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Mark J. Young	Grand Island
John H. Marsh	Kearney
Ryan C. Carson	Kearney
Andrew C. Butler	Grand Island

Tenth District

Counties in District: Adams, Franklin, Harlan, Kearney, Phelps, and Webster

Judges in District	*City*
Stephen R. Illingworth	Hastings
Terri S. Harder	Minden

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
James E. Doyle IV	Lexington
David W. Urbom	McCook
Richard A. Birch	North Platte
Michael E. Piccolo	North Platte

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
Leo P. Dobrovolny	Gering
Derek C. Weimer	Sidney
Travis P. O'Gorman	Alliance
Andrea D. Miller	Gering

JUDICIAL DISTRICTS AND COUNTY JUDGES

First District

Counties in District: Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Curtis L. Maschman	Falls City
Steven B. Timm	Beatrice
Linda A. Bauer	Fairbury

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
Robert C. Wester	Papillion
Todd J. Hutton	Papillion
PaTricia A. Freeman	Papillion
David J. Partsch	Nebraska City

Third District

Counties in District: Lancaster

Judges in District	*City*
Laurie J. Yardley	Lincoln
Timothy C. Phillips	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
Thomas E. Zimmerman	Lincoln
Rodney D. Reuter	Lincoln
Joseph E. Dalton	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey L. Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha
Stephanie S. Shearer	Omaha
Grant A. Forsberg	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Frank J. Skorupa	Columbus
Linda S. Caster Senff	Aurora
C. Jo Petersen	Seward
Stephen R.W. Twiss	Central City
Andrew R. Lange	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
Kurt T. Rager	Dakota City
Douglas L. Luebe	Hartington
Kenneth J. Vampola	Fremont
Francis W. Barron III	Blair

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
Donna F. Taylor	Madison
Ross A. Stoffer	Pierce
Michael L. Long	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
James J. Orr	Valentine
Tami K. Schendt	Broken Bow
Kale B. Burdick	O'Neill

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Gerald R. Jorgensen, Jr.	Kearney
Arthur S. Wetzel	Grand Island
John P. Rademacher	Kearney
Alfred E. Corey III	Grand Island

Tenth District

Counties in District: Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster

Judges in District	*City*
Michael P. Burns	Hastings
Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
Kent D. Turnbull	North Platte
Edward D. Steenburg	Ogallala
Anne M. Paine	McCook
Jeffrey M. Wightman	Lexington
Joel B. Jay	North Platte

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
James M. Worden	Gering
Randin R. Roland	Sidney
Russell W. Harford	Chadron
Kris D. Mickey	Gering
Paul G. Wess	Alliance

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

Judges	*City*
Christopher E. Kelly	Omaha
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha
Chad M. Brown	Omaha
Mary M. Z. Stevens	Omaha
Amy N. Schuchman	Omaha

Lancaster County

Judges	*City*
Linda S. Porter	Lincoln
Roger J. Heideman	Lincoln
Reggie L. Ryder	Lincoln
Elise M. W. White	Lincoln

Sarpy County

Judges	*City*
Lawrence D. Gendler	Papillion
Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	*City*
James R. Coe	Omaha
J. Michael Fitzgerald	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha
Julie A. Martin	Lincoln
Dirk V. Block	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 304

Nathanael Thomas Archuleta
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Brett Mitchell Bruneteau
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Nathaniel S. Dorste
Lucas John Elsbernd
John Patrick Farrell
Melissa Figueroa
Ashley Rae Fischer
John Arnvig Flaten
Alexandra Eryn Fleming
Donna Jo Fudge
David E. Fuxa
Michael Christian Gerhard
Lorie Ann Gerkey
Emily Victoria Grode
Elizabeth Cornelia Grotewohl
Clay Devin Haag
Kali Martine Hague
Joseph Daniel Hall
Leah Rae Hart
Rachael Yvonne Henderson
Jeremiah Charles Hollembeak
Camron Lee Hoorfar
Lincoln Jacob Korell
Ashley Taylor Kunz
Beth Levine
Sarah Lynn Lile
Drew Michael Mandl
Erin Marie Mitchell
Rosario L. Orozco Ramirez
Billie Taylor Orr
Michelle Esther Potts
Sydney Erica Richards
Eric Daniel Seegmiller
Kailey Jo Shively
Michael Small
Allyssa Jordan Wall
Leigha E. Wichelt
Anthony Jeffrey Wilburn
Anne Madelyn Wurth
Alexander Joseph Zajac

TABLE OF CASES REPORTED

A.D.; State v. 154
Amaya; State v. 36
Anderson; State v. 978
App. No. C-4960 of Poppe, In re 635
App. No. C-4973 of Skrdlant, In re 635
Archie; State v. 835
Argyrakis; State ex rel. Counsel for Dis. v. 396
Armitage; Bonness v. 747

BH Media Group, State ex rel. v. Frakes 780
BNSF Railway Co.; Lanham v. 124
Ball; Schaefer Shapiro v. 669
Barfield; State ex rel. Counsel for Dis. v. 79
Barnette; HBI, L.L.C. v. 457
Benjamin; Bierman v. 860
Benjamin v. Bierman 879
Benson; State v. 949
Berry; TransCanada Keystone Pipeline v. 493
Bierman; Benjamin v. 879
Bierman v. Benjamin 860
Blocher; TransCanada Keystone Pipeline v. 493
Bonness v. Armitage 747
Britt; State v. 363
Brown; Huff v. 648
Brown v. State 111

CHP 4 Farms; TransCanada Keystone Pipeline v. 493
C.M.; State v. 154
Carpenter; TransCanada Keystone Pipeline v. 493
Cedar, County of v. Thelen 351
Cedar Cty. Bd. of Adjustment; Hochstein v. 321
City of Falls City; DH-1, LLC v. 23
Cottonwood Ridge; TransCanada Keystone Pipeline v. 493
Counsel for Dis., State ex rel. v. Argyrakis 396
Counsel for Dis., State ex rel. v. Barfield 79
Counsel for Dis., State ex rel. v. Galter 108
Counsel for Dis., State ex rel. v. Hanson 566
Counsel for Dis., State ex rel. v. Nnaka 677
County of Cedar v. Thelen 351

DH-1, LLC v. City of Falls City 23
Degarmo; State v. 680
Dondlinger v. Nelson 894

TABLE OF CASES REPORTED

El-Kasaby; Reveiz v. 440
Estate of Silverman; Seldin v. 185

FTR Farms v. Rist Farm 708
Falls City, City of; DH-1, LLC v. 23
Ferrin; State v. 762
Fischer, Rounds & Assocs.; Merrick v. 230
Frakes; State ex rel. BH Media Group v. 780
Frakes; State ex rel. Lee Enters. v. 780
Frakes; State ex rel. Miller v. 780
Fredrickson; State v. 165

Galter; State ex rel. Counsel for Dis. v. 108
Galvan; State v. 513
Gomez; State v. 222
Great Northern Ins. Co. v. Transit Auth. of Omaha 609
Grutell; State v. 843
Guardianship of Suzette G., In re 428
Guzman; State v. 376

HBI, L.L.C. v. Barnette 457
Hanson, State ex rel. Counsel for Dis. v. 566
Hessler; State v. 451
Hochstein v. Cedar Cty. Bd. of Adjustment 321
Huff v. Brown 648

In re App. No. C-4960 of Poppe 635
In re App. No. C-4973 of Skrdlant 635
In re Guardianship of Suzette G. 428
In re Interest of Taeson D. 279

Jedlicka; State v. 52
Jennings; State v. 809
Jones v. Jones 615

Kelley; State v. 409
Krannawitter; State v. 66
Krutz; TransCanada Keystone Pipeline v. 493

Lang; State v. 726
Lanham v. BNSF Railway Co. 124
Lee Enters., State ex rel. v. Frakes 780
Lierman; State v. 289

Manganaro; TransCanada Keystone Pipeline v. 493
Maughan; TransCanada Keystone Pipeline v. 493
McCulley; State v. 139
Merrick v. Fischer, Rounds & Assocs. 230
Midwest Renewable Energy; Western Ethanol Co. v. 1
Miller, State ex rel. v. Frakes 780

TABLE OF CASES REPORTED

Montoya; State v. 581
Morrison; TransCanada Keystone Pipeline v. 493

Nelson; Dondlinger v. 894
Nnaka; State ex rel. Counsel for Dis. v. 677

Ozuna; Sabino v. 176

Parnell; State v. 932
Pope; State v. 912
Poppe, In re App. No. C-4960 of 635

Reefer Systems; Sellers v. 868
Reveiz v. El-Kasaby 440
Rist Farm; FTR Farms v. 708

Sabino v. Ozuna 176
Schaefer Shapiro v. Ball 669
Schroeder; State v. 527
Seldin v. Estate of Silverman 185
Seldin v. Seldin 185
Sellers v. Reefer Systems 868
Sierra; State v. 249
Silverman, Estate of; Seldin v. 185
Skrdlant, In re App. No. C-4973 of 635
Stabler; State v. 415
State; Brown v. 111
State ex rel. BH Media Group v. Frakes 780
State ex rel. Counsel for Dis. v. Argyrakis 396
State ex rel. Counsel for Dis. v. Barfield 79
State ex rel. Counsel for Dis. v. Galter 108
State ex rel. Counsel for Dis. v. Hanson 566
State ex rel. Counsel for Dis. v. Nnaka 677
State ex rel. Lee Enters. v. Frakes 780
State ex rel. Miller v. Frakes 780
State v. A.D. . . . . `154
State v. Amaya 36
State v. Anderson 978
State v. Archie 835
State v. Benson 949
State v. Britt 363
State v. C.M. 154
State v. Degarmo 680
State v. Ferrin 762
State v. Fredrickson 165
State v. Galvan 513
State v. Gomez 222
State v. Grutell 843
State v. Guzman 376
State v. Hessler 451

TABLE OF CASES REPORTED

State v. Jedlicka 52
State v. Jennings 809
State v. Kelley 409
State v. Krannawitter 66
State v. Lang 726
State v. Lierman 289
State v. McCulley 139
State v. Montoya 581
State v. Parnell 932
State v. Pope 912
State v. Schroeder 527
State v. Sierra 249
State v. Stabler 415
State v. Thelen 334
State v. Valdez 441
State v. Valentino 96
Stelling; TransCanada Keystone Pipeline v. 493
Suzette G., In re Guardianship of 428

Taeson D., In re Interest of 279
Tanderup; TransCanada Keystone Pipeline v. 493
Thelen; County of Cedar v. 351
Thelen; State v. 334
TransCanada Keystone Pipeline v. Berry 493
TransCanada Keystone Pipeline v. Blocher 493
TransCanada Keystone Pipeline v. CHP 4 Farms 493
TransCanada Keystone Pipeline v. Carpenter 493
TransCanada Keystone Pipeline v. Cottonwood Ridge 493
TransCanada Keystone Pipeline v. Krutz 493
TransCanada Keystone Pipeline v. Manganaro 493
TransCanada Keystone Pipeline v. Maughan 493
TransCanada Keystone Pipeline v. Morrison 493
TransCanada Keystone Pipeline v. Stelling 493
TransCanada Keystone Pipeline v. Tanderup 493
TransCanada Keystone Pipeline v. Tree Corners Farm 493
Transit Auth. of Omaha; Great Northern Ins. Co. v. 609
Tree Corners Farm; TransCanada Keystone Pipeline v. 493

Valdez; State v. 441
Valentino; State v. 96

Western Ethanol Co. v. Midwest Renewable Energy 1
Willkie Farr; Yeransian v. 693

Yeransian v. Willkie Farr 693

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-19-065: **Mansuetta v. Mansuetta**. Affirmed as modified. Papik, J.

No. S-19-529: **Edney v. Monthey**. Affirmed. Cassel, J. Funke, J., participating on briefs.

No. S-19-628: **Millard Gutter Co. v. Church Mut. Ins**. Affirmed. Miller-Lerman, J. Stacy, J., concurring. Funke, J., joins in this concurrence.

No. S-19-722: **Sides v. Taylor**. Affirmed. Stacy, J.

No. S-19-893: **In re Estate of Boettcher**. Affirmed. Heavican, C.J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-19-317: **State v. Pathot**. Appeal dismissed as moot. See, § 2-107(A)(2); *State v. Rubek*, 220 Neb. 537, 371 N.W.2d 115 (1985); *Callies v. State*, 157 Neb. 640, 61 N.W.2d 370 (1953); *Van Buren v. State*, 65 Neb. 223, 91 N.W. 201 (1902).

No. S-19-400: **Whelan v. Freeman**. Affirmed. See, § 2-107(A)(1); *St. John v. Gering Public Schools*, 302 Neb. 269, 923 N.W.2d 68 (2019); *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007).

No. S-19-554: **State v. Cotton**. Appeal dismissed for failure to file briefs. See §§ 2-108 and 2-110.

No. S-19-681: **Moser v. Lancaster Cty. Bd. of Equal**. Affirmed. See, § 2-107(A)(1); *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

No. S-19-809: **State v. Lintz**. Motion of appellee for summary affirmance granted; judgment affirmed. See § 2-107(B)(2).

No. S-19-920: **State on behalf of Bryan R. v. Maria E**. Affirmed. See, § 2-107(A)(1)(d); *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019); *Dooling v. Dooling*, 303 Neb. 494, 930 N.W.2d 481 (2019).

No. S-19-988: **State v. Watt**. By order of the court, appeal dismissed for failure to file briefs.

No. S-19-1002: **State v. Saylor**. Stipulation allowed; appeal dismissed.

No. S-19-1097: **State v. Abdulkadir**. Motion of appellee for summary dismissal granted; appeal dismissed. See § 2-107(B)(1).

No. S-19-1225: **State v. Kidder**. Motion of appellee for summary dismissal for lack of jurisdiction sustained; appeal dismissed.

No. S-20-019: **State v. Kellogg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-13-783: **State v. Mumin**. Petition of appellant for further review denied on May 18, 2020, as untimely filed.

No. A-18-033: **In re Warner Family Trust**. Petition of appellant for further review denied on February 19, 2020.

No. A-18-428: **Schnackel v. Schnackel**, 27 Neb. App. 789 (2019). Petition of appellant for further review denied on May 27, 2020.

No. A-18-496: **Koos Enterprises v. Bonnell**. Petition of appellant for further review denied on March 12, 2020.

No. A-18-761: **Kelly v. Cutch, Inc.**, 27 Neb. App. 921 (2019). Petition of appellant for further review denied on March 9, 2020.

No. A-18-802: **State v. Podrazo**. Petition of appellant for further review denied on February 10, 2020.

No. S-18-827: **Russell v. Franklin County**, 27 Neb. App. 684 (2019). Petition of appellants for further review sustained on February 19, 2020.

No. A-18-1042: **Reinmuth v. Reinmuth**. Petition of appellant for further review denied on February 21, 2020.

No. A-18-1109: **Walz v. Harvey**, 28 Neb. App. 7 (2020). Petition of appellant for further review denied on March 24, 2020.

Nos. A-18-1183 through A-18-1185: **In re Interest of Steven S. et al.**, 27 Neb. App. 831 (2019). Petitions of appellant for further review denied on February 6, 2020.

No. A-18-1208: **State v. Childs**. Petition of appellant pro se for further review denied on February 28, 2020, as untimely filed. See § 2-102(F)(1).

No. A-18-1212: **Bauer v. Genesis Healthcare Group**, 27 Neb. App. 904 (2019). Petition of appellant for further review denied on February 19, 2020.

No. A-19-034: **Holen v. Holen**. Petition of appellant for further review denied on April 2, 2020.

No. S-19-082: **Sellers v. Reefer Systems**. Petition of appellee for further review sustained on February 12, 2020.

No. A-19-099: **State on behalf of Waters v. Bentley**, 27 Neb. App. 945 (2020). Petition of appellee for further review denied on March 17, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-19-105: **Donahoe v. Donahoe**. Petition of appellant for further review denied on February 19, 2020, as prematurely filed. See § 2-102(F)(1).

No. A-19-105: **Donahoe v. Donahoe**. Petition of appellant for further review denied on April 7, 2020.

No. A-19-109: **State v. Brown**. Petition of appellant for further review denied on March 12, 2020.

Nos. A-19-144 through A-19-146: **State v. Olivera**. Petitions of appellant for further review denied on April 15, 2020.

No. A-19-162: **Bel Fury Investments Group v. Gonzalez**. Petition of appellee for further review denied on March 10, 2020.

No. A-19-178: **In re Interest of John J. et al**. Petition of appellant for further review denied on February 6, 2020.

No. A-19-188: **City of Ord v. Koch**. Petition of appellant for further review denied on April 15, 2020.

No. A-19-208: **State v. Aguirre**. Petition of appellant for further review denied on March 27, 2020.

No. A-19-211: **Infante v. City of Hastings**. Petition of appellant for further review denied on April 13, 2020.

No. A-19-237: **State v. Bixby**. Petition of appellant for further review denied on April 29, 2020.

No. A-19-258: **State v. Erpelding**. Petition of appellant for further review denied on May 4, 2020.

No. A-19-259: **State v. Sieckmeyer**. Petition of appellant for further review denied on April 8, 2020.

No. A-19-264: **Crow v. Chelli**. Petition of appellant for further review denied on March 25, 2020, as untimely.

No. A-19-280: **Secord v. Kracht**. Petition of appellant for further review denied on March 24, 2020.

No. A-19-283: **Grayek v. Anguiano**. Petition of appellee for further review denied on February 12, 2020.

No. A-19-296: **Wecker v. Branting**. Petition of appellant for further review denied on April 20, 2020.

No. S-19-300: **State v. Briggs**, 28 Neb. App. 65 (2020). Petition of appellant for further review sustained on May 6, 2020.

No. S-19-307: **State v. Street**. Petition of appellant for further review sustained on March 11, 2020.

No. S-19-343: **Higgins v. Currier**. Petition of appellant for further review sustained on May 11, 2020.

No. A-19-367: **In re Interest of M.J**. Petition of appellant for further review denied on February 14, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-19-371: **State v. Stapleton**. Petition of appellant for further review denied on May 4, 2020.

No. A-19-373: **State v. Boyd**. Petition of appellant for further review denied on March 11, 2020.

No. A-19-387: **Jackson v. Pour**. Petition of appellant for further review denied on May 19, 2020.

No. A-19-409: **Martinez v. International Paper Co.**, 27 Neb. App. 933 (2020). Petition of appellants for further review denied on March 11, 2020.

No. A-19-431: **Coughlin v. Graf**. Petition of appellant for further review denied on May 11, 2020.

No. A-19-442: **In re Interest of Blessing S. et al**. Petition of appellant for further review denied on March 2, 2020.

No. A-19-449: **Sawo v. Battle Creek Mut. Ins. Co**. Petition of appellant for further review denied on March 25, 2020, as premature. See § 2-102(F)(1).

No. A-19-461: **State v. Terry**. Petition of appellant for further review denied on May 5, 2020.

No. A-19-464: **Applied Underwriters v. Doyle Signs**. Petition of appellant for further review denied on February 26, 2020.

No. S-19-482: **Frans v. Waldinger Corp**. Petition of appellee for further review sustained on April 14, 2020.

No. A-19-522: **Jones v. Dawson**. Petition of appellant for further review denied on May 19, 2020.

No. A-19-565: **State v. Samayoa**. Petition of appellant for further review denied on May 20, 2020.

No. A-19-593: **State v. Ortega**. Petition of appellant for further review denied on May 26, 2020.

No. A-19-631: **State v. Saienko**. Petition of appellant pro se for further review denied on March 12, 2020.

No. A-19-661: **De Leon v. Chavez**. Petition of appellant for further review denied on February 12, 2020.

No. A-19-663: **Mumin v. Hawk**. Petition of appellant for further review denied on March 19, 2020.

Nos. A-19-670, A-19-671: **State v. Gunnels**. Petitions of appellant for further review denied on February 21, 2020.

No. A-19-708: **State v. Clark**. Petition of appellant for further review denied on March 17, 2020.

No. A-19-769: **State v. Westerholm**. Petition of appellant for further review denied on February 21, 2020.

Nos. A-19-770 through A-19-772: **State v. Jones**. Petitions of appellant for further review denied on March 2, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-19-785: **State v. Bartlett**. Petition of appellant for further review denied on March 12, 2020.

No. A-19-798: **Shear Country v. Koch**. Petition of appellant for further review denied on March 19, 2020.

No. A-19-864: **Bartusek v. Piano Building Managing Member**. Petition of appellants for further review denied on April 7, 2020.

No. A-19-866: **In re Interest of Cherish R. & Charlize R**. Petition of appellant for further review denied on May 4, 2020.

No. A-19-904: **State v. Harlan**. Petition of appellant for further review denied on February 28, 2020.

No. A-19-925: **State v. Yanga**. Petition of appellant for further review denied on April 29, 2020.

Nos. A-19-979, A-19-980: **State v. Doerschlag**. Petitions of appellant for further review denied on May 22, 2020.

No. A-19-984: **Shear Country v. Koch**. Petition of appellant for further review denied on March 25, 2020.

No. A-19-1004: **State v. Sharron**. Petition of appellant for further review denied on April 13, 2020.

No. A-19-1056: **In re Interest of Hope M. et al**. Petition of appellant for further review denied on February 6, 2020.

No. A-19-1149: **Sing v. Department of Corr. Servs**. Petition of appellant pro se for further review denied on May 19, 2020.

No. A-19-1152: **Edwards v. Frakes**. Petition of appellant for further review denied on May 5, 2020.

No. A-19-1212: **State v. Shank**. Petition of appellant for further review denied on May 20, 2020.

No. A-19-1220: **State v. McNeil**. Petition of appellant for further review denied on May 11, 2020, as premature.

No. A-20-033: **State v. Castonguay**. Petition of appellant for further review denied on April 16, 2020.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Western Ethanol Company, LLC, appellee, v. Midwest Renewable Energy, LLC, appellant.

938 N.W.2d 329

Filed February 14, 2020. No. S-18-1192.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
4. **Final Orders: Appeal and Error.** The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
5. ____: ____. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
6. **Contracts: Assignments.** An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to the rules of contract construction.
7. **Contracts: Parties.** Only a party (actual or alleged) to a contract can challenge its validity.

8. ____: ____. Parties can recover as third-party beneficiaries of a contract only if it appears that the rights and interest of the third parties were contemplated and that provision was being made for them.
9. **Assignments: Debtors and Creditors.** If the assignment is effective to pass legal title, the debtor cannot interpose defects or objections which merely render the assignment voidable at the election of the assignor or those standing in his or her shoes. However, a debtor may assert as a defense any matter which renders the assignment absolutely invalid, ineffective, or void.
10. **Assignments: Actions.** An assignee of a chose in action assigned for the purpose of collection is the real party in interest and authorized to maintain an action thereon.
11. **Assignments: Actions: Parties: Standing: Jurisdiction: Proof.** An assignee can establish standing to bring an action in its own name, and thus show the court had subject matter jurisdiction, if it proves by a preponderance of the evidence the existence of a written assignment under Neb. Rev. Stat. § 25-304 (Reissue 2016).
12. **Evidence: Records: Pleadings: Appeal and Error.** An appellate record typically contains the bill of exceptions, used to present factual evidence to an appellate court, and the transcript, used to present pleadings and orders of the case to the appellate court.
13. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
14. **Actions: Judicial Notice: Appeal and Error.** In interwoven and interdependent cases, an appellate court may examine its own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties.
15. **Actions: Judicial Notice: Records: Appeal and Error.** An appellate court may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.
16. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
17. **Jurisdiction.** While parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties, such does not prevent a party from conclusively admitting the truth of an underlying fact required to establish subject matter jurisdiction by judicial admission.

18. **Estoppel.** The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
19. **Estoppel: Intent.** Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.
20. **Estoppel.** Whether judicial estoppel is applicable turns on whether the court has accepted inconsistent positions from the plaintiff.
21. ____. Judicial acceptance does not require that a party prevail on the merits, but only that the first court adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.
22. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the District Court for Lincoln County: Richard A. Birch, Judge. Affirmed.

Dean J. Jungers for appellant.

William J. Troshynski, of Brouillette, Dugan & Troshynski, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

The judgment debtor, Midwest Renewable Energy, LLC (Midwest Renewable), appeals from the denial of its motion to quash execution of a judgment. Midwest Renewable argued to the district court that the original judgment creditor, Western Ethanol Company, LLC (Western Ethanol), had not assigned the judgment to Douglas B. Vind, the managing member of Western Ethanol who requested execution after Western Ethanol dissolved. The district court disagreed and found that the judgment had been assigned to Vind. Finding no merit in Midwest Renewable's appeal, we affirm the decision of the district court.

I. BACKGROUND

A judgment against Midwest Renewable was transcribed in Nebraska in 2010. This is the second appeal brought by Midwest Renewable disputing the ownership of that judgment. In its first appeal,[1] Midwest Renewable argued that Western Ethanol had no interest in the judgment because the judgment had been assigned to Vind. Midwest Renewable argues in the present appeal that there was no valid assignment to Vind. The following background describes the two different cases, which involve the same judgment, and the circumstances which led Midwest Renewable to assert contradictory positions when it filed appeals with this court.

Western Ethanol was a limited liability company formed under Nevada law and registered in California. In September 2010, Western Ethanol obtained a judgment against Midwest Renewable in California for attorney fees in the amount of $30,066.59, plus interest. In November 2010, pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587.01 to 25-1587.09 (Reissue 2016), Western Ethanol filed an action in Nebraska and transcribed the California judgment. Western Ethanol then filed a writ of execution on the judgment and attempted to execute upon the judgment multiple times to no avail. In 2013, Western Ethanol dissolved and distributed its assets to its members.

In September 2014, Midwest Renewable filed a quiet title action against Western Ethanol, and other entities, which claimed an interest in Midwest Renewable's ethanol manufacturing facility located in Lincoln County, Nebraska. When Midwest Renewable moved for partial summary judgment against Western Ethanol, an affidavit executed by Vind was entered into evidence which alleged that Western Ethanol had transferred the California judgment to him. There was no assignment of judgment in the record, and Vind had not been made a party to the litigation. The district court overruled the

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[1] See *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

motion for partial summary judgment. Midwest Renewable settled with the other parties, and the matter proceeded to trial against Western Ethanol as the only remaining defendant. Following trial, the court found that Western Ethanol had transferred its interest to Vind and that the judgment lien was valid and subsisting. Thus, the court dismissed the quiet title action against Western Ethanol.

Midwest Renewable appealed to this court and argued that the district court erred by failing to quiet Western Ethanol's claim. Midwest Renewable argued that "Western Ethanol has no interest in the judgment because it transferred all of its assets, including the judgment, to Vind and its other members on or before December 31, 2013."[2]

In our opinion disposing of that appeal, issued in March 2017, we concluded that the judgment against Midwest Renewable was assignable and that "if Midwest Renewable is correct in arguing that Western Ethanol's judgment was assigned, then . . . Vind would be the only party capable of enforcing or defending the judgment and judgment lien against Midwest Renewable."[3] We determined that Vind was an indispensable party; that the court erred in failing to make Vind a party to the action before rendering a decision; and that without Vind's presence, the court lacked subject matter jurisdiction to make a determination as to the owner of the judgment and the judgment lien. We vacated the district court's decision with direction to order Vind be named a party to the action.

Following remand in the quiet title action, Midwest Renewable unsuccessfully attempted to personally serve Vind with a summons. The court then permitted service by publication, which Midwest Renewable completed. Vind filed an answer, and Midwest Renewable served Vind with discovery requests. We have no further information in our record regarding the status of the quiet title action.

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[2] *Id*. at 86, 894 N.W.2d at 234.

[3] *Id*. at 88, 894 N.W.2d at 235.

In June 2017, in the present registration and enforcement of a foreign judgment case, Western Ethanol filed an "Acknowledgment of Assignment of Foreign Judgment." The document was signed by Vind as managing member and trustee on behalf of Western Ethanol. It stated, "PLEASE TAKE NOTICE that [Western Ethanol] does hereby acknowledge assignment of all interest, right and title to the foreign judgment entered against [Midwest Renewable]." Western Ethanol then filed an amended acknowledgment of assignment which clarified that the judgment had been assigned to Vind.

Without filing a formal pleading or motion to enter the case, Vind, as assignee, filed a praecipe for writ of execution. The praecipe stated that based on the amount of the judgment plus interest, Midwest Renewable owed Vind $51,156.64. Vind requested execution on Midwest Renewable's real estate. The clerk of court issued a writ of execution in conformance with the praecipe.

Midwest Renewable filed a motion to quash the execution. The motion argued that (1) no assignment of the judgment to Vind had been recorded with the court, (2) any assignment of the judgment was improper because Western Ethanol had dissolved, (3) Vind lacked authority to enforce the judgment, and (4) the validity of the judgment was under litigation in the quiet title action.

At the hearing on the motion to quash, Vind's counsel appeared, without objection from Midwest Renewable, and argued against the motion. Vind's counsel argued that the acknowledgments of assignment provide notice of the assignment to Midwest Renewable and the public.

After reviewing evidence and the parties' briefs, the court entered an order finding that the amended acknowledgment of assignment was sufficient to establish that Vind was the successor in interest to the foreign judgment. The court further found that the judgment was not dormant, and it overruled the motion to quash. Midwest Renewable filed a motion to alter or amend which asserted that Vind lacked standing and is not

the real party in interest, requesting a hearing pursuant to our holding in *Jacobs Engr. Group v. ConAgra Foods*.[4] Following a hearing, the court found that Vind is the real party in interest and overruled the motion.

Midwest Renewable appealed, and Vind appeared as appellee. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this State.[5]

II. ASSIGNMENTS OF ERROR

Midwest Renewable assigns, restated, that the district court erred in (1) finding that Vind owns the judgment to be executed, (2) finding that Vind had properly been made a party to the case, and (3) overruling the motion to quash.

III. STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.[6] Other standards of review are articulated in our analysis of the issues below.

IV. ANALYSIS

1. Appellate Jurisdiction

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[7] The threshold

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[4] *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

[5] See Neb. Rev. Stat. § 24-1106 (Cum. Supp. 2018).

[6] *Jacobs Engr. Group, supra* note 4.

[7] *Webb v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 810, 920 N.W.2d 268 (2018).

issue is whether we have appellate jurisdiction over Midwest Renewable's appeal.

[3] In Nebraska, for an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[8] Here, Western Ethanol transcribed the California judgment and allegedly assigned the judgment to Vind, who filed a praecipe for writ of execution. Midwest Renewable filed a motion to quash the execution which was denied by the district court. Midwest Renewable then timely filed a motion to alter or amend, which was denied by the district court. Midwest Renewable then timely appealed from the district court's order denying the motion to alter or amend. The existence of appellate jurisdiction in this case therefore depends on whether Midwest Renewable has appealed from a final order.

A number of courts have held that an order refusing to quash an execution is an appealable order.[9] Nebraska appellate courts have previously exercised jurisdiction over appeals from orders overruling a motion to quash execution.[10]

[4,5] The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[11] A substantial right under § 25-1902 is an essential legal right.[12] A substantial right is affected if an order affects

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[8] *Id.*

[9] *In re Marriage of DeLotel*, 73 Cal. App. 3d 21, 140 Cal. Rptr. 553 (1977); *C. E. McCune Co. v. Warndorf*, 55 Ohio App. 279, 9 N.E.2d 709 (1936); *Farmers Bank of North Henderson v. Stenfeldt*, 258 Ill. App. 428 (1930); *Opening of Parkway*, 267 Pa. 219, 110 A. 144 (1920).

[10] *Chitwood Packing Co. v. Warner*, 138 Neb. 800, 295 N.W. 882 (1941); *Lincoln Lumber Co. v. Elston*, 1 Neb. App. 741, 511 N.W.2d 162 (1993).

[11] See Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[12] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.[13] Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend.[14]

In *Cattle Nat. Bank & Trust Co. v. Watson*,[15] we concluded that an order overruling objections to execution is classified within the third type of final order, a summary application in an action after judgment is rendered. In that case, the trial court issued orders overruling the debtor's objections to execution and garnishments. We found that the orders affected the debtor's substantial rights, because they eliminated the debtor's objections to the execution and garnishments, and that the execution and garnishments authorized the seizure of property or money which would otherwise have remained in the debtor's ownership and control. Thus, we concluded that the debtor had appealed from final orders and that there was jurisdiction over the appeal.

However, in another case in the context of garnishment proceedings under Neb. Rev. Stat. § 25-1011 (Reissue 2016), we determined that an order overruling a debtor's objections to garnishments was not a final order, because the order did not include a determination that the creditor was entitled to the funds.[16] The order appealed from did not authorize execution of a garnishment, did not affect a substantial right, and was not a final, appealable order.[17] Therefore, the existence of appellate jurisdiction turns on whether the order appealed from here authorized seizure of Midwest Renewable's property and affected a substantial right of Midwest Renewable.

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[13] *Id.*

[14] *Id.*

[15] *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

[16] *Shawn E. on behalf of Grace E. v. Diane S.*, 300 Neb. 289, 912 N.W.2d 920 (2018).

[17] *Id.*

In overruling Midwest Renewable's motion to quash, the district court concluded that the foreign judgment had been validly registered in Nebraska and is a lien upon Midwest Renewable's real estate. In addition, the court found that the judgment is not dormant and that Vind holds the interest in the judgment. The court reaffirmed its ruling in denying Midwest Renewable's motion to alter or amend. Therefore, consistent with our decision in *Cattle Nat. Bank & Trust Co.*, the court's orders declining to quash execution affected a substantial right because the execution authorized the seizure of Midwest Renewable's property.[18] As a result, we have appellate jurisdiction in this matter.

2. Merits

Midwest Renewable argues that the judgment has not been assigned to Vind and that the district court lacked jurisdiction over Vind's attempt to execute on the judgment. Midwest Renewable asserts that "[t]here is a substantial question as to the ownership of the judgment and the judgment lien herein"[19] and that there is "a conflict in the evidence presented [as to] when and if there was a valid assignment made."[20] Midwest Renewable contends that without an assignment, Vind is not the real party in interest. In response, Vind contends that pursuant to *Marcuzzo v. Bank of the West*,[21] Midwest Renewable lacks standing to challenge the assignment from Western Ethanol to Vind.

We conclude that Midwest Renewable has standing to challenge the assignment, that Vind is the real party in interest, and that Midwest Renewable's assignments of error lack merit.

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[18] See *Cattle Nat. Bank & Trust Co., supra* note 15.

[19] Brief for appellant at 12.

[20] *Id*. at 14.

[21] *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

(a) Midwest Renewable Has Standing

Vind argues that Midwest Renewable lacks standing to challenge the validity of the assignment of the foreign judgment, because Midwest Renewable is not a party to the assignment and cannot articulate an injury caused by the assignment. Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue.[22] To have standing to sue, a party must have some legal or equitable right, title, or interest in the subject matter of the controversy.[23] Standing requires that a party show his or her claim is premised on his or her own legal rights as opposed to rights of a third party.[24]

[6-8] An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to the rules of contract construction.[25] Nebraska law states that only a party (actual or alleged) to a contract can challenge its validity.[26] Parties can recover as third-party beneficiaries of a contract only if it appears that the rights and interest of the third parties were contemplated and that provision was being made for them.[27]

In *Marcuzzo*, the plaintiffs defaulted on their mortgage loan and their home was foreclosed and sold.[28] The plaintiffs filed suit alleging that the assignment of their mortgage was defective because there were "discrepancies and irregularities in the paperwork of the assignment."[29] In analyzing the plaintiffs'

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[22] *Id.*

[23] See *id.*

[24] See *id.*

[25] *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64 (2003); 6 Am. Jur. 2d *Assignments* § 1 (2018).

[26] *Marcuzzo, supra* note 21, citing *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[27] *Id.*, citing *Palmer v. Lakeside Wellness Ctr.*, 281 Neb. 780, 798 N.W.2d 845 (2011).

[28] *Marcuzzo, supra* note 21.

[29] *Id.* at 818, 862 N.W.2d at 289.

claims on appeal, we applied the principle followed by a majority of courts that borrowers do not have standing to challenge an assignment of their mortgage, because they are not a party to the assignment contract.[30] We held that a borrower who is not a party to a mortgage assignment or a third-party beneficiary of the assignment lacks standing to challenge the assignment. We explained that if the assignment were in fact irregular, that would be an issue between the assignor and assignee.[31]

However, we recognized an exception to this rule. We indicated that a borrower could have standing to challenge the assignment of his or her mortgage where the borrower can show actual prejudice by the improper assignment, an injury that is directly traceable to the assignment, such as being at risk for paying the same debt twice, or by otherwise showing that the assignment is invalid, ineffective, or void.[32]

[9] We therefore limited the standing rule in *Marcuzzo* based on the type of challenge raised to the assignment.[33] The plaintiffs had alleged the assignment was ineffective because of deficiencies in the assignment paperwork. We explained that the plaintiffs had failed to allege an injury directly traceable to the assignment, because even if the plaintiffs' argument were correct that would make the assignment merely voidable at the election of a party to the assignment, but the assignment would otherwise be effective to pass legal title. If the assignment is effective to pass legal title, the debtor cannot interpose defects or objections which merely render the assignment voidable at the election of the assignor or those standing in his or her shoes.[34] However, a debtor may assert as a defense any

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[30] See *id*. (citing cases).

[31] *Id*., citing *Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, 399 Fed. Appx. 97 (6th Cir. 2010).

[32] *Id*., citing *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282 (1st Cir. 2013).

[33] See *Marcuzzo, supra* note 21.

[34] 6A C.J.S. *Assignments* § 133 (2016).

matter which renders the assignment absolutely invalid, ineffective, or void.[35]

In the present matter, the assignment does not appear in the record. Midwest Renewable has made various assertions regarding the assignment and generally argues that no valid assignment was made. As we will later illustrate, Midwest Renewable has taken conflicting positions with regard to the assignment and its effect. However, for purposes of standing, Midwest Renewable's challenge to the assignment here is distinct from the challenge at issue in *Marcuzzo*.[36] If Midwest Renewable were correct that there was no valid assignment, then legal title would not have passed to Vind and Midwest Renewable would be directly injured by becoming obligated to pay a debt to a party without a legal right to collect the foreign judgment. Midwest Renewable has standing to argue the lack of a valid assignment to Vind.

(b) Vind Owns Judgment and Judgment Lien

We must determine whether Vind is the real party in interest for purposes of enforcing the judgment against Midwest Renewable. Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[37] The stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim.[38] If a motion challenging standing is made at the pleadings stage, it is considered a "facial challenge" and a court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing.[39] But if the challenge to standing, and

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[35] *Id.*

[36] See *Marcuzzo, supra* note 21.

[37] *Jacobs Engr. Group, supra* note 4.

[38] *Id.*

[39] See *id.*

thus the court's subject matter jurisdiction, is raised after the pleadings stage and the court holds an evidentiary hearing and reviews evidence outside the pleadings, it is considered a "factual challenge" and the party opposing the challenge must offer evidence to support its burden of establishing subject matter jurisdiction.[40]

Where the trial court's decision on a question of subject matter jurisdiction is based on a factual challenge, the court's factual findings are reviewed under the clearly erroneous standard.[41] But aside from any factual findings, the trial court's ruling on subject matter jurisdiction is reviewed de novo, because it presents a question of law.[42]

Here, the district court received evidence on the issue of Vind's standing to execute the California judgment. We review the court's factual findings on this jurisdictional issue for clear error, and we review de novo the ultimate question of Vind's standing.

[10] Vind claims to be the assignee of a judgment against Midwest Renewable. An assignment is a transfer vesting in the assignee all of the assignor's rights in the property which is the subject of the assignment.[43] The assignee of a chose in action acquires no greater rights than those of the assignor, and takes it subject to all the defenses existent at the time.[44] A judgment, as a chose in action, is assignable.[45] A judgment may be assigned to someone who was not a party to the initial action, and the assignee receives the right to enforce such a judgment.[46] A judgment creditor may assign his rights in a

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[40] See *id*.

[41] See *id*.

[42] See *id*.

[43] *Midwest Renewable Energy, supra* note 1.

[44] *Id*.

[45] *Id*. See 46 Am. Jur. 2d *Judgments* § 410 (2017).

[46] *Gilroy v. Lowe*, 626 P.2d 469 (Utah 1981).

judgment for attorney fees.[47] An assignee of a chose in action assigned for the purpose of collection is the real party in interest and authorized to maintain an action thereon.[48]

[11] Nebraska's real party in interest statute provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ."[49] Neb. Rev. Stat. § 25-304 (Reissue 2016) states in relevant part: "Assignees of choses in action assigned for the purpose of collection may sue on any claim assigned in writing." Neb. Rev. Stat. § 25-302 (Reissue 2016) states: "The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor." Recently, in *Hawley v. Skradski*,[50] we held that an assignee can establish standing to bring an action in its own name, and thus show the court had subject matter jurisdiction, if it proves by a preponderance of the evidence the existence of a written assignment under § 25-304. Under this rule, Vind can establish that he is the real party in interest and has standing to execute the judgment if he can prove by a preponderance of the evidence the existence of a written assignment of the California judgment.

Here, the bill of exceptions shows that the only exhibits received into evidence are a copy of the California judgment and copies of unanswered discovery requests and returns of service from the quiet title action. The court took judicial notice of its case file and the fact that no written assignment appeared in the record. The court found that the amended acknowledgment of assignment of the foreign judgment was sufficient proof of Vind's interest. However, the acknowledgment and amended acknowledgment of assignment appear in the transcript and not in the bill of exceptions.

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[47] See *Boarman v. Boarman*, 210 W. Va. 155, 556 S.E.2d 800 (2001).

[48] See *Archer v. Musick*, 147 Neb. 1018, 25 N.W.2d 908 (1947).

[49] Neb. Rev. Stat. § 25-301 (Reissue 2016).

[50] *Hawley v. Skradski*, 304 Neb. 488, 935 N.W.2d 212 (2019).

[12,13] An appellate record typically contains the bill of exceptions, used to present factual evidence to an appellate court, and the transcript, used to present pleadings and orders of the case to the appellate court.[51] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[52]

The only evidence recited in the court's decision is the amended acknowledgment of assignment, which states that all interest, right, and title to the California judgment has been assigned to Vind. Because the acknowledgments of assignment do not appear in the bill of exceptions, we cannot consider them as evidence. None of the evidence contained in the bill of exceptions shows the existence of a written assignment. However, the fact that the bill of exceptions lacks evidence to support the court's decision is not dispositive in this case. Under the circumstances presented here, we must take judicial notice of facts admitted by Midwest Renewable in the prior appeal which obviate the need for evidence of a written assignment to Vind.

[14,15] Neb. Rev. Stat. § 27-201(2)(b) (Reissue 2016) provides that judicial notice may be taken of any fact not subject to reasonable dispute, when such fact is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The *Midwest Renewable Energy* opinion[53] is a source of which the accuracy cannot reasonably be questioned.[54] In interwoven and interdependent cases, we may examine our own records and take judicial notice of the proceedings and judgment in a former action involving one of

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[51] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

[52] *Id.*

[53] See *Midwest Renewable Energy, supra* note 1.

[54] See, e.g., *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

the parties.[55] We have further held that we may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.[56]

In our opinion in the previous appeal, we referred to the fact that both Western Ethanol's articles of dissolution in Nevada and its certificate of cancellation in California attested that it had distributed all of its assets to its members.[57] In that appeal, the statement of facts section of Midwest Renewable's brief of appellant referred to the affidavit filed by Vind which indicated that, as the result of Western Ethanol's dissolution, Vind received the asset of the judgment against Midwest Renewable. Midwest Renewable's brief stated Vind's affidavit established that the judgment against Midwest Renewable had been transferred to Vind and that he was then the interested party. Western Ethanol's brief of appellee stated in its statement of facts that Vind had received the judgment against Midwest Renewable. In its reply brief, Midwest Renewable accepted the statement of facts and explained that Vind had received the judgment prior to December 31, 2013, the date of Western Ethanol's dissolution.

[16] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.[58] Similar to a stipulation, judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.[59] Additionally, an admission does not extend

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[55] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[56] *Id.*

[57] See *Midwest Renewable Energy, supra* note 1.

[58] *In re Estate of Radford, supra* note 51.

[59] *Id.*

beyond the intendment of the admission as clearly disclosed by its context.[60]

[17] Here, to support its argument that Western Ethanol's claim should be quieted, Midwest Renewable clearly, deliberately, and unequivocally declared that the judgment was validly assigned to Vind. Midwest Renewable asserted that the judgment was assigned solely to Vind and prior to Western Ethanol's dissolution. These admissions obviate the need for evidence of a written assignment in the present matter and defeat each of the arguments raised by Midwest Renewable in its challenge to Vind's standing. While parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties, such does not prevent a party from conclusively admitting the truth of an underlying fact required to establish subject matter jurisdiction by judicial admission.[61]

For the sake of completeness, to the extent that Midwest Renewable may contend that its admissions lack clarity or were made unintentionally, Midwest Renewable is estopped from asserting a position that is inconsistent from the position that it previously advocated before this court.

[18,19] The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[62] Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.[63] This doctrine, however, is to be applied with caution so as to avoid

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[60] *Id.*

[61] *Jacobs Engr. Group, supra* note 4.

[62] *Hike v. State*, 297 Neb. 212, 899 N.W.2d 614 (2017).

[63] *Id.*

impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.[64] We have held that bad faith or an actual intent to mislead on the part of the party asserting inconsistent positions must be demonstrated before the judicial estoppel doctrine may be invoked.[65]

[20,21] Whether judicial estoppel is applicable turns on whether the court has accepted inconsistent positions from the plaintiff.[66] Judicial acceptance does not require that a party prevail on the merits, but only that the first court adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.[67] In the prior appeal, we accepted Midwest Renewable's position to the extent that we were persuaded that Vind qualified as an indispensable party. We did not adopt Midwest Renewable's position that Vind is the real party in interest; we ordered the district court to make that determination. But we credited Midwest Renewable's position on the factual issue of Vind's ownership interest, which was supported by Vind's affidavit. We found that there was a question in the case as to the owner of the judgment and judgment lien and that the district court "could not make a determination as to the owner of the judgment and the judgment lien without affecting Vind's ownership rights."[68] Midwest Renewable was advantaged by having this court accept its factual position that the judgment had been assigned to Vind, because we vacated a judgment that had been entered against Midwest Renewable and remanded the cause for further proceedings, which gave Midwest Renewable another

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[64] *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015).

[65] *Id.*

[66] *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009).

[67] *Id.*, citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982).

[68] *Midwest Renewable Energy, supra* note 1, 296 Neb. at 92, 894 N.W.2d at 237.

opportunity to quiet Western Ethanol's claim. As such, the requirement of judicial acceptance of a prior inconsistent position for purposes of the doctrine of judicial estoppel is met here.

We find no evidence that Midwest Renewable acted in bad faith. Midwest Renewable made efforts to obtain a copy of the assignment and stated at oral argument before this court that it did not know for sure who owned the judgment. However, as demonstrated above, Midwest Renewable's position in the quiet title appeal went further than that by affirmatively declaring that Vind owned the judgment.

Midwest Renewable's self-contradictory approach is harmful to the judicial process. In its two appeals, Midwest Renewable has requested relief from this court while taking opposite sides of the same factual issue. To permit Midwest Renewable to argue the lack of evidence of a written assignment in this case would be to allow Midwest Renewable to withdraw its factual representations in the previous case, despite the fact that we granted Midwest Renewable relief based on its prior representations. For purposes of analyzing intent, we note that Midwest Renewable's previous position is more plausible than its new position, because the previous position was consistent with Western Ethanol's position and was supported by Vind's affidavit, and there is no information in the record to corroborate the new position. These considerations, especially when considered in light of the stark contrast between Midwest Renewable's factual positions in the two cases involving the same judgment, lead us to conclude that there has been sufficient demonstration of an intent to mislead in order to delay execution on the judgment. Judicial estoppel is appropriate in this instance.

Midwest Renewable's judicial admissions establish that Vind owns the judgment and judgment lien and is the real party in interest. Midwest Renewable is estopped from asserting a contrary position. This assignment of error is without merit.

(c) Vind Proper Party

Midwest Renewable's final assignment of error is that Vind should not have been permitted to enforce the judgment in his own name, because he did not file a formal pleading or motion to enter the case. Midwest Renewable argues that the court never approved either a formal complaint for intervention or a motion for substitution of parties.

We clarify that this argument comes to us in a different context than the indispensable party issue we confronted in the quiet title appeal. In that appeal, the district court found that Vind held the sole interest in the judgment, yet Vind had never appeared in the case. All persons whose rights will be directly affected by a decree in equity must be joined as parties in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy.[69] We held that the court erred in not making Vind a party to the action sua sponte, vacated the court's judgment, and remanded the cause with direction to make Vind a party.

[22] Here, Midwest Renewable raises a procedural objection as to how Vind became a party in the case rather than a jurisdictional objection about Vind's lack of presence in the case. We review this assignment of error for abuse of discretion.[70] As noted, Vind filed the praecipe for writ of execution in his own name as assignee and personally appeared without objection at the hearing on the motion to quash. The record shows that the court accepted Vind's appearance in the case. The court's decision is supported by legal authority. An action to enforce a judgment may be prosecuted in the name of the assignee.[71] As discussed above, § 25-302 states: "The assignee of a thing

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[69] *Id*. See Neb. Rev. Stat. § 25-323 (Reissue 2016).

[70] See, *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); John P. Lenich, Nebraska Civil Procedure § 7:6 (2019).

[71] *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946).

in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor." Neb. Rev. Stat. § 25-322 (Reissue 2016) provides that in the case of a "transfer of interest, the action may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action." Neb. Rev. Stat. § 25-705(5) (Reissue 2016) provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action . . . ." Having determined that Vind is the real party in interest and has the right to execute the judgment, and in consideration of the court's authority to add a party to a proceeding at any time, we find no abuse of discretion by the court in accepting Vind's appearance in this case. Midwest Renewable never moved for a substitution of parties and did not raise an objection to Vind's appearance until it filed its motion to alter or amend. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[72] This assignment of error is without merit. The court did not err in overruling the motion to quash.

V. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

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[72] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

DH-1, LLC, a Nebraska limited liability company, et al., appellants, v. City of Falls City, Nebraska, appellee.

938 N.W.2d 319

Filed February 14, 2020. No. S-19-039.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.
4. **Standing: Jurisdiction.** The question whether a party has standing is jurisdictional and may be raised at any time.
5. **Contracts: Attorney and Client.** The construction of contracts between attorneys and their clients as to compensation is to be governed by the usual rules relating to the construction of agreements generally.
6. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** A determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.

9. ____. Where a contract is found to be ambiguous, it is construed against the drafter.
10. **Contracts: Appeal and Error.** An appellate court will not rewrite a contract to provide terms contrary to those which are expressed. Nor is it the province of a court to rewrite a contract to reflect the court's view of a fair bargain.
11. **Contracts: Unjust Enrichment: Quantum Meruit.** A claim that a court should imply a promise or obligation to prevent unjust enrichment goes by a number of names—"quasi-contract," "implied-in-law contract," or "quantum meruit."
12. **Contracts.** An express contract claim supersedes a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief.
13. ____. In the situation where both a contract claim and a quasi-contract claim are alleged, a court should address the contract claim first.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

J.L. Spray and Patricia L. Vannoy, of Mattson Ricketts Law Firm, for appellants.

Michael R. Dunn, of Halbert, Dunn & Halbert, L.L.C., for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

INTRODUCTION

This case presents the interpretation of a contingent fee for legal services between the City of Falls City, Nebraska (Falls City), and two law firms—Houghton Bradford Whitted, PC, LLO, and Weaver & Merz, a partnership. The district court concluded that no fees were due under the agreement or on the firms' equitable claim and accordingly dismissed the actions. The law firms and DH-1, LLC, the organization to which the firms had assigned their rights under the fee agreement, appealed. We refer to the law firms and DH-1 collectively as "the firms." We affirm.

BACKGROUND

Underlying Litigation.

This is the third appearance before this court by Falls City in relation to the underlying litigation. We set forth the facts of the underlying organizations—the Nebraska Municipal Power Pool (NMPP), the Municipal Energy Agency of Nebraska (MEAN), the National Public Gas Agency (NPGA), the American Public Energy Agency (APEA), and the Central Plains Energy Project (CPEP)—and the underlying litigation in our first opinion, decided in 2010:

> NMPP was created in 1975 as a nonprofit corporation with the purpose of idea generation, research, analysis, administration, and the creation of other entities to carry out these activities. NMPP has a 16-member board of directors made up of representatives from the participating municipalities. Falls City is a member of NMPP.
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> The first entity created by NMPP in 1981 was [MEAN] . . . . NMPP created MEAN in order to obtain efficient sources of electricity for participating communities. [NPGA] was created in 1991 by NMPP in order to secure natural gas for the participating municipalities. . . . NPGA is governed by a board of directors made up of a representative from each of the NPGA-member municipalities, including Falls City. Both MEAN and NPGA require their members to also be members of NMPP.
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> NMPP provides all the strategic planning and staffing services for NPGA and MEAN. Other than an executive director, who is employed jointly by NPGA and MEAN, neither organization has employees. NMPP's budgeting process is administered through a joint operating committee, which consists of representatives from NMPP, NPGA, and MEAN. At the beginning of each year, the amount of time each NMPP employee will devote to a particular organization is estimated and expenses are then allocated among the organizations.

> In 1995, NMPP, NPGA, and MEAN created APEA, another interlocal agency. APEA was intended to finance bonds through which natural gas was purchased. APEA remained separate from the joint operating committee and had its own staff, but sometimes utilized NMPP staff for various projects.
>
> APEA issued bonds and purchased gas through a series of "prepays." A prepay involves the purchase of a large supply of natural gas to be delivered in the future. The goal is to purchase a large amount of natural gas at a lower price than index, or market, price. The bonds used to pay for the gas are tax exempt as long as municipal entities purchase the gas later. As the gas is delivered and paid for by the end user, the proceeds are used to repay the principal and interest on the bonds.[1]

The complaint filed by Falls City against NMPP, CPEP, and several individual defendants alleged breach of contract, breach of fiduciary duty, and conspiracy to cause injury to Falls City and others. As relevant, the district court found in favor of Falls City in the amount of $628,267.90. In our 2010 opinion, we reversed the district court's award of damages to Falls City on the ground that Falls City lacked standing.[2] The parties again appeared in 2011, this time with respect to the order on costs assessed against Falls City.[3] Upon remand, the district court entered an order assessing 22 percent of the costs to Falls City, which this court affirmed. The appeal now before us deals with a fee dispute between Falls City and the attorneys representing Falls City in the prior litigation.

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[1] *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 240-41, 777 N.W.2d 327, 330-31 (2010).

[2] *City of Falls City v. Nebraska Mun. Power Pool, supra* note 1.

[3] *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

Fee Agreement.

On November 20, 2006, Falls City and the firms entered into the contingency fee agreement now at issue in this appeal. As relevant, that agreement provided that Falls City retained the firms

> for the prosecution of any claims that Falls City may have and any claims Falls City may pursue on behalf of MEAN, NPGA, NMPP or any of their members including those who might join in the prosecution of these claims individually or by virtue of a class action or who might benefit from any common fund created, discovered, increased, preserved or protected or property to which they may have a claim, against any person or entity thought to be responsible for damages sustained as a result of actions by NMPP, its employees or CPEP.

For this work, the firms were entitled to "$15,000.00 as an Initial Fee" and a "contingent fee based upon the following schedule: (a) 40% of all amounts recovered by settlement or verdict which is not appealed; or, (b) 50% of all amounts recovered in the event of an appeal of a verdict by any party involved in the lawsuit." The agreement indicates that it applied to "relief in addition to, or in lieu of, an immediate monetary benefit, but which relief has a calculable present value"; "securities, or other non-cash assets"; "or[,] if the settlement of this case is made by a structured settlement[,] . . . the present value of the settlement."

While the action filed against NMPP and others proceeded in district court, APEA, NPGA, and MEAN entered into an agreement on February 26, 2007, which dissolved and restructured APEA and equitably distributed its assets. NPGA and MEAN withdrew from APEA, with the withdrawal agreement dividing the $23.1 million held by APEA between NPGA and MEAN. NPGA received $9.8 million. Though Falls City was not a party to the withdrawal agreement, as a member of NPGA it received $1,567,570.02. Thereafter, Falls City elected to become a direct member of APEA.

The firms sought payment under the contingency fee agreement, based upon the funds Falls City received pursuant to the withdrawal agreement and improved equity positions in the various organizations, but Falls City declined to pay. The firms then assigned their claims to DH-1, which filed suit on January 14, 2015, for the fee under the contingency agreement. Eventually, a second amended complaint was filed which joined the firms for purposes of their equitable claims. In total, the firms sought $1,487,785.60 consisting of (1) a $627,028 fee from the APEA distribution, (2) $564,197.60 as a fee for Falls City's interest in the APEA, (3) $40,000 for the increase in Falls City's equity interest in NPGA, and (4) $256,560 for the value of the "Agreement for Termination of Participation of Members, Distribution of Funds to Members, and for Complete Settlement, Mutual Releases and Covenants" entered into between MEAN, NPGA, and APEA.

On October 10, 2017, the district court granted Falls City's motion for summary judgment as to the claims under the fee agreement, concluding that the contingency under the fee agreement was not met and that thus, the firms were not entitled to a fee under the agreement. The district court also held that DH-1's standing was limited to legal rights under the fee agreement and that it had "no equitable rights to assert against Falls City." However, the district court granted DH-1's motion to file a second amended complaint. DH-1 did so, adding the firms as parties to the litigation.

At a hearing on December 21, 2018, ostensibly held with regard to Falls City's motion to compel, Falls City orally moved for summary judgment. The firms waived notice, and a hearing was held at which evidence was offered. The district court granted the motion for summary judgment and dismissed the complaint.

ASSIGNMENTS OF ERROR

The firms assign that the district court erred in dismissing both their contract and equitable claims.

STANDARD OF REVIEW

[1,2] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[5]

[3] The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.[6]

ANALYSIS

Statute of Limitations and Standing.

Before reaching the substantive issues presented by this appeal, we turn to Falls City's arguments regarding the statute of limitations and standing.

Falls City argues that the district court erred in not ruling that the statute of limitations had run on all of the firms' claims. But Falls City failed to file a cross-appeal on this issue, and therefore, such issue is not properly before us, which prevents us from reaching it.[7]

[4] Falls City's argument regarding standing is different in that the question whether a party has standing is jurisdictional and may be raised at any time.[8] Specifically, Falls City argues that the firms have assigned, at least, their legal claims to DH-1, which Falls City argues is an unlicensed collection

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[4] *Williamson v. Bellevue Med. Ctr.*, 304 Neb. 312, 934 N.W.2d 186 (2019).

[5] *Id.*

[6] *Wintroub v. Nationstar Mortgage*, 303 Neb. 15, 927 N.W.2d 19 (2019).

[7] See *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018).

[8] See *Hawley v. Skradski*, 304 Neb. 488, 935 N.W.2d 212 (2019).

agency and as a result lacks standing. We disagree. The record shows that the firms assigned their claims to DH-1. That assignment was not challenged below. As the assignee, DH-1 is the real party in interest and has standing to bring suit in this case.[9]

We disagree with Falls City's argument to the contrary.

Recovery Under Fee Agreement.

[5-8] We now turn to the firms' argument that, contrary to the district court's conclusion, they were entitled to a fee under the contingency fee agreement. The construction of contracts between attorneys and their clients as to compensation is to be governed by the usual rules relating to the construction of agreements generally.[10] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[11] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[12] A determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[13]

[9,10] Where a contract is found to be ambiguous, it is construed against the drafter.[14] This court will not rewrite the contract to provide terms contrary to those which are expressed.

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[9] See Neb. Rev. Stat. §§ 25-301 and 25-302 (Reissue 2016). See, also, *Hawley v. Skradski, supra* note 8.

[10] 7A C.J.S. *Attorney & Client* § 457 (2019).

[11] *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 925 N.W.2d 39 (2019).

[12] *Id.*

[13] *Id.*

[14] See *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013).

Nor is it the province of a court to rewrite a contract to reflect the court's view of a fair bargain.[15]

To support their argument that they are entitled to a fee under the agreement, the firms note that the fee agreement was broad both because it covered the "prosecution of any claims that Falls City may have and any claims Falls City may pursue" on behalf of a myriad of organizations or members of those organizations and because it included language allowing a fee to be recovered on the "receipt of securities, or other non-cash assets," or on the present value of a structured settlement.

The firms further contend that the district court erred in limiting the terms "prosecution," "verdict," and "settlement" to the context of formal litigation and that Falls City received benefits because of the underlying litigation even though Falls City did not ultimately obtain a verdict or settlement with the defendants in that litigation.

We find no error in the decision of the district court. Our analysis begins with the plain language of the opening paragraph of the parties' fee agreement. That agreement, which was entered into in November 2006, states that the firms were retained to pursue claims "against any person or entity thought to be responsible for damages sustained as a result of actions by NMPP, its employees or CPEP." In addition to setting forth the 40- to 50-percent contingency fee owed in the event of recovery, the agreement also notes that the firms are entitled to "$15,000.00 as an Initial Fee . . . for the initial investigation . . . and drafting of the Complaint." It also states that the firms were employed to "prosecute *such claims* and assign to them a lien against all amounts recovered by settlement or otherwise in connection with *this litigation*" (emphasis supplied).

When read together, this language plainly envisions the agreement's applying to the litigation as set forth in the

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[15] *Meyer Natural Foods v. Greater Omaha Packing Co., supra* note 11.

complaint filed against NMPP, CPEP, and others alleging breach of contract, breach of fiduciary duty, and conspiracy to cause injury to Falls City and others. By contrast, the agreement did not encompass other services the firms might provide to Falls City.

The firms assert that the withdrawal agreement is within the consideration of the agreement. However, the firms have failed to establish what work they completed with regard to the withdrawal agreement and how such work would bring the withdrawal agreement within the parameters of the agreement's delineated list of claims. Therefore, since no recoverable verdict or settlement occurred from the specified claims set forth in the agreement, the contingency has not been met requiring the payment of a fee.

There is no merit to the firms' claim that they were entitled to a fee under the agreement.

Recovery Under Equitable Principles.

[11] The firms also assign that the district court erred in granting summary judgment in favor of Falls City on its equitable claims. A claim that a court should imply a promise or obligation to prevent unjust enrichment goes by a number of names—"quasi-contract," "implied-in-law contract," or "quantum meruit."[16] Such claims do not arise from an express or implied agreement between the parties; rather, they are imposed by law "'when justice and equity require the defendant to disgorge a benefit that he or she has unjustifiably obtained at the plaintiff's expense.'"[17]

[12] Unjust enrichment or quasi-contract claims are viable only in limited circumstances. For example, "'[t]he terms of an enforceable agreement normally displace any claim of unjust

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[16] *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 915 N.W.2d 786 (2018).

[17] *Id.* at 729, 915 N.W.2d at 792, quoting *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

enrichment within their reach.'"[18] Put another way, an express contract claim will supersede a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief.[19]

[13] Though contract claims supersede unjust enrichment or quasi-contract claims, a plaintiff is permitted to allege both.[20] We have said that when a plaintiff does so, a court should address the contract claim first.[21]

In this case, there was a contract, the contingency fee agreement, which expressly covered the litigation against NMPP. This agreement superseded the equitable claims to the extent of that contract. Thus, the issue presented is what work not covered by the fee agreement remains unpaid. There is no dispute that the firms would be entitled to compensation for work done on matters not covered by the fee agreement.

Additional factual background is helpful to analyzing this issue. During the course of this litigation, the parties had engaged in discovery. As relevant, Falls City sought information regarding services provided by the firms, including "[w]hether the service provided related to the withdrawal agreement[, the] membership agreement[,] or some other service the [firms] claim to have provided not covered by the contingency fee agreement." To Falls City's interrogatory, the firms responded as follows:

> The firm[s were] retained by [Falls] City to represent [Falls] City and its related entities in efforts to protect their interests and those of other community members of NMPP, MEAN and NPGA in [APEA,] which at the time

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[18] *City of Scottsbluff v. Waste Connections of Neb., supra* note 17, 282 Neb. at 860, 809 N.W.2d at 740, quoting Restatement (Third) of Restitution and Unjust Enrichment § 2, comment *c*. (2011).

[19] *Bloedorn Lumber Co. v. Nielson, supra* note 16.

[20] *Id.*

[21] *Id.*

> was holding funds in excess of $20 Million and had valuable, proprietary, and profitable business interests. The firm[s were] to file a legal action against individuals and entities attempting to take APEA's assets and business. There was no "contingency fee agreement" when the firm[s were] initially retained by [Falls] City. After the firm[s] filed the action and [were] in the midst of discovery, [Falls] City . . . requested that the firm[s] proceed on a "contingency fee agreement." At all times, the scope of the engagement covered all efforts exerted by the firm[s] for a percentage of all benefits derived from the attorney-client relationship.

According to various motions to compel filed by Falls City, counsel attempted to clarify or get the firms to supplement this answer, but the firms stated they had no further answer. Following a hearing, Falls City's motion to compel was granted, with the district court's order noting:

> [Falls City] seek[s] to have [the firms] specify what services were provided or what hours were spent outside the contingency fee agreement for which they have not yet been compensated (under any other agreement) and for which . . . Falls City received a benefit. Whether [the firms] can recover under an implied contract or other equitable theory of relief depends on whether they can show that they performed some services for the benefit of [Falls City] such that [Falls City] should be made to pay the reasonable value of those services. *See Sorenson v. Dager*, 8 Neb. App. [729], 601 N.W.2d 564 (1999). [The firms] have a duty to comply with the discovery requests by going through their time records and specifying such services. It was not sufficient for [the firms] to simply direct [Falls City] to hundreds of time records which have already been produced, especially if most of those services were expended in performance of the contingency fee agreement.

The firms were given 30 days to supplement their answers. No supplementation occurred, and Falls City filed another motion to compel. That motion was converted, with the agreement of all parties, to Falls City's motion for summary judgment, which was granted, dismissing the firms' equitable claims.

For Falls City to obtain such relief as the defendant in this litigation, Falls City had to show that if this case proceeded to trial, the firms' equitable claims would not have been successful, and that Falls City was entitled to judgment.[22] Falls City did so by first relying on case law that showed that equitable claims based on actions which were covered by the contingency fee agreement should be determined under legal principles and not under equity. Given this, the only claims remaining could be those claims not covered by the contingency agreement. Because the firms, in their answers to interrogatories, declined to set forth any work they completed on behalf of Falls City outside of the contingency fee agreement, Falls City met its burden and was entitled to summary judgment.

There is no merit to the firms' equitable claim.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Heavican, C.J., not participating.

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[22] See *Williamson v. Bellevue Med. Ctr., supra* note 4.



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jay D. Amaya, appellant.

938 N.W.2d 346

Filed February 14, 2020. No. S-19-189.

1. **Motions to Dismiss: DNA Testing: Appeal and Error.** A motion to dismiss a proceeding under the DNA Testing Act after testing has been completed is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **DNA Testing: Appeal and Error.** An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **DNA Testing: Pleas.** The DNA Testing Act does not exclude persons who were convicted and sentenced pursuant to pleas.
5. **DNA Testing.** Neb. Rev. Stat. § 29-4123(2) (Reissue 2016) of the DNA Testing Act allows a court to vacate the judgment and release the person from custody only when the DNA test results "exonerate or exculpate the person."
6. ____. When DNA test results are either inculpatory, inconclusive, or immaterial to the issue of the person's guilt, the results will not entitle the person to relief under the DNA Testing Act.
7. **DNA Testing: Motions to Vacate: Motions for New Trial.** The remedies available under the DNA Testing Act are limited to those set out in Neb. Rev. Stat. § 29-4123(2) and (3) (Reissue 2016) and include, respectively, either vacating and setting aside the judgment and releasing the defendant from custody or seeking a new trial.
8. **Statutes.** Basic principles of statutory interpretation require a court to give statutory language its plain and ordinary meaning.

9. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered it in its plain, ordinary, and popular sense.
10. **Statutes: Intent.** When interpreting a statute, a court must give effect, if possible, to all the several parts of a statute and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
11. **DNA Testing: Sentences: Motions for New Trial.** Resentencing, absent a successful motion for new trial under Neb. Rev. Stat. § 29-4123(3) (Reissue 2016), is not a form of relief available under the DNA Testing Act.
12. **DNA Testing: Pleas.** The relief of withdrawing a guilty or no contest plea is not an available remedy under the DNA Testing Act.

Appeal from the District Court for Lincoln County: Michael E. Piccolo, Judge. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Stacy, J.

In 1999, Jay D. Amaya pled no contest and was convicted of first degree murder, use of a deadly weapon to commit a felony, and first degree sexual assault. In 2017, he moved for DNA testing under the DNA Testing Act,[1] and the district court ultimately ordered testing of four items of evidence. After the test results were received, the State moved to dismiss the proceeding. The district court granted the motion to dismiss, and Amaya appeals. We affirm.

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[1] Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2016).

I. FACTS

1. Background

In 1998, Sheri Fhuere was sexually assaulted and killed in her home in North Platte, Nebraska. Both Amaya and Michael E. Long were arrested and charged with the crimes. The following facts are taken from our 2008 opinion addressing Amaya's first motion for postconviction relief.[2]

> When police arrived at Fhuere's home on July 16, 1998, they found Long attempting to resuscitate her. Fhuere had been beaten and sexually assaulted, and her throat had been slashed. There was a severe bite mark on her left thigh. Fhuere was pronounced dead at the scene, and a pathologist later determined that she died as the result of either the slash wound or the beating.
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> Long was interviewed several times over the next hours and eventually gave a written statement to police dated July 16, 1998. Although there were inconsistencies in his story, he generally told officers that he and Amaya beat Fhuere and that Amaya slashed her throat. Long also told the officers where to find the knife that Amaya used, and he stated that Amaya had bitten Fhuere during the assault. A forensic dentist later matched the bite mark to a dental impression of Amaya's teeth. DNA testing established the presence of Fhuere's blood on Amaya's shoe. Amaya wrote letters confessing to the crimes.
>
> Both Long and Amaya were charged with first degree murder. Amaya was also charged with use of a deadly weapon to commit a felony and first degree sexual assault. Long entered into a plea agreement with the State. In exchange for his testimony against Amaya, the charges against Long were reduced to aiding and abetting second degree murder and aiding and abetting first degree

[2] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

sexual assault. Long was sentenced to 25 years' to life imprisonment on the murder conviction and 5 to 10 years' imprisonment on the sexual assault conviction.

Amaya's appointed trial counsel deposed Long after Long had entered into the plea agreement but before Amaya had entered his no contest pleas. The deposition revealed that Long had significant drug, alcohol, and mental health issues that began in his early teens and continued at the time of the deposition. It also revealed that he had given several statements about Fhuere's death to the police and that, in general, each succeeding statement tended to mitigate his culpability and exaggerate Amaya's. Long stated during this deposition that the written statement he had given to police on July 16, 1998, was truthful. He also stated, however, that he was extremely intoxicated the night of the murder and that some of the details in the statement were not correct. He admitted that he had also told officers that evening that he had blacked out and could not remember everything that had happened.

After Long had been deposed, and after being fully advised of his rights, Amaya entered the no contest pleas in exchange for the State's agreement not to seek the death penalty or introduce evidence of aggravating circumstances. Prior to entering the pleas, Amaya wrote a letter to his attorneys expressing his desire to avoid the death penalty. The pleas were entered on October 19, 1999, and Amaya was sentenced on November 19.[3]

Amaya was sentenced to life imprisonment on the first degree murder conviction and to consecutive prison sentences of 10 to 20 years on the use of a deadly weapon conviction and 20 to 40 years on the first degree sexual assault conviction. He did not file a direct appeal.

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[3] *Id.* at 819-20, 758 N.W.2d at 25-26.

2. Motion for DNA Testing

In September 2017, Amaya filed a pro se motion asking the court to order DNA testing of numerous items of evidence under the DNA Testing Act and seeking the appointment of counsel. The court appointed counsel, who revised the pro se motion and successfully moved the court to authorize testing on swabs taken from (1) the bite mark on Fhuere's thigh, (2) the handle of the knife allegedly used to slash Fhuere's throat, (3) the mouth area of the beer bottle in which the knife was allegedly stored for disposal, and (4) the mouth area of a beer bottle found on the front porch of Fhuere's home.

All of the DNA test results generated a DNA profile consistent with a mixture of two individuals. Results from the bite mark showed the major DNA profile matched Amaya, and therefore, Amaya was not excluded as the major contributor. The probability of an unrelated individual matching the major DNA profile was 1 in 1.55 octillion. The minor profile from the bite mark was consistent with Fhuere. Results from the knife handle and from the mouth of the beer bottle in which the knife was stored showed the major DNA profile matched Fhuere, and results concerning the minor contributor were inconclusive due to limited information. Results from the mouth of the beer bottle found on the porch showed the major DNA profile matched Long, and results concerning the minor contributor were inconclusive due to limited information.

After receiving the DNA test results, the State moved to dismiss the proceeding,[4] alleging the results neither exonerated nor exculpated Amaya. At the evidentiary hearing on the motion to dismiss, Amaya claimed the test results entitled him to relief, and he asked the court to either (1) vacate his convictions and release him from custody, (2) allow him to withdraw his no contest pleas and proceed to trial, or (3) resentence him on the same convictions.

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[4] See, *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006); *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

The district court granted the State's motion to dismiss. It found that the DNA test results did not exonerate or exculpate Amaya and that he was not entitled to release or to a new trial. The court did not directly address Amaya's arguments that he should be resentenced or allowed to withdraw his pleas. Amaya filed this timely appeal.

II. ASSIGNMENT OF ERROR

Amaya assigns, restated, that the district court erred in granting the State's motion to dismiss.

III. STANDARD OF REVIEW

[1] A motion to dismiss a proceeding under the DNA Testing Act after testing has been completed is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[5]

[2] An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.[6]

[3] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[7]

IV. ANALYSIS

In arguing it was error for the district court to grant the State's motion to dismiss, Amaya presents three alternative theories. First, he argues the DNA test results completely exonerated and exculpated him so his convictions should have been vacated and he should have been released. Alternatively, Amaya argues he should have been allowed to withdraw his pleas, because if he had known the DNA test results, he would not have entered his pleas and would have insisted on going to trial. Finally, he argues that even if the DNA test results

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[5] See *Poe, supra* note 4.

[6] *State v. Ildefonso*, 304 Neb. 711, 936 N.W.2d 348 (2019).

[7] *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

did not support vacating his convictions or allowing him to withdraw his pleas, the test results entitle him to the relief of resentencing.

Before addressing Amaya's arguments, we review the legal framework of the DNA Testing Act.

1. DNA Testing Act

[4] Section 29-4120(1) of the act provides that a person "in custody pursuant to the judgment of a court may, at any time after conviction," file a motion requesting DNA testing. This court has previously held the DNA Testing Act does not exclude defendants such as Amaya who were convicted based on a plea.[8]

Section 29-4120 sets out what a defendant must do to obtain DNA testing. We have explained:

> "The initial step toward obtaining relief under the DNA Testing Act is for a person in custody to file a motion requesting forensic DNA testing of biological material. . . . Forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques."[9]

If these threshold criteria are met, and if the court finds that "testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced,"[10] then under § 29-4120(5) the court "shall order DNA testing." But a court is not required to order postconviction DNA testing if such testing would not produce exculpatory

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[8] See *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

[9] *State v. Myers*, 301 Neb. 756, 762, 919 N.W.2d 893, 897 (2018), quoting *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). See § 29-4120(1).

[10] § 29-4120(5).

evidence.[11] The act defines "exculpatory evidence" as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person."[12]

In this case, the court ordered DNA testing on four items of evidence and no party contends it was error to order the testing. We therefore move on to the procedure to be followed once the DNA test results are complete.

Under § 29-4123(2), the test results must be disclosed to the county attorney and to the person who requested the testing and his or her attorney. After receiving the test results, either party may request a hearing on whether the results "exonerate or exculpate the person."[13] Following such a hearing, the court may, on its own or on the motion of either party, "vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person."[14] If the court does not vacate and set aside the conviction, then § 29-4123(3) provides that "any party may file a motion for a new trial under sections 29-2101 to 29-2103."

As for when a court may vacate a conviction and release the person under § 29-4123(2), and when it may order a new trial under § 29-4123(3), we have explained:

> "[T]he court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. . . . This requires a finding that guilt cannot be sustained because the evidence is doubtful in

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[11] *Ildefonso, supra* note 6.

[12] § 29-4119.

[13] § 29-4123(2).

[14] *Id.*

> character and completely lacking in probative value. . . . [I]n other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result."[15]

Here, after the DNA test results were obtained, Amaya did not move for a hearing.[16] Instead, the State sought to dismiss the DNA testing proceeding, arguing the results of the DNA testing did not exonerate or exculpate Amaya and he was not entitled to relief. At the hearing on that motion, Amaya orally argued that the DNA test results were exculpatory and his convictions should be vacated or, alternatively, that the results entitled him to either withdraw his pleas or be resentenced. The court granted the State's motion to dismiss. We review its factual findings for clear error[17] and its decision for an abuse of discretion.[18]

2. Amaya's Arguments

Amaya argues, summarized, that his plea-based convictions were largely based on Long's anticipated testimony against him. He contends the DNA test results "provide powerful scientific evidence demonstrating that Long was lying."[19] He focuses primarily on the test results from the mouth of the beer bottle found on the porch, as well as on the test results from the knife and the beer bottle in which the knife was disposed.

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[15] *Myers, supra* note 9 at 764-65, 919 N.W.2d at 898, quoting *Buckman, supra* note 9.

[16] See § 29-4123(2).

[17] See *Ildefonso, supra* note 6.

[18] See *Poe, supra* note 4.

[19] Brief for appellant at 18.

(a) Beer Bottle From Porch

Amaya argues the test results from the beer bottle on the porch "conclusively show that Long lied about the consumption of alcohol at the Fhuere residence."[20] His logic in this regard is not obvious, so we provide additional facts.

Amaya explains that in a 1999 deposition, Long testified that he was drinking beer on the night of the crime and that he brought the beer with him from his own house. According to Amaya, the evidence inventory completed by police shows that the beer bottle that was found to have Long's DNA on the mouth area was the same brand, and from the same batch, as 54 other bottles of beer found at Fhuere's residence. Amaya thus suggests the DNA test results show that Long did not bring that beer bottle from his own home and "firmly establish that Long was lying."[21] Amaya posits that if Long lied about bringing the beer, it "casts a cloud of suspicion"[22] on the credibility of his other statements concerning the crimes.

With respect to this test result, the district court found:

> The major DNA profile from this sample matches the co-Defendant, . . . Long. The results concerning the minor contributor [were] inconclusive, due to limited information. However, this information, when considered with the other evidence of the case, is doubtful in character and lacks, in this Court's opinion, tangible probative value.

The court's findings are fully supported by the record and are not clearly erroneous.

(b) Knife and Beer Bottle

Amaya argues the test results on the handle of the knife and the mouth of the beer bottle in which it was found "fail

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[20] *Id.* at 25.

[21] *Id.* at 18.

[22] *Id.* at 31.

to support any claims Long made about Amaya handling the knife during and after the murder."[23] He points out the test results showed Fhuere was the major contributor of the DNA found on the knife handle and on the mouth of the beer bottle, and he suggests this "directly contradicts the narrative of Long which has Amaya grasping that knife to cut Fhuere's throat, handling that knife by placing it in a beer bottle, and throwing that beer bottle out of a car near 7th and Adams Streets in North Platte."[24]

With respect to these test results, the district court found:

> The material tested from the black-handled knife [and] the mouth area of the beer bottle found . . . in the area of 7th and Adams streets in North Platte conclude[s] that the major DNA profile from each of these specimens matches [Fhuere]. No other minor DNA contributors were identified, "due to limited information."

The court's factual findings are fully supported by the record and are not clearly erroneous.

3. Results Did Not Exonerate Amaya

Amaya contends that the DNA testing on the beer bottles and the knife handle discredited Long's veracity and that the court should have vacated his convictions and released him from custody. We disagree.

[5] Section 29-4123(2) allows a court to vacate the judgment and release the person from custody only when the DNA test results "exonerate or exculpate the person." The district court did not abuse its discretion in finding that threshold was not met here.

First, it is questionable whether the DNA test results implicate Long's veracity at all. It stretches logic to suggest the test results from the beer bottle found on the porch prove that Long lied about bringing his own beer that evening. And

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[23] *Id.* at 25.

[24] *Id*. at 19.

contrary to Amaya's contention, the absence of his DNA on the knife or the beer bottle in which it was disposed does not "directly contradict[]" Long's assertions that Amaya slashed Fhuere's throat and disposed of the knife in the beer bottle, particularly where the results were inconclusive as to the minor contributor.

We have recognized that if DNA testing does not detect the presence of a prisoner's DNA on an item of evidence, such a result is at best inconclusive, especially when there is other credible evidence tying the defendant to the crime.[25] Here, there was plenty of other credible evidence pointing to Amaya's involvement in the crimes.

The DNA test results of the bite mark on the victim's thigh corroborated the forensic dentist's opinion matching the bite mark to Amaya, and also corroborated Long's testimony that Amaya had bitten Fhuere during the assault. Earlier DNA testing showed Fhuere's blood was on Amaya's shoe. And perhaps the most credible evidence tying Amaya to the crimes were letters he wrote from jail confessing to involvement in Fhuere's murder.

Moreover, even if the test results could be understood to call Long's credibility into question, the record shows that, at the time he entered his pleas, Amaya already had reason to question Long's credibility. He knew Long had given police inconsistent accounts of what happened the evening of the crimes, and his attorney had deposed Long and acquired additional information relevant to Long's credibility. Because significant questions as to Long's veracity and credibility already existed at the time Amaya chose to enter his pleas, we do not see how the DNA test results revealed anything new.

[6] When DNA test results are either inculpatory, inconclusive, or immaterial to the issue of a person's guilt, the results will not entitle the person to relief under the DNA Testing

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[25] See *Ildefonso, supra* note 6.

Act. On this record, the DNA test result on the bite mark was inculpatory and unfavorable to Amaya and the remaining testing was either inconclusive or immaterial to the issue of his guilt. The district court did not abuse its discretion in concluding Amaya was not entitled to have his convictions vacated, because the DNA test results were neither exonerative nor exculpatory.[26]

4. Resentencing Is Not Remedy Under DNA Testing Act

Alternatively, Amaya asks us to remand this matter to the district court with instructions to "consider whether Amaya was wrongfully sentenced."[27] He argues the DNA test results "establish that Long had substantially less credibility than was apparent at the time of sentencing,"[28] and he suggests that if the sentencing court had been aware of the test results, "different and more favorable sentences would have been given."[29] Because we conclude the DNA Testing Act does not authorize the relief of resentencing, we reject Amaya's argument without addressing his reasoning.

[7] As noted, there are two remedies available under the DNA Testing Act. Those remedies are set out in § 29-4123(2) and (3), and they include, respectively, either vacating and setting aside the judgment and releasing the defendant from custody or requesting a new trial. As we explain more fully below, resentencing is not among the statutory remedies enacted by the Legislature, and we decline Amaya's invitation to judicially expand the act to include such relief.

Amaya asks us to find that resentencing must be a remedy under the act, because § 29-4120(5)(c) allows a court to order DNA testing if it "may produce noncumulative, exculpatory

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[26] See § 29-4123(2).

[27] Brief for appellant at 17.

[28] *Id*. at 20.

[29] *Id*. at 21.

evidence relevant to the claim that the person was wrongfully convicted or sentenced." This is the only time the DNA Testing Act mentions "sentencing," and it is significant that the reference is contained only in the section of the act governing when testing can be ordered, and not in the later section governing available relief.

[8-10] Basic principles of statutory interpretation require a court to give statutory language its plain and ordinary meaning.[30] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[31] Additionally, when interpreting a statute, a court must give effect, if possible, to all the several parts of a statute and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.[32]

We have recognized that the DNA Testing Act imposes a relatively low threshold for those seeking to obtain testing of biological material, but once the testing is complete, the act imposes a much more rigorous standard for obtaining relief.[33] It is a given that, under such a scheme, far more people will be entitled to ask for DNA testing under the act than will ultimately be entitled to relief under the act.

Giving the statutory language its plain and ordinary meaning, we find that the phrase in § 29-4120(5)(c) referring to a "claim that the person was wrongfully convicted or sentenced" describes the type of claim that may entitle a movant to request DNA testing when the other statutory criteria are met, but the phrase has no impact on the type of relief the movant is ultimately entitled to under § 29-4123 of the act.

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[30] *Lovvorn, supra* note 7.

[31] See *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[32] See *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

[33] See, § 29-4120; *Myers, supra* note 9.

[11] As stated, the DNA Testing Act authorizes just two forms of relief: (1) complete exoneration and vacation of judgment and release from custody or (2) the opportunity to file a motion for new trial.[34] Resentencing, absent a successful motion for new trial under § 29-4123(3), is not a form of relief available under the act. The district court did not err in not considering resentencing in this proceeding.

5. Withdrawal of Plea Not Remedy Under DNA Testing Act

Finally, Amaya argues that if he had known about the DNA test results before he entered his pleas, he would have insisted on going to trial. His argument is, again, generally premised on an assertion that the DNA test results negated Long's credibility—an assertion we already have rejected.

[12] But more importantly, the relief of withdrawing a guilty or no contest plea is not an available remedy under the DNA Testing Act. As already explained, the act authorizes a district court to "vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person."[35] And if that relief is not granted, the act provides that "any party may file a motion for a new trial under sections 29-2101 to 29-2103."[36] The plain language of the act does not authorize a court to find that, based on DNA test results, a defendant's plea-based conviction can be set aside, the plea withdrawn, and a new trial held.

For the sake of completeness, we note that Amaya's counsel insisted during oral argument that his client's request to withdraw his pleas should not be construed as a motion for new trial under § 29-4123(3). This is consistent with the position he took before the district court on the motion to dismiss. We thus express no opinion on whether a person whose conviction

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[34] § 29-4123.

[35] § 29-4123(2).

[36] § 29-4123(3).

is plea based can, after DNA testing results are obtained, move for a new trial under § 29-4123(3) and Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 2016).[37]

V. CONCLUSION

The district court's factual findings were not clearly erroneous, and it did not abuse its discretion in granting the State's motion to dismiss. The judgment of the district court is affirmed.

Affirmed.

Freudenberg, J., not participating.

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[37] Compare *State v. Daly*, 227 Neb. 633, 418 N.W.2d 767 (1988) (holding acceptance of guilty plea constitutes verdict of conviction under statute regarding new trials), and *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977) (motion for new trial on ground of newly discovered evidence not appropriate where defendant enters plea and thus waives all defenses to crime charged), *disapproved on other grounds, State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v. Parris R. Jedlicka, appellee.

938 N.W.2d 854

Filed February 14, 2020. No. S-19-268.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law which an appellate court reviews independently of the lower court.
2. **Judgments: Pleadings: Plea in Abatement: Appeal and Error.** Regarding questions of law presented by a motion to quash or plea in abatement, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
3. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.
4. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Statutes: Appeal and Error.** When construing a statute, an appellate court looks to the statute's purpose and gives to the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.
6. **Statutes.** All statutes in pari materia must be taken together and construed as if they were one law.
7. **Statutes: Legislature: Intent.** In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
8. **Statutes: Legislature.** A definition limited by the Legislature to a particular statute or group of statutes controls only as so specified.
9. **Statutes: Words and Phrases.** The phrase "associated with" must be interpreted within the context of the statute in which it appears.

10. **Probation and Parole: Prosecuting Attorneys.** Selection of allegations of probation violations to be asserted is a prosecutorial and not a judicial function.
11. **Statutes: Words and Phrases.** Traditionally, the word "include" in a statute connotes that the provided list of components is not exhaustive and that there are other items includable though not specifically enumerated.
12. ____: ____. Statutory words are often known by the company they keep.
13. ____: ____. Words grouped in a list within a statute should be given related meaning.
14. ____: ____. It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.
15. **Double Jeopardy.** Application of Neb. Rev. Stat. § 29-2316 (Reissue 2016) by its terms turns on whether the defendant has been placed in jeopardy in the trial court, not by whether the Double Jeopardy Clause bars further action.
16. **Double Jeopardy: Juries: Evidence: Pleas.** In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

Appeal from the District Court for Madison County: James G. Kube, Judge. Exception sustained, and cause remanded for further proceedings.

Douglas J. Peterson, Attorney General, James D. Smith, Solicitor General, and Matthew J. Kiernan, Deputy Madison County Attorney, for appellant.

Jack W. Lafleur, of Moyer & Moyer, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

The issue in this error proceeding[1] is whether a probation violation allegation asserting a law violation from a

[1] See Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2018).

new charge of possession of methamphetamine constitutes a "substance abuse . . . violation"[2] having a prerequisite of 90 days of cumulative custodial sanctions. The district court determined it does and sustained Parris R. Jedlicka's motion to quash an information for revocation of probation. Because we conclude that this allegation of a law violation is not a "substance abuse" violation for revocation of probation purposes, we sustain the exception and remand the cause for further proceedings.

BACKGROUND

In February 2018, the district court for Madison County sentenced Jedlicka for possession of methamphetamine with intent to deliver, a Class II felony. According to comments by the prosecutor at sentencing, the plea agreement required the State to recommend probation "as long as there's no new charges filed." The State did so, and the court imposed a sentence of Specialized Substance Abuse Supervision probation for 2 years.

Two of the conditions of probation are significant. The first condition set forth in the order of probation was to "[n]ot violate any laws, refrain from disorderly conduct or acts injurious to others." The ninth condition required Jedlicka to, among other things, "not use or possess any controlled substance, except by prescription, and voluntarily submit to a chemical test . . . upon request of the probation officer, or any law enforcement officer, to determine the use of alcoholic liquor or drugs."

Eight months after the sentencing, Jedlicka's probation officer and the chief probation officer filed with the court a document titled "Alleged Probation Violation." It alleged that Jedlicka was recently arrested and charged with possession of a controlled substance and possession of drug paraphernalia.

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[2] Neb. Rev. Stat. § 29-2267(3) (Reissue 2016).

The State promptly filed an information for revocation of probation. It alleged that Jedlicka had violated the first condition of the court's probation order—the condition that prohibited the violation of any laws. Specifically, the State alleged that "on or about the 9th day of October, 2018, in Platte County, Nebraska, [Jedlicka] did knowingly or intentionally possess a controlled substance, other than marijuana, to wit: Methamphetamine, a Schedule II Controlled Substance." The State did not allege a violation of the ninth condition of probation.

Jedlicka moved to quash the information for revocation of probation. She claimed that under § 29-2267(3), revocation proceedings could not be instituted for a substance abuse violation, because the State did not allege or show that she had served 90 days of cumulative custodial sanctions during the probation term.

The court sustained Jedlicka's motion to quash. It framed the issue as whether Jedlicka's possession of methamphetamine constituted a substance abuse violation. The court observed that a positive urinalysis for the illegal use of drugs was a substance abuse violation under Neb. Rev. Stat. § 29-2266(5) (Reissue 2016), that one cannot use and test positive for illegal drugs without possessing the same, and that persons on probation for a felony conviction can be subject to revocation proceedings for a substance abuse violation only after serving 90 days of custodial sanctions.[3] The court reasoned

> it would lead to a nonsensical result, to conclude that possession of a controlled substance is not a substance abuse violation, but that the actual ingestion into the body of a controlled substance, as specifically noted in the statute, is. On the other hand, if the defendant had been caught delivering a controlled substance to another, a much higher grade felony, or possessing a large quantity

[3] See § 29-2267(3).

> of a controlled substance, such that an argument could be made that the person possessed a controlled substance with the intent to deliver, then the probationer's actions could be considered to be much more than a substance abuse violation. This is especially pertinent when the Legislature has specifically provided that a substance abuse violation is associated with a probationer's activities or behaviors associated with the **use** of chemical substances.

Because there was no evidence that Jedlicka had served at least 90 days of custodial sanctions, the court sustained the motion to quash the information for revocation of probation.

The State filed an application for leave to docket error proceedings under § 29-2315.01, which was granted. We thereafter granted the State's petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

The State assigns that the district court erred by sustaining Jedlicka's motion to quash.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law which an appellate court reviews independently of the lower court.[4]

[2] Regarding questions of law presented by a motion to quash or plea in abatement, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.[5]

ANALYSIS

The outcome of this appeal depends upon statutory interpretation. So we begin by recalling settled principles governing that process.

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[4] *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

[5] *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

Statutory Interpretation
Principles

[3-5] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[6] In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[7] When construing a statute, an appellate court looks to the statute's purpose and gives to the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.[8]

[6,7] But we do not examine statutes in isolation. All statutes in pari materia must be taken together and construed as if they were one law.[9] Thus, we have said that in construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.[10]

Particular Statutes

In granting Jedlicka's motion to quash the alleged probation violation, the district court relied on § 29-2267(3). Under § 29-2267(3), "For a probationer convicted of a felony, revocation proceedings may only be instituted in response to a substance abuse or noncriminal violation if the probationer has served ninety days of cumulative custodial sanctions during the current probation term." Neither party disputes that Jedlicka

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[6] *State v. Ralios*, 301 Neb. 1027, 921 N.W.2d 362 (2019).

[7] *Id.*

[8] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

[9] *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 283 N.W. 366 (1939).

[10] See *In re Application of Rozgall*, 147 Neb. 260, 23 N.W.2d 85 (1946).

had not served 90 days of custodial sanctions. And neither party contends that the alleged violation was "noncriminal." Thus, the district court's action rests on its conclusion that the alleged violation was a "substance abuse" violation.

Jedlicka maintains that a "substance abuse" violation under § 29-2267(3) is specially defined by § 29-2266(5). That statute provides:

> Substance abuse violation means a probationer's activities or behaviors associated with the use of chemical substances or related treatment services resulting in a violation of an original condition of probation, including:
>
> (a) Positive breath test for the consumption of alcohol if the offender is required to refrain from alcohol consumption;
>
> (b) Positive urinalysis for the illegal use of drugs;
>
> (c) Failure to report for alcohol testing or drug testing; and
>
> (d) Failure to appear for or complete substance abuse or mental health treatment evaluations or inpatient or outpatient treatment.[11]

Thus, Jedlicka contends that because her alleged possession of methamphetamine in Platte County was an "activit[y] or behavior[] associated with" the use of methamphetamine, the alleged violation was a "substance abuse" violation. It appears that the district court adopted this reasoning, which the State attacks in this error proceeding.

[8] The State asserted during oral argument that by express limitation, the definition of § 29-2266(5) does not apply to § 29-2267(3). As the State pointed out, § 29-2266 begins, "For purposes of [Neb. Rev. Stat. §§] 29-2266.01 to 29-2266.03 [(Reissue 2016)] . . . ." Indisputably, § 29-2267(3) resides outside of that range. We have often recognized that a definition limited by the Legislature to a particular statute or group

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[11] § 29-2266(5).

of statutes controls only as so specified.[12] Thus, in a strict technical sense, the State is correct that the definition of a "[s]ubstance abuse violation" in § 29-2266(5) does not dictate the meaning of the term "substance abuse . . . violation" in § 29-2267(3).

Despite this technical flaw, we are reluctant to say that the definition has no significance whatsoever. We recognize that in a single legislative act in 2016, §§ 29-2266 and 29-2267 were amended and Neb. Rev. Stat. §§ 29-2266.01 to 29-2266.03 (Reissue 2016) were added.[13] Thus, they are clearly in pari materia and must be read together. Moreover, neither the term "substance abuse" nor the term "substance abuse violation" appears anywhere within the specified range of §§ 29-2266.01 to 29-2266.03. It seems that the 2016 Legislature both defined a term for a range of statutes and omitted the term from the specified range.

We are equally reticent to apply the virtually unfettered result which would naturally flow from Jedlicka's interpretation. Although the district court suggested that delivery of a controlled substance or possession of a "large quantity" would fall outside of the language of § 29-2266(5), we see no textual basis for that limitation. And at oral argument, Jedlicka acknowledged that an expansive interpretation was likely to be asserted in future cases.

[9] The "[s]ubstance abuse violation" definition of § 29-2266(5) includes the phrase "associated with," but our statutes do not attribute any particular meaning to the phrase. "'Associated with' must be interpreted within the context of the statute in which it appears."[14] "Associated" means

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[12] See *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

[13] See 2016 Neb. Laws, L.B. 1094, §§ 19 to 23.

[14] *Pa. Labor Rel. v. Altoona Area School Dist.*, 480 Pa. 148, 155, 389 A.2d 553, 557 (1978).

"[c]onnected in thought, mentally related" or "[c]ombined locally, circumstantially, or in classification (*with*); occurring in combination."[15] In construing a state racketeering statute, a Hawaii court "adopt[ed] an expansive definition of the term 'associated with.'"[16] Federal courts interpreting a federal racketeering statute also appear to liberally define the phrase "associated with."[17] For example, the Fifth Circuit reasoned that "[t]he substantive proscriptions of the . . . statute apply to insiders *and outsiders*—those merely 'associated with' an enterprise—who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity."[18] It is not difficult to foresee an argument that because of the addictive nature of a probationer's drug use, a burglary or robbery committed to support that use constituted an activity or behavior associated with the probationer's use. We reject such a broad reading regarding the term "substance abuse . . . violation" in § 29-2267(3).

Application

Here, the State commenced Madison County revocation proceedings against Jedlicka, a probationer convicted of a felony, based upon an alleged violation of law: possession of methamphetamine in Platte County. For multiple reasons, we conclude that the alleged law violation was not a "substance abuse . . . violation."[19]

[10] First, the State's allegation was based on the first condition—to not violate any laws—and not on the ninth

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[15] "Associated," Oxford English Dictionary Online, http://www.oed.com/view/Entry/11976 (last visited Feb. 7, 2020).

[16] *State v. Bates*, 84 Haw. 211, 224, 933 P.2d 48, 61 (1997).

[17] See, generally, *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993); *U.S. v. Yonan*, 800 F.2d 164 (7th Cir. 1986); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978).

[18] *United States v. Elliott, supra* note 17, 571 F.2d at 903.

[19] § 29-2267(3).

condition—to not use or possess any controlled substance. Selection of allegations of probation violations to be asserted is a prosecutorial and not a judicial function.[20] The district court lacked the power to compel the prosecutor to pursue a violation of the ninth condition rather than the first condition.

Second, the limitation of a "[s]ubstance abuse violation" under § 29-2266(5) to activities of drug usage, rather than possession, follows from the statutory language and is consistent with other criminal statutes. The Nebraska Criminal Code[21] does not criminalize "use" of controlled substances. Rather, it prohibits *possession* of them.[22] This distinction is fundamental in Nebraska's criminal law, and we discern no intent of the Legislature to obliterate that difference.

[11-13] Third, the listed examples focus on use and not possession. Employing the word "including" in § 29-2266 demonstrates the list was not intended to be an exhaustive list. Traditionally, the word "include" in a statute connotes that the provided list of components is not exhaustive and that there are other items includable though not specifically enumerated.[23] And because the identified examples of substance abuse focus on use rather than possession, none of the items listed is a misdemeanor or felony. Possession of methamphetamine, on the other hand, is a felony.[24] Noscitur a sociis is a "well-worn Latin phrase that tells us that statutory words are often known by the company they keep."[25] Our cases have not used that phrase, but we have stated that words grouped in a list

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[20] See *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

[21] Neb. Rev. Stat. §§ 28-101 to 28-1357 and 28-1601 to 28-1603 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019).

[22] See § 28-416. But, see, § 28-417(1)(g) (criminalizing being under influence of controlled substance).

[23] *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

[24] See § 28-416.

[25] *Lagos v. United States*, 584 U.S. 577, 582, 138 S. Ct. 1684, 201 L. Ed. 2d 1 (2018).

within a statute should be given related meaning.[26] Here, these principles dictate that the examples included in the list should guide our understanding of § 29-2266(5).

[14] Fourth, the district court's interpretation effectively inserts the words "or possession" after the word "use" in § 29-2266(5). But it is not for the courts to supply missing words or sentences to a statute to supply that which is not there.[27]

Finally, we are not persuaded that declining to classify a felony drug offense as a substance abuse violation will lead to an absurd result. Jedlicka argues that "[a]n absurd result would be created if probationers . . . face revocation of probation when caught with an illegal drug prior to using it, but merely face a custodial sanction if they consume the controlled substance and then submit a positive drug test."[28] And the district court similarly reasoned that possession of a controlled substance must be a substance abuse violation because one of the listed violations—testing positive for the use of illegal drugs—cannot occur without possessing the illegal drug.

Both of these premises are flawed. Contrary to Jedlicka's premise, a probationer does not necessarily face revocation from drug possession. Where, as here, the conditions of probation prohibit both law violations and the possession of drugs, a prosecutor can elect to seek a custodial sanction for possession in violation of one condition rather than revocation for a law violation contrary to another condition. In other words, probationers do not automatically face revocation for possession of drugs. And contrary to the district court's premise, testing positive can result without possession although we acknowledge that would not usually be the case. There is a logical reason for treating possession

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[26] See, *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

[27] *State v. Jones*, 264 Neb. 812, 652 N.W.2d 288 (2002).

[28] Brief for appellee at 7.

different from ingestion—the former is a crime,[29] while the latter is not.[30]

The law provides a range of techniques to discourage the use of an illegal controlled substance by a probationer. One using a controlled substance in his or her own home is unlikely to be caught in the act. Subsequent urinalysis testing can reveal usage. But because it is not a crime to have a positive urinalysis, administrative or custodial sanctions can then be imposed to hold a probationer accountable for probation violations without commencing revocation proceedings.[31] But even where a probationer is caught in the act of illegal possession, revocation does not follow automatically.

In determining whether to allege a law violation or a use or possession violation, prosecutors should respect the goals of the Legislature underlying the range of tools provided. In trying to slow or reverse the growth of Nebraska's prison population, the Legislature has authorized administrative or custodial sanctions as an alternative to revocation. Where drug use is the problem, § 29-2267(3) requires that custodial sanctions be used before pursuing probation revocation. But where a probationer engages in serious criminal conduct, revocation proceedings may be appropriate without first pursuing custodial sanctions. Because Jedlicka allegedly committed a new felony while already on probation for a felony, the State could institute revocation proceedings without showing that Jedlicka had served at least 90 days of cumulative custodial sanctions during her current probation term. We sustain the State's exception.

In doing so, we express no opinion regarding what the ultimate result of the proceeding should be. At this point, there has been no admission or adjudication of the existence of a

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[29] See § 28-416.

[30] But, see, § 28-417(1)(g) (criminalizing being under influence of controlled substance).

[31] See §§ 29-2266.01 to 29-2266.03.

violation; nor has any factual record been developed. Our decision should not be read to foreshadow revocation of Jedlicka's probation. We determine only that the district court erred in quashing the information charging a probation violation based upon a law violation.

Effect of Decision

Because the State's exception to the district court's decision has merit, we turn to the effect of our decision on Jedlicka's case. Under Neb. Rev. Stat. § 29-2316 (Reissue 2016):

> 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, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the prosecuting attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

Whether our decision can affect Jedlicka depends on whether she "has been placed legally in jeopardy."[32]

[15,16] Application of § 29-2316 by its terms turns on whether the defendant has been placed in jeopardy in the trial court, not by whether the Double Jeopardy Clause bars further action.[33] In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge,

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[32] § 29-2316.

[33] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.[34] Clearly, jeopardy has not attached under the circumstances here. We therefore remand the cause to the district court for further proceedings.

CONCLUSION

We conclude that the district court erred in sustaining Jedlicka's motion to quash. The State's exception is sustained, and because jeopardy did not attach, the cause is remanded to the district court for further proceedings under § 29-2316.

Exception sustained, and cause remanded for further proceedings.

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[34] *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Amy J. Krannawitter, appellant.

939 N.W.2d 335

Filed February 21, 2020. No. S-19-014.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Motions for New Trial: Appeal and Error.** The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.
3. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection.
4. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Words and Phrases.** The second category of police-citizen encounters, the investigatory stop, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a seizure sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.
5. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Arrests: Search and Seizure: Probable Cause.** The third type of

police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.

6. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
7. ____: ____. In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.
8. **Motions for New Trial: Evidence: Proof.** In order to obtain a new trial based on newly discovered evidence, a defendant must show that the new evidence could not with reasonable diligence have been discovered and produced at trial and that the evidence is so substantial that a different result may have occurred.
9. **Blood, Breath, and Urine Tests: Drunk Driving: Evidence: Proof.** The four foundational elements which the State must establish as a foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Brad Roth and Kenneth Yoho, Senior Certified Law Student, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

I. INTRODUCTION

Amy J. Krannawitter was charged with third-offense driving under the influence. Her motion to suppress was denied, and she was convicted. Krannawitter then filed a motion for new trial on the basis of newly discovered evidence. That motion was denied, and she was sentenced. Krannawitter appeals. We affirm.

II. FACTUAL BACKGROUND

At approximately 6 a.m. on July 4, 2017, Deputy Dennis Guthard of the Lancaster County Sheriff's Department was leaving his home to report for work. Guthard was driving a marked cruiser. He noticed a black Nissan Altima driving slowly down the street of his neighborhood, of which he had been a resident for 16 years. Guthard's house was located on the corner of a street and a neighborhood circle. He drove from the circle onto the nearby through street and emerged behind the Altima. The Altima pulled into the driveway of Guthard's neighbors' house.

Guthard did not recognize the Altima or its driver, who he testified was a "younger woman" later identified as Krannawitter. Guthard testified that the occupants of the neighbors' house were a 70-year-old woman and her 96-year-old mother and that it was his experience that these two women did not wake until around 8:30 a.m. Guthard also testified that he considered keeping an eye on his neighborhood to be part of his job and that he was therefore aware of many of the vehicles belonging to persons who visited the neighborhood. Guthard noted that he often left for work at 6 a.m. and was therefore aware of who might be out and about at that time of the morning.

As Guthard drove down the street, he noticed, using his side and rear view mirrors, that the Altima was "just parked there" in the driveway. Guthard thought that was suspicious, but he also allowed for the possibility that the Altima's driver was lost, because it was a "confusing neighborhood." He therefore turned around at the next neighborhood circle to see if he could

be of assistance. As his cruiser approached the driveway, the driver of the Altima, who had been in the process of backing out of the driveway, paused for several seconds and then abruptly pulled back into the driveway and parked again. No other cars were traveling on the street at the time.

Guthard pulled into the driveway about 5 feet behind the Altima, but did not activate his cruiser's siren or lights. Guthard did turn the cruiser's camera on as he approached the Altima, and a video of the interaction between Guthard and Krannawitter was offered into evidence at trial.

Guthard made contact with the driver, Krannawitter. Immediately before Krannawitter opened the door of the Altima, Guthard observed Krannawitter was "very disheveled" and had droopy eyelids. When she opened the door, Guthard smelled a strong odor of alcohol and further noted Krannawitter's bloodshot eyes and slurred speech.

Krannawitter's breath test, administered approximately 90 minutes later, showed a concentration of .235 grams of alcohol per 210 liters of breath. Krannawitter was charged with aggravated driving under the influence, third offense. Krannawitter's motion to suppress was denied. The district court concluded that the initial stop of Krannawitter was a tier-one police-citizen encounter and that even if it was a seizure, there was reasonable suspicion to support a brief investigative stop.

Following a jury trial, Krannawitter was found guilty of driving under the influence. She filed a motion for new trial on the basis of newly discovered evidence. Krannawitter alleged that her breath test was performed using a machine that was maintained and tested using solutions that did not have certificates of analysis, in violation of title 177 of the Nebraska Administrative Code dealing with the testing of the alcohol content in blood and breath and in violation of her due process and confrontation rights. This argument centered on the testing solutions use to maintain the machine.

Krannawitter presented evidence that when sent to law enforcement, the solutions were accompanied by certificates

of analysis signed by Alma Palmer as the individual who prepared, tested, and supplied the solutions. Such a certificate is required by title 177. However, it was later determined that the solutions were actually prepared, tested, and supplied by Colby Hale. The company that delivered the solutions subsequently provided amended certificates, signed by Hale.

The district court concluded that the amended certificates were "not . . . newly discovered evidence" and that even if they were, the defect in the original certificates would not have rendered the breath test inadmissible. Accordingly, Krannawitter's motion was denied. Krannawitter was sentenced to 5 years' probation and a 15-year license revocation, with the possibility of obtaining an ignition interlock device after 1 year. She appeals.

III. ASSIGNMENTS OF ERROR

Krannawitter assigns, restated and consolidated, that the district court erred in (1) denying her motion to suppress and (2) denying her motion for new trial.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[1]

[2] The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.[2]

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[1] *State v. Hartzell*, 304 Neb. 82, 933 N.W.2d 441 (2019).

[2] *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

V. ANALYSIS

1. Motion to Suppress

In her first assignment of error, Krannawitter assigns that the district court erred in denying her motion to suppress. In so denying, the district court noted that in its view, the interaction between Guthard and Krannawitter was a tier-one police-citizen encounter, but that in any case, the encounter was supported by reasonable suspicion. Krannawitter takes issue with both findings.

[3-5] There are three tiers of police encounters under Nebraska law. The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning.[3] This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*,[4] is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[5] This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.[6] The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention.[7] The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing

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[3] *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See, also, *State v. Schriner, supra* note 3.

[5] See *State v. Schriner, supra* note 3.

[6] *Id.*

[7] *Id.*

a crime.[8] Only the second and third tiers of police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[9]

[6,7] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[10] In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.[11]

We need not decide whether this encounter might have been a tier-one police-citizen encounter, because we conclude that in any case, it was a seizure supported by reasonable suspicion.

The U.S. Supreme Court has recognized that the Fourth Amendment permits brief investigative stops of vehicles based on reasonable suspicion when a law enforcement officer has a "'particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[12] The reasonable suspicion needed to justify an investigatory traffic stop "'"is dependent upon both the content of information possessed by police and its degree of reliability."'"[13] Like the probable cause standard, the reasonable suspicion standard "'takes into account "the totality of the circumstances—the whole

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Navarette v. California*, 572 U.S. 393, 396, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014).

[13] *State v. Barbeau*, 301 Neb. 293, 301, 917 N.W.2d 913, 921 (2018), quoting *Navarette v. California, supra* note 12.

picture."'"[14] A mere hunch does not create reasonable suspicion, but the level of suspicion required to meet the standard is "'"'"considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause.'"'"[15]

Nervous, evasive behavior is a factor in determining reasonable suspicion.[16] Another consideration is unprovoked flight upon noticing the police.[17] Other pertinent circumstances include the officer's own direct observations, dispatch information, directions from other officers, and the nature of the area and time of day during which the suspicious activity occurred.[18]

In this case, Guthard was familiar with the neighborhood where the seizure took place because he lived in it. Specifically, Guthard testified that he was aware of those individuals who frequented the house of the neighbors in question, but did not recognize Krannawitter or her Altima. Because of this personalized knowledge regarding his own neighborhood, Guthard testified that the fact that Krannawitter was parked in the driveway in question at 6 a.m. was suspicious. Guthard thought it was possible that the driver might be lost, but his suspicion about the Altima and its occupants was reinforced when he circled back to check on the Altima and witnessed it begin to back out of the driveway, only to pause for an unknown reason and abruptly drive back into the driveway just as he approached in his marked cruiser. In his interaction with Krannawitter, Guthard indicated that he thought he should check on the property and on her, to be sure that she and her passengers were not attempting to break into the property.

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[14] *Id.*

[15] *Id.*

[16] *U.S. v. Harris*, 313 F.3d 1228 (10th Cir. 2002).

[17] *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

[18] *U.S. v. Campbell*, 549 F.3d 364 (6th Cir. 2008).

Guthard witnessed what appeared to him to be evasive behavior when Krannawitter pulled out of and then immediately back into the neighbors' driveway. Based on his knowledge of the neighbors and the neighborhood in question, Guthard did not believe Krannawitter was visiting or acquainted with those neighbors such that there was a reason for her Altima to be parked in that driveway in the early morning hours. Guthard testified he considered it to be part of his job to keep an eye on his neighborhood. We conclude that when the totality of the circumstances is considered, Guthard's seizure of Krannawitter was supported by a particularized and objective basis for suspecting the particular person stopped of criminal activity.

2. Motion for New Trial

In her second assignment of error, Krannawitter assigns that the district court erred in denying her motion for new trial. In denying Krannawitter's motion for new trial, the district court found that the amended certificates of analysis were "not . . . newly discovered evidence," because they could have been discovered with reasonable diligence, and that in any case, the defect with the original certificates would not have rendered the breath test inadmissible.

[8] In order to obtain a new trial based on newly discovered evidence, a defendant must show that the new evidence could not with reasonable diligence have been discovered and produced at trial.[19] Additionally, the defendant must show the evidence is "so substantial that a different result may have occurred."[20] In other words, the defendant must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.

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[19] See, Neb. Rev. Stat. §§ 29-2101(5) and 29-2103(4) (Reissue 2016); *State v. Cross*, 297 Neb. 154, 900 N.W.2d 1 (2017).

[20] *State v. Cross, supra* note 19, 297 Neb. at 161, 900 N.W.2d at 6.

(a) Newly Discovered Evidence

The district court erred in finding that the amended certificates did not qualify as newly discovered evidence. A timeline of events relating to the certificates is helpful in determining this issue.

On June 29 and July 27, 2016, respectively, Palmer signed the original certificates of analysis of the solutions for testing concentrations of .08 and .15 milliliters of alcohol per 210 liters of breath, and the testing solutions were sent to Lancaster County. The solutions were those used to test and maintain the breath testing machine shortly before Krannawitter was arrested and tested on July 4, 2017.

Krannawitter's trial began on April 9, 2018. On that same date, Palmer signed affidavits stating that she had not tested those solutions, but that Hale had done that testing. It is not clear from the record how these affidavits came to be signed. On April 10, following a second day of trial, Krannawitter was found guilty. On May 7, Hale signed amended certificates of analysis, which were sent to Lancaster County. Krannawitter's motion for new trial was filed May 10. (The operative motion for new trial, however, is the amended motion for new trial, which was filed on July 27.)

Evidence is considered "newly discovered" if it "could not with reasonable diligence have [been] discovered and produced at the trial."[21] Defense counsel's affidavit indicates that he was not aware of the inaccuracy in the original certificates of analysis; nor is there any other evidence in the record to suggest that counsel should have been aware that the original certificates were incorrect. The amended certificates qualify as newly discovered evidence, and the district court erred in finding otherwise.

(b) Substantially Different Result

We turn next to the question of whether, had the certificates been offered at trial, the results of that trial would have

[21] § 29-2101(5).

been substantially different. Krannawitter contends, within the framework of her motion for new trial, that (1) her breath test results were inadmissible, (2) she had a right to confront Palmer and Hale, (3) the certificates of analysis were inadmissible hearsay, and (4) the State violated Krannawitter's due process rights when it offered Palmer's affidavit at trial.

[9] Krannawitter's argument on appeal is based on her assertion that because the original certificates of analysis were incorrect, there was insufficient foundation to support the introduction of her chemical breath test results. The four foundational elements which the State must establish as a foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied.[22] The certificate of analysis at issue in this appeal is required by 177 Neb. Admin. Code, ch. 1, § 008.04A (2016), of the Department of Health and Human Services regulations. Krannawitter contends—as set forth above—that the State did not prove § 008.04A, which requires that the test be properly conducted under the methods stated by the Department of Health and Human Services.

But Krannawitter's assertion that there was improper foundation overlooks both the framework used to determine whether a motion for new trial should be granted and the substantive effect of the amended certificates. We agree with Krannawitter that together with Palmer's affidavit, the amended certificates of analysis showed that the *original* certificates were incorrect.

But we do not agree that this fact results in the conclusion that there was no foundation for the admission of the breath

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[22] *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017).

test results. In addition to contributing to the evidence showing that the original certificates were incorrect, the amended certificates were independent foundational evidence supporting the admission of those results. And in addition to even these certificates, there was other evidence presented at the hearing on the amended motion for new trial that supported the admissibility of the results.

Krannawitter also argued that her confrontation rights were violated when she was not permitted to confront the witnesses against her, specifically naming Hale. The district court rejected this claim in its order, citing to *State v. Fischer*[23] wherein this court held that certificates of analysis similar to these are nontestimonial.

Krannawitter argues that our prior case law is distinguishable because there were *amended* certificates of analysis, the "primary purpose of [which] was to present after-the-fact evidence that the calibration verification was reliable so that the State could establish that the testing device was working properly at the time the breath test was administered."[24] While we understand the distinction Krannawitter relies upon, we find that it makes no difference in this case.

In concluding that such certificates of analysis were nontestimonial, this court in *Fischer* reasoned that the statements in a certificate "did not pertain to any particular pending matter" and that the certificate "was prepared in a routine manner without regard to whether the certification related to any particular defendant."[25]

This reasoning is also applicable to the amended certificates now at issue. There is no indication from the face of the amended certificates that they were prepared for a particular criminal proceeding. Rather, the testimony of one of the

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[23] *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

[24] Brief for appellant at 30-31.

[25] *State v. Fischer, supra* note 23, 272 Neb. at 971, 972, 726 N.W.2d at 182, 183.

maintenance officers indicated that the amended certificates were "additional documentation" received by the county in connection with the simulator solutions in the county's possession and that the only difference between the original and the amended certificates was the name of the person who tested the solutions.

Moreover, the record shows that that the amended certificates were received by Lancaster County after the time Krannawitter was convicted and before the date Krannawitter filed her motion for new trial. Just as the original certificates were nontestimonial, so also were the amended certificates. There is no merit to Krannawitter's contention to the contrary.

Whether there was sufficient foundation for the admission of those results is a question for the trial court.[26] At the hearing on the motion for new trial, the district court found that the foundational elements were met and that the results were admissible. As such, the trial court concluded that the results of a trial where the amended certificates of analysis were offered would not have been substantially different.

We need not reach Krannawitter's arguments on appeal regarding her due process rights, or whether the certificates of analysis were inadmissible hearsay, because neither was raised in her amended motion for new trial or at the hearing on that motion.

The trial court did not abuse its discretion in denying Krannawitter's amended motion for new trial.

VI. CONCLUSION

The judgment and sentence of the district court are affirmed.

Affirmed.

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[26] See *State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013).



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Jackie L. Barfield, respondent.

938 N.W.2d 863

Filed February 21, 2020. No. S-19-204.

1. **Disciplinary Proceedings.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
2. ____. Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
3. ____. Attorneys licensed to practice law in the State of Nebraska agree to operate under the supervision of the office of the Counsel for Discipline.
4. ____. A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.
5. ____. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.
6. ____. The goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the public interest to allow an attorney to keep practicing law.
7. ____. Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.
8. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the

respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

9. ____. Each attorney discipline case must be evaluated in light of its particular facts and circumstances.
10. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
11. ____. In attorney discipline cases, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
12. ____. Neither good faith nor ignorance of the rules prohibiting commingling client and personal funds provides a defense to a disciplinary charge that an attorney violated the rules against commingling.
13. ____. The Nebraska Supreme Court considers commingling of client funds with an attorney's own funds to be a matter of gravest concern in reviewing claims of lawyer misconduct.
14. ____. Even when the client suffers no loss, an attorney's commingling of client funds with personal funds is not a trivial or technical rule violation.
15. ____. Because it is such a dangerous and unfortunately common basis for disciplinary action, there is a continuing need to send a clear and strong message deterring attorneys from commingling client and personal funds and from using client trust accounts as personal checking accounts.
16. **Disciplinary Proceedings: Evidence.** In an attorney discipline case, the burden is on the respondent to provide evidence to be considered for mitigation of the formal charges.
17. **Disciplinary Proceedings.** Continuing commitment to the legal profession and the community is a mitigating factor in an attorney discipline case.
18. ____. Having no prior complaints is a mitigating factor in an attorney discipline case.
19. ____. An attorney's poor accounting practices are neither an excuse nor a mitigating circumstance in reference to commingled or misappropriated funds.
20. ____. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.
21. **Disciplinary Proceedings: Presumptions.** Mitigating factors may overcome the presumption of disbarment in misappropriation and commingling cases only where they are extraordinary and, when aggravating circumstances are present, they substantially outweigh those aggravating circumstances.

Original action. Judgment of disbarment.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

James Walter Crampton for respondent.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

NATURE OF CASE

The respondent appeals from the report and recommendation of the referee in an attorney disciplinary action. The referee recommended disbarment for violations of Neb. Ct. R. of Prof. Cond. §§ 3-501.15 (safekeeping property) and 3-508.4 (rev. 2016) (misconduct) relating to the attorney's commingling of earned and unearned client payments and cash withdrawals and checks written from her attorney trust account to pay for business and personal expenses. The trust account also suffered several overdrafts. The respondent argues that suspension rather than disbarment is the appropriate discipline for her actions.

BACKGROUND

Jackie L. Barfield was admitted to the practice of law in the State of Nebraska in 1993, and at all times relevant was engaged in the practice of law in Omaha, Nebraska. Formal charges against her were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court in February 2019.

The charges alleged that between October 2017 and April 2018, Barfield had written multiple personal checks and had made multiple cash withdrawals out of her attorney trust account. She had also paid insufficient-fund fees several times. Barfield admitted to writing personal checks and taking cash withdrawals from her attorney trust account, as well as having insufficient funds in that account, since at least 2013. Barfield was charged with violating §§ 3-501.15 (safekeeping property) and 3-508.4 (misconduct). Barfield, in her answer, admitted to the allegations.

In mitigation, Barfield pled that (1) any economic harm any person may have suffered from her acts was "of very brief duration," (2) she has been providing services to economically disadvantaged members of the public at lower-than-normal fees throughout her career, (3) she is a minister and religious leader providing "comfort and moral guidance to her small group of followers generally beneficial to the social moral fabric of her community," and (4) she has no prior serious disciplinary complaints except one related to an unpaid bill from a doctor, for which she was privately reprimanded approximately 20 years before. Pursuant to Barfield's motion, judgment on the pleadings was granted as to the facts, under Neb. Ct. R. § 3-310(L) (rev. 2014).

Neither party filed written exceptions to the referee's report that was issued after a hearing to determine the nature and extent of the discipline to be imposed, considering any aggravating and mitigating factors. The report set forth that Barfield had been without a business account for approximately 5 years and, since at least 2013, has been withdrawing cash and writing checks on her attorney trust account to pay for personal and business expenses. Barfield has paid insufficient fund charges since 2013 for at least 23 overdrafts on her attorney trust account.

The record reflects that previously, in May 2000, the Nebraska State Bar Association had privately reprimanded Barfield for failing to deposit into her trust account a check issued to honor a medical lien in relation to her client's settlement and for failing to promptly disburse a portion of the settlement funds designated for medical providers. The Counsel for Discipline had found in the private reprimand that Barfield violated provisions of the Code of Professional Responsibility concerning general misconduct, neglect, and preservation of the identity of client funds.[1]

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[1] Canon 1, DR 1-102(A)(1); Canon 6, DR 6-101(A)(3); and Canon 9, DR 9-102(A)(1)(2) and (B)(4), of the Code of Professional Responsibility.

Barfield's Testimony

Barfield testified at the disciplinary hearing. Barfield was not permitted to offer any other evidence concerning mitigation, due to her failure to comply with discovery deadlines.

Barfield explained that her business account had been closed approximately 5 years prior due to lack of funds. Rather than opening another business account, she used her trust account to pay business expenses. She did not open another business account until recently.

Barfield testified that for the past 5 years she had worked part time as a sole practitioner out of her daughter's home. She explained: "Well, the business expenses are home-related. And I practice out of Bellevue, which is my daughter's home, and so it's been difficult, and that's one of the reasons that I put things related to Barfield Law, I just put it in the trust account." She testified that she has had no support staff since she stopped practicing out of a stand-alone building approximately 5 years before the hearing.

Barfield testified that her retainers were generally small and had been earned sometimes even before they were deposited into the trust account. No client had ever complained about how their funds were handled. When asked whether her commingling and withdrawals had harmed her clients, she said:

> Well, in reading some of the case law and — in my mind I didn't think it was, but in reading the case law, I understand since this case has started that even, you know, if you use it there's a possibility and so, yes, under those circumstances I do agree.

As for the overdrafts, Barfield explained that at least one of the overdrafts was due to a client's check bouncing—after she had withdrawn the deposit by making a check out to herself.

Barfield noted that since 2014, she has had several health concerns related to her knees and hips. She had been trying to wind up her practice in Nebraska in order to live permanently in Texas, where the weather was better for her health. But the winding up was taking longer than she thought, and she was

traveling back and forth between a daughter's home in Texas and another daughter's home in Nebraska. The traveling had put an emotional strain on her, and she suffered from anxiety and migraines. In fact, she had suffered from "anxiety and everything" since she started practicing. Barfield testified that she had taken antidepressants "over the years" and had been prescribed medication for her anxiety.

With regard to the private reprimand approximately 20 years before, Barfield explained that the settlement payment to her client had been stopped due to an ongoing criminal matter in which the FBI was involved. This stop payment, in conjunction with her private practice being otherwise wound down after she accepted a position at a university, "threw my whole account off" and made it difficult for the doctor in question to contact her. Barfield left her job at the university after approximately 1 year of employment there and, in 2000, after taking another year to focus on her family and mental health, returned to private practice.

Barfield asked for any sanction short of disbarment. She stated that she now understood that she could not manage going back and forth between Texas and Nebraska anymore and would stay in Nebraska if allowed to continue to practice, stating:

> [M]y intention is if I'm going to practice in Nebraska, I have to live in Nebraska. And the going back and forth is just too stressful. It's causing me a lot of anxiety and it puts you in the position of having to do more than you can handle.

Barfield testified that she served lower-income clients with the intention of giving back to her community. She explained, "I believe I focus so much probably on trying to do the best work for my clients, and I might have been hyper focused on that than what was going on in my life." Barfield testified that she never wished to harm her clients and believed she could properly manage a trust account in the future.

Referee's Recommendation

The referee in his report noted that misuse of client trust accounts, even without obvious misappropriation, harms the reputation of the bar and that an appropriate sanction should be imposed that will deter others from such conduct. Barfield's conduct, the referee found, had tarnished the reputation of the bar.

The referee found that the duration and repetitive nature of Barfield's violations reflected negatively on Barfield's future fitness to practice law. Also, the referee considered Barfield's conduct to constitute both commingling and misappropriation that caused harm to her clients, reasoning:

> [Barfield] admittedly left earned fees in her trust account without a clear accounting and separation until it was impossible to determine what money belonged to her and what belonged to her clients, thus commingling her money with client money. Additionally, [Barfield's] bank records show numerous overdrafts in her attorney trust account, which is clearly the misappropriation of client funds.

After considering sanctions imposed in similar cases, the referee concluded that the nature of Barfield's offenses "is of the gravest concern to the legal profession and the Court has consistently found these violations require disbarment, absent mitigation."

The referee found that Barfield had been cooperative throughout the investigation and disciplinary proceedings, which the referee considered a mitigating factor. The referee agreed with Barfield's counsel that Barfield's actions of readily admitting misconduct, acknowledging responsibility for her actions, and acknowledging that her violations have harmed the public reflected positively upon Barfield's attitude and character.

On the other hand, the referee stated that it appeared that Barfield failed to grasp the seriousness of her violations. The referee noted that Barfield had expressed that any economic

harm was only of very brief duration. The referee also found that the lack of actual, or only minimal, harm was not a mitigating factor.

The referee also did not consider it as mitigating factors that there is no record of complaints from clients, attorneys, or courts against Barfield or that Barfield claimed to have modified her trust account practices, because she did so only after receiving notice of the disciplinary investigation. Lastly, the referee did not consider as mitigating any depression Barfield may have experienced, since she did not present any medical evidence that the depression was a direct and substantial contributing factor for her misconduct.

The referee found as an aggravating factor that this was not the first disciplinary action brought against Barfield concerning her trust account. Furthermore, the referee noted that Barfield's current misuse of her trust account was not an isolated incident but consisted of cumulative acts occurring over approximately 5 years.

The referee recommended disbarment with the following condition should Barfield apply for reinstatement: "[Barfield] should produce evidence satisfactory to the Court that she is fit to practice law; and further that the Counsel for Discipline has not been notified by the Court that [Barfield] has violated any disciplinary rule during her disbarment." The referee also recommended that Barfield be required to comply with the notification requirements of Neb. Ct. R. § 3-316 (rev. 2014) and that she be subject to punishment for contempt if she fails to do so. Finally, the referee recommended that Barfield be directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days of any order imposing such costs and expenses.

ASSIGNMENT OF ERROR

Barfield disagrees with the referee's recommendation that she should be disbarred as a sanction for her misconduct.

STANDARD OF REVIEW

[1] When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, this court may, at its discretion, adopt the findings of the referee as final and conclusive.[2]

[2] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[3]

ANALYSIS

Under § 3-310(L), we accept the findings of the referee as final and conclusive. In addition, Barfield admitted the allegations and, pursuant to Barfield's motion, judgment on the pleadings was granted. Barfield violated §§ 3-501.15 (safekeeping property) and 3-508.4 (misconduct). The only issue left to consider is the appropriate sanction.

[3-5] Attorneys licensed to practice law in the State of Nebraska agree to operate under the supervision of the office of the Counsel for Discipline.[4] A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.[5] Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.[6]

[6,7] Under Neb. Ct. R. § 3-304, this court may impose one or more of the following disciplinary sanctions: "(1) Disbarment by the Court; or (2) Suspension by the Court; or

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[2] See § 3-310(L).

[3] *State ex rel. Counsel for Dis. v. Nimmer*, 300 Neb. 906, 916 N.W.2d 732 (2018).

[4] *Id.*

[5] *Id.*

[6] *Id.*

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or (4) Censure and reprimand by the Court; or (5) Temporary suspension by the Court[.]" The goal of attorney discipline proceedings is not as much punishment as a determination of whether it is in the public interest to allow an attorney to keep practicing law.[7] Providing for the protection of the public requires the imposition of an adequate sanction to maintain public confidence in the bar.[8]

[8-11] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[9] Each attorney discipline case must be evaluated in light of its particular facts and circumstances.[10] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[11] Furthermore, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[12]

[12] Barfield's use of her trust account as both a business account and a personal account violated the rule against commingling. Generally speaking, an attorney violates the rule against commingling when the funds of the client are

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

intermingled with those of the attorney in such a way that their separate identity is lost and they may be used by the attorney for personal expenses or subjected to the claims of the attorney's creditors.[13] Section 3-501.15(a) requires a lawyer to "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Section 3-501.15(a) also requires that client "[f]unds shall be kept in a separate account maintained in the state where the lawyer's office is situated." The only exception is when the lawyer's own funds are deposited into a client trust account for the sole purpose of paying bank service charges on that account, and the exception applies only to deposits in the amount necessary for that purpose.[14] Neither good faith nor ignorance of the rules prohibiting commingling client and personal funds provides a defense to a disciplinary charge that an attorney violated the rules against commingling.[15]

[13,14] This court considers commingling of client funds with an attorney's own funds to be a matter of gravest concern in reviewing claims of lawyer misconduct.[16] The practice involves the inherent danger of unforeseen circumstances jeopardizing the safety of the client's funds.[17] Even when the client suffers no loss, an attorney's commingling of client funds with personal funds is not a trivial or technical rule violation.[18]

[15] Because it is such a dangerous and unfortunately common basis for disciplinary action, there is a continuing need to send a clear and strong message deterring attorneys from commingling client and personal funds and from using

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[13] *Id.*

[14] § 3-501.15(b).

[15] *State ex rel. Counsel for Dis. v. Nimmer, supra* note 3.

[16] *Id.*

[17] See *id.*

[18] *Id.*

client trust accounts as personal checking accounts.[19] Commingling of client funds with personal funds, even when it does not involve obvious misappropriation, harms the reputation of the entire legal profession by undermining public confidence and trust in attorneys, in the courts, and in the legal system.[20] Thus, we have repeatedly said that absent extraordinary mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.[21]

[16,17] The burden is on the respondent to provide evidence to be considered for mitigation of the formal charges. Cooperation and remorse during disciplinary proceedings are mitigating factors,[22] and it is undisputed that Barfield readily admitted her misconduct, fully cooperated in the investigation, acknowledged responsibility for her actions, and acknowledged that her violations harmed the public. Furthermore, Barfield testified that she provided legal services at a reasonable cost to those who could not otherwise afford such services. Continuing commitment to the legal profession and the community is a mitigating factor in an attorney discipline case,[23] although we note that the record here is somewhat limited as to the level of Barfield's community involvement throughout her career.

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[19] See *id.*

[20] See *id.*

[21] See *id.* See, also, *State ex rel. Counsel for Dis. v. Thebarge*, 289 Neb. 356, 854 N.W.2d 914 (2014); *State ex rel. Counsel for Dis. v. Council*, 289 Neb. 33, 853 N.W.2d 844 (2014); *State ex rel. Counsel for Dis. v. Crawford*, 285 Neb. 321, 827 N.W.2d 214 (2013); *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997); *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995).

[22] See *State ex rel. Counsel for Dis. v. Switzer, supra* note 21.

[23] See, *State ex rel. Counsel for Dis. v. Trembly*, 300 Neb. 195, 912 N.W.2d 764 (2018); *State ex rel. Counsel for Dis. v. Council, supra* note 21.

[18] Barfield further represents as a mitigating factor that there have never been any complaints against her for mishandling clients' cases or for failing to communicate or act. We have recognized that having no prior complaints is a mitigating factor,[24] but we have not considered mitigating the lack of complaints in one area of conduct when there has been a past complaint in another area. Barfield's assertion ignores the prior complaint that resulted in the private reprimand in 2000.

[19] Barfield does not argue that her mental or physical health is a mitigating factor. Regarding depression, we have said that in order to be a mitigating factor, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.[25] No such evidence was presented in this case. Neither, rightly, does Barfield argue that her lack of staff and her living situation, leading to her admittedly poor accounting practices, presented mitigating factors. Poor accounting practices are neither an excuse nor a mitigating circumstance in reference to commingled or misappropriated funds.[26]

[20] We have considered prior reprimands as aggravators,[27] and we agree with the referee that the conduct resulting in the 2000 reprimand is an aggravating factor in this case. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.[28] We have said that cumulative acts of misconduct can, and often do, lead to disbarment.[29] Barfield's description of her

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[24] See *State ex rel. Counsel for Dis. v. Pierson*, 281 Neb. 673, 798 N.W.2d 580 (2011).

[25] *State ex rel. Counsel for Dis. v. Switzer, supra* note 21.

[26] See *State ex rel. Counsel for Dis. v. Nimmer, supra* note 3.

[27] *State ex rel. Counsel for Dis. v. Switzer, supra* note 21.

[28] *Id.*

[29] See *id.*

prior reprimand as a "misunderstanding of a debt owed to a medical provider," which occurred in the "distant past," does not remove it as an aggravating factor.[30]

Moreover, we consider aggravating the fact that the acts of commingling presently at issue were both intentional and routine over the course of several years. During that time, Barfield used her trust account as both a business account and a personal account, regularly withdrawing cash or paying directly from the trust account her utilities, medical expenses, and store purchases.

Barfield asserts that the level of moral turpitude reflected in her commingling and misappropriation was dissimilar to other cases in which we have imposed disbarment, in that she "used her own funds from her trust account to pay day to day meager expenses because she lost her other accounts to write checks from," adding that "[s]he did not steal anybody's money."[31] But we have repeatedly said that the fact that a client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction than disbarment.[32] Further, Barfield fails to point to a case where the prolonged use of a trust account to pay meager, as opposed to lavish, expenses has led to a lesser sanction.

In numerous cases, we have imposed disbarment for commingling or misappropriation when the client did not suffer a financial loss, even when there were mitigating factors.[33]

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[30] Brief for respondent at 7.

[31] *Id.* at 9, 10.

[32] See, *State ex rel. Counsel for Dis. v. Crawford, supra* note 21; *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

[33] See, e.g., *State ex rel. Counsel for Dis. v. Nimmer, supra* note 3; *State ex rel. NSBA v. Howze, supra* note 21; *State ex rel. NSBA v. Malcom, supra* note 21; *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996); *State ex rel. NSBA v. Woodard, supra* note 21; *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

In *State ex rel. NSBA v. Veith*,[34] for example, the relator was disbarred because of several instances over the course of 8 months of having a deficient balance in his client trust account, which he subsequently attempted to remedy through personal loans to cover the deficiencies. The deficiencies were the result of transfers to his business account, and the transferred funds were used for salaries, office expenses, an upgraded computer system and law library, and a car.[35]

We noted case law from other jurisdictions holding that the mere fact that an attorney's trust account balance falls below the amount deposited in and purportedly held in trust supports a finding of misappropriation, explaining that wrongful or improper intent is not an element of misappropriation.[36] We found the proper sanction to be disbarment, despite no aggravating factors and several mitigating factors, including being in good standing and free from disciplinary complaint or penalty, cooperation with the investigation, remorse, a good reputation in the community, and the provision of many pro bono hours.[37] We repeated that an attorney has a duty to keep separate and properly account for client trust funds and explained that an attorney may not use client trust funds to cover business expenses.[38] We also disapproved of a prior trend toward lighter sanctions for such behavior, citing with approval another court's reasoning that imposing lighter discipline would "'"stand out like an invitation to the lawyer who is in financial difficulty for one reason or another"'" and that "'"[t]he profession and the public suffer as a consequence."'"[39]

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[34] *State ex rel. NSBA v. Veith, supra* note 33.

[35] *Id.*

[36] See *id.*

[37] See *id.*

[38] *Id.*

[39] *Id.* at 252, 470 N.W.2d at 558, quoting *The Florida Bar v. Breed*, 378 So. 2d 783 (Fla. 1979).

[21] We have generally imposed the lesser discipline of suspension in cases of commingling or misappropriation only where (1) it involved an isolated incident or a limited number of incidents over a relatively isolated period of time, (2) there were multiple significant mitigating factors, and (3) there were no aggravating factors.[40] Mitigating factors may overcome the presumption of disbarment in misappropriation and commingling cases only where they are extraordinary and, when aggravating circumstances are present, they substantially outweigh those aggravating circumstances.[41]

Here, the mitigating factors of Barfield's cooperation, remorse, and efforts to provide affordable representation to the community, while laudable, are insufficient both to rebut the presumption of disbarment for commingling and to substantially outweigh the aggravating factors. This is not the first time Barfield has been disciplined in relation to her maintenance of her trust account, and she has for several years engaged in a continuous pattern of commingling client funds. Especially in light of the prior reprimand, Barfield's prolonged and persistent violation of the rule against commingling reflects a general failure to fully comprehend the serious nature of such conduct.[42]

After balancing the relevant factors in comparison to other cases, considering the need to protect the public, considering the need to deter others, and considering the reputation of the

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[40] See, *State ex rel. Counsel for Dis. v. Davis*, 276 Neb. 158, 760 N.W.2d 928 (2008); *State ex rel. Counsel of Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004); *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001); *State ex rel. NSBA v. Kratina*, 260 Neb. 1030, 620 N.W.2d 748 (2001); *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995). But see *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014).

[41] See, *State ex rel. Counsel for Dis. v. Nimmer, supra* note 3; *State ex rel. NSBA v. Woodard, supra* note 21.

[42] See *State ex rel. Counsel for Dis. v. Nimmer, supra* note 3.

bar as a whole, we agree with the referee that disbarment is the only appropriate sanction.

CONCLUSION

Barfield violated §§ 3-501.15 (safekeeping property) and 3-508.4 (misconduct). It is the judgment of this court that Barfield is disbarred from the practice of law in the State of Nebraska, effective immediately. She is directed to comply with § 3-316, and upon failure to do so, she shall be subject to punishment for contempt.

Judgment of disbarment.

Heavican, C.J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Vincent Valentino, appellant.

939 N.W.2d 345

Filed February 21, 2020. No. S-19-270.

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. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Motions to Dismiss: Prosecuting Attorneys: Discrimination: Evidence.** On a defendant's motion to dismiss based on discriminatory or selective prosecution, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
7. **Prosecuting Attorneys: Discrimination.** The State's decision to deny an arrestee admission into a pretrial diversion program is a decision to prosecute and may be attacked by a claim of selective prosecution.
8. **Constitutional Law: Prosecuting Attorneys: Discrimination.** The general rule regarding prosecutorial discretion in law enforcement is that

unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race, religion, nationality, sex, or political affiliation, the use of such discretion does not violate constitutional protections.

9. **Prosecuting Attorneys: Discrimination: Proof.** To establish a selective prosecution claim, a defendant must demonstrate that the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose.
10. **Constitutional Law: Prosecuting Attorneys: Discrimination: Proof.** A defendant claiming selective prosecution based on gender must establish (1) that similarly situated individuals of a different gender were not prosecuted and (2) that the decision to prosecute was invidious or in bad faith, based upon impermissible considerations or the desire to prevent the defendant's exercise of his or her constitutional rights.
11. **Prosecuting Attorneys: Discrimination: Dismissal and Nonsuit.** In a selective prosecution claim, the trial court has the remedy of dismissing the charge against the defendant if intentional and purposeful discriminatory enforcement is shown.

Appeal from the District Court for Lancaster County, Jodi L. Nelson, Judge, on appeal thereto from the County Court for Lancaster County, Laurie J. Yardley, Judge. Judgment of District Court affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Vincent Valentino, pro se.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Following an arrest for solicitation of prostitution under Neb. Rev. Stat. § 28-801.01 (Reissue 2016), Vincent Valentino unsuccessfully applied to participate in the Lancaster County pretrial diversion program. An administrative review hearing

was held, and the hearing officer concluded that because the offense was not listed as an eligible offense, no error had occurred. Valentino moved to suppress evidence and statements and served subpoenas duces tecum alleging that he had been selectively prosecuted based on his gender. Valentino claimed that the sting operation in which he was arrested was conducted pursuant to the National Johns Suppression Initiative (NJSI) and that it impermissibly targeted men for prosecution. The county court for Lancaster County quashed the subpoenas and denied his motions to suppress and to dismiss. The county court ultimately convicted Valentino of the offense. Valentino appealed to the Lancaster County District Court, which affirmed the judgment of the county court. Valentino appealed, claiming he was selectively prosecuted and excluded from the pretrial diversion program because of his gender. We affirm.

STATEMENT OF FACTS

In 2015, the Lincoln Police Department (LPD) began participating in the NJSI in partnership with the Cook County, Illinois, Sheriff's Department. Press releases from the Cook County sheriff stated that the NJSI "highlight[s] the role of sex buyers — or 'johns' — as perpetrators in this violent and exploitive industry" and had resulted in the arrests of more than 5,800 people across 22 states. Following a sting operation, the LPD arrested six men, including Valentino, for soliciting prostitution; four women for prostitution; and several other individuals for other crimes.

The State charged Valentino with one count of solicitation of prostitution in violation of § 28-801.01, a Class I misdemeanor. Valentino applied to participate in a pretrial diversion program run by the Lancaster County Attorney's office. His application was denied, and Valentino sought administrative review.

Administrative Review.

An administrative review hearing was held regarding pretrial diversion on November 17, 2016. The two issues up for review

were: (1) whether the offense of solicitation of prostitution in violation of § 28-801.01 is an eligible offense under the "Lancaster County Adult Diversion Program Eligibility Criteria and Program Conditions" (the Diversion Guidelines) and, (2) if so, whether Valentino was otherwise eligible to participate in pretrial diversion. A local attorney was appointed as the hearing officer to review the county attorney's decision. The hearing officer issued an opinion in which he concluded that under the Diversion Guidelines, the crime of solicitation was not enumerated as eligible, ineligible, or eligible on a case-by-case basis for pretrial diversion, and that therefore, the decision to deny pretrial diversion was not arbitrary and capricious. The opinion concluded that Valentino's charge was ineligible and that it was unnecessary to address eligibility further.

Motion to Suppress for Selective Prosecution and Subpoenas Duces Tecum.

Valentino served a subpoena duces tecum on a deputy county attorney and Ben Miller, a sergeant with the LPD. The subpoenas requested documents regarding Valentino's request for the pretrial diversion program. The State moved to quash the subpoenas for various reasons, including that the requests were unduly burdensome and required the witnesses to produce documents which were not relevant to Valentino's guilt or innocence and were not in its custody.

Valentino moved to suppress, alleging, inter alia, that he had been unconstitutionally and selectively prosecuted based upon his gender. In support of his claim, Valentino alleged that LPD's sting operation impermissibly targeted men for prosecution.

At a hearing on the State's motions to quash and Valentino's motion to suppress based on selective prosecution, the county court allowed Valentino to question both the deputy county attorney and Sergeant Miller but ultimately granted the motions to quash.

Sergeant Miller testified that the purpose of the NJSI is to "focus on people typically referred to as Johns, who are

looking to purchase women for sale for sexual purposes." He testified that he had never encountered a female soliciting a prostitute and that he had never arrested a woman for solicitation of prostitution. He testified that advertisements created by the LPD do not invite gender-specific responses and that the LPD cannot control the gender of who responds to its advertisements. Sergeant Miller testified that in addition to stings aimed at buyers, the LPD also conducts prostitution stings in which prostitutes, including women, are arrested and referred for prosecution.

The deputy county attorney testified that he was unaware whether a female had been prosecuted for solicitation but stated that "[i]f [the police] arrest a female for it, we'd prosecute the female." He stated that he was unaware of a case where a person was denied pretrial diversion based upon their gender.

The court found that based on the evidence, Valentino did not show he was selectively arrested and prosecuted. With regard to Valentino's claims that he was entitled to pretrial diversion, the court concluded that the offense of solicitation of prostitution was not an eligible offense for pretrial diversion under the Diversion Guidelines.

Valentino subsequently appealed the county court's decision denying his motion to suppress; however, his appeal was dismissed for lack of jurisdiction—first by the district court and then by the Nebraska Court of Appeals. Valentino then filed a petition for further review, which we denied on March 27, 2018, in case No. A-17-1305.

County Court Trial.

After a stipulated bench trial held on August 29, 2018, the county court found Valentino guilty. It ordered him to pay a fine of $500. Valentino appealed to the district court. Valentino filed a statement of errors, claiming, inter alia, that the county court erroneously denied his various claims and motions relating to gender-based discrimination, including those connected to pretrial diversion, evidence, and "[Valentino's]

motion to dismiss for selective investigation/prosecution based upon gender."

District Court Appeal.

On appeal to the district court, Valentino claimed that the Lancaster County Attorney and the LPD selectively arrested and prosecuted him based on his gender and that the Lancaster County Attorney did not let him participate in pretrial diversion due to his gender. Following a hearing, the district court found that law enforcement did not exercise its discretion in a discriminatory manner and affirmed the judgment of the county court. In reaching its conclusion, the district court reasoned that Valentino had not presented evidence that a similarly situated person was not prosecuted, nor had he presented evidence of clear and intentional discrimination. The district court assumed without deciding that the decision of the county attorney regarding pretrial diversion was reviewable and concluded that Valentino had not shown that the county attorney wrongly deprived him of an opportunity for administrative review or written reasons for denial of admission to the pretrial diversion program. The district court agreed with the hearing officer that the record showed that the application for pretrial diversion was denied because "solicitation, like prostitution, was not an eligible offense" and not because of Valentino's gender.

Valentino appeals.

ASSIGNMENTS OF ERROR

Valentino claims, restated and consolidated, that the district court sitting as an appellate court erred when it failed to reverse various orders of the county court and affirmed his conviction. With respect to the pretrial diversion, Valentino claims that the county attorney improperly failed to give reasons for denying him participation in the pretrial diversion program and that the denial was motivated by selective prosecution. With respect to the trial in county court, Valentino claims that the county court erred when it denied his motion

to suppress, granted the State's motions to quash subpoenas, and rejected his claims that the prosecution was motivated by selective prosecution. The rejection of these claims form the basis of Valentino's appeal.

STANDARDS OF REVIEW

[1-5] 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. *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018); *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id.* 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. *Id.* But we independently review questions of law in appeals from the county court. *Id.* When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court. *Id.*

[6] On a defendant's motion to dismiss based on discriminatory or selective prosecution, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. See *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988).

ANALYSIS

In this case, Valentino generally contends that he was selectively prosecuted for soliciting prostitution. In particular, he asserts that the decision by law enforcement to target and prosecute male buyers of sex was selective prosecution because it was an unlawful, deliberate discrimination based on a suspect class, namely the arrestee's gender. Valentino also

asserts that a policy of denying pretrial diversion to buyers was impermissible gender-based discrimination.

With respect to pretrial diversion, Valentino contends that the county attorney improperly failed to give reasons for denying him participation in the pretrial diversion program. We find no impropriety. We refer to *Clayton v. Lacey*, 256 Neb. 282, 589 N.W.2d 529 (1999), which primarily involved a question of appealability. Although in *Clayton* we disapproved of the county attorney's failure to give a reason for denying participation in pretrial diversion, we ultimately dismissed the challenge, because the defendant had pursued an unacceptable form of action. The crime for which the defendant in *Clayton* was prosecuted was specifically identified on the list of crimes eligible for pretrial diversion. In contrast, the crime of soliciting with which Valentino was charged was not listed as an eligible offense, and thus our disapproval of providing no reasons for denial in *Clayton* is not warranted in this case.

[7] The State's decision to deny an arrestee admission into a pretrial diversion program is a decision to prosecute and may be attacked by a claim of selective prosecution. We need not separately analyze Valentino's pretrial diversion selective prosecution contention, because it is encompassed by Valentino's claim that he was selectively brought to trial. See *Clayton v. Lacey, supra*. Thus, Valentino's claims of selective prosecution with regard to pretrial diversion and trial are but a single claim that he was selectively prosecuted based on his gender. As explained below, we conclude that Valentino did not proffer sufficient evidence of selective prosecution to entitle him to relief.

[8] It is important to underscore that the general rule regarding prosecutorial discretion in law enforcement is that unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race, religion, nationality, sex, or political affiliation, the use of such discretion does not violate constitutional protections. See, *State v.*

Katzman, supra; *Salaiscooper v. Dist. Ct.*, 117 Nev. 892, 34 P.3d 509 (2001).

[9-11] To establish a selective prosecution claim, it has been generally held that a defendant must demonstrate that the prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). As in the present case, this requires the defendant to establish (1) that similarly situated individuals of a different gender were not prosecuted and (2) that the decision to prosecute was "invidious or in bad faith," based upon impermissible considerations or the desire to prevent the defendant's exercise of his or her constitutional rights. *State v. Katzman*, 228 Neb. 851, 855, 424 N.W.2d 852, 856 (1988). See *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). It has been observed that the trial court has the remedy of dismissing the charge against the defendant if such intentional and purposeful discriminatory enforcement is shown. *City of Minneapolis v. Buschette*, 307 Minn. 60, 240 N.W.2d 500 (1976).

With respect to obtaining discovery in support of a selective prosecution claim, a defendant must produce "some evidence" making a "credible showing" of both discriminatory effect and discriminatory intent. *United States v. Armstrong*, 517 U.S. at 470. Just as the standard for ultimately proving a selective prosecution claim is a rigorous one, so, too, is the evidentiary threshold for obtaining discovery from the State or government to support such a claim. *United States v. Armstrong, supra*. The U.S. Supreme Court has observed:

> Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption" . . . that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

Id., 517 U.S. at 463-64 (citation omitted).

Turning to Valentino's arguments on appeal, his claims are predicated on the view that only men were prosecuted as buyers of sex and that such prosecution was driven by bad faith. However, the record does not support Valentino's view. Sergeant Miller testified that he had not arrested a woman for solicitation of prostitution, but that he had also never encountered a woman as a buyer. The deputy county attorney testified that the Lancaster County Attorney will "prosecute who shows up on our doorstep" and would prosecute women charged with soliciting a prostitute. It has been observed and we agree that "[t]he police do not intentionally discriminate against one gender by the absence of attempts to detect and apprehend offenders of the other gender, when no evidence is presented that offenders of the other gender are engaging in similar criminal behavior." *Branche v. Com.*, 25 Va. App. 480, 489, 489 S.E.2d 692, 696-97 (1997). Thus, Valentino did not show that similarly situated women were not prosecuted for solicitation as buyers or that the prosecutorial decision had a discriminatory effect. See, *United States v. Armstrong, supra*; *State v. Katzman, supra*.

To the extent that Valentino asserts that solicitation is gender specific and impermissible, a plain reading of the statute is to the contrary. *State v. Stanko*, 304 Neb. 675, 936 N.W.2d 353 (2019) (noting that in absence of anything indicating otherwise, statutory language is to be given its plain and ordinary meaning). Section 28-801.01 regarding solicitation provides as follows: "(1) Any person who solicits another person not *his or her* spouse to perform any act of sexual contact or sexual penetration, as those terms are defined in section 28-318, in exchange for money or other thing of value, commits solicitation of prostitution." (Emphasis supplied.)

Neb. Rev. Stat. § 28-801 (Reissue 2016) regarding prostitution provides in relevant part as follows:

> (1) Except as provided in subsection (5) of this section, any person who performs, offers, or agrees to perform any act of sexual contact or sexual penetration, as those

> terms are defined in section 28-318, with any person not *his or her* spouse, in exchange for money or other thing of value, commits prostitution.

(Emphasis supplied.)

In Nebraska, solicitation and prostitution are separate gender-neutral offenses, meaning they can be committed by either men or women. In particular, as can be seen in the foregoing gender-neutral statutory language regarding solicitation and prostitution, the defendant is referred to as "any person" and "his or her." Compare *City of Minneapolis v. Buschette*, 307 Minn. 60, 240 N.W.2d 500 (1976) (referring in footnote to historical prostitution statutes which applied only to women).

With respect to bad faith, Valentino has not shown that the State acted with a discriminatory purpose with respect to the decision to prosecute. A court will not presume a discriminatory purpose. See *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988).

The record shows that Valentino's application for pretrial diversion was denied because the county attorney's office follows written eligibility Diversion Guidelines under which neither solicitation nor, incidentally, prostitution is identified as an eligible offense. Other courts have found, and we agree, that where a government distinguishes between buyers and sellers of sex and offers pretrial diversion to one group but not the other, the deterrence of crime is a valid, gender-neutral motivation for the differential policy. See, e.g., *Salaiscooper v. Dist. Ct.*, 117 Nev. 892, 34 P.3d 509 (2001). The record shows that the NJSI operation was designed to reduce prostitution—a valid motivation—and targeted buyers of prostitution and that it could have resulted in arrests of either men or women as buyers. Valentino has not made an adequate showing that the denial of his request for participation in a pretrial diversion program or that the prosecutor's decision to prosecute him was based on an impermissibly discriminatory reason. Furthermore, the rulings on motions about which Valentino

complains are encompassed by the foregoing analysis and were not erroneous. Neither the county court nor the district court erred when it found that Valentino had not been selectively prosecuted based upon his gender.

CONCLUSION

A government's decision to deny pretrial diversion is a decision to prosecute, and we find no merit to Valentino's claim that he was selectively prosecuted for solicitation based on gender. The order of the district court, which affirmed the county court's rulings and Valentino's conviction for solicitation in the county court, is affirmed.

Affirmed.

Heavican, C.J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Paul E. Galter, respondent.

938 N.W.2d 875

Filed February 21, 2020. No. S-20-057.

Original action. Judgment of disbarment.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Paul E. Galter, on January 23, 2020. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 18, 1953. On January 23, 2020, respondent filed a voluntary surrender of license to practice law, in which he stated that a grievance was filed against him with the Counsel for Discipline. Respondent states that a grievance was filed by Kansas attorneys, Jason E. Brinegar and Coleman J. Younger, which alleged that respondent, as trustee of the Edwin Irvine Testamentary Trust, misappropriated funds from said trust during 2018 and 2019 in the approximate amount of $37,000. Respondent states that he knowingly does not contest the truth of the allegations set forth in the grievance.

Respondent stated that he freely and voluntarily surrenders his privilege to practice law in the State of Nebraska; waives his right to notice, appearance, or hearing prior to the entry of an order of disbarment; and consents to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations that could be made against him as trustee of the Edwin Irvine Testamentary Trust. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with

all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Aaron G. Brown, appellant, v. State of Nebraska, appellee.

939 N.W.2d 354

Filed February 28, 2020. No. S-19-073.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Tort Claims Act: Appeal and Error.** Whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act or whether the allegations set forth claims which are precluded by the exemptions set forth in the act is a question of law, for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes: Immunity: Waiver.** Statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.
6. **Immunity: Waiver.** In order to strictly construe against a waiver of sovereign immunity, courts broadly read exemptions from a waiver of sovereign immunity.
7. **Tort Claims Act.** For the recreational activity exception in Neb. Rev. Stat. § 81-8,219(14)(a)(i) (Supp. 2019) to apply, the following elements must be met: (1) The claim must relate to a recreational activity on property leased, owned, or controlled by the State; (2) the claim must result

from an inherent risk of that recreational activity; and (3) no fee must have been charged for the plaintiff to participate in, or be a spectator at, the recreational activity.

8. ____. Because the recreational activity exception in Neb. Rev. Stat. § 81-8,219(14)(a)(i) (Supp. 2019) applies only to tort claims relating to recreational activities on state property and resulting from the inherent risk of the recreational activity, it is necessary as a threshold matter to identify the recreational activity, if any, in which the plaintiff was engaged as either a participant or spectator. Only after the recreational activity is identified can a principled determination be made as to whether the plaintiff's tort claim relates to that particular activity and whether the claim resulted from an inherent risk of that particular activity.

9. **Statutes.** When interpreting a statute, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

Appeal from the District Court for Buffalo County: John H. Marsh, Judge. Reversed and remanded for further proceedings.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Charles E. Chamberlin for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

Aaron G. Brown sued the State of Nebraska for negligence under the State Tort Claims Act (STCA),[1] alleging he was injured at a state recreational area when a riding lawnmower struck the picnic table where he was sitting. The State moved to dismiss the action, claiming sovereign immunity under the "recreational activity" exception to the STCA.[2] That

[1] See Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014, Cum. Supp. 2018 & Supp. 2019).

[2] § 81-8,219(14).

exception provides in relevant part that the STCA "shall not apply" to any claim "relating to recreational activities on property leased, owned, or controlled by the state for which no fee is charged . . . resulting from the inherent risk of the recreational activity."[3]

The district court found the recreational activity exception applied, and it dismissed Brown's action with prejudice. He appealed, and we granted the State's petition to bypass. We now reverse, and remand for further proceedings.

I. BACKGROUND

1. Brown's Complaint

This matter was disposed of on a motion to dismiss. In such a situation, the factual record consists only of the allegations in the complaint, which are accepted as true, and all reasonable inferences are made in favor of the nonmoving party.[4] Brown's complaint alleged the following facts:

On or about August 14, 2017, Brown visited a state recreational area in Elm Creek, Nebraska, to go fishing. The property is owned and operated by the State of Nebraska as a state recreational area that provides opportunities for fishing, boating, kayaking, picnicking, and primitive camping.

After fishing for a while, Brown took a break and sat on the bench of a picnic table a few feet from the lake. He was facing the lake with his back near the top of the picnic table when an employee, agent, or representative of the State "violently" struck the picnic table with a gas-powered lawnmower. The force of the impact caused the tabletop to strike Brown in the middle of his back and propel him forward, nearly into the lake. The impact injured his back, resulting in past and future pain and suffering, medical expenses, lost income, and loss of earning capacity.

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[3] § 81-8,219(14)(a)(i).

[4] See, *Rouse v. State*, 301 Neb. 1037, 921 N.W.2d 355 (2019); *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

On July 11, 2018, Brown filed this tort action against the State. Attached to Brown's complaint was a copy of the tort claim that he filed with the State Claims Board on December 5, 2017,[5] and a copy of the letter dated June 7, 2018, denying his claim.

2. District Court Proceedings

The State moved to dismiss Brown's complaint for lack of subject matter jurisdiction pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) and for failure to state a claim pursuant to § 6-1112(b)(6). After a hearing, the court dismissed the action for lack of subject matter jurisdiction. The court found the State had not waived its sovereign immunity, because Brown's claim fell within the STCA's recreational activity exception.[6] The district court reasoned:

> The key issue is whether being struck by a lawn mower while sitting at a picnic table is an inherent risk of [Brown's] recreational activity. There seems to be no dispute that [Brown] was engaged in a recreational activity [and he] has not alleged being charged a fee.
>
> . . . .
>
> The Court finds that a user of a recreational area could reasonably expect mowing and other maintenance activities being performed. Recreational areas are generally not overgrown wilderness areas. Most are obviously mowed and otherwise maintained. Maintenance, like any other human activity, brings a risk that it may [be] done negligently.
>
> Construing the exception strictly in favor of the State's sovereign immunity, the Court finds that the risk posed by mowing and other maintenance activities is characteristic of, intrinsic to, or an integral part of the recreational activity, even if that activity is sitting at a

[5] See § 81-8,227.

[6] § 81-8,219(14).

> picnic table. As the State has not waived its sovereign immunity for a claim relating to recreational activities pursuant to Section 81-8,219[(14)(a)(i)], the State remains immune and the Court does not have subject matter jurisdiction.

Because the district court dismissed the complaint on the basis of sovereign immunity, it did not consider the State's alternative theory for dismissal. After Brown's motion to alter or amend was denied, he filed this timely appeal. We granted the State's petition to bypass the Nebraska Court of Appeals.

II. ASSIGNMENT OF ERROR

Brown assigns, restated, that the district court erred in finding his tort claim was barred by the recreational activity exception to the STCA.

III. STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[7]

[2] Whether the allegations made by a plaintiff constitute a cause of action under the STCA or whether the allegations set forth claims which are precluded by the exemptions set forth in the act is a question of law, for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.[8]

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[9]

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[7] *Rouse, supra* note 4; *Amend, supra* note 4.

[8] *Amend, supra* note 4.

[9] *Rouse, supra* note 4; *Amend, supra* note 4.

IV. ANALYSIS

Because the district court resolved the State's motion to dismiss on sovereign immunity grounds, we begin by setting out the general principles of sovereign immunity under the STCA. Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Through the STCA, the Legislature has waived the State's sovereign immunity with respect to certain, but not all, types of tort actions.[10] Section 81-8,215 of the STCA is the State's general waiver of tort immunity under the STCA, and we have explained that when that section is read in pari materia with § 81-8,209, it operates as a limited waiver of the State's tort immunity, subject to specified exceptions that are set out in § 81-8,219.[11]

1. Recreational Activity Exception

This appeal concerns the statutory exception to the waiver of sovereign immunity which we refer to as the "recreational activity exception." At the time Brown was allegedly struck by the lawnmower, this exception was codified at § 81-8,219(13). Subsequent amendments to the STCA have not affected the language of the exception, and we therefore cite to its current version, codified at § 81-8,219(14). Pursuant to this exception, the STCA does not apply to

> [a]ny claim relating to recreational activities on property leased, owned, or controlled by the state for which no fee is charged (i) resulting from the inherent risk of the recreational activity, (ii) arising out of a spot or localized defect of the premises . . . , or (iii) arising out of the design of a skatepark or bicycle motorcross park . . . .[12]

Only the "inherent risk" portion of the recreational activity exception, found in § 81-8,219(14)(a)(i), is at issue in this case.

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[10] *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

[11] *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[12] § 81-8,219(14).

For purposes of this exception, the Legislature has defined "[i]nherent risk of recreational activities" to mean "those risks that are characteristic of, intrinsic to, or an integral part of the activity."[13] Further, for purposes of § 81-8,219(14)(a), "fee" is defined as follows:

> [A] fee to participate in or be a spectator at a recreational activity. A fee shall include payment by the claimant to any person or organization other than the state only to the extent the state retains control over the premises or the activity. A fee shall not include payment of a fee or charge for parking or vehicle entry.[14]

We pause here to note that the Political Subdivisions Tort Claims Act (PSTCA)[15] contains a similar exception for recreational activities.[16] Both the STCA and the PSTCA were amended in 2007[17] in response to our 2006 decision in *Bronsen v. Dawes County.*[18] In that case, we overruled a quarter century of precedent and held for the first time that the Recreation Liability Act[19]—which encourages landowners to open their property to the public for "recreational purposes" by limiting their tort liability[20]—applies only to private landowners and not to governmental entities. The Legislature responded to *Bronsen* by amending the STCA and the PSTCA to add the exceptions for tort claims related to "recreational activities."[21]

This appeal is our first opportunity to address the proper interpretation and application of the recreational activity

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[13] § 81-8,219(14)(b)(ii).

[14] § 81-8,219(14)(b)(iv).

[15] See Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012, Cum. Supp. 2018 & Supp 2019).

[16] § 13-910(13)(a).

[17] 2007 Neb. Laws, L.B. 564.

[18] *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[19] Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004).

[20] See § 37-730.

[21] §§ 81-8,219(14) and 13-910(13)(a).

exception. Our analysis is governed by settled principles of statutory construction.

[4-6] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[22] Additionally, it is well settled that statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.[23] In order to strictly construe against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity.[24]

2. Applying Exception

[7] For the exception in § 81-8,219(14)(a)(i) to apply, the following elements must be met: (1) The claim must relate to a recreational activity on property leased, owned, or controlled by the State; (2) the claim must result from an inherent risk of that recreational activity; and (3) no fee must have been charged for the plaintiff to participate in, or be a spectator at, the recreational activity.

In this appeal, the parties agree that Brown's injury occurred on property owned and controlled by the State, and they also appear to agree the only fee Brown was charged was a vehicle entry fee. We thus confine our analysis to the disputed elements of the recreational activity exception: whether Brown's claim relates to a recreational activity and whether his claim resulted from an inherent risk of that activity.

(a) Threshold Question

[8] Because the recreational activity exception in § 81-8,219(14)(a)(i) applies only to tort claims "relating to recreational activities" on state property and "resulting from the inherent risk of the recreational activity," it is necessary

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[22] *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

[23] *Amend, supra* note 4.

[24] *Id.*

as a threshold matter to identify the recreational activity, if any, in which the plaintiff was engaged as either a participant or spectator. Only after the recreational activity is identified can a principled determination be made as to whether the plaintiff's tort claim relates to that particular activity and whether the claim resulted from an inherent risk of that particular activity.

For purposes of the recreational activity exception, the Legislature has defined "[r]ecreational activities" as follows:

> Recreational activities include, but are not limited to, whether as a participant or spectator: Hunting, fishing, swimming, boating, camping, picnicking, hiking, walking, running, horseback riding, use of trails, nature study, waterskiing, winter sports, use of playground equipment, biking, roller blading, skateboarding, golfing, athletic contests; visiting, viewing, or enjoying entertainment events, festivals, or historical, archaeological, scenic, or scientific sites; and similar leisure activities.[25]

(b) Identifying Brown's Recreational Activity

The parties generally agree that Brown was engaged in some sort of recreational activity at the time he was injured, but they disagree on what that activity was. Until the answer to this threshold question is known, the remaining questions as to the applicability of § 81-8,219(14)(a)(i) cannot be determined.

Brown's complaint did not allege he was engaged in any particular activity—recreational or otherwise—while seated at the picnic table. But in response to the State's motion to dismiss, Brown urged the district court to conclude his recreational activity was either "fishing" or "participating in leisure activities." On appeal, Brown suggests he was "picnicking" when the mower struck the picnic table.[26]

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[25] § 81-8,219(14)(b)(i).

[26] Brief for appellant at 5.

The State argues Brown was not "picnicking," because there is no allegation he was eating a meal outdoors.[27] Instead, the State suggests Brown's recreational activity was either "fishing" or "viewing scenic sites."[28] Ultimately, however, the State asks us to find that Brown's "overarching recreational activity [was] utilizing maintained space."[29] In that regard, the State contends that the "crux of the issue" for purposes of the recreational activity exception is really that Brown "chose to utilize a maintained area" of state property and that, consequently, "the rest of his activities on that area carried with [them] the inherent risks of using a maintained area."[30]

The district court found there was "no dispute that [Brown] was engaged in a recreational activity," but it did not expressly identify the activity. Based on its reasoning, however, we understand the court to have agreed with the State that Brown's recreational activity was using a maintained area of state property. The court described Brown as a "user of a recreational area" who could "reasonably expect mowing and other maintenance activities being performed" in the area. It then found that "[r]ecreational areas are generally not overgrown wilderness areas. Most are obviously mowed and otherwise maintained," and it also found that "[m]aintenance, like any other human activity, brings a risk that it may [be] done negligently." Finally, the court concluded that "the risk posed by mowing and other maintenance activities" was characteristic of, intrinsic to, or an integral part of Brown's recreational activity and that the exception in § 81-8,219(14)(a)(i) applied to bar Brown's claim.

On de novo review, we find the district court erred as a matter of law in two respects. First, because the matter was before the court on a motion to dismiss, it should have confined its

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[27] Brief for appellee at 16.

[28] *Id.*

[29] *Id.* at 13.

[30] *Id*. at 19.

analysis to the allegations of the complaint and the reasonable inferences therefrom construed in the light most favorable to Brown.[31] When the court found that Brown was in an area that was "obviously mowed and otherwise maintained" and that "[r]ecreational areas are generally not overgrown wilderness areas," it went well beyond the face of the complaint, which described neither Brown's activity while seated at the picnic table nor the characteristics of the area.

More important, we find the trial court erred in concluding Brown's recreational activity was utilizing a maintained area of state property. The statutory definition of "recreational activities" in § 81-8,219(14) is broad and contains a nonexclusive list of what the Legislature describes as "leisure activities." Some of the listed activities are decidedly physical in nature (such as hiking, biking, and athletic contests), while others are more cerebral (such as viewing or enjoying historical or scenic sites). But regardless of the level of activity required, the statutory definition requires that one must be engaged in a recreational or leisure activity as either a participant or a spectator. The focus of the statutory definition is on the activity itself rather than the characteristics of the area where the activity occurs. Indeed, because being on state-controlled property is already required for the recreational activity exception to apply, a "recreational activity" as defined in § 81-8,219(14)(b)(i) must mean something more than simply being on property maintained by the State.

[9] When interpreting a statute, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[32] Thus, although we are required to broadly construe exceptions to the waiver of sovereign immunity under the STCA,[33] we decline to read the definition of "recreational

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[31] See, *Rouse, supra* note 4; *Amend, supra* note 4.

[32] *State v. McColery*, 301 Neb. 516, 919 N.W.2d 153 (2018).

[33] See *Rouse, supra* note 4.

activity" so broadly that it includes simply being on property maintained by the State.

Allowing the State to define a "recreational activity" that broadly would judicially expand the recreational activity exception to include most, if not all, tort claims occurring on state property. Indeed, when the recreational activity is defined as "using a maintained area of state property," it is difficult to conceive of any tort claim that would not both relate to that activity and result from a risk inherent in that activity. We thus reject the State's position and hold instead that a "recreational activity" under § 81-8,219(14) must involve some leisure activity other than merely being present on state-maintained land.

The trial court erred in concluding that Brown's recreational activity was using a maintained area of state property. And because the trial court misidentified Brown's recreational activity, its analysis of whether his claim resulted from an inherent risk of that activity was likewise erroneous, as was its ultimate conclusion that the recreational activity exception applied as a matter of law to bar Brown's claim.

But this does not end our analysis, because whether Brown's complaint alleged claims that are barred by the recreational activity exception under the STCA presents a question of law, which we must determine independent of the conclusions reached by the district court.[34] After de novo review, we conclude that while there will surely be cases where the applicability of the recreational activity exception can be determined as a matter of law from the face of the complaint, this is not such a case.

As stated, Brown's complaint does not allege he was engaged in any particular recreational activity at the time he was injured, and we have determined that simply being present on state-maintained property is not a "recreational activity" as that term is defined in § 81-8,219(14)(b)(i). We agree with the

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[34] See *Amend, supra* note 4.

State the facts as alleged do not support concluding as a matter of law that Brown was "picnicking." And while the development of additional facts may reveal that Brown was engaged in one or more specific recreational activities while sitting at the picnic table, the face of his complaint simply does not permit such a conclusion as a matter of law.

At this stage in the proceeding, the allegations of Brown's complaint and the reasonable inferences therefrom do not allow a court to find as a matter of law that his tort claim is barred by the recreational activity exception of § 81-8,219(14)(a)(i). Unless and until the specific recreational activity, or activities, in which Brown was engaged as either a participant or a spectator can be identified, there is no principled way to apply the remaining statutory elements to determine whether his tort claim is related to that recreational activity and whether his claim resulted from an inherent risk of that recreational activity.

V. CONCLUSION

For the foregoing reasons, it was error for the district court to dismiss Brown's complaint with prejudice on the ground it was barred by the recreational activity exception. We reverse the judgment and remand the matter for further proceedings.

Reversed and remanded for
further proceedings.

Heavican, C.J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Alexander Lanham, appellant and cross-appellee, v. BNSF Railway Company, appellee and cross-appellant.

939 N.W.2d 363

Filed February 28, 2020. No. S-19-114.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.
2. **Constitutional Law: Due Process: Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions. This power is limited by the 14th Amendment's Due Process Clause because a state court's assertion of jurisdiction exposes defendants to the state's coercive power.
3. **Constitutional Law: Due Process.** The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
4. **Constitutional Law: Jurisdiction: Statutes: Due Process: States.** A two-step analysis is used to determine whether a Nebraska court may validly exercise personal jurisdiction over an out-of-state defendant. First, a court must consider whether Nebraska's long-arm statute authorizes the exercise of personal jurisdiction over the defendant. Second, a court must consider whether the exercise of personal jurisdiction over the defendant comports with due process.
5. **Constitutional Law: Due Process: Jurisdiction: States: Appeal and Error.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. Thus, an appellate court needs only to look to the Due Process Clause when determining personal jurisdiction.
6. **Due Process: Jurisdiction: States.** Generally, the analysis of whether a court has personal jurisdiction over a defendant requires a determination

of whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. However, this analysis is not required when the parties have consented to the exercise of personal jurisdiction.

7. **Jurisdiction: Waiver.** Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.
8. ____: ____. In order to be valid, the waiver of the requirement of personal jurisdiction must, at the very least, be clear.
9. **Due Process: Jurisdiction: Corporations.** The Due Process Clause precludes a state from exercising general jurisdiction over a corporation that is not at home in the forum.
10. **Jurisdiction: States: Corporations.** Absent exceptional circumstances, a corporation is only at home in two places: the state in which it is incorporated and the state in which its principal place of business is located.
11. **Jurisdiction: Corporations.** A corporation's registration under Neb. Rev. Stat. § 21-19,152 (Reissue 2012) does not provide an independent basis for the exercise of general jurisdiction.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed.

Corey L. Stull and Jeanette Stull, of Atwood, Holsten, Brown, Deaver & Spier, P.C., L.L.O., and Christopher H. Leach, of Hubbell Law Firm, L.L.C., for appellant.

Nichole S. Bogen, of Lamson, Dugan & Murray, L.L.P., Wayne L. Robbins, Jr., of Robbins Travis, P.L.L.C., and Andrew S. Tulemello, of Gibson, Dunn & Crutcher, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

This is an appeal from a negligence action under the Federal Employers' Liability Act (FELA).[1] Appellant, Alexander Lanham, appeals the order of the district court for Lancaster

[1] 45 U.S.C. §§ 51 through 60 (2012).

County, Nebraska, granting summary judgment in favor of appellee, BNSF Railway Company (BNSF). BNSF cross-appeals, arguing the district court erred in holding that it had personal jurisdiction over BNSF. We reverse the district court's order overruling BNSF's motion to dismiss for lack of jurisdiction.

BACKGROUND

On January 16, 2014, Lanham was seriously injured while working for his employer, BNSF, on a section of train tracks near Houston, Texas. Lanham generally worked for BNSF as a track laborer on a rail production "gang" in Iowa, Nebraska, and Minnesota. Rail production gangs work to repair and replace rail on train tracks. Lanham's regular gang "shut down" during the winter months. To avoid a layoff during the winter of 2013, Lanham bid for a position replacing railroad ties in Texas, with the intent to return to his regular rail gang position when it opened back up in March. Lanham was working on a section of train tracks in Texas when he hit his foot with a sledge hammer and sustained injuries as a result.

Lanham filed a complaint in the district court under FELA, alleging BNSF was negligent in failing to provide him with a reasonably safe place to work, reasonably safe equipment for work, and reasonably safe methods for work. Lanham further alleged that his injuries were a result of BNSF's negligence.

At the time Lanham's complaint was filed, he was a resident of Dorchester, Nebraska. BNSF is a Delaware corporation with its principal place of business in Fort Worth, Texas. BNSF currently operates railroads in 28 states, including Nebraska. Pursuant to Neb. Rev. Stat. § 21-19,152 (Reissue 2012), BNSF registered with the Secretary of State to do business in Nebraska and designated an agent for service of process in the state.

BNSF filed a motion to dismiss the complaint on the grounds that the district court had neither general nor specific jurisdiction over BNSF. Citing a U.S. Supreme Court case decided in

2014,[2] BNSF argued the district court lacked general jurisdiction because BNSF was incorporated in Delaware and has its principal place of business in Fort Worth; thus, BNSF is not "'at home'" in Nebraska. BNSF also argued that the district court lacked specific jurisdiction over BNSF because Lanham's injuries had occurred in Texas, and the complaint failed to allege any connection between those injuries and Nebraska, or BNSF's activities in Nebraska.

The district court overruled the motion to dismiss after finding that BNSF consented to personal jurisdiction by registering to do business in Nebraska under § 21-19,152. In its order, the district court extensively relied on the holding of the U.S. District Court for the District of Nebraska in *Consolidated Infrastructure Group, Inc. v. USIC, LLC*.[3] *Consolidated Infrastructure Group, Inc.* is an unpublished opinion in which the court concluded that under Nebraska law, "'[b]y designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court'"[4] based on this court's prior holding in *Mittelstadt v. Rouzer*.[5]

Because the district court found that BNSF had consented to personal jurisdiction, the court did not engage in an analysis of BNSF's minimum contacts in the state. However, it quoted *Consolidated Infrasructure Group, Inc.*[6] and noted that BNSF's "'activities in this state are not the sort of random or attenuated conduct that has been insufficient to confer jurisdiction on the court.'"

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[2] *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

[3] *Consolidated Infrastructure Group, Inc. v. USIC, LLC*, No. 8:16CV472, 2017 WL 2222917 (D. Neb. May 18, 2017) (unpublished opinion).

[4] *Id.* at *7 (quoting *Mittelstadt v. Rouzer*, 213 Neb. 178, 328 N.W.2d 467 (1982)).

[5] *Mittelstadt, supra* note 4.

[6] See *Consolidated Infrastructure Group, Inc., supra* note 3.

BNSF subsequently filed a motion for summary judgment on the grounds that the district court lacked personal jurisdiction over BNSF and, alternatively, that Lanham was unable to present any evidence of BNSF's negligence. The district court overruled the motion on the issue of jurisdiction and sustained it on the issue of negligence.

Lanham appeals the district court's order granting summary judgment in favor of BNSF. BNSF filed a cross-appeal, arguing that the district court erred in holding it had personal jurisdiction over BNSF.

ASSIGNMENTS OF ERROR

Lanham's sole assignment of error is that the district court erred in granting summary judgment in favor of BNSF. In its cross-appeal, BNSF assigns, restated, that the district court erred in holding BNSF's registration to do business in the State of Nebraska constituted consent to personal jurisdiction.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.[7]

ANALYSIS

BNSF argues that Nebraska law does not provide for consent by registration and that even if Nebraska's registration statute could be construed to extract consent to personal jurisdiction, such an exercise of general jurisdiction would violate the Due Process Clause of the U.S. Constitution. Because we believe this issue is dispositive, we will discuss it first.

[2,3] Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.[8]

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[7] *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. 705, 905 N.W.2d 644 (2018).

[8] *Id.*

This power is limited by the 14th Amendment's Due Process Clause because "'[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power.'"[9] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.[10]

[4] A two-step analysis is used to determine whether a Nebraska court may validly exercise personal jurisdiction over an out-of-state defendant.[11] First, a court must consider whether Nebraska's long-arm statute authorizes the exercise of personal jurisdiction over the defendant.[12] Second, a court must consider whether the exercise of personal jurisdiction over the defendant comports with due process.[13]

[5] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[14] Thus, we need only look to the Due Process Clause when determining personal jurisdiction.[15]

[6-8] Generally, this analysis requires a determination of whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate

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[9] *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. 255, 261, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017) (quoting *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d. 796 (2011)).

[10] *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005) (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

[11] *Hand Cut Steaks Acquisitions, supra* note 7.

[12] *Id.*

[13] *Id.*

[14] *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013).

[15] See *id.*

being haled into court there.[16] However, this analysis is not required when the parties have consented to the exercise of personal jurisdiction.[17] "Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."[18] In order to be valid, the waiver "must, at the very least, be clear."[19]

Consent by Registration.

In concluding that BNSF had consented to jurisdiction in Nebraska, the district court relied on this court's prior holding in *Mittelstadt*,[20] where we appear to have held that a corporation's appointment of an agent for service constitutes implied consent to general jurisdiction in the state.[21] In that case, Nebraska residents sued an Arkansas corporation for damages arising out of an automobile accident that occurred in Arizona, and the defendant corporation had no contacts with Nebraska other than its trucks' limited use of the highways.[22] We held that by appointing a resident agent for service as required by the federal Motor Carrier Act, the "nonresident corporation ha[d] consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce."[23]

The reasoning in *Mittelstadt* reflects the 19th century's traditional view of personal jurisdiction, where personal jurisdiction could be obtained over a nonresident by personal service

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[16] *McKinney, supra* note 10.

[17] See *id.*

[18] *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982).

[19] *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (emphasis omitted).

[20] *Mittelstadt, supra* note 4.

[21] See John P. Lenich, Nebraska Civil Procedure § 3:9 (2019).

[22] *Mittelstadt, supra* note 4.

[23] *Id.* at 184, 328 N.W.2d at 470.

in the state.[24] Under the rigid territorial approach espoused in the U.S. Supreme Court case of *Pennoyer v. Neff*,[25] state courts could only exercise personal jurisdiction over a defendant that was physically present within the state's borders because a tribunal's jurisdiction was limited to the territorial limits of the state in which it was established. A natural person was deemed to be physically present in a state and subject to personal jurisdiction if he or she could be served with process in the state.[26] However, because a corporation was only deemed to be physically present in its state of incorporation, courts lacked authority to exercise personal jurisdiction over out-of-state corporations.[27]

With the rise of interstate commerce, many states began "assimilating corporations to natural persons"[28] and enacted statutes requiring foreign corporations to appoint an instate agent for service of process when seeking to do business in the state.[29] Based on this "purely fictional" doctrine of "consent and presence," courts permitted substituted service on a foreign corporation's registered instate agent.[30] In 1917 and 1939, the U.S. Supreme Court endorsed this procedure in *Penna. Fire Ins. Co. v. Gold Issue Mining Co.*[31] and *Neirbo Co. v. Bethlehem Corp.*[32]

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[24] See *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).

[25] *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877).

[26] *Id.*

[27] *St. Clair v. Cox*, 106 U.S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882).

[28] See *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 169, 60 S. Ct. 153, 84 L. Ed. 167 (1939).

[29] *Neirbo Co., supra* note 28.

[30] *Burnham*, *supra* note 24, 495 U.S. at 618 (plurality opinion).

[31] *Penna. Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93, 37 S. Ct. 344, 61 L. Ed. 610 (1917).

[32] *Neirbo Co., supra* note 28.

Mittelstadt was decided in 1982.[33] At that time, many other states had similarly held that a foreign corporation's authorization of an agent to accept service of process within a state constitutes consent to personal jurisdiction in the state.[34] Since that time, the U.S. Supreme Court's jurisprudence regarding the scope of general jurisdiction permitted by the Due Process Clause has resulted in a tremendous shift.

In 2011 and 2014, the U.S. Supreme Court set significantly narrower due process limits on the states' exercise of general jurisdiction over out-of-state corporations. The Court abandoned the territorial approach of *Pennoyer*,[35] and the central focus became the "'relationship among the defendant, the forum, and the litigation.'"[36]

In *Goodyear Dunlop Tires Operations, S. A. v. Brown*,[37] the Court clarified the difference between general (all-purpose) jurisdiction and specific jurisdiction when holding that general jurisdiction over a defendant is limited to jurisdictions in which the defendant's contacts "render them essentially at home in the forum State." In doing so, the Court articulated: "A corporation's 'continuous activity of some sorts within a state,' . . .

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[33] *Mittelstadt, supra* note 4.

[34] See, e.g., *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (applying Minnesota law when holding "[a]ppointment of a registered agent for service is . . . a traditionally recognized and well-accepted species of general consent"); *Bohreer v. Erie Ins. Exchange*, 216 Ariz. 208, 214, 165 P.3d 186, 192 (Ariz. App. 2007) ("by agreeing to appoint an agent for service of process to do business in a state, a foreign corporation expressly consents to general personal jurisdiction without any need for minimum contact analysis"). See, also, *Merriman v. Crompton Corp.*, 282 Kan. 433, 146 P.3d 162 (2006); *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988); *Sharkey v. Washington Nat. Ins. Co.*, 373 N.W.2d 421 (S.D. 1985).

[35] *Pennoyer, supra* note 25.

[36] *Daimler AG, supra* note 2, 571 U.S. at 133 (quoting *Shaffer v. Heitner,* 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)).

[37] *Goodyear Dunlop Tires Operations, S. A., supra* note 9, 564 U.S. at 919.

'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'"[38]

[9,10] In *Daimler AG v. Bauman*,[39] the Court made clear that the Due Process Clause precludes a state from exercising general jurisdiction over a corporation that is not "'at home in the forum.'" The Court clarified that absent exceptional circumstances, a corporation is only at home in two places: the state in which it is incorporated and the state in which its principal place of business is located.[40] The Court rejected the argument that a foreign corporation's "'continuous and systematic'" business activities in a state are sufficient for the exercise of general jurisdiction as being inconsistent with due process.[41] The Court stated that this type of "global reach" was "unacceptably grasping" and "exorbitant."[42] The Court also warned that cases "decided in the era dominated by *Pennoyer*'s territorial thinking . . . should not attract heavy reliance today."[43]

In the present case, the district court concluded BNSF had consented to jurisdiction based solely on its compliance with § 21-19,152.

Section 21-19,152 provides:

> Each foreign corporation authorized to transact business in this state must continuously maintain in this state:
>
> (1) A registered office with the same address as that of its current registered agent. A post office box number may be provided in addition to the street address of the registered agent; and

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[38] *Id.*, 564 U.S. at 927 (quoting *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

[39] *Daimler AG, supra* note 2, 571 U.S. at 122 (quoting *Goodyear Dunlop Tires Operations, S. A., supra* note 9).

[40] *Daimler AG, supra* note 2.

[41] *Id.*, 571 U.S. at 138 (quoting *Internat. Shoe, supra* note 38).

[42] *Id.*, 571 U.S. at 137, 139.

[43] *Id.*, 571 U.S. at 138 n.18.

(2) A registered agent, who may be:

(i) An individual who resides in this state and whose office is identical with the registered office;

(ii) A domestic business or nonprofit corporation whose office is identical with the registered office; or

(iii) A foreign business or nonprofit corporation authorized to transact business in this state whose office is identical with the registered office.

Section 21-19,152 does not explicitly state that compliance with the statute constitutes a waiver of the foreign corporation's right to require personal jurisdiction. Therefore, BNSF could not be said to have expressly consented to jurisdiction by merely complying with the statute. Lanham asserts that a corporation's consent may be implied when § 21-19,152 operates in tandem with Neb. Rev. Stat. § 21-2,207(b) (Cum. Supp. 2018). Section 21-2,207(b) includes a provision stating that a foreign corporation with a valid certificate of authority "is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on a domestic corporation of like character." But, even assuming BNSF's registration to do business in Nebraska constitutes implied consent, the exercise of personal jurisdiction must comport with due process.

We conclude that treating BNSF's registration to do business in Nebraska as implied consent to personal jurisdiction would exceed the due process limits prescribed in *Goodyear Dunlop Tires Operations, S. A.*[44] and *Daimler AG*.[45] Currently, every state requires a foreign corporation "doing business in the state to register . . . and appoint an agent for service of process."[46] Consequently, consent by registration would permit a corporation to be subject to general jurisdiction in every state in which it does business. This is the same type of "global reach"

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[44] *Goodyear Dunlop Tires Operations, S. A., supra* note 9.

[45] *Daimler AG, supra* note 2.

[46] Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1363 (2015).

jurisdiction the U.S. Supreme Court expressly rejected as being inconsistent with due process.[47] The Second Circuit Court of Appeals has observed:

> If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief.[48]

[11] Since *Daimler AG* was decided, the vast majority of state and federal courts have rejected consent by registration as being irreconcilable with *Goodyear Dunlop Tires Operations, S. A.* and *Daimler AG*.[49] In light of the due process limits prescribed in *Goodyear Dunlop Tires Operations, S. A.* and *Daimler AG*, we join the majority of jurisdictions and hold that a corporation's registration under § 21-19,152 does not provide

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[47] See *Daimler AG, supra* note 2, 571 U.S. at 139.

[48] *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016).

[49] See, e.g., *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 n.120 (Del. 2016) (overruling *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), and holding consent by registration is incompatible with *Daimler AG*); *Howe v. Samsung Electronics America, Inc.*, No. 1:16cv386, 2018 WL 2212982 at *5 (N.D. Fla. Jan. 5, 2018) (unpublished opinion) ("requirement to designate a registered agent is not intended to—and in any event under the Due Process Clause could not—subject a corporation to an action over which a state's courts cannot properly exercise jurisdiction. Were it otherwise, the Supreme Court's decisions recognizing limits on personal jurisdiction over out-of-state corporations would be nearly meaningless"). See, also, *Am Trust v. UBS AG*, 681 Fed. Appx. 587 (9th Cir. 2017); *Beasley v. Providence Hospital*, No. 18-0004, 2018 WL 2994380 (S.D. Ala. June 13, 2018) (unpublished opinion); *Perry v. JTM Capital Management, LLC*, Nos. 17 C 7601, 17 C 7769, 2018 WL 1635855 (N.D. Ill. Apr. 5, 2018) (unpublished opinion). But see *American Dairy Queen Corporation v. W.B. Mason Co.*, Inc., No. 18-cv-693, 2019 WL 135699 (D. Minn. Jan. 8, 2019) (unpublished opinion) (holding consent by registration remains independent basis for personal jurisdiction).

an independent basis for the exercise of general jurisdiction. Accordingly, we overrule *Mittelstadt* to the extent that applying it outside the context of the federal Motor Carrier Act conflicts with *Daimler AG* and *Daimler AG*'s progeny.[50]

"At Home" for Purposes of General Jurisdiction.

During oral argument, Lanham asserted that while BNSF is neither incorporated in nor maintains its principal place of business in Nebraska, exceptional circumstances exist making BNSF "at home" in the state. Lanham contends the fact that BNSF owns approximately $108 million of property in Nebraska, maintains 11 percent of its workforce in Nebraska, is the second highest tax payer in Nebraska, and has stated that Nebraska is one of the most important states in which it operates, suffices to make BNSF "at home" in the state for purposes of general jurisdiction. However, the U.S. Supreme Court rejected a similar argument in *BNSF Ry. Co. v. Tyrrell*.[51]

In *Tyrrell*, the Court held that notwithstanding BNSF's over 2,000 miles of railroad tracks and more than 2,000 employees in Montana, BNSF was not subject to general jurisdiction in Montana because BNSF is not incorporated in Montana, did not maintain its principal place of business in Montana, and was not "so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State."[52] The Court articulated that "'the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts.'"[53] Instead, the Court explained, "the inquiry 'calls for an appraisal of a corporation's activities in their entirety'; '[a] corporation

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[50] See *Mittelstadt, supra* note 4.

[51] *BNSF R. Co. v. Tyrrell*, 581 U.S. 402, 137 S. Ct. 1549, 198 L. Ed. 2d 36 (2017).

[52] *Id.*, 581 U.S. at 414 (quoting *Daimler AG, supra* note 2).

[53] *Id.*

that operates in many places can scarcely be deemed at home in all of them.'"[54]

Clarifying the "exceptional case," the *Tyrrell* Court recognized *Perkins v. Benguet Mining Co.*,[55] as an example of a case in which a corporation was "'at home'" in a forum other that its state of incorporation or principal place of business.[56] In *Perkins*, the defendant corporation was incorporated under the laws of the Philippines, where it operated gold and silver mines.[57] During the Japanese occupation of the Philippines in World War II, the corporation ceased its mining operations and the corporation's president moved to Ohio, "where he kept an office, maintained the company's files, and oversaw the company's activities."[58] The *Daimler AG* Court stated that the *Perkins* Court concluded that the corporation was subject to personal jurisdiction in Ohio because Ohio had become "'the corporation's principal, if temporary, place of business.'"[59]

In the present case, BNSF is not incorporated in Nebraska, nor does it maintain its principal place of business in Nebraska. BNSF is incorporated in Delaware, and it is undisputed that BNSF's principal place of business is in Fort Worth. All of BNSF's principal officers and managing departments are located in Texas, along with its central network operations center, which monitors BNSF's network operations and dispatches trains. BNSF's interstate rail system includes 32,500 miles of train tracks in 28 states and three Canadian provinces. Only 1,478 miles of these tracks are located in Nebraska, and only

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[54] *Id.*

[55] *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 448, 72 S. Ct. 413, 96 L. Ed. 485 (1952).

[56] *Tyrrell, supra* note 51, 581 U.S. at 413 (quoting *Daimler AG, supra* note 2).

[57] See *Daimler AG, supra* note 2.

[58] *Id.*, 571 U.S. at 129.

[59] *Id.* (quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)).

4,479 of BNSF's 41,000 employees are employed in Nebraska. Finally, of BNSF's nationwide revenues, less than 8 percent are revenues from Nebraska.

BNSF's business in Nebraska, although significant, is not "so 'continuous and systematic' as to render [it] essentially at home"[60] in the state. Consequently, BNSF's business activities in Nebraska do not permit the exercise of general jurisdiction over BNSF for claims that are unrelated to BNSF's activity occurring in the state. We hold that BNSF is not "at home" in Nebraska for purposes of general jurisdiction.

CONCLUSION

We conclude that the district court erred in determining it could exercise personal jurisdiction over BNSF for claims that are unrelated to BNSF's instate activity. Because of this determination, we do not reach Lanham's assignment of error. The district court's order overruling BNSF's motion to dismiss for lack of jurisdiction is reversed.

Reversed.

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[60] *Id.*, 571 U.S. at 127 (quoting *Goodyear Dunlop Tires Operations, S. A., supra* note 9).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jennifer A. McCulley, appellant.

939 N.W.2d 373

Filed February 28, 2020. No. S-19-313.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
2. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. ____: ____. Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.
4. **Sentences: Restitution: Appeal and Error.** The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence, and the standard of review for restitution is the same as it is for other parts of the sentence.
5. **Sentences: Records.** The credit for time served to which a defendant is entitled is an absolute and objective number that is established by the record.
6. **Sentences: Restitution.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 2016) is a criminal penalty imposed as a punishment for a crime and is part of the criminal sentence imposed by the sentencing court.
7. **Restitution: Appeal and Error.** On appeal, an appellate court does not endeavor to reform the trial court's order. Rather, the appellate court reviews the record made in the trial court for compliance with the statutory factors that control restitution orders.
8. **Criminal Law: Restitution: Damages.** Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 2008), before restitution can be properly ordered, the trial court must consider (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime,

and (3) the amount of restitution a criminal defendant is capable of paying.

9. **Sentences: Records.** Neb. Rev. Stat. § 29-2260 (Reissue 2008) does not require the trial court to articulate on the record that it has considered each sentencing factor, and it does not require the court to make specific findings as to the factors and the weight given them.
10. **Sentences: Appeal and Error.** The failure of the trial court to make specific findings concerning the factors set forth in Neb. Rev. Stat. § 29-2260 (Reissue 2008) cannot in itself be error or grounds for reversal.
11. **Sentences.** 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.
12. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
13. **Rules of Evidence: Presentence Reports.** Statements made by a defendant during a presentence investigation regarding his or her financial condition are the defendant's own statements and would be allowable evidence against him or her under the Nebraska Evidence Rules.
14. **Courts: Plea Bargains.** In Nebraska, a court is never bound by the plea agreement made between a defendant and the government.

Appeal from the District Court for Buffalo County: Ryan C. Carson, Judge. Affirmed.

D. Brandon Brinegar, Deputy Buffalo County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

Jennifer A. McCulley appeals her plea-based convictions and sentences. The plea agreement involved a promise by

McCulley to pay restitution related to several financial crimes in exchange for the State's reducing some of the charges and dismissing other charges against her. After the pleas were entered, but before sentencing, McCulley absconded from Nebraska to Oregon for nearly 8 years. She was eventually arrested, extradited back to Nebraska, and sentenced. McCulley appeals her sentences as excessive, claiming that the court erred in its calculation of credit for time served and in failing to consider her inability to pay the restitution and costs ordered as part of her sentences.

BACKGROUND

In November 2010, David McConnell engaged an agency in Grand Island, Nebraska, to provide in-home care for his wife. Shortly thereafter, McCulley began employment, through that agency, in the McConnell home. McConnell explicitly instructed McCulley that she was not to handle any money or financial transactions on behalf of McConnell's wife. In December, McConnell's bank contacted him about the possibility that one of his checks had been forged. He looked into the matter and discovered that a number of his checks had been used by McCulley to make unauthorized purchases. A law enforcement investigation located store surveillance videos showing McCulley as the individual passing the forged checks. The investigation further identified multiple instances of McCulley's fraudulent misuse of the McConnells' credit cards.

McCulley was originally charged with seven counts related to the unauthorized use of McConnell's financial accounts and the misuse of the McConnells' credit cards. These charges included three felony counts and four misdemeanors. McCulley and the State reached a plea agreement whereby four counts were dismissed and the felony counts were reduced to misdemeanors in exchange for pleas that included restitution to the businesses defrauded by the transactions, as well as restitution to the McConnells. The plea agreement specified the amount of each victim's damages.

After entering her pleas, McCulley was released on bond until her sentencing hearing. During this period of time, McCulley absconded to Oregon.

In late 2018, McCulley was arrested in Oregon and extradited to Nebraska. She then appeared for a contempt hearing, was found in contempt of court for fleeing the jurisdiction, and was sentenced to 30 days in jail. McCulley indicated to the court that she went to Oregon to take care of her children and was not trying to flee criminal punishment. The court ordered McCulley to cooperate with updating the presentence investigation report (PSI), which was to include an update of the calculation of time served.

A sentencing hearing was held in February 2019. At the hearing, defense counsel was given an option to provide the court with any changes or amendments to the updated PSI and declined to do so. Defense counsel informed the court that McCulley went to Oregon to take care of her children, one of whom requires full-time medical care. Defense counsel recounted the plea agreement and repeatedly mentioned that McCulley had agreed to pay restitution as a part of that agreement. Defense counsel affirmed McCulley's willingness to pay restitution.

Defense counsel asked for credit for time served of 20 days. When the court asked for clarification based on the time served in the contempt charges, however, defense counsel requested 27½ days.

After recounting the plea agreement and McCulley's willingness to pay restitution, defense counsel then raised the court's statutory duty pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 2008) to consider factors related to McCulley's ability to pay restitution. While raising the statutory inquiry, defense counsel reiterated that McCulley is willing to pay restitution. At no point did counsel directly suggest that McCulley would be unable to pay restitution. Defense counsel explained that McCulley had the assistance of family to pay restitution if ordered. The court inquired about how much time McCulley

would need for restitution, and defense counsel indicated that it could be paid by McCulley's mother on her behalf within 90 days of McCulley's release.

The court made several comments on the record in consideration of the sentencing factors. The court also asked McCulley if she had income during the prior 8 years. McCulley responded that she did not work during that time; her only source of income was her son's Social Security payments. However, her PSI recounts that McCulley intended to seek part-time employment when she returns to Oregon.

The court sentenced McCulley to three concurrent 1-year periods of incarceration and ordered the payment of restitution pursuant to the parties' plea agreement. McCulley was further ordered to pay the court costs and extradition expenses incurred by the State. Finally, the court found that McCulley was to receive credit for 27 days served spent in custody during the pendency of this matter.

ASSIGNMENTS OF ERROR

On appeal, McCulley asserts that the trial court erred in (1) imposing excessive sentences, (2) failing to give her credit for all of her time previously served, and (3) ordering her to pay restitution and costs without ascertaining ability to pay pursuant to § 29-2281.

STANDARD OF REVIEW

[1] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.[1]

[2] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.[2]

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[1] *State v. McBride*, 27 Neb. App. 219, 927 N.W.2d 842 (2019) (petition for further review denied June 28, 2019).

[2] *Id.*

[3] Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.[3]

[4] The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence, and the standard of review for restitution is the same as it is for other parts of the sentence.[4]

ANALYSIS

At oral arguments, McCulley conceded that her assignment of error alleging excessive sentences in relation to the period of incarceration ordered is moot because she has completed serving the sentences.[5] We agree and do not address it further. With regard to her remaining assignments of error, we find that the record supports the credit for time served as calculated at the sentencing hearing and that there is sufficient evidence in the record to support the order for restitution and costs.

Time Served

[5] We first address McCulley's assignment of error concerning credit for time served. McCulley asserts that the court incorrectly calculated the time served and requests that the credit for additional time served be applied to the court costs. Neb. Rev. Stat. § 83-1,106 (Reissue 2014) creates the requirement for the court to determine and apply credit for time served. The credit for time served to which a defendant is entitled is an absolute and objective number that is established by the record.[6]

When calculating the time served, the sentencing court identified the days accounted for in the evidence and the PSI. The

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[3] *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

[4] *State v. McMann*, 4 Neb. App. 243, 541 N.W.2d 418 (1995).

[5] See *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

[6] *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

court referenced the updated PSI and gave defense counsel the opportunity to present any additional evidence related to time served. Defense counsel recounted the arrests on record in the PSI and did not present any evidence of additional time served. Based on our review of the record before us, the calculation for time served was correct.

Restitution

The remaining assignment of error asserts that the trial court abused its discretion by ordering restitution where the record allegedly did not support McCulley's ability to pay. We find that the record is sufficient to demonstrate that the court conducted the inquiry mandated by Neb. Rev. Stat. § 29-2280 (Reissue 2016), and McCulley has failed to demonstrate that the court otherwise abused its discretion in ordering restitution. While an ability to pay is not a necessary prerequisite under § 29-2280 to an order of restitution, the record supports McCulley's ability to pay. We find no merit to McCulley's contention that the district court improperly balanced McCulley's earning ability, employment status, financial resources, and family or other legal obligations against her obligations to the victims of her crimes, especially when McCulley agreed to pay restitution in the amount ordered as a means of obtaining the benefit of a plea agreement.

[6,7] Restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as a punishment for a crime and is part of the criminal sentence imposed by the sentencing court.[7] On appeal, we do not endeavor to reform the trial court's order. Rather, we review the record made in the trial court for compliance with the statutory factors that control restitution orders.[8] The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to

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[7] *State v. St. Cyr*, 26 Neb. App. 61, 916 N.W.2d 753 (2018) (petition for further review denied Aug. 21, 2018).

[8] See *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012).

the restitution portion of a criminal sentence just as it is to any other part of the sentence.[9]

[8] Neb. Rev. Stat. § 29-2280 et seq. (Reissue 2008) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted.[10] Section 29-2281 elaborates that before restitution can be properly ordered, the trial court must consider (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.[11] Section 29-2281 provides in full:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. A person may not be granted or denied probation or parole either solely or primarily due to his or her financial resources or ability or inability to pay restitution. The court may order that restitution be made immediately, in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later. Restitution payments shall be made through the clerk of the court ordering restitution. The clerk shall maintain a record of all receipts and disbursements.

Although resitiution, like any other part of the sentence, involves discretion, we have also held that sentencing courts

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[9] *State v. McMann, supra* note 4.

[10] See *State v. Mick, supra* note 8.

[11] See *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

must meaningfully consider the evidence and weigh the statutory factors set forth in § 29-2281 to determine whether restitution is appropriate.[12] This is similar to the court's obligations to weigh the statutuory factors set forth in Neb. Rev. Stat. § 29-2260 (Reissue 2008) in determining whether or not to impose a period of incarceration for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required. We thus look to case law applying § 29-2260 for guidance in our application of § 29-2281.

We have said that § 29-2260 is a directive to the trial court as to certain factors to be considered in imposing the sentence,[13] but also that § 29-2260 does not control the trial court's discretion in its conclusion reached as to the proper sentence to be imposed, after weighing the statutory factors.[14] The specified factors must be "accorded weight," but they are neither exclusive of other factors nor "controlling the discretion of the court."[15] Our review of an alleged abuse of the sentencing judge's discretion in refusing to withhold imprisonment under § 29-2260 must recognize the statutory guidelines set out in § 29-2260 for the direction of the sentencing judge in imposing or withholding imprisonment,[16] but the factors are not mathematically applied.[17]

[9,10] We have held, further, that § 29-2260 does not require the trial court to articulate on the record that it has considered each sentencing factor, and it does not require the court to make specific findings as to the factors and the weight given them.[18] Thus, the absence of specific findings concerning the

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[12] See *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990).

[13] See *State v. Hunt*, 214 Neb. 214, 333 N.W.2d 405 (1983).

[14] See *id.*

[15] § 29-2260(3).

[16] *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984).

[17] *State v. McBride, supra* note 1.

[18] See *State v. Hunt, supra* note 13.

factors set forth in § 29-2260 cannot in itself be error or grounds for reversal.[19]

[11] We have held that in reviewing a sentence that fails to withhold imprisonment, the appropriateness of the 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.[20] We review a sentence that is within the statutory limits for an abuse of discretion by examining whether it is supported by the evidence.[21]

These same principles apply to an appeal of an order of restitution as part of the sentence. Section 29-2281 mandates that "[t]he court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations," as well as the defendant's "obligation to the victim," balancing one set of circumstances against the other. Though it is always good practice for district courts to provide a record of their reasoning, like § 29-2260, § 29-2281 does not require the sentencing court to specifically articulate that it has considered the listed statutory factors. It also does not require that trial courts make explicit findings as to facts pertaining to the statutory factors or the relative weight given to each factor. The absence of articulated findings is not in itself reversible error.

We disapprove of the Nebraska Court of Appeals' opinions in *State v. Mick*[22] and *State v. St. Cyr*[23] to the extent that they suggest otherwise. We clarify here that absent evidence to the contrary, we presume that the sentencing court has considered the appropriate factors to be weighed before determining

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[19] See *id.*

[20] *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

[21] See, *State v. McBride, supra* note 1; Neb. Rev. Stat. § 29-2308 (Reissue 2008). See, generally, *State v. Manjikian, supra* note 20.

[22] *State v. Mick, supra* note 8.

[23] *State v. St. Cyr, supra* note 7.

whether to order restitution. As always, the burden is on the appellant to show that the sentencing court has abused its discretion.[24]

Like with § 29-2260, the listed factors of § 29-2281 are neither exhaustive nor mathematically applied, and the court's ultimate determination of whether restitution should be imposed is a matter of discretion that is not controlled by § 29-2281. In fact, by its plain language, § 29-2281 does not require that the defendant be able to pay as a prerequisite to an order of restitution—so long as the defendant is not "granted or denied probation or parole either solely or primarily due to his or her financial resources or ability or inability to pay restitution," which could run afoul of due process and equal protection principles.[25] While the factors of the defendant's earning ability, employment status, financial resources, and family or other legal obligations principally implicate the extent to which a defendant is able to pay restitution, notably absent from § 29-2281 is any indication that the court lacks discretion, when balancing those factors against the defendant's obligation to the victim and other considerations, to order restitution as part of a sentence despite an inability to pay. Those factors need only be given meaningful weight. We note that in the federal system, certain crimes require an order of restitution regardless of ability to pay[26] and orders of restitution have been held not to violate due process or equal protection despite an inability to pay, so long as the defendant is not later subjected to increased imprisonment or a period of imprisonment beyond the statutory maximum solely on the basis of indigency.[27]

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[24] See *State v. McMann, supra* note 4.

[25] See *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[26] See 18 U.S.C. § 3663A (2012).

[27] See *U.S. v. Dubose*, 146 F.3d 1141, 1142 (9th Cir. 1998) (upholding constitutionality of federal "Mandatory Victims Restitution Act" and § 3663A). See, also, Annot., 20 A.L.R. Fed. 2d 239 (2007).

Thus, even if we were to accept McCulley's argument that she was, at the time of sentencing, unable to pay restitution, that would not end our inquiry. McCulley's sentences presented no issue pertaining to McCulley's being granted or denied probation or parole, because the court made it clear on the record that probation would not be ordered because McCulley had absconded. Under such circumstances, § 29-2281 required only that McCulley's "earning ability, employment status, financial resources, and family or other legal obligations" be "consider[ed]" and "balanc[ed]" against her "obligation[s] to the victim[s]." The record clearly demonstrates that the district court held a hearing in which evidence was adduced that enabled the court's consideration under § 29-2281 of the statutory factors relevant to restitution. The court asked several questions of McCulley and her counsel concerning her employment and other financial resources. The court also relied on information contained in the PSI. This was sufficient to satisfy the mandate under § 29-2281 that the court "consider" earning ability, employment status, financial resources, and family or other legal obligations.

[12,13] To the extent that *State v. Wells*[28] stands for the proposition that the evidence pertaining to the statutory considerations must be "sworn," we disapprove of it. A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[29] Furthermore, statements made by a defendant during a presentence investigation regarding his or her financial condition are the defendant's own statements and would be allowable evidence against him or her under

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[28] *State v. Wells, supra* note 11, 257 Neb. at 341, 598 N.W.2d at 37.

[29] See *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

the Nebraska Evidence Rules.[30] We find that the court complied with § 29-2281.

Once it is established that the court has meaningfully considered the evidence and weighed the statutory factors, an appeal attacking a sentence imposing restitution is simply an allegation that the sentence is excessive. A restitution order is reviewed for compliance with the factors from § 29-2281 rather than § 29-2260, but the procedures for challenging and reviewing the sentence are the same. The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence, and the standard of review for restitution is the same as it is for other parts of the sentence.[31]

[14] Because this case involved a plea agreement in which the defendant agreed to restitution, such an agreement is relevant to establishing whether the court abused its discretion.[32] In Nebraska, a court is never bound by the plea agreement made between a defendant and the government.[33] But in only the rarest instances[34] do we fail to affirm a sentence that was contemplated by the parties' plea agreement.[35] The same is true when the sentence involves restitution. 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.[36] It cannot usually be said that the trial

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[30] See, Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 2016); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[31] *State v. McMann, supra* note 4.

[32] See, generally, *State v. Elliott*, 21 Neb. App. 962, 845 N.W.2d 612 (2014).

[33] *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013).

[34] See *State v. Leahy, supra* note 6.

[35] See, *State v. Alegria*, 198 Neb. 750, 255 N.W.2d 419 (1977); *State v. Kirby*, 25 Neb. App. 10, 901 N.W.2d 704 (2017); *State v. Moore*, 4 Neb. App. 564, 547 N.W.2d 159 (1996).

[36] *State v. Ralios*, 301 Neb. 1027, 921 N.W.2d 362 (2019).

judge's ruling requiring restitution as part of the sentence is clearly untenable when the defendant has agreed as part of a plea agreement to the specific amount of restitution ultimately imposed.

In any event, there is no merit to McCulley's argument that the court abused its discretion, because the record demonstrated that she was able to pay the restitution ordered. As the district court observed, although McCulley indicated she was currently unemployed and taking care of a sick child, McCulley's unemployment was voluntary and it was likely that she could find gainful employment and still care for her children. McCulley had gainful employment prior to her flight to Oregon. She also has had the assistance of her mother in supporting and caring for her children. McCulley stated in the PSI that she is intending to seek part-time employment when she returns to Oregon. This is a situation similar to that presented in *State v. Hosack*,[37] where the defendant remained voluntarily unemployed to take care of his disabled parents and help his grandmother and we held that when a court is considering the required factors under § 29-2281, the court can give weight to the fact that a defendant's status as unemployed is voluntary.

Nothing in the record before us demonstrates that McCulley is unable to find work and to provide appropriate care for her children. We also find relevant to McCulley's ability to pay her representations that her mother could provide the funds to satisfy the order of restitution. When the court inquired as to the timeframe McCulley would need to repay the restitution, counsel indicated that it could be paid within 90 days through help from McCulley's mother.

McCulley does not challenge the method and manner of restitution ordered as unreasonable,[38] and indeed we observe that the court structured the repayment based on a timeframe

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[37] See *State v. Hosack*, 12 Neb. App. 168, 668 N.W.2d 707 (2003).

[38] See, *State v. Wells, supra* note 11; *State v. Hosack, supra* note 37.

requested by McCulley. McCulley concedes that the restitution reflected the correct amount of the victims' damages, which she had agreed to pay as part of the plea agreement. On these facts, we find no abuse of discretion by the court in its sentences that included ordering restitution and costs. We hold that the inquiry by the court into McCulley's ability to pay satisfied the requirements of § 29-2281 and that the evidence in the PSI, McCulley's prior plea agreement to pay restitution, and McCulley's representation of her ability to pay at the sentencing hearing all provide sufficient factual support for the restitution ordered as part of the sentences. Nothing in the record suggests that the order of restitution was clearly untenable, unfairly depriving McCulley of a substantial right and denying a just result.

CONCLUSION

For the foregoing reasons, we hold that McCulley's assignment of error related to excessive sentences of incarceration is moot. We affirm the district court's calculation of time served and the order of costs and restitution as part of the sentences.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee,
v. A.D., appellant.

State of Nebraska, appellee,
v. C.M., appellant.

939 N.W.2d 484

Filed February 28, 2020. Nos. S-19-583, S-19-678.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Statutes.** Where it is possible to harmonize apparently conflicting statutes, a court should do so.
4. **Jurisdiction: Appeal and Error.** When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
5. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeals from the County Court for Sarpy County: Robert C. Wester and Todd J. Hutton, Judges. Appeals dismissed.

Dennis P. Marks, Deputy Sarpy County Public Defender, and Mitchell S. Sell, Senior Certified Law Student, for appellant A.D.

Todd A. West, Sarpy County Public Defender, Dennis P. Marks, Deputy Sarpy County Public Defender, and Mitchell S. Sell, Senior Certified Law Student, for appellant C.M.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Appellants in both of these consolidated appeals contend that the county court erred by concluding it lacked jurisdiction to decide motions to transfer their felony criminal cases to juvenile court. We conclude that the county court correctly found it lacked jurisdiction over the motions to transfer to juvenile court. Because the county court lacked jurisdiction, we find that we too lack jurisdiction and dismiss the appeals.

BACKGROUND

In both of these consolidated cases, the State filed complaints in county court charging appellants with felonies. The State charged A.D. with first degree sexual assault, a Class II felony. The State charged C.M. with possession of a stolen firearm, a Class IIA felony. Both offenses were alleged to have been committed when appellants were older than 14 years old but younger than 18 years old.

Both A.D. and C.M. filed motions asking the county court to transfer their respective cases to juvenile court under Neb. Rev. Stat. §§ 29-1816 (Cum. Supp. 2018) and 43-276 (Reissue 2016). In both cases, the State argued that the county court did not have jurisdiction to decide a motion to transfer to juvenile court in felony cases. And in both cases, after a hearing, the county court issued orders stating that it did not have jurisdiction to rule on a motion to transfer to juvenile court and scheduled preliminary hearings.

Before a preliminary hearing was held in either case, appellants filed notices of appeal. We moved the appeals to our docket and consolidated them for oral argument and disposition.

ASSIGNMENTS OF ERROR

Both appellants claim that the county court erred in one respect: by holding that it lacked jurisdiction to rule on their respective motions to transfer to juvenile court.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Green v. Seiffert*, 304 Neb. 212, 933 N.W.2d 590 (2019).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Griffith v. Nebraska Dept. of Corr. Servs.*, 304 Neb. 287, 934 N.W.2d 169 (2019).

ANALYSIS

This case presents multiple jurisdictional arguments. Appellants argue that the county court erred by finding it lacked jurisdiction to decide their motions to transfer to juvenile court. The State contends that the county court correctly determined it lacked jurisdiction of the motions to transfer to juvenile court in felony cases. Alternatively, the State contends that the orders at issue are not final and appealable, an argument we discuss briefly below.

Final Order.

In *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016), we held that a trial court's denial of a motion to transfer to juvenile court was not a final, appealable order. In response to our decision, the Legislature amended § 29-1816 to provide that "[a]n order granting or denying transfer of [a] case from county or district court to juvenile court" may be appealed to the Nebraska Court of Appeals, provided a party files a notice of appeal within 10 days of the entry of such an order. § 29-1816(3)(c). See 2017 Neb. Laws, L.B. 11, § 1. See, also, *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018). Both

appellants filed notices of appeal within 10 days of the county court orders at issue, but the State argues that the county court declined to rule on the motions to transfer, as opposed to granting or denying them, and that thus, the orders are not covered by § 29-1816(3)(c) and are not appealable.

It is unnecessary to resolve whether the orders appealed from were orders "denying transfer" for purposes of § 29-1816(3)(c). Even if they were, we find that we lack jurisdiction over these appeals and are obligated to dismiss them for another reason, as we explain in more detail below.

County Court Jurisdiction Over Motions to Transfer Felony Cases to Juvenile Court.

As noted above, appellants' central argument in these appeals is that county courts have jurisdiction to decide motions to transfer felony cases to juvenile court. Any case in which the scope of a county court's authority is at issue must begin with the understanding that county courts are statutorily created courts which possess limited jurisdiction. See *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016). More specifically, county courts have only that jurisdiction which has been granted to them through specific legislative enactment. See *id.* And while county courts have been given jurisdiction of criminal matters classified as misdemeanors or infractions via Neb. Rev. Stat. § 24-517 (Cum. Supp. 2018), that statute does not provide for county court jurisdiction over felonies. In *State v. Schanaman*, 286 Neb. 125, 835 N.W.2d 66 (2013), we cited § 24-517 for the proposition that county courts cannot try felony cases.

While we were correct in *Schanaman* to note that § 24-517 does not generally grant county courts jurisdiction over felonies, other statutes do authorize county court judges to play a role in felony matters. For example, in those counties that do not have separate juvenile courts, county court judges can, sitting as a juvenile court, preside in proceedings against

juveniles who are alleged to have committed a felony. See, Neb. Rev. Stat. § 43-245(12) (Supp. 2019); Neb. Rev. Stat. § 43-246.01(1)(d) and (2)(b) (Reissue 2016). See, also, *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016). Another statute authorizes county court judges to act as a district judge in Class IV felony cases, even without the consent of the parties. See Neb. Rev. Stat. § 24-312 (Reissue 2016). The authority of the county court to act as a juvenile court or district court as described is not at issue in these appeals.

Our opinion in *Schanaman, supra*, discussed another function county courts are authorized to serve in felony cases. As we noted, "a felony charge generally originates by complaint in county court, but after a preliminary hearing and probable cause finding, the county court must bind the defendant over to the district court." *Id.* at 131, 835 N.W.2d at 70. The authority of county courts to conduct preliminary hearings in felony cases referred to in *Schanaman* is derived from other statutes. As we explained in *State v. Wilkinson*, 219 Neb. 685, 686, 365 N.W.2d 478, 479 (1985), when a county court judge conducts a preliminary hearing, he or she is acting as an "examining magistrate," pursuant to Neb. Rev. Stat. §§ 29-201, 29-504, and 29-506 (Reissue 2016), and has only the authority to discharge the defendant or, upon a probable cause finding, bind the defendant over to the district court for further proceedings.

The county court concluded in these matters that its authority was limited to conducting a preliminary hearing and that thus, a motion to transfer to juvenile court could only be decided by the district court in the event probable cause was found and the case was bound over. Appellants argue that the county court misunderstood its authority and that it is authorized to decide a motion to transfer to juvenile court even in felony cases.

In support of this argument, appellants rely on several statutes that they contend provide such authority. First, they direct us to § 43-246.01(3), a statute that provides that juvenile

courts shall have "[c]oncurrent original jurisdiction with the county court or district court" in several categories of cases. One such category is cases involving juveniles that were younger than 18 years old and were 14 years old or older "when an alleged offense punishable as a Class I, IA, IB, IC, ID, II, or IIA felony was committed." § 29-1816(1)(a)(ii). See § 43-246.01(3)(c).

Appellants also find support for their position in § 29-1816, the statute discussing motions to transfer to juvenile court, and invoke the following portions of that statute:

> (1)(a) The accused may be arraigned in county court or district court:
>
> (i) If the accused was eighteen years of age or older when the alleged offense was committed;
>
> (ii) If the accused was younger than eighteen years of age and was fourteen years of age or older when an alleged offense punishable as a Class I, IA, IB, IC, ID, II, or IIA felony was committed;
>
> (iii) If the alleged offense is a traffic offense as defined in section 43-245; or
>
> (iv) Until January 1, 2017, if the accused was seventeen years of age when an alleged offense described in subdivision (1) of section 43-247 was committed.
>
> (b) Arraignment in county court or district court shall be by reading to the accused the complaint or information, unless the reading is waived by the accused when the nature of the charge is made known to him or her. The accused shall then be asked whether he or she is guilty or not guilty of the offense charged. If the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he or she shall be deemed to have waived arraignment and a plea of not guilty shall be deemed to have been made.
>
> (2) At the time of the arraignment, the county court or district court shall advise the accused, if the accused was younger than eighteen years of age at the time the alleged

> offense was committed, that the accused may move the county court or district court at any time not later than thirty days after arraignment, unless otherwise permitted by the court for good cause shown, to waive jurisdiction in such case to the juvenile court for further proceedings under the Nebraska Juvenile Code.

Appellants contend that §§ 43-246.01 and 29-1816 give county courts the power to decide motions to transfer to juvenile court in felony cases. They contend that by its plain language, § 43-246.01(3)(c) gives county courts concurrent jurisdiction of cases involving juveniles charged with the enumerated felonies. If that were not enough, they contend that § 29-1816(1)(a) authorizes county courts to conduct arraignments in those cases. And finally, they argue that the advisement at arraignment required by § 29-1816(2) indicates that the accused may seek transfer in either county court or district court.

The State interprets each of these statutes differently. It argues that each time the statutes mentioned above refer to "county court or district court," they do so against the backdrop of the jurisdiction that has been granted to those respective courts. So, according to the State, § 43-246.01(3)(c) should not be read to give county courts and district courts (along with juvenile courts) concurrent jurisdiction over all of the enumerated categories of cases, but to give juvenile courts concurrent jurisdiction with county courts over those cases for which the county court has jurisdiction and concurrent jurisdiction with district courts over those cases for which the district court has jurisdiction.

The State urges us to interpret § 29-1816 in a similar fashion. It argues that statute should be understood to give county courts the authority to arraign defendants and decide motions to transfer to juvenile court in cases in which it has jurisdiction over the underlying charge and to give district courts the same authority in cases in which it has jurisdiction over the underlying charge. Under the State's interpretation, the county

court could not entertain the motions to transfer to juvenile court, because it did not have jurisdiction to try these cases in which appellants were charged with Class II and Class IIA felonies. Although it does not appear we were addressing this particular issue, language in one of our recent opinions is consistent with the State's interpretation. See *State v. Tyler P.*, 299 Neb. 959, 967, 911 N.W.2d 260, 266-67 (2018) ("in deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, *the court having jurisdiction over a pending criminal prosecution* must carefully consider the juvenile's request in the light of the criteria or factors set forth in § 43-276") (emphasis supplied).

Appellants contend that their interpretation gives effect to the plain language of the statutes at issue and that the State's does not. In our view, however, both sides present plausible interpretations of the plain language of the statutes if that language is viewed in isolation. Statutes, however, are not properly interpreted in isolation. See *State v. Jedlicka, ante* p. 52, 938 N.W.2d 854 (2020). Rather, when interpreting a statute, well-established principles of statutory interpretation require a court to take account of context and of other statutes pertaining to the same subject. See *id.* As we will explain below, those principles lead us to conclude that the State's interpretation is correct and that county courts have not been given authority to decide motions to transfer to juvenile court in cases in which they lack jurisdiction to try the case.

First, we note that the interpretations offered by appellants sweep much more broadly than they are willing to acknowledge. Appellants assert repeatedly that § 43-246.01(3) gives county courts concurrent jurisdiction over cases involving juveniles who are between 14 and 18 years old accused of Class I and Class II felonies. Appellants attempt to cabin their argument, however, by conceding that county courts cannot decide the merits of these felony cases and contending that this case involves only the authority of a county court to decide a motion to transfer to juvenile court. But appellants'

textual argument cannot logically stop at a motion to transfer to juvenile court. If county courts truly have concurrent jurisdiction over cases in which juveniles are accused of Class I and Class II felonies, they have jurisdiction to decide not only motions to transfer but also the merits of such cases.

In addition, if, as appellants contend, the authority to arraign defendants given to county courts and district courts in § 29-1816(1)(a) is made without reference to existing jurisdictional limitations, county courts' authority would be expanded in another way. One type of case listed in that statute is one in which "the accused was eighteen years of age or older when the alleged offense was committed." § 29-1816(1)(a)(i). Under appellants' interpretation then, county courts would have the authority to conduct an arraignment and, presumably, accept a guilty plea in any case in which a defendant *18 years of age or older* was charged with a felony.

Interpreting the statutes discussed above as appellants suggest would significantly expand the authority of county courts over felony cases. While § 24-517 does not confer jurisdiction over felony cases to county courts, appellants' interpretations would result in county courts having jurisdiction to try certain felony cases and to conduct arraignments in many others. One would expect such significant expansions of county court authority to be stated in much clearer terms. As the U.S. Supreme Court memorably observed, legislative bodies do "not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they do] not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

Appellants' interpretation has other problems. As the State points out, it creates conflicts with other statutes. Section 43-246.01(3)(b) states that the juvenile court shall have concurrent original jurisdiction with the county court or district court as to juveniles described in Neb. Rev. Stat. § 43-247(9) (Reissue 2016). That section refers to adoption or guardianship

proceedings for a child over which the juvenile court already has jurisdiction. Under appellants' interpretation of § 43-246.01, the district court would have concurrent jurisdiction over such adoption proceedings. Section 24-517(11), however, provides that if a separate juvenile court already has jurisdiction over the child to be adopted, the county court has concurrent jurisdiction with the separate juvenile court. No mention is made of the district court.

[3] Where it is possible to harmonize apparently conflicting statutes, a court should do so. *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 924 N.W.2d 678 (2019). Interpreting the references to "county court or district court" in §§ 43-246.01 and 29-1816, in light of the jurisdiction granted to those courts elsewhere, results in no such conflicts. This interpretation also still allows juvenile offenders to seek transfer to juvenile court when the county court does not have jurisdiction to decide the case. It merely requires that in such cases, they seek transfer in the district court after the case is bound over.

Perhaps recognizing the problems posed by their reliance on §§ 43-246.01 and 29-1816, appellants shifted course in their reply brief and primarily argued that county courts have jurisdiction to decide motions to transfer to juvenile court in felony cases by analogizing to county courts' authority to conduct preliminary hearings in felony cases. Appellants suggest that just as a county court can find probable cause and bind over a felony case to district court for disposition of the merits, it should be able to decide that a case alleging a felony should be transferred to juvenile court for further proceedings. But appellants' analogy is flawed. As noted above, county courts have authority to conduct preliminary hearings in felony cases because statutes specifically authorize them to do so. Those same statutes cannot be interpreted to authorize county courts to decide motions to transfer to juvenile court. See §§ 29-201, 29-504, and 29-506.

Finally, we note that throughout their briefing and again in oral argument, appellants have emphasized that juveniles will

benefit from having a transfer motion decided as soon as possible and that such motions can be resolved sooner in felony cases if they can be decided in county court. All of this may be true, but it is also a policy argument about whether county courts *should* have the power to decide motions to transfer to juvenile court in felony cases. That is a question for the Legislature to resolve rather than this court. See *Rogers v. Jack's Supper Club*, 304 Neb. 605, 614, 935 N.W.2d 754, 762 (2019) ("[b]ut we are not tasked with selecting what we believe is the best policy"). Our role is limited to deciding whether the Legislature has given county courts the authority to decide motions to transfer to juvenile court in these cases. For all the reasons discussed herein, we conclude it has not.

[4,5] When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Id.* Because the county court lacked jurisdiction over the motions to transfer, we lack jurisdiction over these appeals and must dismiss.

CONCLUSION

Because we conclude we lack jurisdiction, we dismiss the appeals.

Appeals dismissed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v. Richard A. Fredrickson, appellee.

939 N.W.2d 385

Filed February 28, 2020. No. S-19-743.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Criminal Law: Right to Counsel: Appeal and Error.** A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. ____: ____. Appellate jurisdiction is the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts.
5. **Constitutional Law: Jurisdiction.** The Nebraska Constitution confers the Nebraska Supreme Court with only "such appellate jurisdiction as may be provided by law."
6. **Courts: Jurisdiction: Legislature: Appeal and Error.** In order to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.
7. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.
8. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
9. **Criminal Law: Judgments: Sentences: Appeal and Error.** In a criminal case, the judgment from which the appellant may appeal is the sentence.

10. **Judgments: Words and Phrases.** Every direction of the court made or entered in writing and not included in a judgment is an order.
11. **Final Orders: Appeal and Error.** In order to be a final order which an appellate court may review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.
12. ____: ____. Whether an order affects a substantial right focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.
13. **Final Orders.** Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.
14. ____. Whether an order affects a substantial right depends on whether the right could otherwise effectively be vindicated.
15. **Final Orders: Appeal and Error.** An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.

Appeal from the District Court for Washington County: John E. Samson, Judge. Appeal dismissed.

Desirae M. Solomon, Deputy Washington County Attorney, for appellant.

David V. Drew, of Drew Law Firm, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

The State of Nebraska, through the Washington County Attorney's office, appeals the district court's order finding Richard A. Fredrickson indigent and entitled to court-appointed appellate counsel at the expense of Washington County (the County). The State argues the court abused its discretion because Fredrickson failed to adequately provide his financial situation to the lower court, acquired undisclosed additional

funds during the pendency of the underlying action, and had sufficient assets to pay for his legal counsel. Fredrickson, in turn, argues that this court lacks jurisdiction to consider the State's appeal and that the district court did not abuse its discretion. Because the court's order finding Fredrickson indigent and appointing counsel was neither a judgment nor a final, appealable order, we lack jurisdiction and dismiss the State's appeal.

BACKGROUND

Fredrickson was charged by amended information with possession of a deadly weapon, robbery, and use of a deadly weapon to commit a felony for events occurring on April 11, 2018.

At his initial hearing before the county court on April 16, 2018, Fredrickson was advised of his rights, including his right to counsel. In its journal entry and order, the county court stated that Fredrickson was to file a poverty affidavit, that Fredrickson was "adjudged indigent," and that counsel was appointed to represent Fredrickson at the County's expense. On the same date, the county court entered a separate order restating its appointment of counsel. Fredrickson never filed the poverty affidavit, and the case was moved to the district court.

In district court, Fredrickson entered a no contest plea to robbery in exchange for the State's dismissing the remaining counts. The State then filed a motion to determine Fredrickson's indigent status, noting Fredrickson's failure to file the poverty affidavit and alleging Fredrickson may have sufficient funds to compensate the County for legal work performed. The State also filed a motion to dispose of property, requesting the sale of Fredrickson's impounded vehicle allegedly used in the commission of the robbery. The State asked that any funds acquired from such sale be directed by the court to reimburse the County for Fredrickson's representation.

Immediately prior to sentencing, a hearing was held on the State's two motions. At the hearing, counsel for Fredrickson

alleged that although Fredrickson had failed to turn in the affidavit, he had filled one out. The court instructed Fredrickson to complete a new form with his then-current financial information. Under this affidavit, Fredrickson averred that his vehicle was worth $9,000, which was the price he had originally paid for it, and that he had a bank account with a $13,000 balance. The affidavit also indicated that Fredrickson was obligated to pay child support in the amount of $100 per month for each of his two children. According to Fredrickson, his savings were being managed by his "power of attorney person" for the continued payment of child support.

After Fredrickson provided the completed financial affidavit, the court took up the State's motion for the sale of Fredrickson's vehicle. Fredrickson did not object to the vehicle's sale, and the court ordered that any money derived from the sale of the vehicle be applied to court costs and as restitution to the County for any of Fredrickson's court-appointed attorney fees. The court further ordered that any money received from the sale of the vehicle in excess of the attorney fees be paid to the person holding Fredrickson's power of attorney and used for payment of child support. In the event the sale of the vehicle produced insufficient funds to cover the court costs and attorney fees, the court denied the State's request for further reimbursement from Fredrickson's savings and other available assets.

After the hearing on the State's motions, the court proceeded to sentence Fredrickson to a term of incarceration. At sentencing, Fredrickson continued to be represented by his court-appointed counsel.

Fredrickson subsequently appealed his conviction and sentence and filed a motion for appointment of appellate counsel. Along with his motion, Fredrickson filed a new financial affidavit in which he claimed he had $10,000 to $14,000 in a bank account which was to be used "solely for payments of child support to maintain current status." The affidavit stated this child support was $200 per month. The State filed an objection to Fredrickson's alleged indigent status.

A hearing was held on Fredrickson's motion for appointment of appellate counsel and the State's objection. During the hearing, the State submitted a real estate transfer statement concerning a property in which Fredrickson was indicated to have a one-half interest and which sold for $180,000 in July 2018.

Fredrickson conceded that the property, which he owned with his father, was sold and that he received about $80,000 from the sale. Fredrickson explained that he was incarcerated during and since the sale of the property so the person holding his power of attorney had made expenditures from the sale's funds for "any financial things that I would have had to have taken care of, anything like that, children, holidays, whatever, has been taken care of out of that." Fredrickson testified that the $10,000 to $14,000 listed on his financial affidavit was what was left of the $80,000 after those expenses. Fredrickson also clarified that his child support obligation may have changed since the filing of his affidavit and is at least $100 per month and at most $200 per month.

On July 12, 2019, the district court entered an order finding Fredrickson was entitled to court-appointed appellate counsel according to the information contained within his financial affidavit. As such, the court appointed to Fredrickson appellate counsel at the County's expense. The court explained that Fredrickson was advised, in the event the financial affidavit contained incorrect information, he may be ordered to reimburse the County for his appellate attorney fees. On July 30, the State filed a notice of appeal of the July 12 order.

ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court abused its discretion in declining to apply Fredrickson's savings and other available assets to reimburse the County for any court-appointed appellate attorney fees in excess of the amount received from the sale of Fredrickson's impounded vehicle.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[1]

[2] A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination.[2]

ANALYSIS

[3-7] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] Appellate jurisdiction is the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts.[4] The Nebraska Constitution confers the Nebraska Supreme Court with only "such appellate jurisdiction as may be provided by law."[5] In order to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.[6] An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.[7]

[8-10] For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[8] A judgment is the final determination of the rights

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[1] *State v. Coble*, 299 Neb. 434, 908 N.W.2d 646 (2018).

[2] *State v. Richter*, 225 Neb. 837, 408 N.W.2d 717 (1987).

[3] *Coble, supra* note 1.

[4] *Webb v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 810, 920 N.W.2d 268 (2018).

[5] Neb. Const. art. V, § 2.

[6] See *Webb, supra* note 4.

[7] *Id.*

[8] *Id.* See Neb. Rev. Stat. § 25-1911 (Reissue 2016).

of the parties in an action.[9] In this case, the State is appealing the district court's finding that Fredrickson was indigent and entitled to appellate counsel for his appeal of his criminal conviction and sentence. In a criminal case, the judgment from which the appellant may appeal is the sentence,[10] and every direction of the court made or entered in writing and not included in a judgment is an order.[11] Thus, the indigency finding and appointment of appellate counsel is not a judgment but is, instead, an order. We thus turn to the question of whether this order was a final order sufficient to confer appellate jurisdiction.

[11] In order to be a final order which an appellate court may review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.[12] Because the order at issue here was not on a motion for summary judgment and all three remaining categories of final orders under § 25-1902 affect a substantial right in the action, it is unnecessary to evaluate the three categories individually unless the order affects a substantial right.[13]

[12-15] Numerous factors determine whether an order affects a substantial right for purposes of appeal.[14] The inquiry focuses

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[9] Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2018).

[10] *State v. Ratumaimuri*, 299 Neb. 887, 911 N.W.2d 270 (2018).

[11] See *Webb, supra* note 4.

[12] See Neb. Rev. Stat. § 25-1902 (Supp. 2019).

[13] See *Mutual of Omaha Bank v. Watson*, 301 Neb. 833, 920 N.W.2d 284 (2018).

[14] *In re Grand Jury of Douglas Cty.*, 302 Neb. 128, 922 N.W.2d 226 (2019); *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.[15] Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.[16] It also depends on whether the right could otherwise effectively be vindicated.[17] An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[18]

The County filed a notice of appeal on July 30, 2019, as though it were taking an ordinary appeal under § 29-1902 and Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), and we must therefore analyze jurisdiction according to the ordinary principles of appellate jurisdiction just recited.

The order finding Fredrickson indigent and entitled to appellate counsel did not affect a substantial right. First, while the order stated Fredrickson was entitled to the appointment of appellate counsel at the County's expense, it did not obligate the County to pay any specific amount or set a deadline for payment. Such determinations are to be the subject of future proceedings addressing the question of reasonable attorney fees. At that point, the State is entitled to object and seek appellate review because the determination of attorney fees and expenses of court-appointed counsel are the final determination of the County's right to avoid expending its funds on a defendant's representation.[19] The current order stating the County may be obligated to pay some unknown amount at some unknown future date does not substantially impact the County.

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[15] *In re Grand Jury of Douglas Cty., supra* note 14.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] See *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987).

Further, the current order does not affect a substantial right of the State because it is not the final determination obligating the payment of Fredrickson's appellate attorney fees. As explained above, the State has the ability to contest requested fees as they come before the court for approval. Additionally, the State can challenge the finding of Fredrickson's indigency through Neb. Rev. Stat. § 29-3908 (Reissue 2016), which provides:

> Whenever any court finds subsequent to its appointment of . . . counsel to represent a felony defendant that its initial determination of indigency was incorrect or that during the course of representation by appointed counsel the felony defendant has become no longer indigent, the court may order such felony defendant to reimburse the county for all or part of the reasonable cost of providing such representation.

Thus, even though the order appointing appellate counsel specified that it is at the County's expense, the State is able to seek reconsideration and can challenge the underlying finding of indigency and recoup any subsequently expended funds from the defendant.

Prior to the appointment of appellate counsel, which is the order at issue here, the State utilized this statutory right to ask the district court to review its indigency finding from the appointment of trial counsel in its motion to determine defendant's indigent status. Although the court did not modify its previous indigency determination, it did order that the State could sell Fredrickson's vehicle and apply the money to Fredrickson's attorney fees.

Additionally, in the appointment of appellate counsel, Fredrickson was advised that in the event the financial affidavit contained incorrect information, he may be ordered to reimburse the County for his appellate attorney fees. The State's motion to determine indigency and the court's advisement demonstrate our analysis that the initial finding of indigency and appointing of appellate counsel at the County's expense

was not the final determination of the State's obligation to pay for Fredrickson's representation.

The State makes some argument that postponing the review of the court's indigency determination would undermine its right to avoid paying attorney fees for individuals with sufficient funds when they are initially determined indigent. In making this argument, the State claims § 29-3908 is insufficient to protect its rights because it would be difficult to recoup the money from incarcerated criminal defendants. This argument is without merit. Although recovery of attorney fees may be, at times, difficult, the Nebraska Legislature has specified the process for determination of the County's rights and recovery of funds when there is a subsequent modification of an indigency finding. This argument is insufficient to show a significant undermining of the State's right.

We also note that the finding of Fredrickson's indigency and the appointment of counsel does not affect any of Fredrickson's substantial rights. Although Fredrickson has a right to counsel, the court's order appointing counsel upheld this right and Fredrickson's right was not aggrieved. Because Fredrickson was appointed counsel, his right to counsel was not significantly undermined or irrevocably lost.[20]

Considering all of the above, the order finding Fredrickson indigent and appointing appellate counsel at the County's expense did not affect a substantial right of the parties and was not a final order for purposes of review. Thus, we lack jurisdiction to consider this appeal.

During oral argument, there was discussion as to whether Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2018) permits the State to appeal orders of the court rather than only those classified as final orders. This statute expresses an exception to the general rule that the State cannot appeal an adverse ruling in a criminal case and provides additional, required

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[20] See *In re Grand Jury of Douglas Cty., supra* note 14.

steps the State must take to make such an appeal.[21] In explaining the additional filing requirements, the first sentence of § 29-2315.01 states the State may take exception to "any ruling or decision." However, § 29-2315.01 clarifies that these filings must occur after a final order by setting time limitations which begin to run "after the final order is entered in the cause." Therefore, § 29-2315.01 does not grant the State the ability to appeal an order finding indigency and appointing counsel prior to the issuance of a final order.

Because the order finding that Fredrickson is indigent and entitled to court-appointed appellate counsel is not a judgment or a final, appealable order, we decline to address whether we also lack jurisdiction due to the State's failing to meet the filing requirements of § 29-2315.01 and do not reach the merits of the State's assignments of error on appeal.

CONCLUSION

The district court's order finding Fredrickson indigent and appointing appellate counsel was not a judgment or a final, appealable order. Accordingly, we lack jurisdiction to consider this appeal and it is dismissed.

Appeal dismissed.

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[21] See § 29-2315.01.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Ariana Bernal Sabino, appellant, v. Juan Carlos Genchi Ozuna, appellee.

939 N.W.2d 757

Filed March 6, 2020. No. S-18-110.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Divorce: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
4. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
6. **Statutes: Time.** Amendments to Neb. Rev. Stat. § 43-1238(b) (Cum. Supp. 2018) were procedural and applicable to pending cases.
7. **Courts: Minors.** The role of state courts in the special immigrant juvenile status determination is to make the findings of fact necessary to the U.S. Citizenship and Immigration Service's legal determination of the immigrant child's entitlement to special immigrant juvenile status.
8. **Courts: Federal Acts: Minors.** Federal law affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, and abandonment, as well as a child's best interests. But it is not the role of the state court to make a determination as to whether a child will ultimately be eligible for special immigrant juvenile status; that is a determination reserved for the U.S. Citizenship and Immigration Service and the federal government.

9. **Courts: Minors.** That a court is requested to make special immigrant juvenile status findings does not mean that it must make findings favorable to the party seeking them.
10. **Courts: Minors: Evidence.** Courts asked to make special immigrant juvenile status findings may conclude that there was insufficient evidence or that the evidence was not credible.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Reversed and remanded for further proceedings.

Roxana Cortes Reyes, of Immigrant Legal Center, an affiliate of the Justice For Our Neighbors Network, for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

The Douglas County District Court dissolved the marriage of Ariana Bernal Sabino and Juan Carlo Genchi Ozuna and awarded full custody of the parties' child to Sabino. Sabino sought specific findings of fact for purposes of special immigrant juvenile (SIJ) status under federal law. The district court declined to make such findings, and Sabino appealed. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

According to an affidavit offered into evidence by Sabino at trial, she and Ozuna met in Cuatro Bancos, Guerrero, Mexico, in approximately 2000. Sabino was born in Cuatro Bancos, and she was 13 years old when she met Ozuna. A year later, she and Ozuna moved in together, and 5 months after that, Ozuna began to physically assault Sabino. Sabino became pregnant in May 2003, and she and Ozuna were married in November. Throughout this time, Ozuna continued to physically assault Sabino. In December, Sabino left Ozuna and returned to her

parents' home. According to Sabino's affidavit, just 1 week later, Ozuna moved in with another woman.

Sabino averred that Ozuna was aware of her pregnancy and of the due date of the baby. Sabino also averred that Ozuna was aware of where she was staying. Sabino stated that Ozuna never attempted to see her or the baby and provided no financial assistance.

According to her affidavit, Sabino was unable to provide for the couple's son on her own and came to the United States when her son was 20 months old. Sabino left her son in Mexico with her mother and sent money to cover his expenses. She also spoke with him on the telephone frequently. In August 2016, Sabino's son and mother, who was also a victim of domestic violence at the hands of Sabino's father, left Mexico for the United States.

In June 2017, Sabino filed a complaint in the Douglas County District Court for the dissolution of marriage. Ozuna entered a voluntary appearance in October, but did not personally appear. Trial was held on November 8. Sabino testified through a Spanish language interpreter that she was married to Ozuna and was seeking a divorce because Ozuna had hit her, that she had been separated from him for over 13 years, and that she did not believe the marriage could be saved. Sabino sought an award of all of the property in her possession and custody of the parties' son.

Because Sabino had borne children from other relationships while Sabino and Ozuna were married, the trial court continued the trial in order for Sabino to gather evidence rebutting the statutory presumption that Ozuna was the father of those children. The trial resumed on January 11, 2018, at which time evidence rebutting that presumption was offered.

In addition to the proof of paternity for her other children, Sabino offered exhibit 4, which was a photocopy of materials from the U.S. Citizenship and Immigration Services explaining "Special Immigrant Juvenile Status." According to this exhibit, SIJ status is available to children who present in the United

States without legal immigration status because they have been "abused, abandoned, or neglected by a parent." As relevant to this appeal, exhibit 4 notes: "Juvenile courts issue orders that help determine a child's eligibility for SIJ status. . . . The role of the court is to make factual findings based on state law about the abuse, neglect, or abandonment; family reunification; and best interests of the children."

Following admission of this evidence, the court made certain inquiries of Sabino while she was on the witness stand. Specifically, the court asked Sabino whether she or her mother had "any legal authority to live in the United States." Sabino's counsel objected on relevancy grounds, noting that it went to neither "the best interest of the child [n]or the divorce proceedings."

The court then made an oral pronouncement (with an accompanying written decree) granting the divorce and awarding custody to Sabino, subject to Ozuna's reasonable visitation at Sabino's reasonable discretion. Ozuna was also ordered to pay $50 per month in child support.

As relevant to this appeal, the court also stated:

> The Court makes no decision as to the other issues that [Sabino] has requested with regard to abandonment in Mexico, abuse in Mexico, and things of that nature, as the Court does not have adequate information as to why the child could not live safely in some part of Mexico.
>
> In addition, the Court does find that it's relevant as to whether [Sabino] is legally in the United States, if her mother is legally in the United States, things of that nature. And if she refuses to answer those, then I'm not going to go any further with asking other questions in this matter.
>
> The Court's also concerned as to whether it's even within my purview to makes [sic] these determinations. If I do make these — if this is in my purview to make these determinations, then I need a lot more evidence to make that determination. For sure I need evidence as to how

> paragraph 7 [of Sabino's affidavit, detailing her mother's flight to the United States due to domestic violence,] was arrived at. . . . Sabino . . . doesn't know how the information in paragraph 7 was obtained. If she doesn't know, then that is somewhat of a crux of the information in this matter.

The district court signed a decree prepared by Sabino's counsel that included the findings sought regarding abuse, neglect, or abandonment; family reunification; and best interests of the child. However, the court struck through those findings and therefore did not make the findings requested by Sabino.

Sabino appealed. In a prior opinion, we concluded that the district court erred in not allowing Sabino to proceed in forma pauperis.[1] We are now presented with the merits of Sabino's appeal.

ASSIGNMENT OF ERROR

Sabino assigns three assignments of error that can be consolidated as one: The district court erred in not making the findings of fact requested by Sabino.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.[2] We independently review questions of law decided by a lower court.[3]

[3-5] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.[4] In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions

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[1] See *Sabino v. Ozuna*, 303 Neb. 318, 928 N.W.2d 778 (2019).

[2] *In Re Guardianship of Carlos D.*, 300 Neb. 646, 915 N.W.2d 581 (2018).

[3] *Id.*

[4] *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

with respect to the matters at issue.[5] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[6]

ANALYSIS

This appeal generally presents the question of whether the district court had the authority to make the findings of fact requested by Sabino and, if so, whether there was sufficient evidence for the court to make those findings. Each issue will be addressed in turn.

District Court's Authority.

[6] The district court in this case had the authority to make the findings sought by Sabino. Neb. Rev. Stat. § 43-1238(b) (Cum. Supp. 2018) provides:

> In addition to having jurisdiction to make judicial determinations about the custody and care of the child, a court of this state with exclusive jurisdiction under subsection (a) of this section [setting forth when a court has jurisdiction to make an initial child custody determination] has jurisdiction and authority to make factual findings regarding (1) the abuse, abandonment, or neglect of the child, (2) the nonviability of reunification with at least one of the child's parents due to such abuse, abandonment, neglect, or a similar basis under state law, and (3) whether it would be in the best interests of such child to be removed from the United States to a foreign country, including the child's country of origin or last habitual residence. If there is sufficient evidence to support such factual findings, the court shall issue an order containing such findings when requested by one of the parties or upon the court's own motion.

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[5] *Id.*

[6] *Id.*

Although the amendments to § 43-1238 were not effective until July 19, 2018, which was several months after the order was issued in this case, we recently held in *In re Guardianship of Carlos D.*[7] that the change made to § 43-1238(b) was procedural and thus applied to pending cases.

The language of § 43-1238 provides that if a court has jurisdiction to make an initial child custody determination, it also has the jurisdiction and authority to make the factual findings relevant to SIJ status. In this case, the record shows that the child's home state for purposes of § 43-1238(a) was Nebraska, and, as such, the court had the jurisdiction to make an initial child custody determination and to make the requested findings.

Sufficient Evidence.

Section 43-1238 provides that "[i]f there is sufficient evidence to support such factual findings, the court shall issue an order containing such findings when requested by one of the parties or upon the court's own motion."

[7,8] Having concluded that the court has the authority to make these findings, we turn to an examination of what these factfinding courts should consider when doing so. The role of state courts in the SIJ status determination is to make the findings of fact necessary to the U.S. Citizenship and Immigration Service's legal determination of the immigrant child's entitlement to SIJ status.[8] Federal law affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, and abandonment, as well as a child's best interests.[9] But it is not the role of the state court to make a determination as to whether

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[7] *In re Guardianship of Carlos D., supra* note 2.

[8] 8 U.S.C. § 1101(a)(27)(J)(iii) (Reissue 2018).

[9] See, *Guardianship of Penate*, 477 Mass. 268, 76 N.E.3d 960 (2017); *H.S.P. v. J.K.*, 223 N.J. 196, 121 A.3d 849 (2015); *Kitoko v. Salomao*, 215 A.3d 698 (Vt. 2019); *In re Y.M.*, 207 Cal. App. 4th 892, 144 Cal. Rptr. 3d 54 (2012); *Simbaina v. Bunay*, 221 Md. App. 440, 109 A.3d 191 (2015).

a child will ultimately be eligible for SIJ status; that is a determination reserved for the U.S. Customs and Immigration Service and the federal government.[10]

[9,10] That a court is requested to make findings for purposes of SIJ status does not mean that it must make findings favorable to the party seeking them.[11] Courts asked to make these findings may conclude that there was insufficient evidence or that the evidence was not credible.[12]

Federal law provides:

> Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.[13]

Courts in other jurisdictions have interpreted this language as a caution to courts to not place insurmountable evidentiary burdens on SIJ petitioners, because those seeking that status will have limited abilities to corroborate testimony with additional evidence.[14]

In this case, the district court questioned both the record before it and its authority, before concluding that it was not "even within [its] purview" to make the findings sought by Sabino. We conclude that although the court can and should entertain a request for findings, the court's powers as a fact

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[10] See, *J.U. v. J.C.P.C.*, 176 A.3d 136 (D.C. 2018); *Romero v. Perez*, 463 Md. 182, 205 A.3d 903 (2019); *Guardianship of Penate, supra* note 9; *Kitoko v. Salomao, supra* note 9.

[11] See, *J.U. v. J.C.P.C., supra* note 10; *Romero v. Perez, supra* note 10; *Kitoko v. Salomao, supra* note 9; *In re J.J.X.C.*, 318 Ga. App. 420, 734 S.E.2d 120 (2012).

[12] See *id.*

[13] 8 U.S.C. § 1232(d)(8) (2018).

[14] See, *J.U. v. J.C.P.C., supra* note 10; *Romero v. Perez, supra* note 10; *Kitoko v. Salomao, supra* note 9.

finder to assess the credibility of a witness or judge the sufficiency of evidence remain in effect. But nothing in this opinion should be read to suggest what findings the court should make on remand.

Because in this case the district court concluded that it lacked the authority to make the requested findings, we accordingly reverse the decision of the district court and remand the cause for further proceedings.

CONCLUSION

The decision of the district court is reversed and the cause is remanded for further proceedings.

Reversed and remanded for
further proceedings.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Millard R. Seldin, individually and as Trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993, et al., appellants and cross-appellees, and Scott A. Seldin, individually and as Trustee of the Seldin 2002 Irrevocable Trust, dated December 31, 2002, appellant, cross-appellant, and cross-appellee, v. Estate of Stanley C. Silverman et al., appellees, cross-appellants, and cross-appellees.

Theodore M. Seldin, individually and as Trustee of the Amended and Restated Theodore M. Seldin Revocable Trust, dated May 28, 2008, et al., appellees, cross-appellants, and cross-appellees, v. Millard R. Seldin, individually and as Trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993, et al., appellants and cross-appellees, and Scott A. Seldin, individually and as Trustee of the Seldin 2002 Irrevocable Trust, dated December 31, 2002, appellant, cross-appellant, and cross-appellee.

939 N.W.2d 768

Filed March 6, 2020. Nos. S-19-310, S-19-311.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Arbitration and Award: Federal Acts: Appeal and Error.** In reviewing a decision to vacate, modify, or confirm an arbitration award under the Federal Arbitration Act, an appellate court is

obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.

3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
4. ____: ____. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
5. **Pleadings: Judgments: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
7. **Arbitration and Award: Federal Acts: Contracts.** Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce; otherwise, it is governed by Nebraska's Uniform Arbitration Act.
8. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it.
9. **Arbitration and Award: Federal Acts: Jurisdiction: Notice.** The Federal Arbitration Act's notice requirements are jurisdictional, and failure to strictly comply deprives the district court of authority under the Federal Arbitration Act to vacate the arbitration award.
10. **Arbitration and Award: Federal Acts: Notice.** The Federal Arbitration Act's notice requirements are satisfied if the notice provided complies with Nebraska's statutory notice requirements.
11. **Arbitration and Award: Federal Acts: Legislature.** The Federal Arbitration Act favors arbitration agreements and applies in both state and federal courts. It also preempts conflicting state laws and forecloses state legislative attempts to undercut the enforceability of arbitration agreements.
12. **Arbitration and Award: Motions to Vacate.** When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, an extraordinary level of deference is given to the underlying award itself.
13. **Arbitration and Award: Federal Acts: Motions to Vacate.** The Federal Arbitration Act sets forth four grounds under which a court may vacate an arbitration award, and in the absence of one of these grounds, the award must be confirmed.

14. **Arbitration and Award: Federal Acts: Motions to Vacate: Proof.** A party seeking to vacate an award for misconduct under 9 U.S.C. § 10(a)(3) (2018) of the Federal Arbitration Act must show that he or she was deprived of a fair hearing.
15. **Arbitration and Award: Federal Acts.** Under 9 U.S.C. § 10(a)(2) (2018) of the Federal Arbitration Act, evident partiality exists where the nondisclosure at issue objectively demonstrates such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.
16. **Arbitration and Award: Federal Acts: Motions to Vacate.** Under the Federal Arbitration Act, courts lack authority to vacate or modify arbitration awards on any grounds other than those specified in 9 U.S.C. §§ 10 and 11 (2018) of the Federal Arbitration Act.
17. **Arbitration and Award: Federal Acts: Motions to Vacate: Public Policy.** Under the Federal Arbitration Act, a court is not authorized to vacate an arbitration award based on public policy grounds because public policy is not one of the exclusive statutory grounds set forth in 9 U.S.C. § 10 (2018) of the Federal Arbitration Act.
18. **Arbitration and Award: Federal Acts: Contracts: Proof.** Pursuant to 9 U.S.C. § 10(a)(4) (2018) of the Federal Arbitration Act, a court is authorized to set aside an arbitration award where the arbitrator exceeded his or her powers. However, it is not enough to show that the arbitrator committed an error—or even a serious error. The analysis is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he or she got its meaning right or wrong.
19. **Attorney Fees.** Attorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct.
20. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. The term frivolous connotes an improper motive or legal position so wholly without merit as to be ridiculous.
21. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
22. **Appeal and Error.** An appeal or error proceeding, properly perfected, deprives the trial court of any power to amend or modify the record as to matters of substance.
23. **Arbitration and Award: Federal Acts: Contracts.** Under the Federal Arbitration Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.

24. **Arbitration and Award.** An evident material mistake is an error that is apparent on the face of the record and would have been corrected had the arbitrator known at the time.
25. **Attorney Fees: Appeal and Error.** Ordinarily, an improper calculation of attorney fees would require a remand in order to reconfigure the award. However, when the record is sufficiently developed that a reviewing court can apply the law to the facts and calculate a fair and reasonable fee without resorting to remand, that route is available to the appellate court.
26. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
27. **Judgments: Appeal and Error.** Generally, under the acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant.
28. ____: ____. The acceptance of the benefits rule does not apply when the appellant has conceded to be entitled to the thing he or she has accepted and where the appeal relates only to an additional claim on his or her part.
29. **Judgments: Proof: Appeal and Error.** In asserting that the acceptance of benefits rule precludes an appeal, the burden is on the party asserting the rule to demonstrate that the benefits of the judgment were accepted.

Appeals from the District Court for Douglas County: J Russell Derr, Judge. Affirmed as modified.

Jason M. Bruno and Robert S. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Bartholomew L. McLeay, of Kutak Rock, L.L.P., for appellee Scott A. Seldin, individually.

Robert L. Lepp and Mathew T. Watson, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., and Sean K. McElenney, of Bryan, Cave, Leighton & Paisner, L.L.P., for Omaha Seldin appellees.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

I. INTRODUCTION

This is an appeal from a judgment of the district court for Douglas County, confirming an arbitration award of $2,997,031 under the Federal Arbitration Act (FAA)[1] and awarding attorney fees as a sanction under Neb. Rev. Stat. § 25-824 (Reissue 2016).

II. BACKGROUND

These two cases arose out of an arbitration between family members designated as the "Omaha Seldins" and the "Arizona Seldins." The term "Omaha Seldins" refers to the following individuals, entities, and trusts: Theodore M. Seldin, individually and in his capacity as trustee of the Amended and Restated Theodore M. Seldin Revocable Trust, dated May 28, 2008; Howard Scott Silverman as trustee of the Amended and Restated Stanley C. Silverman Revocable Trust, dated August 26, 2006; Silverman Holdings, LLC, a Nebraska limited liability company; SCS Family, LLC, a Nebraska limited liability company; TMS & SNS Family, LLC, a Nebraska limited liability company; Sarah N. Seldin and Irving B. Epstein, as trustees of the Theodore M. Seldin and Sarah N. Seldin Children's Trust, dated January 1, 1995; Uri Ratner as trustee of the Stanley C. Silverman and Norma R. Silverman Irrevocable Trust Agreement (2008), dated April 10, 2008; John W. Hancock, Irving B. Epstein, and Randall R. Lenhoff as trustees of the Theodore M. Seldin and Sarah N. Seldin Irrevocable Trust Agreement (2008), dated May 12, 2008. The term "Arizona Seldins" refers to the following individuals, entities, and trusts: Millard R. Seldin, individually and as trustee of the Millard R. Seldin Revocable Trust, dated October 9, 1993; Scott A. Seldin, individually and as trustee of the Seldin 2002 Irrevocable Trust, dated December 13, 2002; Seldin Real Estate, Inc., an Arizona corporation; Kent Circle Investments, LLC, an Arizona limited liability company;

[1] 9 U.S.C. §§ 1 through 16 (2018).

and Belmont Investments, LLC, an Arizona limited liability company.

For a period of more than 50 years, the parties held joint ownership interests as the Seldin Company in numerous entities located in the Omaha, Nebraska, area. The three principals of the Seldin Company were Millard; Millard's younger brother, Theodore; and Millard's brother-in-law, Stanley C. Silverman. The Seldin Company's principal place of business was Omaha. However, in 1987, Millard began relocating the business operations from Omaha to Scottsdale, Arizona. Theodore and Stanley co-owned the company, and they agreed to manage the jointly owned properties through management agreements.

In 2007, the Arizona Seldins (specifically Millard and Millard's son, Scott) began to question how Theodore and Stanley were managing the jointly owned properties. In 2010, the Arizona Seldins terminated the management agreements and the parties entered into an agreement to separate their joint interests in real estate assets through a bidding process. The "Separation Agreement" included a provision whereby the parties agreed to resolve all "Ancillary Claims" exclusively through binding arbitration before arbitrator Stefan Tucker with the Venable, LLP, law firm in Washington, D.C. In case of Tucker's inability to serve as arbitrator, the agreement named a Venable partner as his successor. If both Tucker and the successor were unable to serve as arbitrator, the agreement provided that Venable's managing partner was responsible for identifying a substitute successor. The agreement also included provisions defining the scope of arbitration, as well as a provision that the "Commercial Division Rules" of the American Arbitration Association (AAA) would govern.

After the bidding process was completed, the parties began arbitration before Tucker in October 2011. While the arbitration was ongoing, the Arizona Seldins filed three lawsuits in the district court for Douglas County regarding their claims or, alternatively, seeking to remove Tucker as arbitrator. The district court dismissed the lawsuits and compelled the Arizona

Seldins back to arbitration after finding the FAA governed the arbitration provision in the agreement. The Arizona Seldins then filed a demand with the AAA, seeking to disqualify Tucker as the arbitrator. The AAA denied the request; however, Tucker subsequently resigned and neither the successor arbitrator nor Venable was willing to participate in the arbitration. The parties agreed to select an arbitrator through the AAA, and Eugene R. Commander (hereinafter arbitrator) was appointed.

Arbitration resumed in October 2013. Due to the number of claims, each involving several independent causes of action and affirmative defenses, the arbitrator proposed bifurcating each claim to address liability and damage claims in separate hearings when necessary. The parties agreed to the proposal, and a schedule of hearings was adopted.

After extensive discovery was conducted, 11 evidentiary hearings took place over a span of 14 months. Pursuant to the separation agreement, the hearings took place in Omaha. During the 53 days of hearings, 58 fact and expert witnesses testified and 1,985 exhibits were admitted into evidence. As permitted by the AAA's rules,[2] the arbitrator issued 12 separate interim awards at the end of hearings in which determinations of liability or damages had been made. The parties agreed that these interim awards were not considered final awards and that a final award would be issued after the arbitration had closed. The parties also agreed that the entities and individuals that made up each of the two parties were jointly and severally liable for any award issued by the arbitrator.

At some point during the arbitration proceedings, the Arizona Seldins asserted that the Omaha Seldins' lack of tender of one of its assets, Sky Financial Securities, LLC (Sky Financial), was a defense to damages under the Arizona Securities Act. Sky Financial is an Arizona limited liability company, created as part of a plan to acquire and operate a chain of pizza

[2] American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-37 at 24 (Oct. 1, 2013).

restaurants in numerous states. In response, the Omaha Seldins requested that the arbitrator take possession of Sky Financial as a form of interpleader so as to permit the award of the asset to the appropriate party after a determination was made. The Arizona Seldins did not object to the procedure, and when asked whether the assignment as a form of interpleader was acceptable to both sides, the Arizona Seldins stated, "Yes." The Omaha Seldins then tendered Sky Financial to the arbitrator by assignment.

In one of the interim awards, the arbitrator determined that the Arizona Seldins had breached their fiduciary duties and engaged in securities law violations relating to Sky Financial. After finding that none of the affirmative defenses raised by the Arizona Seldins were meritorious, the arbitrator awarded the Omaha Seldins $1,962,528 in damages for their lost corporate opportunities claims, as well as an additional $3,135,681 in recessionary damages for the securities violation claims.

On April 12, 2017, the arbitration was officially closed. On April 27, the arbitrator issued a final net award in favor of the Omaha Seldins and against the Arizona Seldins in the amount of $2,997,031, plus postaward simple interest. The final award incorporated each of the prior interim awards issued and found the Arizona Seldins jointly and severally liable for the entire amount.

On May 23, 2017, the Omaha Seldins filed a motion to confirm the final award in district court. Opposing confirmation, the Arizona Seldins filed a motion seeking to modify, correct, and/or vacate the award. The Arizona Seldins argued, summarized, that the arbitrator (1) engaged in misbehavior regarding assignment of the Sky Financial asset, and thus the Omaha Seldins lacked standing after the assignment; (2) failed to provide a reasoned award on three of the Arizona Seldins' key affirmative defenses; (3) exceeded his power in awarding legal fees and expenses to the Omaha Seldins, because the separation agreement precluded the award of attorney fees; and (4) materially miscalculated the amount of prejudgment interest by applying the incorrect interest rate or, alternatively, exceeded

his power in awarding damages that included the calculated amount of prejudgment interest.

Scott, one of the Arizona Seldins, sought further and separate relief. Scott argued that with regard to the Sky Financial claims, the arbitrator made an "evident material mistake in the description of 'Respondents'" and made an award on matters not submitted to him. Scott alternatively argued that the arbitrator exceeded his power or imperfectly executed it, by issuing an award of liability against Scott on those claims. In addition, Scott filed multiple applications seeking to vacate, confirm, and/or modify some of the interim awards in companion cases CI 16-7509, CI 16-8394, CI 17-506, CI 17-651, and CI 17-3637. The district court held that the interim awards were nonfinal arbitration orders and dismissed the applications.

On May 3, 2018, the district court issued an order sustaining the Omaha Seldins' motion to confirm the arbitration award and overruling the Arizona Seldins' motion to vacate the award. The district court also awarded the Omaha Seldins

> an amount equal to the attorneys' fees and costs [the Omaha Seldins] incurred in resisting [the Arizona Seldins'] application seeking vacation or modification of the Final Award and in seeking dismissal of the various applications (Case Nos. CI 16-7509; CI 16-8394; CI 17-506; CI 17-651; and CI 17-3637) . . . Scott . . . filed seeking to modify, vacate, or confirm the Arbitrator's Interim Awards [under Neb. Rev. Stat. "§ 25-834"].

The district court had mistakenly referred to the statute authorizing the sanction as Neb. Rev. Stat. § 25-834 (Reissue 1995), instead of § 25-824.

On July 30, 2018, the Omaha Seldins offered into evidence affidavits with attached fee statements from two law firms, demonstrating the amount of fees incurred on behalf of the Omaha Seldins in resisting the Arizona Seldins' motion to vacate and in seeking dismissal of Scott's interim award applications. The affidavits established that the law firm of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O. (McGill),

had incurred $131,184.45 in fees and that the law firm of Bryan Cave Leighton Paisner LLP (Bryan Cave) had incurred $211,676.50 in fees, both on behalf of the Omaha Seldins. The exhibit containing the McGill firm's statement of fees had been redacted for privilege purposes. At a subsequent hearing, the Omaha Seldins offered an unredacted version of the McGill firm's fee statement, which the court received into evidence under seal.

On February 28, 2019, the district court issued its order denying the Arizona Seldins' and Scott's motions to alter or amend. In the same order, the district court awarded the Omaha Seldins attorney fees in the amount of $131,184.45.

On June 3, 2019, the Omaha Seldins filed a motion for order nunc pro tunc, requesting that the district court modify the amount of attorney fees to include Bryan Cave's fees of $211,676.50, for a total award of $342,860.95. After a hearing on the motion, in a written order dated August 26, 2019, the district court denied the Omaha Seldins' motion for order nunc pro tunc. In its order, the district court stated that it had "clearly intended to award attorney fees to [the Omaha Seldins] in an amount, as stated in the Court's Order of February 28, 2019, equal to the attorney fees and costs incurred," but denied the motion after concluding that "[a]n Order Nunc Pro Tunc [could not] be used to enlarge the judgment or substantially amend[] the judgment even though said judgment was not the order intended."

On May 11, 2018, Scott filed a motion to alter or amend the district court's May 3 order. Scott argued that the award of attorney fees and costs was beyond the amount permitted as damages and that the arbitrator's award of attorney fees was improper. The motion further asserted that the order had referenced § 25-834 as authorizing the sanction against the Arizona Seldins, but that § 25-834 is unrelated to an award of attorney fees and had been repealed by the Legislature in 2002.

The Arizona Seldins also filed a motion to alter or amend the order. The motion incorporated Scott's arguments and additionally asserted that the district court failed to specifically

address some of the Arizona Seldins' prior arguments, including whether the final award violated the automatic bankruptcy stay, whether the final award violated Nebraska's public policy and resulted in a massive windfall to the Omaha Seldins, and whether the arbitrator engaged in evident partiality.

On February 28, 2019, the district court issued a 13-page order detailing its findings and overruling both motions to alter or amend the May 3, 2018, order. The February 28, 2019, order included a nunc pro tunc modification, substituting § 25-824 for the references to § 25-834 in the previous order. When discussing the sanction ordered against the Arizona Seldins, the district court noted that its May 3, 2018, order had "repeatedly identified the absence of rational factual or legal basis to support [the Arizona Seldins'] theories of modifying or vacating the Final Award." The district court articulated that "[w]hat should have been a fairly simple procedure, [the Arizona Seldins] literally turned into a re-litigation of the Arbitration itself."

The Arizona Seldins appeal the district court's order confirming the award and the district court's order of sanctions under § 25-824. Scott, individually, filed a cross-appeal asserting that the final award against him should be modified, corrected, or vacated by law and that the district court abused its discretion in imposing sanctions and overruling his motion to alter or amend. The Omaha Seldins also filed a cross-appeal, challenging the amount of attorney fees and costs ordered by the district court and the district court's denial of the Omaha Seldins' motion for order nunc pro tunc. The Arizona Seldins subsequently filed a motion to dismiss the Omaha Seldins' cross-appeal, claiming the Omaha Seldins' registration of the district court's judgment with an Arizona state court constituted an acceptance of the benefits of the judgment and, thus, precluded them from appealing the judgment.

We granted the parties' petition to bypass the Nebraska Court of Appeals, and the two cases, S-19-310 and S-19-311, have been consolidated for purposes of oral argument and disposition.

III. ASSIGNMENTS OF ERROR

The Arizona Seldins' assignments, renumbered and restated, are that the district court erred in (1) failing to vacate the Sky Financial award because the award was secured through misbehavior by the arbitrator; (2) failing to vacate the final award because the Sky Financial award violates Nebraska public policy by creating a massive windfall for the Omaha Seldins; (3) confirming the arbitrator's award of attorney fees because the award exceeded the scope of the separation agreement, which expressly prohibited an award of attorney fees; (4) awarding sanctions under § 25-824; and (5) excluding evidence of the Omaha Seldins' acting contrary to the separation agreement and the award by currently seeking additional damages in other litigation for the same Sky Financial investment.

Scott's assignments of error on cross-appeal, summarized, are that the district court erred in (1) failing to modify or correct an evident material mistake in the description of respondents in the final award relating to him; (2) failing to vacate the final award on the ground of arbitrator misbehavior; (3) failing to vacate the final award on the ground that the arbitrator exceeded his authority in regard to the claims bar date; and (4) imposing sanctions pursuant to § 25-824 and denying Scott's motion to alter or amend the district court's order regarding the sanctions.

The Omaha Seldins assign on cross-appeal that the district court erred in (1) denying their motion for order nunc pro tunc and (2) failing to award the Omaha Seldins their reasonable attorney fees and costs incurred. While not specifically assigned as error, the Omaha Seldins also assert that the Arizona Seldins' public policy argument is time barred.

IV. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

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[3] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[2] In reviewing a decision to vacate, modify, or confirm an arbitration award under the FAA, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.[4] However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[5]

[3,4] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[6] When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[7]

[5] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[8]

[6] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[9]

V. ANALYSIS

1. Appeal Is Governed by FAA

[7] Prior to addressing the arbitration issues raised by the parties on appeal, we must determine which law governs—the Uniform Arbitration Act (UAA)[10] or the FAA. Arbitration in Nebraska is governed by the FAA if it arises from a contract involving interstate commerce; otherwise, it is governed by the

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[4] *Ronald J. Palagi, P.C. v. Prospect Funding Holdings*, 302 Neb. 769, 925 N.W.2d 344 (2019).

[5] *Id.*

[6] *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

[7] *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997).

[8] *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[9] *Id.*

[10] See Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016 & Cum. Supp. 2018).

UAA.[11] The district court determined that the issues presented in this case were governed by the FAA. We agree. Arbitration that arises from a contract involving interstate commerce is governed by the FAA.[12] Because this case arose from a commercial dispute involving properties and companies located in multiple states, the arbitration agreement clearly involves interstate commerce and thus is governed by the FAA.

2. Motion to Vacate Was Timely

[8] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it.[13] The Omaha Seldins claim the Arizona Seldins are precluded from seeking modification or vacatur of the final award on public policy grounds because this argument was not raised within 3 months of the final order being issued as required by § 12 of the FAA.

[9] Section 12 of the FAA sets forth the specific service requirements for motions to vacate, modify, or correct an award and requires notice of an application seeking judicial vacatur to "be served upon the adverse party or his attorney within three months after the award is filed or delivered." This court has held that these notice requirements are jurisdictional and that failure to strictly comply deprives the district court of authority under the FAA to vacate the arbitration award.[14] And, where the district court lacks jurisdiction, this court lacks jurisdiction.[15]

The relevant portion of § 12 provides:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his

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[11] *Garlock v. 3DS Properties*, 303 Neb. 521, 930 N.W.2d 503 (2019).

[12] *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008).

[13] *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018).

[14] See *Karo v. Nau Country Ins. Co.*, 297 Neb. 798, 901 N.W.2d 689 (2017).

[15] *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

> attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

[10] Thus, the FAA's notice requirements are satisfied if the notice provided complies with Nebraska's statutory notice requirements. Neb. Rev. Stat. § 25-910 (Reissue 2016) requires that the notice be in writing and provides that it

> shall state (1) the names of the parties to the action or proceeding in which it is to be made, (2) the name of the court or judge before whom it is to be made, (3) the place where and the day on which it will be heard, (4) the nature and terms of the order or orders to be applied for, and (5) if affidavits are to be used on the hearing, the notice shall state that fact. It shall be served a reasonable time before the hearing.

The record reflects that the final arbitration award was issued on April 27, 2017. The Arizona Seldins moved to modify, correct, or vacate the award on July 25. On the same day, the Arizona Seldins provided the other parties with notice of the motion via U.S. mail and electronic mail. While the motion did not specifically assert the Arizona Seldins' public policy argument, the notice included each of the five requirements set forth in § 25-910 and was provided within 3 months of the final order being issued. The Arizona Seldins' notice complied with Nebraska's statutory notice requirements; thus, the notice requirements under § 12 of the FAA were satisfied. The public policy argument was timely raised, and therefore, this court has jurisdiction over the claim.

3. Claims by Arizona Seldins and Scott

(a) Arbitrator Misbehavior

In their first assignment of error, the Arizona Seldins claim the district court erred in failing to vacate the Sky Financial award because the award was secured through misbehavior by the arbitrator. On cross-appeal, Scott also asserts that the arbitrator's acceptance of Sky Financial constituted misconduct. Scott further asserts that the Arizona Seldins could not have accepted or consented to the interpleader because the transfer abrogated the Omaha Seldins' interest in Sky Financial and thus the interpleader never existed. Scott also claims that the interpleader procedure was not disclosed or explained and that he "should not be bound by a secret interpleader procedure of which he was never informed since he had no need for concern regarding any securities claim at the time the purported interpleader was first proposed for that purpose."[16]

[11,12] Congress enacted the FAA to provide for "expedited judicial review to confirm, vacate, or modify arbitration awards."[17] The FAA favors arbitration agreements and applies in both state and federal courts.[18] It also preempts conflicting state laws and "'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'"[19] When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, "'"an extraordinary level of deference" [is given] to the underlying award itself.'"[20] The U.S. Supreme Court has instructed that under the FAA, a court

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[16] Brief for appellee Scott on cross-appeal at 24.

[17] *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

[18] *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008).

[19] *Id.*, 552 U.S. at 353 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)).

[20] *SBC Advanced v. Communications Workers of America*, 794 F.3d 1020, 1027 (8th Cir. 2015).

may vacate an arbitrator's decision "'only in very unusual circumstances.'"[21]

[13] The FAA sets forth four grounds under which a court may vacate an arbitration award, and in the absence of one of these grounds, the award must be confirmed.[22] These grounds are as follows:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[23]

Both the Arizona Seldins and Scott claim the arbitrator engaged in misbehavior by accepting ownership of Sky Financial. We reject this claim because the Arizona Seldins expressly agreed to the transfer of Sky Financial during the arbitration proceedings, and there is no evidence that the arbitrator engaged in misconduct by accepting the transfer.

The Omaha Seldins attempted to "tender" Sky Financial as a form of interpleader after the Arizona Seldins asserted that a lack of tender is a defense under the Arizona Securities Act in regard to damages. The Omaha Seldins transferred ownership of Sky Financial to the arbitrator "'for purposes of effectuating the relief to be awarded.'" The relief contemplated was the

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[21] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013).

[22] *Hall Street Associates, L. L. C., supra* note 17.

[23] 9 U.S.C. § 10(a).

award of the asset to the appropriate party after a determination had been made.

At the time the assignment was made, the following colloquy occurred:

> ARBITRATOR: Well, I'm in uncharted waters here. I guess my first question is why would the assignment come to me?
>
> [Counsel for the Omaha Seldins]: It's largely in the sense of an interpleader. Is this to be — I mean, it emphasizes the point which is the impossibility, to whom do we tender, do we tender to Millard, do we tender to Sky Financial, to whomever it is that it is deemed you think, to the extent it isn't impossible and excused by impossibility, you're welcome to determine to whomever it should be tendered.
>
> . . . .
>
> ARBITRATOR: Well, the only way I know how to deal with this right now is to consider this an act of interpleading these interests to me. I'm not an officer of the court, but I do have jurisdiction over this matter, so for the time being, at least, I'll accept them. With that understanding in mind. Is that acceptable to both sides?
>
> [Counsel for the Arizona Seldins]: Yes.

[14] "A party seeking to vacate an award for misconduct under § 10(a)(3) must show that he [or she] was 'deprived of a fair hearing.'"[24] When a party "'who contests the merits of an arbitration award in court fails to first present the challenges on the merits to the arbitrators themselves, review is compressed still further, to nil.'"[25] Here, the district court noted that the Arizona Seldins appeared to have consented to the arbitrator's acceptance of the assignment as a form of interpleader.

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[24] *Brown v. Brown-Thill*, 762 F.3d 814, 820 (8th Cir. 2014) (quoting *Grahams Service Inc. v. Teamsters Local 975*, 700 F.2d 420 (8th Cir. 1982)).

[25] *Medicine Shoppe Intern. v. Turner Investments*, 614 F.3d 485, 489 (8th Cir. 2010) (quoting *Intern. Broth. v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004)).

We agree. Not only did the Arizona Seldins not object to the assignment at the time it was made, but they agreed that the transfer as an act of interpleading was acceptable after the purpose of the procedure was explained. By consenting to the assignment, the Arizona Seldins waived the argument that the arbitrator's acceptance of the transfer constituted misconduct. And, the record clearly refutes Scott's claim that the intended interpleader was not disclosed or explained.

[15] Furthermore, while the Arizona Seldins' attempt to invoke the grounds set forth in § 10(a)(3) of the FAA by using the term "misconduct," their argument focuses only on the arbitrator's possible partiality as the purported owner of Sky Financial. Under § 10(a)(2), a court may vacate an award for the arbitrator's "evident partiality." However, this is a "'heavy burden'"[26] because the standard "'is not made out by the mere appearance of bias.'"[27] "Evident partiality exists where the non-disclosure at issue '*objectively* demonstrate[s] such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.'"[28]

The Arizona Seldins assert that the arbitrator's taking actual possession of Sky Financial without first securing mutual consent of the parties in writing and making it part of the record disqualified him as an interested party under Neb. Rev. Stat. § 24-739 (Reissue 2016). Section 24-739 provides, in relevant part, that a judge shall be disqualified in any case in which he or she is a party or interested except by mutual consent of the parties, which mutual consent is in writing and made part of the record.

The Arizona Seldins contend that § 24-739 applies to arbitrators as well as judges per this court's instruction that "'judges

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[26] *Williams v. National Football League*, 582 F.3d 863, 885 (8th Cir. 2009) (quoting *Choice Hotels Intern. v. SM Property Management*, 519 F.3d 200 (4th Cir. 2008)).

[27] *Id.*

[28] *Id.* (quoting *Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003)).

and arbitrators are subject to the same ethical standards.'"[29] However, this court has expressly rejected a "judicial ethics" standard when analyzing the FAA's requirement of "evident partiality." In *Dowd v. First Omaha Sec. Corp.*,[30] we held that "'"evident partiality" within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'"

Here, the record contains no evidence that the arbitrator engaged in misconduct or partiality by accepting the assignment of Sky Financial. Rule R-37(a) of the AAA rules, which was incorporated into the parties' separation agreement, provides that "[t]he arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." Moreover, the Arizona Seldins' argument that the arbitrator's acceptance of Sky Financial constituted misconduct is confuted by their express acceptance of the procedure. This argument is without merit.

(b) Public Policy

In their second assignment of error, the Arizona Seldins assert that the district court erred in failing to vacate the final award because the Sky Financial award violates Nebraska public policy by creating a massive windfall for the Omaha Seldins. The Arizona Seldins argue that the Omaha Seldins profited substantially from Sky Financial and that the award of damages results in a double recovery and windfall for the Omaha Seldins in violation of public policy. The Arizona Seldins further assert that a court may refuse to enforce an arbitration award on the ground that it is contrary to public

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[29] See brief for appellants at 24 (quoting *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004)).

[30] *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 358, 495 N.W.2d 36, 43 (1993) (quoting *Morelite Const. v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79 (2d Cir. 1984)).

policy. In making this assertion, the Arizona Seldins rely on this court's prior holding in *State v. Henderson*.[31]

In *Henderson*, a Nebraska State Patrol officer had been terminated based on his membership in a Ku Klux Klan-affiliated organization. An arbitrator determined that the State Patrol had violated the officer's constitutional rights because his affiliation with the organization was not "'just cause'" for termination.[32] The arbitrator issued an award ordering the officer to be reinstated.[33] The district court vacated the award after concluding that the officer's reinstatement violated Nebraska public policy, and this court affirmed the judgment.[34]

Unlike the present case, *Henderson* was governed by Nebraska's UAA.[35] However, this court found none of the UAA's statutory bases for vacating an award applied.[36] Noting that the applicable provisions in the UAA and the FAA were similar, the majority, in a 4-to-2 decision, relied on three U.S. Supreme Court cases applying the FAA when holding that an arbitration award could be vacated on public policy grounds.[37]

The majority in *Henderson* held that a court may refuse to enforce an arbitration award that is contrary to a public policy when the policy is explicit, well defined, and dominant. The majority concluded that Nebraska has "an explicit, well-defined, and dominant public policy" that "the laws of Nebraska should be enforced without racial or religious discrimination" and that the arbitrator's decision reinstating the officer violated this public policy because the policy "incorporates, and depends upon, the public's reasonable perception

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[31] *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009).

[32] *Id.* at 242, 762 N.W.2d at 3.

[33] *Id.*

[34] *Id.*

[35] See §§ 25-2601 to 25-2622.

[36] *Henderson, supra* note 31.

[37] *Id.*

that the laws are being enforced without discrimination."[38] The dissent argued that the U.S. Supreme Court's narrow public policy exception did not bar judicial enforcement of the award and that the majority was doing precisely what the Supreme Court had prohibited in *Paperworkers v. Misco, Inc.*[39]: engaging in factfinding, which is the arbitrator's function, not the appellate court's.[40]

[16] Prior to 2008, a circuit split existed on whether courts could apply nonstatutory standards when reviewing arbitration awards under the FAA. Many courts had been relying on language in the 1953 case of *Wilko v. Swan*,[41] which indicated courts could vacate an award made in "manifest disregard" of the law. In *Hall Street Associates, L. L. C. v. Mattel, Inc.*,[42] the U.S. Supreme Court resolved the split and held that under the FAA, courts lack authority to vacate or modify arbitration awards on any grounds other than those specified in §§ 10 and 11 of the FAA.[43] The Court was explicit that

> [o]n application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to

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[38] *Id.* at 263, 762 N.W.2d at 16-17.

[39] See *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

[40] *Henderson, supra* note 31 (Stephan J., dissenting). See, also, *Misco, Inc., supra* note 39, 484 U.S. at 44, 45 (criticizing federal Court of Appeals' conclusion that machine operator had ever been or would be under influence of marijuana while he was on job from fact that marijuana was located in his car as "an exercise in factfinding" that "exceeds the authority of a court asked to overturn an arbitration award").

[41] *Wilko v. Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed 168 (1953).

[42] *Hall Street Associates, L. L. C., supra* note 17.

[43] See John M. Gradwohl, *Arbitration: Interface of the Federal Arbitration Act and Nebraska State Law*, 43 Creighton L. Rev. 97 (2009).

grant confirmation in all cases, except when one of the "prescribed" exceptions applies.[44]

Pointedly, the Eighth Circuit Court of Appeals has explained that prior to 2008, "a court could vacate arbitration awards on grounds other than those listed in the FAA."[45] However, "*Hall Street*, resolving a circuit split, held that 'the text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive.'"[46]

[17] Because the U.S. Supreme Court's decision in *Hall Street Associates, L. L. C.* abrogated public policy as grounds for vacating an arbitration award under the FAA, we reject the Arizona Seldins' argument. We hold that under the FAA, a court is not authorized to vacate an arbitration award based on public policy grounds because public policy is not one of the exclusive statutory grounds set forth in § 10 of the FAA. We also clarify that *Henderson* was governed by the UAA—not the FAA—and expressly disapprove of any language in *Henderson* that could be construed as authorizing courts to vacate awards on public policy grounds under the FAA.[47]

Because public policy is not a ground for vacating an arbitration award under the FAA, we need not address the merits of the Arizona Seldins' argument that the purported windfall in favor of the Omaha Seldins is contrary to public policy.

(c) Arbitrator's Award of Fees and Costs

In their third assignment of error, the Arizona Seldins argue that the district court erred in confirming the arbitrator's award of attorney fees because the award exceeded the scope of the separation agreement.

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[44] *Hall Street Associates, L. L. C., supra* note 17, 552 U.S. at 587 (quoting 9 U.S.C. § 9).

[45] *Medicine Shoppe Intern., supra* note 25, 614 F.3d at 489.

[46] *Id.*

[47] *Henderson, supra* note 31.

[18] Pursuant to § 10(a)(4) of the FAA, a court is authorized to set aside an arbitration award where the arbitrator exceeded his or her powers. However, "'[i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error.'"[48] The analysis is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[49] "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits."[50]

In the final award, the arbitrator ordered the parties to pay their own attorney fees, expenses, and costs arising from the arbitration proceedings, "[e]xcept as specifically provided in Supplemental Interim Award Claim 16," which awarded $1,001,051 in attorney fees and costs to the Omaha Seldins as a partial measure of the damages caused by securities violations related to Sky Financial. The Arizona Seldins assert that the award of attorney fees exceeded the scope of the separation agreement because the agreement expressly prohibited such an award.

This assertion is based on a provision of the separation agreement, which states:

> In General: Except as otherwise provided in this Agreement, each Party shall bear its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby. No party shall be required to pay to the other Party any commissions, penalties, fees or expenses arising out of or associated with any of the transactions contemplated by this Agreement.

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[48] *Oxford Health Plans LLC, supra* note 21, 569 U.S. at 569 (quoting *Stolt-Nielsen S. A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)).

[49] *Oxford Health Plans LLC, supra* note 21, 569 U.S. at 569.

[50] *Id.*, 569 U.S. at 569 (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000)).

In "Supplemental Interim Award Claim 16," the arbitrator interpreted the parties' agreement regarding the award of fees and costs and found that the agreement did not preclude an award of fees and costs incurred in prosecuting the lost corporate opportunity and securities violations claims related to Sky Financial. The arbitrator concluded that the agreement's "transactions contemplated" language referred to the transactions and process contemplated by the parties in separating their joint ownership interests in the jointly owned properties and entities and not ancillary claims.

The arbitrator's conclusion was based, in part, on the location of the provision within the separation agreement, and on another provision which stated: "Cooperation. The Parties acknowledge and agree that the transactions contemplated by this Agreement are intended to permit the Omaha Seldins, on the one hand, and the Arizona Seldins, on the other hand, to separate their joint ownership of the Properties." In addition, the arbitrator found that the rules of the AAA, which the parties had incorporated into the separation agreement, authorized the award of attorney fees and costs under circumstances such as those presented here.

We hold that the arbitrator did not exceed his authority under the separation agreement by issuing the award of fees and costs. In the parties' separation agreement, the parties each agreed to resolve their disputes relating to severing their jointly owned properties through final and binding arbitration. By entering into the agreement, the parties bargained for the arbitrator's construction of that agreement. The arbitrator construed the agreement as permitting the award of attorney fees for the parties' ancillary claims. The Sky Financial claim was an ancillary claim, and thus, the arbitrator did not exceed his authority in awarding costs and fees related to that claim. The Arizona Seldins' third assignment of error is without merit.

(d) Sanctions Under § 25-824

In their fourth assignment of error, the Arizona Seldins argue that the district court erred in awarding sanctions against

them under § 25-824. Scott individually asserts on cross-appeal that the district court abused its discretion in imposing sanctions against Scott for filing the various applications in CI 16-7509, CI 16-8394, CI 17-506, CI 17-651, and CI 17-3637 and in overruling his motion to alter or amend the district court's order.

Section 25-824(2) provides that

> in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

[19-21] We have stated that attorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct.[51] A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.[52] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[53] Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[54]

In seeking to modify or vacate the final award, the Arizona Seldins asserted four arguments. As previously summarized, these arguments were that the arbitrator (1) engaged in misbehavior relating to the assignment of the Sky Financial

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[51] *Moore v. Moore*, 302 Neb. 588, 924 N.W.2d 314 (2019).

[52] *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

[53] *Id.*

[54] *Id.*

property, (2) failed to provide a reasoned award on three affirmative defenses raised by the Arizona Seldins related to the Sky Financial claims, (3) exceeded his power in awarding legal fees and expenses to the Omaha Seldins, and (4) materially miscalculated the prejudgment interest when awarding damages.

In its May 3, 2018, order, the district court entered judgment in favor of the Omaha Seldins and against the Arizona Seldins under § 25-824. When evaluating the Arizona Seldins' claim that the arbitrator engaged in misbehavior, the district court noted that the Arizona Seldins appeared to have consented to the assignment of Sky Financial, they had presented no evidence demonstrating the arbitrator had improper motives when accepting the assignment of Sky Financial, and their argument "conflicts with the facts and the law."

With regard to the argument that the arbitrator had failed to provide a reasoned award in relation to the Arizona Seldins' affirmative defense involving the claims bar date, the district court found this argument lacked merit and "mischaracterize[d]" the significance of the relation-back doctrine under Fed. R. Civ. P. 15. In doing so, the district court called attention to the arbitrator's written findings and awards relating to the Sky Financial claim, which consisted of 60 pages and contained multiple paragraphs explaining the arbitrator's reasoning when rejecting the defense.

The district court also rejected the argument that the arbitrator exceeded his power when awarding legal fees and expenses. Recognizing that the cases cited by the Arizona Seldins when asserting this argument either did not support their argument or were not relevant, the district court found the arbitrator had correctly interpreted and applied the separation agreement when awarding the fees and costs.

The district court characterized the Arizona Seldins' argument that the arbitrator had materially miscalculated the prejudgment interest as "misleading" and "fundamentally misplaced." Noting that allegations of an arbitrator's legal error

are not reviewable, the district court found that the Arizona Seldins had failed to identify *any* "'mathematical error'" in the arbitrator's calculations. The court recognized that in making this assertion, the Arizona Seldins were attempting to challenge the merits of the final award by arguing that the arbitrator had committed legal error.

Addressing Scott's individual claims, the district court found there was no legal basis for Scott's challenge of the interim awards as the parties had agreed that the arbitrator's interim awards were nonfinal. Further, each of the 12 interim awards included the following statement: "The parties understand this Interim Award is not a final appealable arbitration award, but it will be part of the law of the case moving forward." Still, Scott proceeded to file lawsuits seeking to modify, vacate, and/or confirm five of these awards. In addition to finding the interim applications frivolous, the district court found Scott's argument that he should not be held jointly and severally liable to be "misleading."

Reviewing the record and arguments in this case, we agree with the district court in that "[w]hat should have been a fairly simple procedure, [the Arizona Seldins] literally turned into a re-litigation of the Arbitration itself." The district court issued the § 25-824 sanction after repeatedly finding the absence of rational factual or legal bases to support the Arizona Seldins' theories of modifying or vacating the final award. We hold that the district court did not abuse its discretion in awarding attorney fees and costs under § 25-824.

We also reject Scott's claim that the district court abused its discretion in overruling his motion to alter or amend the district court's order and judgment. Scott argues that his arguments were not ridiculous and that the applications regarding the interim awards "were filed only in an 'abundance of caution' and sought an 'immediate stay' to minimize any action by the parties or the district court."[55]

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[55] Brief for appellee Scott on cross-appeal at 34.

In support of his argument, Scott first cites *In re Chevron U.S.A., Inc.*,[56] in which the Texas Court of Appeals held that an arbitrator's interim awards were sufficiently final for purposes of confirmation and vacation. The district court specifically rejected this argument in its February 28, 2019, order. The district court noted that *In re Chevron U.S.A., Inc.* lacked evidence demonstrating that the parties or arbitration panel had agreed or intended the interim decision to be nonfinal and nonappealable. The district court also recognized that the Arizona Seldins had "not cited to a case where an interim award that both the parties and the Arbitrator intended to be non-final was treated as a final, appealable arbitration award."

Scott also cites *American Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*[57] However, that case is clearly distinguishable from the facts presented here as the parties had specifically requested that the arbitration panel make a final determination on one of the issues.

We hold that the district court did not abuse its discretion in finding Scott's interim applications to be frivolous and ordering sanctions accordingly.

(e) Evidence of Omaha Seldins' Claims in Arizona State Court

In their fifth assignment of error, the Arizona Seldins argue that the district court erred in excluding evidence of the Omaha Seldins' acting contrary to the separation agreement and the award by currently seeking additional damages in other litigation for the same Sky Financial investment.

[22] This court has held that "'[a]n appeal or error proceeding, properly perfected, deprives the trial court of any power to amend or modify the record as to matters of substance[.]'"[58]

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[56] *In re Chevron U.S.A., Inc.*, 419 S.W.3d 329 (Tex. App. 2010).

[57] *American Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*, 167 A.D.3d 142, 86 N.Y.S.3d 472 (2018).

[58] *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 231, 159 N.W.2d 310, 313 (1968).

An appeal is taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court.[59]

The Arizona Seldins filed their notice of appeal in these cases on March 27, 2019. On July 5, the Arizona Seldins filed a motion in the district court seeking to supplement the bill of exceptions and/or to reopen the record. The Arizona Seldins claimed that after the arbitration award had been confirmed, the Omaha Seldins filed a complaint in an Arizona state court alleging the same or similar claims regarding Sky Financial that had been arbitrated in these cases. The Arizona Seldins sought to supplement the record with evidence of the newly filed Arizona cases for purposes of this appeal. The district court overruled the motion on the ground that perfection of an appeal deprives the trial court of any power to amend or modify the record as to matters of substance.

We hold that the district court did not err when overruling the motion to supplement the record. Because the Arizona Seldins had perfected their appeal prior to the filing of the motion, the district court did not have jurisdiction to supplement the record with evidence of the Omaha Seldins' purported filings. The Arizona Seldins' fifth assignment of error is without merit.

(f) Description of "Respondents"

Scott individually asserts on cross-appeal that the district court erred in failing to modify or correct an evident material mistake in the description of "Respondents" in the final award relating to Scott. Scott argues that the parties agreed Scott had not personally violated any securities laws and, therefore, he cannot be jointly and severally liable on the Sky Financial award.

In the Arizona Seldins' motion to modify or vacate the arbitration award, Scott individually asserted that the arbitrator had made a material mistake in the final award relating to the description of "Respondents." In its May 3, 2019, order

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[59] See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018).

overruling the motion, the district court found the final award had properly provided that Scott was jointly and severally liable for all damages awarded. Classifying Scott's argument as misleading, the district court recognized that although the parties agreed Scott had not violated any securities laws, he usurped corporate opportunities relating to Sky Financial. The district court also noted that Scott's liability was not based on common-law principles of joint and several liability, but on his contractual liability as set forth in the parties' separation agreement.

Scott attempts to invoke § 11(a) of the FAA, which permits a court to modify or correct an award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award."

[23,24] Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."[60] "An evident material mistake is an error that is apparent on the face of the record and would have been corrected had the arbitrator known at the time."[61]

In the present case, the definition of which individuals and entities comprised each party was set forth in the separation agreement and in the first case management order. Throughout the arbitration proceedings, the individuals and entities comprising the Omaha Seldins and the Arizona Seldins agreed to joint and several liability for any award entered against the Omaha Seldins or the Arizona Seldins, respectively.

Scott entered into a binding agreement to arbitrate all claims relating to the separation of the parties' jointly owned properties, and he is included in the definition as one of the individuals comprising the Arizona Seldins. Scott also agreed to joint and several liability for all awards issued against the

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[60] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)).

[61] 94 Am. Jur. *Trials* 211, § 96 at 359 (2004).

Arizona Seldins. According to the terms of the separation agreement, Scott is jointly and severally liable for all awards issued. We hold that the district court did not err in overruling Scott's motion.

(g) Claims Bar Date

Scott individually asserts that the district court erred in failing to vacate the final award relating to the Sky Financial claim because the claim was untimely and the arbitrator exceeded his powers by permitting the Omaha Seldins to bring the claim.

Again, §§ 10 and 11 of the FAA set forth the exclusive grounds for vacating or modifying an arbitration award.[62] "'[S]o long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the award should be confirmed."[63]

The separation agreement contains a provision stating that "reasonable amendments to Claims in pending actions shall be allowed in the Mediator's discretion based on discovery, admissions, interim decision, and other developments in the prosecution of the Claim, consistent with the Federal Rules of Civil Procedure." On December 3, 2013, the arbitrator granted the Omaha Seldins leave to amend their claims on or before December 6, "in the interests of justice and economy."

Scott complains that the parties' agreed-upon claims bar date was July 2, 2012, and that the Omaha Seldins' Sky Financial claim was untimely because it was filed on November 14, 2014. Scott argues that the arbitrator exceeded his powers by granting leave to amend because under Fed. R. Civ. P. 15, he was required to apply the relation-back doctrine when assessing the timeliness of the claim.

Rejecting this argument, the district court found that the arbitrator interpreted the separation agreement when concluding

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[62] See *Hall Street Associates, L. L. C., supra* note 17.

[63] *Beumer Corp. v. ProEnergy Services, LLC*, 899 F.3d 564, 565 (8th Cir. 2018) (quoting *Medicine Shoppe Intern., supra* note 25).

leave to amend should be granted and that the arbitrator's decision was consistent with Fed. R. Civ. P. 15(a)(2). That section provides that "[t]he court should freely give leave [to amend] when justice so requires."[64] The district court also found that this argument mischaracterized the significance of "relation back" under Fed. R. Civ. P. 15 because the amended pleading did relate back to a claim that had originally been filed on October 9, 2011, prior to the parties' claims bar date.

We hold that the district court did not err in rejecting this claim. Scott does not argue that the arbitrator was not interpreting the separation agreement; rather, he argues that the arbitrator "was required to apply the 'relation-back' method of review under the [Federal Rules of Civil Procedure], before allowing the Sky Financial Claim to be brought after the Claims Bar Date."[65] The record clearly demonstrates the arbitrator was construing the separation agreement when he concluded that leave should be granted. The arbitrator's decision to grant the leave is not grounds to vacate the award. This argument is without merit.

4. Omaha Seldins' Cross-Appeal

On cross-appeal, the Omaha Seldins argue they are entitled to reasonable attorney fees and costs in the amount of $342,860.95. Alternatively, the Omaha Seldins seek a determination that the district court erred in denying their motion for order nunc pro tunc.

In determining the amount of a cost or attorney fee award under § 25-824(2), Neb. Rev. Stat. § 25-824.01 (Reissue 2016) states that "the court shall exercise its sound discretion."

In its May 3, 2018, order, the district court entered judgment in favor of the Omaha Seldins for an amount equal to the attorney fees and costs incurred in resisting the Arizona Seldins' application seeking vacation or modification of the final award and in seeking dismissal of the various

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[64] Fed. R. Civ. P. 15(a)(2).

[65] Brief for appellee Scott on cross-appeal at 33.

applications filed by Scott. After the judgment was issued, the Omaha Seldins submitted evidence demonstrating that it had incurred $342,860.95 in fees and costs: $211,676.50 by the Bryan Cave law firm and $131,184.45 by the McGill law firm. However, when calculating the amount of fees to be awarded, the district court neglected to include the Bryan Cave law firm's fees of $211,676.50. Although intending to include the fees from both law firms, the district court's order included only the McGill law firm's fees for a total amount of $131,184.45.

The Omaha Seldins filed a motion for order nunc pro tunc, seeking an order substituting $342,860.95 for the total amount of fees incurred. In a written order, the district court stated that it had "clearly intended to award attorney fees to Petitioners in an amount, as stated in the Court's Order of February 28, 2019, equal to the attorney fees and costs incurred." But the court denied the motion after concluding that "[a]n Order Nunc Pro Tunc [could not] be used to enlarge the judgment or substantially amend[] the judgment even though said judgment was not the order intended."

Pursuant to the May 3, 2018, order, the Omaha Seldins are entitled to their judgment for "an amount equal to the attorneys' fees and costs [the Omaha Seldins] incurred in resisting [the Arizona Seldins'] application seeking vacation or modification of the Final Award and in seeking dismissal of the various applications [filed by Scott]." The district court's error in calculating the amount of the award resulted in the Omaha Seldins' being unfairly deprived of their right to $211,676.50 in fees incurred by the Bryan Cave law firm. Thus, the district court abused its discretion in determining the overall amount of the award.

[25] Ordinarily, an improper calculation of attorney fees would require a remand in order to reconfigure the award.[66] However, when the record is sufficiently developed that a

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[66] *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998).

reviewing court can apply the law to the facts and calculate a fair and reasonable fee without resorting to remand, that route is available to the appellate court.[67]

Here, a remand is not required because the Omaha Seldins presented evidence demonstrating the amount of fees incurred, and we find these fees to be reasonable. Further, a remand would serve only to needlessly prolong this litigation and further undermine the finality of the arbitration award. We conclude that the Omaha Seldins are entitled to a total fee award of $342,860.95. Accordingly, we order the Arizona Seldins to pay the Omaha Seldins an additional $211,676.50 for fees incurred by the Byran Cave law firm on behalf of the Omaha Seldins.

[26] Because we order the payment of $211,676.50, we do not reach or address the issue of whether the district court erred in denying the Omaha Seldins' motion for order nunc pro tunc. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[68]

5. Arizona Seldins' Motion to Dismiss Cross-Appeal

The Arizona Seldins, along with Scott and Millard, filed a joint motion to dismiss the Omaha Seldins' cross-appeal on the ground that the Omaha Seldins' registration of the district court's judgment with an Arizona state court constituted a voluntary acceptance of the benefits of the judgment and, thus, prevents the Omaha Seldins from prosecuting their cross-appeal. The Omaha Seldins maintain that they have not attempted to collect upon the judgment entered on February 28, 2019, and that the registration of the judgment was merely a procedural act taken for purposes of collecting on the judgment when collection was permitted.

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[67] *Id.*

[68] *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

[27-29] Generally, under the acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant.[69] However, the rule does not apply when the appellant has conceded to be entitled to the thing he or she has accepted and where the appeal relates only to an additional claim on his or her part.[70] In asserting that the acceptance of benefits rule precludes an appeal, the burden is on the party asserting the rule to demonstrate that the benefits of the judgment were accepted.[71]

Here, the Omaha Seldins agree with the judgment, except for seeking an additional recovery of attorney fees that were mistakenly omitted from the district court's judgment. Further, the Arizona Seldins have presented no evidence demonstrating the Omaha Seldins have accepted the benefits of the judgment. We hold that the Omaha Seldins' mere registration of the judgment does not preclude their cross-appeal for the recovery of additional fees and costs. This argument is without merit.

VI. CONCLUSION

The FAA provides that a court must confirm an arbitration award unless grounds exist for vacating or modifying the award under § 10 or § 11 of the FAA.[72] Because neither the Arizona Seldins nor Scott have demonstrated any such grounds exist, the parties are bound by their agreement to arbitrate and the arbitrator's construction of that agreement.

We hold that the district court did not err in confirming the arbitration award and denying the motions to vacate and/or modify the award, nor did it err in denying the Arizona

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[69] *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

[70] *Id.*

[71] See 5 Am. Jur. 2d *Appellate Review* § 543 (2018).

[72] *Hall Street Associates, L. L. C., supra* note 17.

Seldins' motion to supplement the record. We further hold that the district court did not abuse its discretion when awarding attorney fees in favor of the Omaha Seldins or when denying Scott's motion to alter or amend the court's May 3, 2018, order. We conclude that the Omaha Seldins' registration of the district court's judgment does not preclude the Omaha Seldins' cross-appeal. Finally, we hold that the Omaha Seldins are entitled to reasonable attorney fees and costs incurred in confirming the arbitration award and resisting the various applications filed by the Arizona Seldins and Scott and that the district court abused its discretion when failing to include the Bryan Cave law firm's fees in its calculation of the amount of fees to be awarded.

Accordingly, we (1) affirm the district court's confirmation of the arbitration award, (2) affirm the district court's denial of the Arizona Seldins' and Scott's motions to vacate and/or modify the award, (3) affirm the district court's denial of the Arizona Seldins' motion to supplement the record, (4) affirm the district court's award of sanctions under § 25-824, (5) overrule the Arizona Seldins' motion to dismiss the Omaha Seldins' cross-appeal, and (6) sustain the Omaha Seldins' cross-appeal and order the fee judgment in favor of the Omaha Seldins be increased to $342,860.95.

Affirmed as modified.

Miller-Lerman, J., not participating.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Domingo Gomez III, appellant.

939 N.W.2d 763

Filed March 6, 2020. No. S-19-369.

1. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory and no act is criminal unless the Legislature has in express terms declared it to be so.

Appeal from the District Court for Scotts Bluff County, Leo P. Dobrovolny, Judge, on appeal thereto from the County Court for Scotts Bluff County, James M. Worden, Judge. Judgment of District Court affirmed.

Darin J. Knepper, Deputy Scotts Bluff County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

Domingo Gomez III challenges his conviction for violating a domestic abuse protection order. He contends that his

conviction must be reversed because the service return the State introduced at trial did not specifically state that Gomez was served with the protection order he allegedly violated. We affirm his conviction. While the State was required to show that Gomez was personally served with the protection order, we find there was sufficient evidence of personal service.

BACKGROUND

County Court Bench Trial.

The State charged Gomez in county court with violating a domestic abuse protection order, which generally prohibited him from communicating with Michaela Arellano, the mother of his child. Evidence introduced at the subsequent bench trial showed that the district court for Scotts Bluff County entered an ex parte domestic abuse protection order against Gomez on November 28, 2017. The ex parte protection order, among other things, prohibited Gomez from "telephoning, contacting, or otherwise communicating with" Arellano, except to arrange visitation with the parties' minor child. Gomez was personally served with the ex parte protection order a few days after it was entered.

After Gomez did not appear at a subsequent hearing and show cause why the ex parte protection order should be rescinded, the district court entered an order affirming the ex parte protection order on December 28, 2017. The order stated that it would remain in effect for a period of 1 year from the date the ex parte protection order was entered.

Much of the evidence at trial concerned whether Gomez was personally served with the order affirming the ex parte protection order. Over Gomez' objections, the county court received exhibit 3, which included a cover sheet and a service return, both bearing the document identification number "71215" and both listing Arellano and Gomez as the parties in the civil case that resulted in the entry of the protection order at issue. The cover sheet instructed the Scotts Bluff

County sheriff to "serve the following certified copies: Order Affirming Domestic Abuse Protection Order with Ex Parte Order attached." The service return, signed by Matt Dodge, certified that on January 4, 2018, Gomez was served with "Doc. No. 71215 a Cover Sheet with attachments" by personal service. The service return indicated that service was completed at "the hospital."

The county court also received exhibit 4 over Gomez' objections. Exhibit 4 contained a certified copy of the cover sheet described above, the order affirming the ex parte protection order, and the ex parte protection order.

The State also called Dodge to testify. Dodge, a deputy sheriff with the Scotts Bluff County sheriff's office, testified that he had previously served Gomez with legal papers. He recalled that after unsuccessful attempts to contact Gomez at his home, he met Gomez at a local hospital and "gave him the papers." Dodge testified that he signed the service return in exhibit 3. He also testified that he did not serve Gomez with just the cover sheet, but that he served Gomez with the attachments to the cover sheet reflected in exhibit 4—the order affirming the ex parte protection order and the ex parte protection order.

Arellano also testified at trial regarding calls Gomez made to her in February 2018. She testified that these calls were not for the purpose of arranging visitation with their child.

At the conclusion of evidence in the bench trial, counsel for Gomez argued that Gomez could not be convicted, because the service return did not specifically state that Gomez had been served with the order affirming the ex parte protection order.

The county court found Gomez guilty and sentenced him accordingly. It explained on the record that in its view, the State demonstrated beyond a reasonable doubt that Gomez was served with the order affirming the ex parte protection order and that he subsequently contacted Arellano for purposes unrelated to child visitation in violation of that order.

Appeal to District Court.

Gomez appealed his conviction to the district court. He contended that there was insufficient evidence that he was personally served with the protection order.

The district court affirmed his conviction. It observed that Gomez had not identified any law requiring that the return of service specifically identify each document that was served and concluded that there was sufficient evidence that Gomez was personally served with the protection order.

ASSIGNMENT OF ERROR

Gomez assigns one error on appeal. He contends, rephrased, that the district court erred by finding there was sufficient evidence that he was personally served with the order affirming the ex parte protection order.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

ANALYSIS

Gomez argues that his conviction must be overturned because the State introduced insufficient evidence that he was served with the order affirming the ex parte protection order. Gomez' argument rests on two propositions: (1) that personal service of the protection order is an essential element of the crime of which he was convicted and (2) that the record contains insufficient evidence of such personal service. As we will explain, we generally agree with Gomez on the former proposition but disagree on the latter.

Elements of Offense.

Gomez was charged with and convicted of violating Neb. Rev. Stat. § 42-924(4) (Cum. Supp. 2018). That subsection provides as follows:

> Any person who knowingly violates a protection order issued pursuant to this section or section 42-931 after service or notice as described in subsection (2) of section 42-926 shall be guilty of a Class I misdemeanor, except that any person convicted of violating such order who has a prior conviction for violating a protection order shall be guilty of a Class IV felony.

[2] In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so. *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019). Accordingly, to determine the elements of a crime, we look to the text of the operative statute. *Id.* Section 42-924(4) makes the knowing violation of certain protection orders a crime. By its terms, the statute requires proof of the following: (1) service or notice as described in Neb. Rev. Stat. § 42-926(2) (Reissue 2016) and (2) a subsequent knowing violation of a qualifying protection order. Because the crime can be established with proof of either service *or* the notice described in § 42-926(2), it is not technically accurate to describe service alone as an essential element of the crime. We do read the statute, however, to make either service or the notice described in § 42-926(2) an essential element.

This reading of § 42-924(4) is consistent with our decision in *State v. Graff*, 282 Neb. 746, 810 N.W.2d 140 (2011). In *Graff*, we interpreted substantively similar language in a statute governing harassment protection orders to allow for a criminal conviction upon a showing that a defendant knowingly violated a protection order after service. See Neb. Rev. Stat. § 28-311.09(4) (Reissue 2008).

We also concluded in *Graff* that *personal* service was required because the statute governing service of harassment protection orders required it. See § 28-311.09(9)(a). Similar

language requires personal service of domestic abuse protection orders. See § 42-926(1). Following our reasoning in *Graff*, we conclude that in cases alleging a violation of § 42-924(4), in which the defendant does not receive the notice described in § 42-926(2), the State must demonstrate that the defendant was personally served with the protection order.

Sufficiency of Evidence of Personal Service.

While we agree with Gomez that the State was required to demonstrate that he was personally served with the order affirming the ex parte protection order, we cannot agree that there was insufficient evidence of such service.

According to Gomez, the only way the State could demonstrate the requisite personal service was through a service return. He also contends that in the service return, the officer must specifically certify that he or she served the protection order. He asserts that the service return offered into evidence by the State is deficient in this respect because it refers generally to a cover sheet with attachments rather than to a protection order.

In support of his argument that the State must prove service in this particular way, Gomez relies on language in § 42-926(1) providing that once a domestic abuse protection order is issued, the clerk of the court is to give it to the sheriff's office and that upon receipt, the sheriff's office "shall forthwith serve the protection order upon the respondent and file its return thereon with the clerk of the court which issued the protection order within fourteen days of the issuance of the protection order." Because the service return here does not refer specifically to service of a protection order, Gomez claims that the sheriff's office did not "file its return thereon," as provided in § 42-926.

Gomez' reliance on the provisions in § 42-926 regarding the return of service is misplaced. As discussed above, § 42-924(4) allows a defendant to be convicted if he or she

knowingly violates a domestic abuse protection order after *service* of the protection order. Gomez is essentially asking us to make punctilious compliance with the service return provisions of § 42-926(1) an essential element of the crime defined in § 42-924(4). But because § 42-924(4) says nothing about the return of service, such an interpretation would run counter to our practice of strictly construing penal statutes and not supplying missing words or sentences to make clear that which is indefinite, or to supply that which is not there. See *State v. Duncan*, 294 Neb. 162, 882 N.W.2d 650 (2016).

We note that it is far from anomalous to permit a party to prove service of civil process even if the process server fails to comply with statutory direction regarding the service return. Both a Nebraska civil procedure statute and the Federal Rules of Civil Procedure provide that the failure to make proof of service or delay in doing so does not affect the validity of the service. See, Neb. Rev. Stat. § 25-507.01 (Reissue 2016); Fed. R. Civ. P. 4(l)(3). Such provisions "prevent[] a defendant who has been properly served from attacking the validity of service on the technical ground of the process server's failure to make return in timely fashion, or because the return is deficient in some way." 4B Charles Alan Wright et al., Federal Practice and Procedure § 1130 at 210-11 (4th ed. 2015). The fact that § 42-924(4) allows a defendant to be convicted of violating a domestic abuse protection order upon a showing of service, as opposed to proper return of service, serves the same function here.

This leaves only the question of whether there was sufficient evidence that Gomez was served with the order affirming the ex parte protection order. On this question, we do not hesitate to find that there was. The face of the cover sheet indicates that the sheriff's office was instructed to serve the order affirming the ex parte protection order and the ex parte protection order. Dodge testified that he met Gomez at a local hospital and that he provided Gomez with the attachments to the cover sheet in exhibit 4, i.e., the order affirming the

ex parte protection order and the ex parte protection order. Dodge also testified that he signed the service return indicating he served the cover sheet and attachments on Gomez at a hospital on January 4, 2018. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that Gomez was served with the order affirming the ex parte protection order.

CONCLUSION

Finding no merit in the sole assignment of error, we affirm.

Affirmed.

Freudenberg, J., not participating.

Nebraska Supreme Court
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Jerald Merrick, as assignee of Western Hay Services, Inc., appellant, v. Fischer, Rounds & Associates, Inc., doing business as Quality Truck Insurance, and Great West Casualty Company, appellees.

939 N.W.2d 795

Filed March 13, 2020. No. S-18-1173.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
4. **Insurance: Agents: Brokers: Negligence: Proximate Cause: Liability: Damages.** An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence.
5. **Insurance: Agents.** When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance.
6. ____: ____. An insurance agent has no duty to anticipate what coverage an insured should have.
7. ____: ____. It is the duty of an insured to advise the agent as to the insurance he or she wants, including the limits of the policy to be issued.

8. **Insurance: Brokers: Negligence: Proximate Cause: Liability: Damages.** A broker who agrees to obtain insurance coverage for another but fails to do so is liable for damage proximately caused by such negligence, including the amount that would have been due under such policy if it had been obtained.
9. **Insurance: Agents: Brokers.** If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information.
10. **Insurance: Agents: Brokers: Contracts: Breach of Contract: Negligence.** Absent evidence that an insurance agent or broker has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent or broker must answer in damages.
11. **Insurance: Contracts.** A court construes insurance contracts like other contracts, according to the meaning of the terms that the parties have used. When the terms of an insurance contract are clear, a court gives them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
12. **Insurance: Contracts: Liability.** Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy.
13. **Insurance: Contracts: Liability: Damages.** The insurer has a duty to indemnify an insured who becomes legally liable to pay damages for a covered occurrence.
14. **Insurance: Liability.** An insurer's duty to defend is broader than the duty to indemnify.
15. ____: ____. An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.
16. ____: ____. An insurer has a duty to defend its insured whenever it ascertains facts that give rise to potential liability under the policy. Conversely, an insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Affirmed.

Michael W. Meister for appellant.

Sean A. Minahan and Patrick G. Vipond, of Lamson, Dugan & Murray, L.L.P., for appellee Fischer, Rounds & Associates, Inc.

Robert S. Keith and Alexis M. Wright, of Engles, Ketcham, Olson & Keith, P.C., for appellee Great West Casualty Company.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Jerald Merrick was injured in a truck accident in the course and scope of his employment. Merrick reached a settlement with his employer and received an assignment of rights against his employer's insurance broker and insurer. Merrick filed this action claiming that the broker had a duty to advise Merrick's employer to obtain workers' compensation insurance and that the insurer had a duty to defend the employer in the underlying action. The district court for Scotts Bluff County granted summary judgment in favor of the broker and insurer. We affirm.

BACKGROUND

Western Hay Services, Inc. (Western Hay), is a company located in Morrill, Nebraska, that buys and sells hay and alfalfa and delivers the hay and alfalfa to feedlots and dairies in Colorado and Texas. During Western Hay's first 4 years, owner Johnny Hill drove one truck and did not have employees. Hill subsequently added a second truck and, in 2009, hired Merrick as a truckdriver.

Since its inception, Western Hay has purchased insurance through an insurance broker, Fischer, Rounds & Associates, Inc., doing business as Quality Truck Insurance (Fischer). Great West Casualty Company (Great West) issued Western Hay a commercial lines insurance policy, effective from September 1, 2008, to September 1, 2009, which provided three different forms of coverage: commercial auto coverage,

commercial inland marine coverage, and commercial general liability coverage. Western Hay did not have workers' compensation insurance.

The commercial auto policy states that Great West will "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The policy contains an exclusion entitled "Workers Compensation and Similar Laws," which states that "[t]his insurance does not apply to . . . [a]ny obligation for which any 'insured' or any 'insured's' insurer may be held liable under any workers compensation . . . law or any similar law." The policy also contains an exclusion entitled "Employee Indemnification and Employer's Liability" which states that the insurance does not apply to "'[b]odily injury'" to an "'employee' of any 'insured' arising out of and in the course of . . . [e]mployment by any 'insured.'"

The commercial inland marine policy states that Great West will pay sums "because of 'loss' to 'covered property' while in your custody or control in the ordinary course of transit for which you are legally liable as a 'trucker.'"

Under the commercial general liability coverage provisions, "Coverage A" regarding "Bodily Injury and Property Damage Liability" states that Great West will "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies." Coverage A contains exclusions equivalent to the workers' compensation and employer's liability exclusions in the commercial auto coverage provisions discussed above. In addition, Coverage A contains an exclusion for "'[b]odily injury'" arising out of ownership, maintenance, use, or entrustment to others of any "'auto.'" "Coverage C" regarding "Medical Expenses" states that Great West will pay medical expenses for "'bodily injury'" caused by an accident "[b]ecause of your operations." Coverage C contains all exclusions provided within Coverage A.

Hill's daughter, Tracie Margheim, was responsible for handling Western Hay's insurance needs. Margheim spoke with an insurance agent with Fischer on a yearly basis prior to renewal of Western Hay's insurance and on occasion to increase the insurance for special cargo trips. In August 2008, a Fischer insurance agent called Margheim to discuss the annual renewal. Upon speaking with Margheim, the insurance agent completed a renewal checklist which included question 10: "Is work comp needed?" The agent answered question 10 as "does not have," because Western Hay had elected not to purchase workers' compensation insurance. Thereafter, a Fischer insurance agent spoke with Margheim, confirmed the information on the renewal checklist, and submitted the information for a quote.

In February 2009, Margheim contacted Fischer and requested that workers' compensation coverage be added to Western Hay's insurance. Fischer's agent asked Margheim to provide Western Hay's payroll records in order to obtain a quote for the new workers' compensation coverage. Margheim provided Fischer with Western Hay's payroll information on April 1.

The day prior, March 31, 2009, Merrick was injured in a truck accident while in the course and scope of his employment with Western Hay. Margheim notified Great West of the claim on that date. On April 1 and again on April 6, Great West spoke with Margheim and advised that Western Hay did not have workers' compensation, personal injury, or auto medical insurance under the commercial lines policy. In a May 13 letter, Great West advised Western Hay that all liability claims had been paid for a total loss amount of $600 and that the file was closed. Great West later advised Western Hay that it would continue its investigation of the claim and assessment of coverage under a full reservation of rights. Great West indicated that it would consider all additional information Western Hay may provide and, if warranted, reconsider its coverage position.

In 2012, Merrick filed a negligence action against Western Hay in the district court for Scotts Bluff County alleging he was injured in the truck accident and had incurred $309,154.10 in medical expenses as a result of his injuries. Merrick claimed that Western Hay was negligent for requiring him to drive during a high-wind warning and failing to carry workers' compensation insurance. Merrick alleged that Western Hay was required to carry workers' compensation insurance pursuant to Neb. Rev. Stat. § 48-106 (Reissue 2010) and that such insurance would have provided coverage for his injuries. Fischer was not notified of the lawsuit or asked to indemnify or defend Western Hay. Western Hay requested a defense and indemnity from Great West. After reviewing the allegations in the complaint, Great West sent a letter to Western Hay denying the request, indicating that the claim was not covered because the policy did not provide workers' compensation coverage, coverage for an injury to an employee of the insured, or coverage for potential liability for failing to provide workers' compensation benefits.

In February 2016, the district court entered a stipulated judgment in favor of Merrick and against Western Hay in the amount of $800,000. As part of the settlement, Western Hay assigned its claims against Fischer and Great West to Merrick. Fischer and Great West were not notified in advance of the stipulated settlement. Thereafter, Merrick, as the assignee of Western Hay, filed the present action against Fischer and Great West. Merrick alleged in this action that Fischer was negligent in failing to procure workers' compensation insurance for Western Hay when Western Hay had specifically requested such insurance for its trucking business, failing to notify Western Hay of Nebraska's statutory requirement for employers to carry workers' compensation insurance, and failing to warn Western Hay that its insurance did not cover injuries to employees while in the scope of their employment. Merrick separately alleged that Great West denied Western

Hay's request for a defense in bad faith. Merrick alleged that Fischer and Great West are responsible for payment of the judgment entered against Western Hay.

Fischer filed an answer which admitted that it is an insurance broker and alleged that it met any and all applicable duties and responsibilities. Great West filed an answer which alleged that Merrick's claim is not covered under the relevant policy, because of the policy's workers' compensation and employer's liability exclusions. Each defendant moved for summary judgment. Following a hearing, the district court issued an order sustaining both motions and dismissing Merrick's complaint with prejudice.

In considering Merrick's claim against Fischer, the court found the undisputed evidence showed that on February 2, 2009, Western Hay called Fischer to request workers' compensation insurance, but did not provide the payroll information necessary for Fischer to complete the quote until April 1, the day after Merrick's accident. The court concluded that Fischer had no duty to secure workers' compensation insurance for Western Hay until after the payroll records were provided on April 1. The court further concluded that there was no evidence showing that Fischer breached a duty to obtain workers' compensation insurance for Western Hay, failed to advise Western Hay regarding workers' compensation insurance prior to its request for a quote, or failed to warn Western Hay that its insurance policy did not cover injuries to employees in the course and scope of their employment. The court concluded that Fischer was entitled to judgment as a matter of law.

As to Merrick's claim against Great West, the court determined that the policy at issue contains exclusions for claims based on workers' compensation liability. The court determined that due to such exclusions, Great West was not required to defend Western Hay in the underlying lawsuit. The court concluded that Great West was entitled to judgment as a matter of law.

Merrick appealed. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this State.[1]

ASSIGNMENTS OF ERROR

Merrick assigns, restated, that the district court erred in (1) applying case law applicable to insurance agents rather than insurance brokers, (2) finding that Fischer fulfilled its duties as an insurance broker to Western Hay, and (3) finding that Great West did not owe a duty to defend Western Hay.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3] The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.[4]

ANALYSIS

Fischer Not Negligent

Merrick argues that, as an insurance broker, Fischer had a duty to advise Western Hay of its obligation as an employer under the Nebraska Workers' Compensation Act to carry workers'

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[1] See Neb. Rev. Stat. § 24-1106 (Cum. Supp. 2018).

[2] *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

[3] *Id.*

[4] *Gage County v. Employers Mut. Cas. Co.*, 304 Neb. 926, 937 N.W.2d 863 (2020).

compensation insurance.[5] Merrick contends that had Fischer "simply told Western Hay that [it] had to carry coverage" then Fischer "would have met its duty of providing sound advice to Western Hay."[6] Merrick thus argues that the court erred in dismissing his negligence claim against Fischer.

[4-7] To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages.[7] An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence.[8] When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance.[9] An insurance agent has no duty to anticipate what coverage an insured should have.[10] It is the duty of an insured to advise the agent as to the insurance he or she wants, including the limits of the policy to be issued.[11]

In *Polski v. Powers*,[12] this court noted that although it may be good business for an insurance agent to make insurance coverage suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. We went on to hold that it would be an unreasonable

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[5] See, Neb. Rev. Stat. § 48-103 (Reissue 2010); § 48-106.

[6] Brief for appellant at 10.

[7] *Lewison v. Renner*, 298 Neb. 654, 905 N.W.2d 540 (2018).

[8] *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 570 N.W.2d 525 (1997); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991).

[9] *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994).

[10] *Id.*

[11] *Manzer v. Pentico*, 209 Neb. 364, 307 N.W.2d 812 (1981).

[12] *Polski v. Powers*, 221 Neb. 361, 377 N.W.2d 106 (1985).

burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way.[13]

Relying on this line of authority, the district court found that Fischer had no duty to advise Western Hay regarding workers' compensation insurance until Western Hay requested a quote for workers' compensation insurance in February 2009. Fischer responded to that request by asking for Western Hay's payroll information in order to obtain a quote for the necessary coverage. Fischer did not receive the requested information until after Merrick's accident. On April 8, Fischer informed Western Hay that it had obtained a quote, but the quote was too expensive. The district court reasoned that under these facts, Fischer had no duty to obtain workers' compensation insurance for Western Hay and advise Western Hay regarding such insurance until Western Hay's request in February 2009. The court found that it was the actions of Western Hay which delayed the insurance quote and that Fischer had not provided Western Hay with any false information regarding the commercial line policy's coverage or the need for workers' compensation coverage. Thus, the court found that Fischer had not breached its duty to Western Hay and that Fischer was entitled to judgment as a matter of law.

Merrick suggests that the district court did not sufficiently recognize that Fischer is an insurance broker and not an insurance agent. We have previously addressed the distinction between an insurance broker and an insurance agent.

> "A representative of the insured is known as an 'insurance broker.' A broker represents the insured by acting as a middleman between the insured and the insurer, soliciting insurance from the public under no employment from any special company, and, upon securing an order, places it with a company selected by the insured, or if the insured has no preference, with a company selected by the broker.

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[13] *Id.*

> In contrast, an 'insurance agent' represents an insurer under an exclusive employment agreement by the insurance company."[14]

Merrick's primary argument on appeal is that "the duty owed by an insurance broker differs from that of an insurance agent as to a broker's duty to advise clients concerning certain matters."[15] Merrick argues that based on cases like the Eighth Circuit's decision in *Bell v. O'Leary*,[16] a broker owes an insured a duty to act with reasonable care, skill, and diligence. Merrick then goes on to argue, without supporting legal authority or standard of care testimony, that Fischer had an affirmative duty to advise Western Hay for insurance risks known to the trucking business and that in order for Fischer to fulfill its duty to act with reasonable care, Fischer was required to advise Western Hay to carry workers' compensation insurance.

We find that under the facts of this case, and upon consideration of Merrick's theory regarding the duty an insurance broker owes to an insured, Merrick's reliance on the distinction between an insurance broker and an insurance agent is misplaced.

Merrick's argument is not supported by the rationale articulated in our decision in *Broad v. Randy Bauer Ins. Agency*.[17] In that case, we acknowledged that courts often use the term "insurance agent" loosely,[18] but recognized the need to consider how agency principles affect an insurance intermediary's contract liability. Upon review of agency principles recognized

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[14] *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 794, 749 N.W.2d 478, 483 (2008). See, also, *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992); 3 Steven Plitt et al., Couch on Insurance 3d § 45:1 (2011).

[15] Brief for appellant at 7.

[16] *Bell v. O'Leary*, 744 F.2d 1370 (8th Cir. 1984).

[17] *Broad, supra* note 14.

[18] See, e.g., *id.*; *Bell, supra* note 16; 3 Plitt et al., *supra* note 14.

in the insurance context, we concluded that an insurance agent is not personally liable to the insured for contracts the agent makes on behalf on the insurer.[19] However, we recognized the existence of a valid cause of action against a broker for breach of contract to procure insurance, because the broker is the insured's agent.[20] Thus, *Broad* recognized that agency principles may dictate the causes of action available against a broker or agent. The distinction between an agent and a broker is important because acts of an agent are imputable to the insurer and acts of a broker are imputable to the insured.[21] Our decision in *Broad* did not suggest, as Merrick assumes, that agency principles affect the scope of the general duty that an insurance intermediary owes to an insured to act with reasonable care.

[8,9] Here, Merrick has asserted a claim against Fischer for negligence. We have previously recognized that a broker who agrees to obtain insurance coverage for another but fails to do so is liable for damage proximately caused by such negligence, including the amount that would have been due under such policy if it had been obtained.[22] If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information.[23] Thus, Nebraska law requires an insurance broker to secure the insurance requested by the insured and if the insurance broker is advising the insured, the broker must do

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[19] *Broad, supra* note 14, citing *Gieseke v. Hardware Dealers Mut. Fire Ins. Co.*, 46 Ill. App. 2d 131, 195 N.E.2d 32 (1963).

[20] See *Broad, supra* note 14.

[21] See, *United Fire & Cas. Ins. Co. v. Garvey*, 419 F.3d 743 (8th Cir. 2005); *Mark Andy, Inc. v. Hartford Fire Ins. Co.*, 229 F.3d 710 (8th Cir. 2000); 3 Plitt et al., *supra* note 14.

[22] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010), *disapproved on other grounds, Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019).

[23] *Flamme, supra* note 8.

so with reasonable care. Merrick posits that Fischer's duty in this case is broader than previously recognized by this court and encompasses a duty to evaluate risks within the insured's business and advise the insured regarding those risks or, more specifically, to advise an insured employer to obtain workers' compensation insurance even in the absence of a request for such insurance.

We are persuaded that Merrick's claim against Fischer is resolved by application of the Nebraska Court of Appeals' decision in *Hansmeier v. Hansmeier*.[24] There, the owners of a farming operation obtained insurance through an insurance agent. The farm had one full-time employee but did not provide insurance for the employee. The employee then injured his thumb in an auger, and the injury was not covered under the farm's liability policy. The farm had not complied with § 48-106(7), which provides that if an employer who is engaged in an agricultural operation, as described under § 48-106(2)(d), elects to be exempt from the Nebraska Workers' Compensation Act, then the employer must provide employees written notice that the employer does not provide workers' compensation coverage and the employee must sign the notice. Section 48-106(7) states that the failure to provide the required notice subjects the employer to liability under the Nebraska Workers' Compensation Act for any employee not notified. The farm owners did not provide the required notice, the employee brought a workers' compensation claim against the farm owners, and the parties reached a settlement.

The farm owners in *Hansmeier* then brought a negligence claim against their insurance agent based on the failure to properly advise them regarding the necessity or availability of workers' compensation insurance. The Court of Appeals found that any claim of negligence or negligent representation failed as a matter of law. The court stated that the parties had discussed workers' compensation insurance, but the

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[24] *Hansmeier v. Hansmeier*, 25 Neb. App. 742, 912 N.W.2d 268 (2018).

farm owners elected not to purchase such insurance. The court found that the insurance agent had not provided any false information to the insureds and that the agent had no further responsibility to inform the insureds of their obligations under the notice provisions of the Nebraska Workers' Compensation Act.[25]

[10] We agree with the proposition articulated in *Hansmeier* that the Nebraska Workers' Compensation Act governs employers, not insurance agents.[26] Our prior cases have generally indicated an insurance intermediary owes a duty of reasonable care, whether the intermediary is an agent or broker.[27] Given that, under *Hansmeier*, the Nebraska Workers' Compensation Act does not affect an insurance agent's duty to act with reasonable care, we hold that the same is true for insurance brokers. Absent evidence that an insurance agent or broker has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent or broker must answer in damages.[28]

The Eighth Circuit Court's decision in *Bell* is factually distinguishable.[29] In that case, an insurance broker obtained flood insurance for two different owners of mobile homes. The mobile home owners experienced flood damage, and their insurance claims were denied because the policies had been issued erroneously. The insurer determined that the mobile homes were not eligible for flood insurance because they were located in unincorporated areas. The Eighth Circuit held that under Missouri law, an insurance broker who fails to determine whether a client is eligible for insurance coverage

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[25] See *id.*

[26] *Id.*

[27] See, *Hobbs, supra* note 8; *Flamme, supra* note 8.

[28] See *Polski, supra* note 12.

[29] *Bell, supra* note 16.

is negligent.[30] The court found that the insured had relied on the broker to obtain the requested insurance, that the broker accepted that responsibility, and that by failing to discover the insureds were ineligible for coverage and by failing to notify them of that fact, the broker was negligent.[31]

In the present case, even when the evidence is viewed in the light most favorable to Merrick, there is no failure to obtain effective insurance by Fischer that is analogous to the actions of the broker in *Bell*. Rather, the failure in this case was on the part of the insured for failing to request workers' compensation insurance and failing to timely provide payroll information. Merrick acknowledged at oral argument that he was not alleging any negligence in procuring the requested insurance and that he did not challenge the district court's finding that the actions of Western Hay delayed the insurance quote by failing to provide the necessary information until 1 day after Merrick's accident. Further, we note that the Eighth Circuit was applying Missouri law in *Bell*, and the Missouri Supreme Court has specifically rejected the argument that insurance brokers have the duty Merrick is arguing for here.[32]

Just as in *Hansmeier*, Fischer never provided Western Hay with false information regarding insurance coverage and there were no agreements between Western Hay and Fischer which obligated Fischer to advise Western Hay of its obligation to maintain workers' compensation insurance.[33] As a result, Fischer had no duty to advise Western Hay of its obligations under the Nebraska Workers' Compensation Act.

Further, as we stated in *Broad*, a broker represents the insured by acting as a middleman between the insured and the

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[30] *Id.*

[31] *Id.*

[32] See, e.g., *Emerson Elec. Co. v. Marsh & McLennan Co.*, 362 S.W.3d 7 (2012) (brokers have no duty to advise insured on its insurance needs unless they specifically agree to do so).

[33] See *Hansmeier, supra* note 24.

insurer, soliciting insurance from the public under no employment from any special company, and, upon securing an order, places it with a company selected by the insured or, if the insured has no preference, with a company selected by the broker.[34] The evidence indicates that no order for workers' compensation insurance was placed by Western Hay until February 2009 and that Western Hay failed to provide the necessary payroll information to secure such an order. As a result, Fischer did not breach its duty to Western Hay.

Fischer is entitled to judgment as a matter of law. This assignment of error is without merit.

Great West Owed No Duty to Defend

Merrick argues that Great West had a duty to defend Western Hay in the underlying lawsuit and acted in bad faith when it failed to provide a defense. The district court found that the commercial lines policy clearly excluded coverage for workers' compensation liability and that as a result, Great West was not required to defend Western Hay. Merrick argues that the workers' compensation exclusion in the policy is inapplicable because the case was brought in district court, not workers' compensation court.

[11] A court construes insurance contracts like other contracts, according to the meaning of the terms that the parties have used. When the terms of an insurance contract are clear, a court gives them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.[35]

[12-14] Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy.[36] The insurer has a duty to indemnify

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[34] See *Broad, supra* note 14.

[35] *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

[36] *Id.*

an insured who becomes legally liable to pay damages for a covered occurrence.[37] An insurer's duty to defend is broader than the duty to indemnify.[38]

[15,16] A court must initially measure an insurer's duty to defend an action against the insured by the allegations in the complaint against the insured, but in determining its duty to defend, an insurer must look beyond the complaint and investigate and ascertain the relevant facts from all available sources.[39] An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.[40] Thus, an insurer has a duty to defend its insured whenever it ascertains facts that give rise to potential liability under the policy.[41] Conversely, an insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability.[42] Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.[43] To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the insurance policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.[44]

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Mortgage Express v. Tudor Ins. Co.*, 278 Neb. 449, 771 N.W.2d 137 (2009).

[44] See *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005).

Upon our de novo review of the commercial lines policy, we are persuaded that Western Hay's underlying claim is excluded under the employer's liability exclusion. As detailed above, both the commercial auto and commercial general liability provisions of the commercial lines policy contain a workers' compensation exclusion and an employer's liability exclusion. The workers' compensation exclusion excludes any obligation for which any "'insured'" may be held liable under any workers' compensation law or similar law. The employer's liability exclusion states that the insurance policy does not apply to "'[b]odily injury'" to an "'employee' of any 'insured' arising out of and in the course of . . . [e]mployment by any 'insured.'"

We determine that the language of the employer's liability exclusion is clear and unambiguous and that based on an ordinary understanding of the terms within the exclusion, a reasonable person in the insured's position would understand that the policy does not cover injuries to employees occurring in the course and scope of their employment. The allegations in Merrick's complaint in the underlying action made clear that he sought to hold Western Hay liable for damages based on injuries he sustained during the course and scope of his employment as a truckdriver. These allegations demonstrate that Great West had no potential liability under the commercial lines policy based on Merrick's injuries. As a result, Great West had a reasonable basis for denying benefits of insurance coverage and did not act in bad faith in refusing to provide a defense to Western Hay.

And it makes no difference here that Merrick's claim was asserted in the district court rather than the Nebraska Workers' Compensation Court. As we have already explained, the policy exclusion was clear and unambiguous. The procedure permitting a suit in the district court by an injured worker against an uninsured employer does not impose an obligation upon an insurer where the policy at issue clearly excludes any such coverage.

Based on the employer's liability exclusion, Great West had no contractual obligation to defend or indemnify Western Hay in the lawsuit brought by Merrick. Great West had a valid basis for denying coverage, and thus, Great West is entitled to judgment as a matter of law. This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court granting summary judgment in favor of Fischer and Great West.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jonathan J. Sierra, appellant.

939 N.W.2d 808

Filed March 13, 2020. No. S-19-180.

1. **Appeal and Error.** An appellate court may, at its option, notice plain error.
2. **Right to Counsel: Appeal and Error.** An appellate court reviews the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.
3. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
4. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
6. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.

7. **Constitutional Law: Double Jeopardy.** The protection granted by the Nebraska Constitution against double jeopardy is coextensive to the protection granted by the U.S. Constitution.
8. **Theft.** Where a theft involves items taken from multiple owners at the same time and in the same place, such theft constitutes a single offense.
9. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
10. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record, in order to preserve such claim.
11. ____: ____. Once issues of trial counsel's ineffective performance are properly raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.
12. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. This is because the trial record reviewed on appeal is generally devoted to issues of guilt or innocence and does not usually address issues of counsel's performance. The determining factor is whether the record is sufficient to adequately review the question.
13. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
14. **Effectiveness of Counsel: Proof.** To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
15. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
16. **Rules of Evidence: Words and Phrases.** In the context of Neb. Rev. Stat. § 27-403 (Reissue 2016), unfair prejudice means an undue tendency to suggest a decision based on an improper basis. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.

17. **Jury Instructions: Testimony: Appeal and Error.** A defendant is clearly entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an alleged accomplice, and the failure to give such an instruction, when requested, is reversible error.
18. **Jury Instructions: Evidence: Witnesses: Testimony.** Whenever a judge decides that the evidence supports a conclusion that a witness is an accomplice and the defendant requests a cautionary instruction, the instruction is appropriate and should be given. This is because any alleged accomplice testimony should be examined more closely by the trier of fact for any possible motive that the accomplice might have to testify falsely.
19. **Effectiveness of Counsel: Rules of the Supreme Court: Trial: Records.** When recordation of parts of a trial is not made mandatory by the rules, the failure to require recordation cannot be said, ipso facto, to constitute negligence or inadequacy of counsel.

Appeal from the District Court for York County: James C. Stecker, Judge. Affirmed in part, and in part vacated.

Lisa M. Meyer, of Fillman Law Offices, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. NATURE OF CASE

Jonathan J. Sierra was convicted of burglary, conspiracy to commit burglary, and several counts of theft involving a truck, a trailer, and several tools from a garage. Sierra's accomplice, Jonathan Mally, entered into a plea agreement with the State and testified against Sierra. The majority of Sierra's claims in this direct appeal are ineffective assistance of counsel claims. Sierra also claims that his court-appointed trial counsel had a personal conflict of interest because she was being investigated for and was charged with theft during her representation of Sierra. Finally, Sierra asserts that he was charged with separate theft charges in violation of the Double Jeopardy Clause of the U.S. Constitution.

II. BACKGROUND

In December 2017, the State filed an eight-count complaint against Sierra alleging that Sierra was involved in the theft of a truck and trailer which he then used to assist in the theft of automotive tools from a mechanic's garage in York, Nebraska. The complaint was based on an incident which occurred in the early morning of October 15, 2017, when a window of Extreme Automotive in York was broken and tools were stolen from the premises. The tools belonged, separately, to a co-owner of the garage business and his two employees. The co-owner, Andrew Wilkinson, notified the officer investigating the break-in, Sgt. Michael Hanke, that his checkbook and debit card had also been stolen.

Sierra was charged with eight counts: (1) burglary; (2) conspiracy to commit burglary; (3) three counts of theft by unlawful taking ($5,000 or more), which were related to the tools taken; (4) theft by unlawful taking ($5,000 or more) for stealing the truck; (5) theft by unlawful taking (less than $1,500 to $5,000) for stealing the trailer; and (6) criminal mischief (less than $500).

Upon Sierra's request, the court appointed an attorney to represent him in this matter. During preparation for trial, Sierra became frustrated with the lack of action on his attorney's part and requested that she withdraw. Sierra's attorney moved to withdraw. At the hearing on the motion, Sierra's attorney indicated that there was a breakdown of the attorney-client relationship. Sierra told the judge that he had stopped speaking with his attorney and that he tried to have his fiance and mother talk with his attorney in his stead. Sierra claims that he spoke with his attorney only twice prior to the hearing. The court denied the motion.

The court adopted the parties' reciprocal discovery agreement and set a deadline of March 5, 2018, or "as soon as it becomes reasonably discovered, but not less than ten days before trial." Approximately 4 months after the reciprocal discovery deadlines and 5 days before trial, Sierra's attorney

filed, for the first time, a witness list identifying five witnesses that the defense intended to call. The State responded by filing a motion in limine to preclude undisclosed witnesses, alibi defense, and undisclosed exhibits. In the alternative, the State asked for a 30-day continuance.

At the hearing to consider the motion, the State pointed out that Sierra had failed to comply with the deadline for reciprocal discovery and the 30-day deadline for notice of alibi defense and had filed the witness list less than 10 days before trial.

Sierra's attorney responded that all of the witnesses were known to the State from its reports and that one witness was on the State's list, but Sierra's attorney did not provide any reason for not complying with the reciprocal discovery order. Similarly, Sierra's attorney also did not provide a reason for failing to comply with the statutory notice requirements for an alibi defense. Rather, she asked the judge to waive the notice requirement in the interest of justice. The district court sustained the State's motion in limine. As a result, Sierra was able to call only one of the five listed witnesses and was precluded from pursuing his alibi defense.

At trial, Hanke's testimony provided a general timeline of the investigation. Hanke testified that after Wilkinson called the York police about the break-in, police reviewed surveillance videos taken from businesses in the area. The videos revealed that two individuals stole a truck from the garage parking lot and then drove to a nearby pizza restaurant, where they stole a trailer before returning to the garage. Thirty minutes later, the truck and trailer left the garage.

Wilkinson's bank notified him on October 15, 2017, that someone had attempted to use the stolen debit card at a Walmart store in Norfolk, Nebraska. Wilkinson notified law enforcement of the bank's report. Hanke used that information to get pictures taken from the Norfolk Walmart's security cameras, which depicted two individuals using the stolen debit card. Hanke testified that, based on information received from the Butler County Sheriff's Department, the investigators

eventually identified both of the individuals in the photographs as Mally and Sierra.

A Walmart store in York provided photographs of two individuals to law enforcement, after the individuals were suspected of shoplifting on the morning of October 15, 2017. Maggie Wolfe, an asset protection associate for the York Walmart, and Hanke presented identification testimony related to the photographs taken from the Walmarts in York and Norfolk. Wolfe provided the authentication for exhibit 1, a collection of photographs taken from the York Walmart on the morning of the burglary. During direct examination, Wolfe positively identified Sierra as being depicted in the photographs taken from the York Walmart. On cross-examination, Wolfe admitted that her identification of Sierra came after she read about the investigation in the newspaper.

Hanke testified that a cell phone traceable to Sierra "pinged off [of]" a cell tower in York around the time that Mally's testimony placed them both in York. Hanke testified that cell phone records placed Sierra's cell phone within 20 miles of York on the day of the burglary. Sierra's attorney did not object to Hanke's testimony about the content of the cell phone records, and the records themselves are not in evidence.

Evidence recovered from the search of Sierra's home was admitted based on the testimony provided by Hanke. According to Hanke's testimony at trial, based on the Butler County, Nebraska, sheriff's identification of Sierra in the photographs taken from the York Walmart and pursuant to a clause in Sierra's probation order, police searched Sierra's residence, where they found a majority of the tools taken from Extreme Automotive. The sheriff who identified Sierra in the photographs did not testify at trial. The law enforcement officers who conducted the search did not testify at trial, and the probation order is not in the record.

Hanke testified that the stolen truck was recovered after being abandoned on the road north of the York Walmart. The stolen trailer was recovered after being abandoned on the road

near Genoa, Nebraska. Sierra's attorney made no objections to these portions of Hanke's testimony. Hanke testified that during his first interview of Sierra, Sierra claimed he had never been to York, denied all involvement in the burglary, and said that he possessed the tools because he had purchased them from Mally.

Sierra's attorney cross-examined Hanke about the story Sierra gave to the York police as to how the tools ended up in his possession. Hanke testified that during his first interview, Sierra denied ever being in York, and that Sierra claimed he had purchased the tools. Hanke testified that during a second interview with Sierra, Sierra admitted to being in York. Sierra's attorney did not object to Hanke's testimony regarding either interview.

Mally was arrested in Columbus, Nebraska, for an unrelated incident. A search revealed that Mally had on his person and in his vehicle several of the tools and financial items taken from Extreme Automotive. A warrant was executed for Mally's residence, where several more items from Extreme Automotive were found. Mally subsequently entered into a plea agreement with the State and testified against Sierra.

Mally testified as Sierra's accomplice and provided a general timeline for the events on October 15, 2017, similar to that set forth by Hanke. Mally testified that he helped Sierra commit the burglary and theft at Extreme Automotive because Sierra needed mechanics tools. Mally asserted that the various pictures taken at both Walmart locations accurately depicted Sierra and him at those locations. Mally also testified that he was receiving benefits from the State concerning various charges in exchange for his cooperation.

Evidence concerning the value of the tools was presented through various sources at trial. Several of the exhibits entered into evidence by the State display tools that were recovered from the search of Mally's residence. During the presentation of evidence recovered from Mally's residence, Sierra's attorney made several objections, some of which were sustained. There

was also evidence of financial items, including checkbooks and a debit card, that were recovered in Mally's possession and testimony by Mally that Sierra attempted to use the stolen debit card to buy items. Mally denied the existence of any arrangement with Sierra to buy the tools.

Sierra's attorney elected to forgo the creation of a record of the voir dire, closing arguments, and jury instructions. The jury instructions that were given are preserved in the transcript. A jury found Sierra guilty on all counts except the charge of criminal mischief.

At some point after the trial, Sierra's attorney was charged with theft by unlawful taking ($5,000 or more) in an unrelated case. Sierra requested new counsel, and the request was granted before sentencing. Sierra was sentenced to 16 to 20 years' imprisonment on each of the Class IIA felonies and 1 to 2 years' imprisonment on the Class IV felony, with orders for the sentences to run concurrently. Sierra appeals.

III. ASSIGNMENTS OF ERROR

Three errors Sierra assigns, which are not ineffective assistance of counsel claims, assert that the court erred by (1) denying Sierra's attorney's motion to withdraw, (2) granting the State's motion in limine, and (3) sentencing Sierra on multiple charges of theft by unlawful taking, in violation of the Double Jeopardy Clause of the U.S. Constitution.

Sierra also assigns 14 ineffective assistance of counsel claims. Sierra first asserts that his attorney was "per se ineffective" for failing "to maintain her law license and appropriate moral standing." In his argument, Sierra elaborates that his attorney had a personal conflict of interest such that she failed to act in Sierra's best interests because her focus was torn between her own pending legal actions and representing Sierra.

Sierra also assigns that his attorney was deficient by failing to (1) comply with discovery; (2) serve notice of Sierra's alibi; (3) move for a continuance at the hearing on the motion

in limine; (4) call Sierra's fiance as a witness for the defense; (5) depose Sierra's brother, mother, and fiance, as well as two potential alibi witnesses, prior to trial; (6) communicate with Sierra to prepare for trial; (7) assert a double jeopardy claim; (8) move to suppress identification evidence and evidence found from the search of Sierra's home; (9) file a motion in limine to exclude evidence discovered at Mally's home; (10) object to identification evidence during trial; (11) object to "proffer interview" statements admitted in evidence during trial; (12) maintain a sufficient record; and (13) request a jury instruction on accomplice testimony.

IV. STANDARD OF REVIEW

[1] An appellate court may, at its option, notice plain error.[1]

[2] We review the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.[2]

[3] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.[3]

[4] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[4]

[5] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[5] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[6] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test

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[1] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[2] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[3] *State v. Hatfield*, 304 Neb. 66, 933 N.W.2d 78 (2019).

[4] *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

[5] *State v. Chairez*, 302 Neb. 731, 924 N.W.2d 725 (2019).

[6] *Id.*

articulated in *Strickland v. Washington*,[7] an appellate court reviews such legal determinations independently of the lower court's decision.[8]

[6] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[9]

V. ANALYSIS

1. Double Jeopardy

[7] We first address Sierra's claim that he was charged with three counts of theft related to the tools taken from Extreme Automotive, in violation of the Double Jeopardy Clauses of the Nebraska and U.S. Constitutions. The protection granted by the Nebraska Constitution against double jeopardy is coextensive to the protection granted by the U.S. Constitution.[10] Both clauses are designed to 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.[11]

[8] Though we have never been presented with a situation where the multiple items belonged to multiple people, we have held that an act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense under

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[7] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[8] *State v. Chairez, supra* note 5.

[9] *Id.*

[10] See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[11] See *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

Neb. Rev. Stat. § 28-518 (Reissue 2016).[12] Moreover, the criminal code forbids the amounts taken pursuant to one scheme or course of conduct from being aggregated into more than one offense.[13] This principle of considering theft of multiple items as one offense has been applied by a majority of jurisdictions, even when the property taken has more than one owner.[14] And we likewise hold that where a theft involves items taken from multiple owners at the same time and in the same place, such theft constitutes a single offense.

Where the defendant is charged with and punished for multiple offenses based on each stolen item taken simultaneously from the same place, the defendant is subjected to multiple punishments for the same offense, in violation of the prohibition against double jeopardy.[15] The State concedes that Sierra was improperly charged, convicted, and punished in violation of the Double Jeopardy Clauses of the Nebraska and U.S. Constitutions. We accordingly find that charging and convicting Sierra with three separate offenses for theft by unlawful taking ($5,000 or more), each a Class IIA felony, violated the Double Jeopardy Clauses of the Nebraska and U.S. Constitutions and constituted plain error.

[9] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[16] Allowing three convictions for the same offense is a clear violation of both the Nebraska and

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[12] See *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

[13] § 28-518(7).

[14] See, *State v. White*, 348 Md. 179, 702 A.2d 1263 (1997); *People v. Dist. Ct.*, 192 Colo. 355, 559 P.2d 1106 (1977). See, also, Annot., 37 A.L.R.3d 1407 (1971).

[15] See *State v. Miner, supra* note 10.

[16] *Mays v. Midnite Dreams, supra* note 1.

U.S. Constitutions. Left uncorrected, this error would be a violation of Sierra's fundamental rights and damage the integrity of the judicial process.[17] The appropriate remedy for this plain error is to vacate two of the three convictions and sentences for theft by unlawful taking ($5,000 or more) that are based on the theft of the tools from Extreme Automotive.[18]

2. Exclusion of Witnesses

We next address Sierra's assignments of error concerning the court's exclusion of defense witnesses who were not disclosed by his attorney until 5 days before trial. Sierra asserts that these witnesses would have provided alibi testimony and information attacking the credibility of Mally.

(a) State's Motion in Limine

We find no merit to Sierra's contention that the district court erred by granting the State's motion in limine to exclude late-disclosed defense witnesses.

A discovery stipulation was agreed to on February 12, 2018, which designated a deadline to provide all discovery information by March 5 or "as soon as it becomes reasonably discovered, but not less than ten days before trial." At the hearing on the motion in limine, Sierra's attorney's only stated reason for not complying with the order was that the individuals the defense intended to call were named in the State's reports and one was also included in the witness list attached to the State's information filed in this matter.

Neb. Rev. Stat. § 29-1912 (Reissue 2016) describes the types of information that are discoverable. Neb. Rev. Stat. § 29-1916 (Reissue 2016) provides the court discretion to grant reciprocal discovery. Neb. Rev. Stat. § 29-1919 (Reissue 2016) specifies that when a party has failed to comply with

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[17] See *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[18] See *State v. Miner, supra* note 10. See, also, *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

the discovery statutes, the court may (1) order such party to permit the discovery or inspection of materials not previously disclosed, (2) grant a continuance, (3) prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or (4) enter such other order as it deems just under the circumstances. In the present case, the court prohibited Sierra from calling a witness or introducing evidence that had not been disclosed pursuant to the court's discovery order.

Nevertheless, Sierra argues that our holding in *State v. Woods*[19] relieved him of the burden to disclose witnesses because he did not request a witness list from the State. In *Woods*, we held that Neb. Rev. Stat. § 29-1927 (Reissue 2016) does not require disclosure of alibi witnesses and that § 29-1916 (reciprocal discovery) applies only when the defendant requests "'comparable items or information'" from the State.[20] However, the situation in *Woods* differs from the present case in two important ways.

First, in *Woods*, the State waived the notice requirement for an alibi defense and so the issue on appeal was whether § 29-1919 required the filing of a witness list. Here, the State did not waive notice and filed a motion in limine to keep the alibi defense evidence from being admitted.

Second, all of the witnesses in *Woods* were to be used to present alibi information. Sierra concedes that at least two of the witnesses excluded by the State's motion in limine were intended to offer evidence impeaching Mally's testimony and not an alibi defense.

Thus, our holding in *Woods* does not shield Sierra from the trial court's sanctions for failing to file a witness list. The court considered Sierra's attorney's failure to comply with the discovery order and applied an authorized remedy under § 29-1919.

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[19] See *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

[20] See *id.* at 767, 587 N.W.2d at 130 (quoting § 29-1916).

We likewise find no merit to Sierra's alternative argument that the use of the definite article in § 29-1919(3), giving the trial court discretion to prohibit a party from calling "a witness," limits the court's remedy to excluding only one undisclosed witness. Sierra's reading of § 29-1919 disregards our rules for construction and the interchangeability of singular and plural words. Neb. Rev. Stat. § 49-802 (Reissue 2010) specifies as follows:

> Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows:
>
> . . . .
>
> (6) Singular words may extend and be applied to several persons or things as well as to one person or thing.
>
> (7) Plural words may extend and be applied to one person or thing as well as to several persons or things.

Under the plain meaning of § 29-1919, if a party fails to comply with discovery and give notice of an intent to call a witness, the court may prohibit that witness from being called. Nothing in § 29-1919 suggests that the remedy cannot be extended to prohibiting multiple witnesses.

Lastly, Sierra contends that the court's order granting the State's motion in limine violated his constitutional right under the Sixth Amendment to have process to compel the attendance of witnesses on his behalf. The U.S. Supreme Court has established that the Sixth Amendment does not provide an absolute right to call witnesses; rather, the defendant's right is weighed against the concerns of the state to have a fair and efficient administration of justice.[21] We have considered the same concerns when determining whether other discovery sanctions violate the Nebraska Constitution.[22] Sierra does not have an

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[21] *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

[22] See, *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014); *State v. McMillion*, 23 Neb. App. 687, 875 N.W.2d 877 (2016).

absolute right to present witnesses and evidence. The State's interest in protecting itself against an 11th-hour defense is merely one component of the broader public interest in a full and truthful disclosure of critical facts.[23]

We find that the trial court did not abuse its discretion in granting the State's motion in limine. Further, we conclude that the court's ruling granting the State's motion in limine did not violate Sierra's constitutional rights under the Sixth Amendment.

(b) Failure to Depose Witnesses, File Witness List, and Serve Notice of Alibi

[10] In the alternative to Sierra's challenge to the court's ruling granting the State's motion in limine, Sierra asserts that his attorney's ineffective assistance of counsel led to that ruling. Sierra has new counsel on direct appeal. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record, in order to preserve such claim.[24]

[11-13] Once such issues are properly raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[25] We have said that the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[26] This is because the trial record reviewed on appeal is generally "'"devoted to issues of guilt or innocence"'" and does not usually address issues of counsel's performance.[27] The determining factor is whether the record is

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[23] See *Taylor v. Illinois, supra* note 21.

[24] *State v. Chairez, supra* note 5.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 736, 924 N.W.2d at 730.

sufficient to adequately review the question.[28] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[29]

[14,15] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[30] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[31]

We cannot determine on the appellate record whether the witnesses the court prohibited from testifying would have in fact supported Sierra's alibi defense and impeached Mally's testimony. Without such information, we can determine neither deficiency nor prejudice. We find that the record is insufficient for us to address this claim on direct appeal.

Sierra argues that his attorney's "agreement" not to call his fiance was an additional act of ineffective assistance of counsel, separate from her failure to timely disclose defense witnesses.[32] We find it indistinguishable from the claim of ineffective assistance based on the failure to comply with the reciprocal discovery order. Based on the record, it appears Sierra's attorney's comments that Sierra characterizes as an "agreement" were merely a concession of the facts that the name of Sierra's fiance did not appear in the State's reports and that his attorney's failure to file a separate witness list had precluded her from calling his fiance as a witness. Such comments were mere observations of undisputed facts and cannot constitute deficient performance. If the deficient performance occurred, it was in the failure to timely file the witness list, not the acknowledgment of the result of doing so.

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[28] *State v. Chairez, supra* note 5.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Brief for appellant at 35.

(c) Failure to Request Continuance at Hearing on State's Motion in Limine

We find no merit to Sierra's assertion that his attorney was ineffective for failing to request a continuance at the hearing on the State's motion in limine. During the course of the hearing, the State had already raised the possibility of a continuance, as § 29-1919 lists a continuance as a possible remedy for an untimely witness list. The trial court was fully informed of the option to order a continuance and declined to do so. Sierra's attorney was not deficient for failing to bring an optional remedy to the court's attention that had already been raised moments earlier by the State.

3. Lack of Communication With Sierra's Attorney

We turn next to Sierra's assertions relating to his attorney's more generalized failure to communicate with Sierra while preparing for trial.

(a) Motion to Withdraw

First, we find no merit to Sierra's assertion that the district court abused its discretion in denying his attorney's motion to withdraw. Appointed counsel must remain with an indigent accused unless one of the following occurs: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent; or (3) the accused chooses to retain private counsel.[33] We review the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.[34]

Sierra argues that the district court had an obligation to make a thorough inquiry concerning his attorney's lack of preparation for the trial and that the court would have realized, through further inquiry, that trial counsel was incompetent.

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[33] *State v. McGuire, supra* note 2.

[34] *Id.*

However, the record indicates that the court investigated and addressed all of the specific examples of incompetency alleged by Sierra at the time of the hearing. At the hearing on the motion to withdraw, Sierra's attorney indicated that the reason for the motion was a breakdown of the attorney-client relationship. Sierra indicated at the hearing that he had stopped speaking with his attorney and had tried to have his fiance and mother talk with her instead. Sierra's attorney explained that she did not respond to calls by Sierra's fiance and mother, because doing so would violate attorney-client privilege.

The court heard each of Sierra's complaints and determined they did not warrant the withdrawal of counsel. The facts demonstrated at the hearing do not indicate the district court abused its discretion in concluding that under the evidence presented, Sierra's attorney was representing Sierra competently. Therefore, we find no merit to Sierra's assignment that the trial court erred in overruling his attorney's motion to withdraw.

(b) Ineffective Assistance

Relatedly, Sierra raises on direct appeal that the breakdown in communication with his attorney constituted ineffective assistance of counsel. Sierra asserts that he met with his attorney only twice before trial. Sierra claims he provided his attorney with information and names of potential witnesses at the first meeting. Sierra contends that at the second meeting, she took a personal call and then was in a hurry to leave. Sierra describes that he had more information that he was attempting to provide his attorney concerning his defense and that she did not consider that information because she was distracted during their second meeting. We find that the record is insufficient for us to address this claim on direct appeal. The nature and extent of meetings in preparation for trial between Sierra and his attorney are not in the record.

4. Evidence of Tools Found in Sierra's and Mally's Possession

We next address Sierra's claims that various acts of deficient conduct by his attorney led to the admission at trial of prejudicial evidence of his and Mally's possession of the stolen tools.

(a) Failure to Move to Suppress Search of Sierra's Residence

Sierra first argues that his attorney was ineffective by failing to move to suppress all of the evidence obtained from the search of Sierra's residence, on the ground that he did not consent to the search. The record indicates that Sierra's home was searched without a warrant pursuant to a clause in his probation order. We have held that certain probation orders may contain conditions authorizing warrantless searches under specific circumstances when such orders comply with constitutional requirements and contribute to the rehabilitation of the offender.[35] Because the probation order and evidence of Sierra's consent to the order are not in the record, we cannot determine whether failure to file the motion to suppress was deficient or prejudicial. We find that the record is insufficient for us to address this claim on direct appeal.

(b) Failure to Move to Suppress Tools Found in Mally's Possession as Unfairly Prejudicial

Second, Sierra argues that evidence related to tools found in Mally's possession was inadmissible under Neb. Rev. Stat. § 27-403 (Reissue 2016) and that his attorney was ineffective in failing to object to the evidence on this ground. Sierra provides a specific list of exhibits and portions of testimony which reflect the fact that stolen tools were found in Mally's possession and which Sierra asserts his attorney should have

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[35] See, *U.S. v. Brown*, 346 F.3d 808 (8th Cir. 2003); *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980).

objected to as unfairly prejudicial under § 27-403. Sierra concedes that she objected to several of the exhibits in question as lacking foundation or as irrelevant under Neb. Rev. Stat. § 27-402 (Reissue 2016). In fact, the court sustained some of her objections to similar evidence.

[16] To show prejudice under *Strickland*, it must be shown that a motion under § 27-403 should have resulted in the evidence in question's being ruled inadmissible and that, without such evidence, there is a reasonable probability of a different outcome in the trial.[36] In the context of § 27-403, unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[37] Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.[38]

When the State is prosecuting an individual for conspiracy to commit burglary, items found in the possession of a coconspirator are undoubtedly relevant to the crime charged. In fact, Sierra does not challenge on appeal the fact that the district court overruled his attorney's relevancy objections to the evidence.

Sierra makes the conclusory statement that admitting evidence of the tools found in Mally's possession made it more difficult for the jury to weigh Sierra's defense, but Sierra fails to articulate how this evidence could lead a jury to convict Sierra for an incorrect reason. Sierra's defense was that he did not take part in the burglary, but bought the tools found in his possession from Mally. The fact that Mally had stolen tools in his home, which Sierra did not "purchase," is not inconsistent with this defense. It is not deficient conduct to fail to object on grounds that are likely to properly be overruled.

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[36] See, *Strickland v. Washington, supra* note 7; *State v. Chairez, supra* note 5.

[37] *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018).

[38] *Id.*

We find no merit to Sierra's contention that his attorney was ineffective for failing to object on § 27-403 grounds to evidence that stolen tools were found in Mally's possession.

5. Failure to Object to Identification Evidence

Sierra asserts that his attorney was also ineffective by failing to make the appropriate motions or objections concerning several pieces of identification evidence adduced during the testimony of Wolfe and Hanke. Sierra contends that his attorney was ineffective by failing to make hearsay, foundation, and Confrontation Clause objections, presumably to each part of the testimony and each exhibit specified.

We find that Sierra has failed to sufficiently assign and argue any claim related to his attorney's failure to object on Confrontation Clause grounds. The protections afforded by the Confrontation Clauses of the Nebraska and U.S. Constitutions overlap with the purposes and policies of the rules on hearsay. The Nebraska Evidence Rules provide that hearsay is generally inadmissible except as provided by these rules, by other rules adopted by the statutes of the State, or by the discovery rules of the Nebraska Supreme Court.[39] Where testimonial statements are at issue, the Confrontation Clause and the Nebraska Constitution demand that hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination; if the statements are nontestimonial, then no further Confrontation Clause analysis is required.[40]

While Sierra provides annotations to several large swaths of Wolfe's and Hanke's testimony, he fails to describe with any specificity even a single statement by either Wolfe or Hanke that he alleges to be testimonial. We will not scour the record to determine which portions of their testimony, or what portion

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[39] Neb. Rev. Stat. § 27-802 (Reissue 2016). See, also, Neb. Rev. Stat. §§ 27-801 through 27-806 (Reissue 2016).

[40] See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

of the exhibits annotated to, Sierra contends were objectionable on Confrontation Clause grounds.

We find that Sierra has failed to sufficiently argue his attorney's deficient conduct as to the alleged failure to make Confrontation Clause objections.[41] An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.[42] A claim insufficiently stated is no different than a claim not stated at all.[43]

(a) Photographic Exhibits and Identification Statements

We next consider Sierra's contention that his attorney should have raised both foundation and hearsay objections to portions of Wolfe's and Hanke's testimony identifying Sierra and Mally as the individuals depicted in the photographs contained in exhibits 1 and 23. Exhibit 1 consists of photographs provided by Wolfe to law enforcement after Mally was suspected of shoplifting from the York Walmart. During Wolfe's testimony, the State authenticated, picture by picture, each photograph contained in exhibit 1. Exhibit 1 was received into evidence after the court overruled Sierra's attorney's foundation objection. Exhibit 23 was entered into evidence based on the testimony provided by Mally. Sierra does not assign error to the admission of exhibits 1 and 23.

The photographs in exhibit 1 depict a person exiting the York Walmart with Mally and then that person and Mally getting into separate vehicles in the parking lot. Wolfe identified

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[41] See *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

[42] *Id.*

[43] *Id.*

the second individual as Sierra. Sierra argues that his attorney was ineffective for failing to move to strike Wolfe's identification of Sierra after evidence was adduced on cross-examination that Wolfe identified Sierra based on reading his name in the newspaper after the incident. We do not have sufficient evidence on the record to determine deficiency or prejudice. We find that the record is insufficient to determine this claim on direct appeal.

Similarly, we find the record is insufficient to determine Sierra's assertion that his attorney was ineffective for failing to object on foundation and hearsay grounds to Hanke's identification of Sierra in the photographs contained in exhibits 1 and 23. Hanke admitted that he did not personally identify Sierra as the second person depicted in the photographs. Rather, Hanke testified that he received information from the Butler County sheriff identifying the second person in the photographs in exhibit 1 as Sierra. Hanke also testified that the photographs taken from the Norfolk Walmart, exhibit 23, depicted Sierra and Mally.

Although Hanke lacked personal knowledge and his statement relaying information from the Butler County sheriff was inadmissible hearsay,[44] we do not have information in the record concerning Sierra's attorney's trial strategy. Furthermore, we do not know what theories of prejudice Sierra is alleging relating to this claim because an appellant is only required to allege deficient conduct on direct appeal.[45] Accordingly, we find the record is insufficient to resolve this claim on direct appeal.

(b) Testimony About Search of Sierra's Residence, Location of Trailer, and Cell Phone Records

Sierra asserts that his attorney missed objections to three other portions of Hanke's testimony on foundation and hearsay

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[44] See §§ 27-801 and 27-803(23).

[45] See, *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

grounds. Sierra contends that had she made the proper objections, the court would have sustained the objections, which would have prevented the admission of several pieces of prejudicial evidence, unless the State called the proper witnesses to adduce the evidence. Sierra identifies the testimony at issue as statements about the location of the recovered trailer, testimony related to the search of his residence, and cell phone location data retrieved from a search warrant. Sierra argues that assuming the State would not have called additional witnesses to present such evidence, if Sierra's attorney had made objections that would have been sustained, there would have been a void in the circumstantial evidence significant enough to raise a reasonable doubt as to whether he committed the crimes charged.

(i) Trailer

Hanke testified as to the location of the trailer without specifying who recovered the trailer and whether he had personal knowledge of its recovery. We cannot determine whether either a hearsay or a foundation objection would have had merit without knowing whether Hanke had personal knowledge of the trailer's recovery. That information is not in the trial record. Without being able to determine whether either objection had merit, we cannot determine on direct appeal whether Sierra's attorney's failure to object was deficient and whether Sierra was prejudiced by deficient conduct. Thus, we find the record is insufficient to resolve this claim on direct appeal.

(ii) Tools Found in Sierra's Residence

Evidence of the physical tools and photographs of tools recovered from Sierra's residence were admitted based upon Hanke's testimony despite the fact that Hanke did not take part in the search of Sierra's residence. Sierra argues that his attorney was ineffective for failing to object on foundation and hearsay grounds to this evidence, found in exhibits 3 and 14. However, she objected to the admission of exhibit 3.

Exhibit 3 was a series of photographs of items taken from Extreme Automotive and recovered during the search of Sierra's residence. Sierra's attorney objected to exhibit 3 on foundation and, after a clarification from the State, made a second objection on relevancy that was overruled. Sierra does not assign error to the trial court's rulings on any of these objections. Sierra's attorney did not object to exhibit 14. The record does not reveal any grounds that would have warranted an objection to exhibit 14. The record demonstrates Sierra's attorney repeatedly made the appropriate hearsay and foundation objections to the evidence at issue. Thus, we find no deficient conduct by her related to Hanke's testimony about items recovered from the search of Sierra's residence.

(iii) Cell Phone Records

Hanke was the sole source for the content of the cell phone records. Hanke testified that he obtained a search warrant for the records and that those records indicated Sierra was in York on October 15, 2017. Neither the warrant nor the records are in evidence, and no cell phone company representative testified as to the authenticity of the records provided. Sierra's attorney made no objections to this testimony, and Sierra asserts that this constituted ineffective assistance of counsel.

Hanke's testimony about the contents of the cell phone records very well may have violated evidence rules for foundation and hearsay.[46] Although Sierra's attorney's failure to object on these grounds may qualify as deficient conduct, we cannot make that determination without information about her trial strategy, which is not contained in the appellate record. Moreover, we decline to speculate on direct appeal about whether the State would have called additional witnesses to authenticate the records if she had made the objections and they had been sustained. Thus, we find the record is insufficient to resolve this claim on direct appeal.

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[46] See § 27-802 and Neb. Rev. Stat. § 27-901 (Reissue 2016).

6. Failure to Object to "Proffer Interview" Evidence

Sierra contends that his attorney was also ineffective for failing to object to Hanke's testimony about Sierra's statements made during a "proffer interview." Hanke testified to a second interview that occurred with Sierra where Sierra admitted to being in York. No information appears in the record about the nature of this second interview. The term "proffer interview" is one way of describing interviews that occur in order to arrive at a negotiated plea in exchange for a defendant's cooperation; this is also referred to as "plea negotiations"[47] or, in federal cases, as "'cooperation-immunity agreements.'"[48]

Typically, "proffer interviews" involve some sort of agreement. The interpretation of such an agreement is governed by general contract principles, and an alleged violation by the State of the agreement implicates the due process rights of the defendant.[49] The record does not contain any information about any alleged agreements between the State and Sierra prior to the interview. Thus, the record is insufficient to determine this claim on direct appeal.

7. Failure to Request Accomplice Jury Instruction

Having addressed all of Sierra's arguments concerning the evidence adduced at trial, we now turn to the jury instructions. Sierra argues his attorney was ineffective because she failed to request a cautionary jury instruction on accomplice testimony. Sierra claims that she should have requested an instruction, patterned from NJI2d Crim 5.6, which would have read:

> "There has been testimony from . . . Mally, a claimed accomplice of [Sierra]. You should closely examine his

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[47] See *State v. McGee*, 282 Neb. 387, 395, 803 N.W.2d 497, 505 (2011).

[48] See *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986).

[49] See *State v. Wacker*, 268 Neb. 787, 688 N.W.2d 357 (2004).

> testimony for any possible motive he might have to testify falsely. You should hesitate to convict [Sierra] if you decide that . . . Mally testified falsely about an important matter and that there is no other evidence to support his testimony. In any event, you should convict [Sierra] only if the evidence satisfies you beyond a reasonable doubt of his guilt."[50]

Whether Sierra's attorney was deficient for not requesting an instruction on accomplice testimony depends in part on whether such an instruction was warranted.

[17,18] A defendant is clearly entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an alleged accomplice, and the failure to give such an instruction, when requested, is reversible error.[51] We have held that whenever a judge decides that the evidence supports a conclusion that a witness is an accomplice and the defendant requests a cautionary instruction, the instruction is appropriate and should be given.[52] This is because any alleged accomplice testimony should be examined more closely by the trier of fact for any possible motive that the accomplice might have to testify falsely.[53]

There is evidence on the record to indicate Mally was an accomplice. Sierra's attorney adduced evidence on cross-examination of the benefits he was receiving from the State in exchange for his testimony, and Mally's plea deal was entered into evidence. If she had requested a cautionary instruction on accomplice testimony, the instruction should have been given. It is unclear on the trial record why Sierra's attorney did not request such an instruction, but we cannot say on the record before us that the failure to request a cautionary instruction

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[50] Brief for appellant at 45.

[51] See *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[52] See *id.*

[53] *Id.*

on accomplice testimony was deficient and prejudicial under *Strickland*.[54] Thus, we find that the record is insufficient for us to address this claim on direct appeal.

8. Failure to Maintain Adequate Record

Sierra generally contends that his attorney was ineffective for not maintaining a record of certain portions of the trial. This contention rests on the idea that there could have been potential due process violations during these parts of the trial. The portions that went unrecorded included voir dire, closing arguments, and the reading of the instructions to the jury. Without a sufficient record, Sierra argues that he is foreclosed from assigning such violations as errors on appeal. Sierra does not elaborate on what the alleged violations were, except as to the error related to the accomplice jury instruction discussed above.

We have long held that both parties can waive the creation of the record for nonevidentiary proceedings.[55] The burden to create the trial record is on the trial court; however, this burden only extends to the evidence offered at trial and other evidentiary proceedings, and it may be waived for nonevidentiary proceedings.[56] None of the proceedings omitted from the record involved the presentation of evidence at trial.

[19] Raising a claim of ineffective assistance based on the mere conjecture that something inappropriate may have occurred during these proceedings is not enough. Sierra was present during each part of the trial, including those portions not on the record. Thus, he has knowledge of what occurred and was free to assign on appeal any specific claims of deficiency by his attorney during the proceedings not on the

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[54] See *Strickland v. Washington, supra* note 7.

[55] See *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

[56] See, *id.*; *Lockenour v. Sculley*, 8 Neb. App. 254, 592 N.W.2d 161 (1999). See, also, Neb. Ct. R. App. P. § 2-105(A)(2) (rev. 2018).

record. When recordation of parts of a trial is not made mandatory by the rules, the failure to request recordation cannot be said, ipso facto, to constitute negligence or inadequacy of counsel.[57] When the defendant was present but does not allege what specific deficient conduct was not recorded, the defendant fails to allege with sufficient specificity how trial counsel was deficient by simply alleging that counsel waived creation of a trial record for nonevidentiary proceedings.[58]

Other than the allegation relating to the accomplice jury instruction, Sierra has not assigned any specific allegations of deficient conduct; nor has he made any specific arguments related to voir dire or closing arguments. We do not address those claims alleging simply that the failure to create a trial record, in itself, constituted ineffective assistance.

Sierra has alleged specifically deficient conduct pertaining to the jury instructions. However, the assignment of ineffective assistance is unrelated to the reading of the jury instructions. Rather, Sierra alleges the deficient conduct was in the failure to request that the giving of the jury instructions be recorded.

Counsel is not required to request a record of the reading of the jury instructions, because instructions to the jury, whether given or refused, when filed in a cause, are a part of the record and need not be embodied in the bill of exceptions.[59] Thus, an ineffective assistance claim asserting deficient conduct based on a failure to request that a record be made of the reading of the jury instructions would need to specifically allege that trial counsel was deficient in conduct during the reading of the jury instructions. Sierra has failed to specify deficient conduct by his trial counsel during the reading of the jury instructions. We find this claim to be without merit.

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[57] *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994).

[58] See, *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017); *State v. Jones, supra* note 57.

[59] See *Bennett v. McDonald*, 52 Neb. 278, 72 N.W. 268 (1897).

9. Failure to Maintain Law License and Appropriate Moral Standing

Lastly, Sierra claims that his attorney's failure to maintain her law license and the investigation into her criminal conduct rendered his attorney per se ineffective. There is no evidence in the record concerning Sierra's attorney's personal conduct or any potential conflict of interest. At the original sentencing hearing, she made a motion to withdraw, it was granted, and the trial court gave a newly appointed public defender additional time to prepare for sentencing. No further details are provided. We find that the record is insufficient for us to address this claim on direct appeal.

VI. CONCLUSION

For the foregoing reasons, we vacate Sierra's convictions and sentences pursuant to counts III and IV of the State's amended information, which each asserted a separate offense of theft by unlawful taking ($5,000 or more). Furthermore, we find that the district court did not abuse its discretion in denying the motion to withdraw and in granting the State's motion in limine. We find the claims of ineffective assistance of counsel for agreeing not to call Sierra's fiance as a witness, failure to request a continuance, failure to exclude evidence found in Mally's possession, and failure to object to Hanke's testimony about evidence found at Sierra's residence to be without merit. We find the claim of ineffective assistance of counsel for failure to maintain a sufficient record of voir dire, closing arguments, and jury instructions to be insufficiently stated. We find the record is insufficient to address the remaining ineffective assistance of counsel claims on direct appeal.

Affirmed in part, and in part vacated.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Interest of Taeson D., a child under 18 years of age. State of Nebraska, appellee, v. Samuel T., appellant.

939 N.W.2d 832

Filed March 13, 2020. No. S-19-382.

1. **Parental Rights: Due Process.** Whether a parent who is incarcerated or otherwise confined in custody has been afforded procedural due process for a hearing to terminate parental rights is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion.
2. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
3. **Parental Rights: Due Process.** An incarcerated parent's physical presence is not necessary at a hearing to terminate parental rights, provided that the parent has been afforded procedural due process.
4. ____: ____. The initiative is properly placed on the parent or the parent's attorney to notify the court of the parent's incarceration and to request to appear telephonically at the hearing to terminate parental rights.
5. **Juvenile Courts: Parental Rights: Due Process.** The juvenile court has discretion to determine how an incarcerated parent may meaningfully participate in the hearing on the termination of his or her parental rights consistent with due process.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Affirmed.

Troy J. Bird, of Hoppe Law Firm, L.L.C., for appellant.

Pat Condon, Lancaster County Attorney, Mary Norrie, and Danielle M. Kerr for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Samuel T. appeals the termination of his parental rights to his minor child, Taeson D. During the pendency of these proceedings, Samuel became incarcerated in South Carolina, serving a 30-year sentence. Following a termination hearing at which Samuel was represented by counsel but not present, the separate juvenile court of Lancaster County determined that (1) Samuel substantially neglected to give Taeson necessary parental care; (2) Taeson was a juvenile as described by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) and reasonable efforts have failed to correct conditions; (3) Taeson was in an out-of-home placement for 15 or more months of the most recent 22 months; (4) it was in the best interests of Taeson to terminate Samuel's parental rights; and (5) Samuel was unfit to parent Taeson. The juvenile court terminated Samuel's parental rights to Taeson on three statutory bases as more fully described below. Samuel appeals. He claims that his procedural due process rights were violated and that the juvenile court erred when it terminated his parental rights to Taeson. We affirm.

FACTS

Taeson was born in July 2017. The Nebraska Department of Health and Human Services (DHHS) took custody of Taeson at the hospital shortly after his birth because his biological mother had admitted to methamphetamine use during pregnancy and the meconium fluid had tested positive for methamphetamine. Taeson's biological mother relinquished her parental rights in late 2018. Taeson was placed with Lachrisha T., Samuel's adult daughter, who has cared for Taeson since his birth.

Samuel was present at the hospital for Taeson's birth. Samuel and the child apparently had almost no further contact after this point. Samuel became incarcerated in November 2017 on what the record suggests was a drug-related offense.

In December 2017, a paternity test showed that Samuel was the biological father of Taeson. Candace Sturgeon, a caseworker with DHHS, unsuccessfully attempted to contact Samuel through Lachrisha and other means. Sturgeon eventually located Samuel through a DHHS computer system search and visited him at the jail in Saline County, Nebraska, in June 2018. She testified at the termination hearing that she informed Samuel that the result of the paternity test he had taken showed he was Taeson's biological father. According to Sturgeon, Samuel stated that he had assumed he probably was Taeson's father, that he was aware Taeson was living with Lachrisha, and that he had personally recommended that Taeson be placed with her after the child was removed from his biological mother's care.

According to Sturgeon, Samuel had indicated he supported Lachrisha's potentially adopting Taeson. According to Sturgeon, Samuel stated "something to the effect of well I obviously am not an option since I'm going to be in prison for 30 years, so I understand that." Sturgeon testified that she advised Samuel that he needed to keep her updated on his whereabouts, because it would be very difficult for her to know where he was if he was transferred.

Samuel asked Lachrisha to bring the child to county jail one time, but before arrangements could be made, Samuel was transferred to federal prison in South Carolina on a 30-year sentence. After the transfer, Samuel did not communicate with Sturgeon or DHHS to update them on his whereabouts or to contact Taeson. Sturgeon testified that she made largely unsuccessful efforts to contact Samuel multiple ways at least once a month.

Samuel attended a paternity hearing on June 6, 2018, at which he was declared Taeson's legal father. In October 2018,

the State moved to terminate Samuel's and the biological mother's parental rights. The motion to terminate alleged three grounds under Neb. Rev. Stat. § 43-292 (Reissue 2016), which states:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination;
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months.

On November 19, 2018, Samuel was served in prison in South Carolina with a copy of the motion to terminate his parental rights and a summons to appear before the court for a hearing on the matter. In December, Samuel denied the allegations in the motion to terminate and the termination hearing was continued.

In December 2018, Sturgeon left a message with a caseworker at the South Carolina prison and Samuel called her back. During that telephone call, Sturgeon explained to Samuel that the State was moving to terminate his parental rights. Samuel stated that he did not want his parental rights

terminated and that he no longer approved of Taeson's being placed with Lachrisha. He explained that Lachrisha was not "put[ting] any money on his books" and had stopped communicating with him. Samuel stated that he hoped he would be successful in the appeal of his criminal conviction and that his intent was to win his appeal and parent Taeson.

Sturgeon testified that Samuel did not make further contact with DHHS after December 2018. At the time of the termination hearing in March 2019, Samuel had been in prison in South Carolina for 8 months. Taken as a whole, the testimony showed that Samuel had not attempted to be involved in Taeson's life either before or after his incarceration. Samuel had not requested photographs of Taeson and had not contacted him after his birth. Sturgeon explained that the service DHHS typically offers to parents who are incarcerated is visitation with the child; however, it is very difficult to offer services if someone is placed out of state and it is impossible to offer services to someone that DHHS is unable to contact. She testified that, in her view, Samuel's parental rights should be terminated even if he wins his appeal on his criminal case because it is unclear how long it would take him to work through a case with DHHS and ensure he could care for a child.

The termination hearing was held on March 13, 2019. The child was represented by a guardian ad litem, and counsel appeared for the State.

Samuel was represented throughout the termination hearing by an attorney. Samuel did not appear physically or telephonically. The juvenile court recognized that Samuel denied the allegations in the motion to terminate. Samuel's counsel was asked to address Samuel's nonappearance, and Samuel's counsel stated as follows:

> Well, Your Honor, he's incarcerated in North [sic] Carolina penitentiary system. I've had communication with him be [sic] email on and off throughout the last six weeks or so. I know that he does object to what — having his rights terminated. I've also tried to communicate with

> him regarding relinquishment, which he's been unable to or unwilling to sign a relinquishment, and so you know, I can't imagine the Court is going to continue this out for 30 years 'til he can put himself in a place where he can parent, so I see no other alternative but moving forward today.

Following the hearing, the juvenile court filed an order which found that the allegations of the motion for termination of parental rights were true by clear and convincing evidence. The court enumerated its findings that (1) regarding § 43-292(2), Samuel substantially neglected to give Taeson necessary parental care; (2) regarding § 43-292(6), Taeson was a juvenile as described by § 43-247(3)(a) and reasonable efforts have failed to correct conditions; (3) regarding § 43-292(7), Taeson was in an out-of-home placement for 15 or more months of the most recent 22 months; (4) it was in the best interests of Taeson to terminate Samuel's parental rights; and (5) Samuel was unfit to parent Taeson now and in the future. The juvenile court terminated Samuel's parental rights to Taeson.

Samuel appeals.

ASSIGNMENTS OF ERROR

On appeal, Samuel claims, summarized and restated, that (1) he was denied procedural due process rights at the termination hearing and (2) the juvenile court erred when it terminated his parental rights because DHHS had failed to make reasonable efforts to reunite him and Taeson.

STANDARDS OF REVIEW

[1] Whether a parent who is incarcerated or otherwise confined in custody has been afforded procedural due process for a hearing to terminate parental rights is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. See *In re Interest of Zoie H.*, 304 Neb. 868, 937 N.W.2d 801 (2020).

ANALYSIS

Due Process.

Samuel, who was incarcerated in South Carolina, had his parental rights to Taeson terminated at a hearing at which he was represented by counsel; he was not physically present nor did he participate telephonically. In Samuel's brief, he contends that he was denied due process generally because he did not appear "in some fashion," brief for appellant at 12, and, in particular, he was denied a "telephonic or video hearing," brief for appellant at 9. We determine that under the facts of this case, Samuel was not denied due process.

[3] It is settled in Nebraska, and Samuel agrees, that an incarcerated parent's physical presence is not necessary at a hearing to terminate parental rights, provided that the parent has been afforded procedural due process. See, *In re Interest of Mainor T. & Estela T., supra*; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). The fundamental requirement of due process is the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). We have explained that a juvenile court must consider several factors in determining whether to allow a parent's attendance, which factors are as follows:

> the delay resulting from prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's

> release from custody or confinement to attend the hearing, the reasonable availability of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing.

In re Interest of L.V., 240 Neb. at 416, 482 N.W.2d at 258-59.

[4] With respect to the participation of the incarcerated parent, we have stated that in most situations, in order to trigger the requirements of *In re Interest of L.V.*, the initiative is properly placed on the parent or the parent's attorney to notify the court of the parent's incarceration and to request attendance. See *In re Interest of Mainor T. & Estela T., supra*. We logically apply this principle to an incarcerated parent's request to appear telephonically. In the present case, no such request was made and, to the contrary as seen in the material quoted above, such appearance was waived.

[5] We are aware of jurisdictions which require juvenile courts to either give incarcerated parents the opportunity to participate by telephone in the entire hearing, e.g., *In Interest of M.D.*, 921 N.W.2d 229 (Iowa 2018) (amended Mar. 5, 2019), or offer an alternative procedure by which the incarcerated parent may review a transcript of the record of the evidence presented against him or her and testify later at a bifurcated hearing. See, *E.J.S. v. Dept. of Health & Soc. Serv.*, 754 P.2d 749 (Alaska 1988); *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986). However, in light of a juvenile court's relative inability to compel an out-of-state correctional facility to allow an incarcerated parent to participate in an entire hearing, we decline to require juvenile courts to follow a rigid procedure of telephonic participation for the entire hearing in all cases. Like several other jurisdictions that have thoroughly considered the issue, we leave it to the juvenile courts' discretion to determine how an incarcerated parent may meaningfully participate in the hearing on the termination of his or her parental rights consistent with due process. See, *In re C.G.*, 954 N.E.2d 910 (Ind.

2011) (cases collected); *In re D.C.S.H.C.*, 733 N.W.2d 902 (N.D. 2007); *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000).

In this case, Samuel was aware that Taeson was adjudicated as a juvenile under § 43-247(3)(a). Samuel received notice of the termination hearing, filed a pleading denying the allegations, and was represented by counsel throughout the termination proceeding. Compare *In re Interest of Davonest D. et al.*, 19 Neb. App. 543, 809 N.W.2d 819 (2012) (concluding due process violated for inmate who was neither present nor represented by counsel at termination hearing). The record shows that Samuel had been communicating with counsel and that Samuel's counsel cross-examined the witness and had the opportunity to present evidence, which he declined. Samuel did not request to be present or telephonically participate at the termination hearing and did not request a continuance. The hearing on parental termination had already been continued twice, and the juvenile court properly exercised its discretion when it conducted the hearing with Samuel's interests represented by counsel. Samuel was not denied procedural due process under the circumstances.

Termination.

Samuel contends that the juvenile court erred when it terminated his parental rights under § 43-292(6) because the State did not make reasonable efforts to reunite him with Taeson. See Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2018) and § 43-292(6). We reject this assignment of error.

The juvenile court found sufficient evidence existed under § 43-292(2), (6), and (7) to support a termination of Samuel's parental rights. We have held that any one of the bases for termination of parental rights codified by § 43-292 can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

Samuel has not raised a challenge to the sufficiency of the evidence establishing that under § 43-292(2), he substantially and continuously or repeatedly neglected and refused to give Taeson necessary parental care and protection, or that under § 43-292(7), Taeson had been in an out-of-home placement for 15 or more months of the most recent 22 months. Each of these subsections is a statutory basis for termination. See *In re Interest of Sir Messiah T. et al., supra*. We find support in the record establishing grounds for termination under § 43-292(2) and (7). In addition, the evidence demonstrates that termination of Samuel's parental rights is in the best interests of Taeson. At the time of the proceedings, Samuel had virtually no relationship with Taeson and there was no evidence that Samuel had taken steps to establish a relationship. Samuel was sentenced on a drug-related offense to be incarcerated for the entirety of Taeson's juvenile years. Further, the juvenile court's finding that Samuel was unfit was supported by the record.

Because the State needed to prove only one basis for termination, and did so here, we need not further analyze Samuel's claim that the State made insufficient efforts to preserve and reunify the family under § 42-292(6). See *In re Interest of Sir Messiah T. et al., supra*.

CONCLUSION

The juvenile court did not deny Samuel procedural due process, and it did not err when it determined that terminating Samuel's parental rights to Taeson was appropriate under § 43-292(2) and (7) and was in the best interests of Taeson. Accordingly, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Darryl Lierman, appellant.

940 N.W.2d 529

Filed March 20, 2020. No. S-18-402.

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 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, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Criminal Law: Judgments: Proof.** An acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.
4. **Criminal Law: Proof.** The standard of proof in a criminal case is that the State must prove the charges against the defendant beyond a reasonable doubt.
5. **Sexual Assault: Evidence.** Evidence that a defendant committed an act of sexual assault is, by its very nature, prejudicial.
6. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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 the 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.
7. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.

8. **Trial: Judges: Words and Phrases.** An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.
9. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal.
10. **Judges: Recusal.** A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
11. **Judges: Recusal: Presumptions.** A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.
12. **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.
13. **Judgments: Words and Phrases.** 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 evidence.
14. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
15. **Effectiveness of Counsel: Appeal and Error.** In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
16. ____: ____. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.
17. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** In order to know whether the record is insufficient to address assertions on direct appeal that trial counsel was ineffective, appellate counsel must assign and argue deficiency with enough particularity (1) for an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) for a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.

18. **Effectiveness of Counsel: Proof: Appeal and Error.** When a claim of ineffective assistance of trial counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.

Appeal from the District Court for Antelope County: Mark A. Johnson, Judge. Affirmed.

Bradley A. Ewalt, of Ewalt Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Heavican, C.J.

I. INTRODUCTION

Darryl Lierman was convicted of multiple counts of sexual assault of a child and child abuse and was sentenced to a total term of 70 to 140 years' imprisonment, with credit for 272 days' time served. The child in question was B.L., Lierman's adopted daughter, who was born in January 2000. Lierman's primary argument on appeal is that the district court erred in admitting evidence of prior sexual assault alleged to have been committed by Lierman against another adopted daughter, A.L., because Lierman was acquitted in that case. We affirm.

II. BACKGROUND

Lierman was charged by information with three counts of first degree sexual assault of a child, three counts of third degree sexual assault of a child, and four counts of child abuse. Though further details of these charges will be discussed in more detail below, it is sufficient to note here that B.L. alleged this sexual abuse began in approximately 2010. At that time, Lierman was on bond awaiting trial on charges that he sexually abused B.L.'s biological sister, A.L., who was another of

Lierman's adopted daughters. Lierman was eventually acquitted by a jury of the charges involving A.L.

B.L.'s allegations first came to light on or about February 12, 2015. On February 7, B.L. ingested an unknown number of pills in an attempted suicide and was taken to a hospital in Kearney, Nebraska. During a counseling session on February 12, B.L. made statements suggesting that Lierman had been sexually abusing her. An interview at a child advocacy center was scheduled, at which time B.L. made further allegations against Lierman, including that he would make her model bras for him and that he would watch her while she was showering. B.L. was placed in foster care while the matter was investigated.

In July 2015, B.L. disclosed that from the ages of 12 to 14, she was subject to digital and penile penetration by Lierman on more than one occasion, primarily while at the family's home in Neligh, Nebraska. Lierman was ultimately charged with the allegations set forth above. Various pretrial hearings were held, details of which will be noted below as relevant. After a jury trial, Lierman was found guilty of all charges. He appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Lierman assigns that the district court erred in (1) allowing the State to present evidence of prior sexual assaults, where that evidence was in support of charges of sexual assault for which Lierman was ultimately acquitted, or where at least some of those assaults were alleged to have been committed by Lierman in other jurisdictions; (2) not admitting evidence that prior to her suicide attempt, B.L. was unhappy at home and at school and was using the home computer to access adult dating sites; (3) finding the evidence sufficient to convict Lierman; (4) not recusing itself; (5) imposing excessive sentences; and (6) not permitting Lierman to issue subpoenas duces tecum in order to obtain records through depositions. Lierman additionally assigns that his counsel was ineffective by not (1) calling certain witnesses, (2) utilizing

evidence of Lierman's driving logs to form an alibi defense, (3) filing a motion in limine regarding the evidence to be sought about B.L.'s difficulties at school and general unhappiness, (4) objecting to the order in which the State presented its evidence, and (5) objecting to the State's use of B.L.'s suicide attempts and ideations.

IV. ANALYSIS

1. Admissibility of Evidence

(a) Standard of Review

[1,2] 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 discretion a factor in determining admissibility.[1] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[2]

(b) Background

Prior to trial, the State filed a motion for a hearing to determine the admissibility of prior sexual assault evidence and an intent to offer additional evidence pursuant to Neb. Rev. Stat. §§ 27-404 and 27-414 (Reissue 2016). The State averred that it wished to use evidence that had previously been presented against Lierman in the case involving A.L.'s allegations.

At this hearing, the State introduced evidence generally comprising three categories: (1) evidence that had been offered against Lierman during A.L.'s trial in Antelope County, Nebraska, for which Lierman was acquitted; (2) evidence that was not offered in Antelope County either for reasons not clear from the record or because the events in question did not occur in Antelope County, but instead in Madison County, Nebraska,

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[1] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[2] *Id.*

or while Lierman was on the road with A.L; and (3) evidence of allegations by B.L. that did not occur in Antelope County, but instead in Madison County, or while Lierman was on the road with B.L.

A.L. testified that Lierman began sexually abusing her when she was approximately 10 years old, when the family lived in both Neligh and Tilden, Nebraska. A.L. testified that Lierman had, for the 2 or 3 years prior, sought "hip rubs" from A.L. and asked her to walk on his back. (There was testimony at trial that "hip rubs" and the children's walking on Lierman's back were a common occurrence for all of the children in the household and were apparently performed to relieve pain that Lierman suffered as a result of his over-the-road trucking job. The record shows that Lierman was obese, weighing approximately 500 pounds.)

The first sexual abuse occurred when A.L. was sleeping with Lierman and Lierman's wife, Julie Lierman (the mother of the adopted children), in the couple's bed. Early in the morning of this first occasion, A.L. was giving Lierman a hip rub and accidently rubbed his penis over his clothing. A.L. was told to stop and was sent to her own bed. But the next night, A.L. was again sleeping with Lierman and Julie in their bed, when Lierman told her to "do what [you] did last night." At first A.L. thought Lierman meant a hip rub, but subsequently began rubbing his penis over his clothes, and Lierman did not tell her to stop.

Lierman eventually introduced A.L. to the "cowlick," which involved Lierman's licking A.L.'s vagina. A.L. testified that at the time, she and Lierman were watching television in the couple's bedroom and Julie was not at home. The "cowlick" began after the family moved to Tilden.

A.L. also testified that Lierman began taking her on his multiday trucking routes and would engage in sexual activity with her in the sleeper portion of the semi-truck. On one such occasion in the truck, A.L. and Lierman were watching a movie and Lierman told A.L. to rub his penis, which A.L. did

over his clothing. Lierman then directed her to rub his penis under his clothing. In a second incident, A.L. was walking on Lierman's back, when he rolled over and she accidentally hit his groin area, causing him pain. He then grabbed her, took off her pajamas, got on top of her, and penetrated her vagina with his penis. A.L. cried out that it hurt and screamed at him to stop, but Lierman placed a pillow over her head to muffle the screams. A.L. further testified that almost every time she went with Lierman in the truck, some type of sexual activity occurred, and that she was often asked to model underwear that he had brought along.

A.L. testified that after the family moved from Tilden to Neligh, she shared a room with another sister. The house was being remodeled, so Lierman and Julie's bed was in the living room, and as a result, no sexual abuse took place during that time. But as soon as the remodel was finished, the sexual abuse resumed. The abuse usually began with a request that A.L. give Lierman a hip rub or back rub, and it occurred most evenings when Lierman was not on the road. A.L. also testified that she performed oral sex on Lierman and that Lierman used a purple sex toy on her on at least two occasions.

A.L. disclosed some of these events to Neligh school authorities on September 17, 2010, after speaking with the counselor about her concern that Lierman may have impregnated her. A search of the family's home revealed bedding and a purple sex toy. DNA that included Lierman and A.L., but excluded Julie, was found on both items. (The DNA evidence was apparently either not available or not offered at the time of Lierman's trial on A.L.'s allegations.)

Evidence of non-Antelope County incidents involving B.L. and Lierman was also offered. B.L.'s therapist testified that B.L. revealed to her that Lierman began sexually abusing her when she was approximately 10 years old, when the family lived in Meadow Grove, Nebraska, and while Lierman was out on bond for the charges he faced involving A.L. Similar to A.L., the abuse began with Lierman's asking B.L. to massage

his penis. B.L. reported that Lierman assaulted her while she was with him on the road and that Lierman was "'not right down there,'" meaning something was wrong with his penis. B.L. also reported that Lierman penetrated her with his penis and that it hurt.

Following this hearing, the court found that (1) the State was not barred by principles of collateral estoppel from introducing evidence regarding A.L., despite the fact that Lierman had been acquitted of those charges; (2) A.L.'s allegations were inextricably intertwined with B.L.'s allegations; and (3) the evidence the State sought to admit as to both A.L. and B.L. was conditionally admissible under §§ 27-404 and 27-414, subject to confirmation of factual similarities deemed relevant at trial.

(c) Analysis

In his first assignment of error, Lierman assigns that the district court erred in admitting A.L.'s allegations, because he was acquitted of those charges at trial. He contends that the principles of collateral estoppel prevent the State from offering evidence about charges for which he was acquitted. Lierman also asserts that by offering evidence regarding A.L.'s allegations, the State was attempting to convince the jury that he should have been found guilty in A.L.'s case and that it had an opportunity to correct that wrong.

We turn first to Lierman's assertion that the U.S. Supreme Court's decision in *Ashe v. Swenson*[3] precludes the admission of that evidence. In *Ashe*, the Court explained that in the context of collateral estoppel, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[4]

[3] We find Lierman's assertion to be without merit. While *Ashe* does speak to the issue of collateral estoppel in the criminal case, the Court expanded on that holding in *Dowling*

[3] *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).

[4] *Id.*, 397 U.S. at 443.

v. United States.[5] In *Dowling*, the Court noted that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."[6]

Section 27-414 provides:

> (1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.
>
> (2) In a case in which the prosecution intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
>
> (3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

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[5] *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

[6] *Id.*, 493 U.S. at 349.

> (4) This section shall not be construed to limit the admission or consideration of evidence under any other section of the Nebraska Evidence Rules.

Thus, under § 27-414, assuming that notice and hearing requirements are met and the evidence survives a more-probative-than-prejudicial balancing test, evidence of prior sexual assaults are admissible if proved by clear and convincing evidence.

[4] The standard of proof in a criminal case is that the State must prove the charges against the defendant beyond a reasonable doubt,[7] a higher standard of proof.[8] Because the standard set forth as to the question of whether A.L.'s allegations were proved for purposes of § 27-414 is lower than the standard of proof the State was held to in prosecuting those allegations, the principles of collateral estoppel do not bar the admission of that evidence.

And we disagree with Lierman's contention that the State did not prove A.L.'s allegations by clear and convincing evidence. A.L. testified to the truth of her allegations, and her testimony was at least partially corroborated by DNA testing and other physical evidence. Lierman attempted to attack A.L.'s credibility by pointing out inconsistencies and failed memory, but as the State noted, those inconsistencies are typical of a young adult remembering traumatic events that took place years ago.

While the fact that Lierman was acquitted does not affect the threshold admissibility of the evidence under § 27-414, it is relevant to the undue prejudice analysis conducted under § 27-414 and Neb. Rev. Stat. § 27-403 (Reissue 2016). We held in *State v. Kirksey*,[9] a case involving § 27-404, that a prior acquittal

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[7] See, U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[8] See, e.g., *State v. Bigelow*, 303 Neb. 729, 931 N.W.2d 842 (2019).

[9] *State v. Kirksey*, 254 Neb. 162, 180, 575 N.W.2d 377, 390-91 (1998).

> does not, in and of itself, preclude admission of the facts underlying the charge as evidence of other bad acts when offered for one of the purposes specified in [§ 27-404(2)]. . . . However, the acquittal is a factor which the court must consider when weighing the probative value of the evidence against the potential for unfair prejudice under [§ 27-403].

[5] We turn to the balancing test set forth in §§ 27-414 and 27-403. We first note that evidence that a defendant committed an act of sexual assault is, by its very nature, prejudicial[10]:

> The [§ 27-403] unfairly prejudicial analysis cannot be based on the fact that evidence of sexual misconduct propensity evidence would be prejudicial. . . . Of course, the more probative the evidence is in establishing a similar deviant sexual propensity the more prejudicial the evidence becomes, but such prejudice is not unfair under [§ 27-403] because of its enhanced probative value.[11]

Despite the prejudice inherent in this type of evidence, the Legislature enacted § 27-414. Assuming that the evidence met the balancing test of § 27-414, the Legislature set no limitation on a fact finder's use of this evidence. This stands in contrast to § 27-404, where other types of character or bad acts evidence are presumed to be *inadmissible*, and where admissible for one or more of the particular purposes as set forth by the statute, the evidence may be considered only for those purposes. Thus, while § 27-404 is a rule of exclusion, § 27-414 is a rule of admissibility.

It is with an understanding of the prejudicial nature of such evidence, and the wide range of purpose for which the fact finder may consider it, that we weigh the various factors of the balancing test set forth in § 27-414.

The district court found, and we agree, that there was clear and convincing evidence that the events composing A.L.'s

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[10] See *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

[11] R. Collin Mangrum, Mangrum on Nebraska Evidence § 27-414[D](5) at 334 (2019).

allegations occurred. In addition, we have previously noted that evidence of the repeated nature of sexual assault incidents may be relevant in proving these crimes occurred, especially when committed against "'"persons otherwise defenseless due to age."'"[12] This is applicable in this situation, given the young age of B.L. (as well as A.L.) at the time of the alleged assaults.

In addition, the events described in A.L.'s allegations were close in time to the charges involving B.L. for which Lierman was on trial. According to A.L., Lierman sexually assaulted her until the time of his arrest, while B.L. testified that Lierman began assaulting her when he was on bond awaiting trial on A.L.'s allegations.

A.L.'s allegations were similar to the allegations made by B.L. The girls were similar in age when the assaults began, were sisters, and were both adopted daughters to Lierman. Both girls reported that the sexual acts grew out of "hip rubs" that they each gave Lierman, which led to fondling outside of clothing, and then eventually, penile penetration. Both girls reported incidents occurring in Lierman's bedroom and in his semi-truck while on the road.

Of course, as Lierman points out, he was acquitted by a jury of A.L.'s allegations, which we consider in this balancing test. Lierman argues that the State offered A.L.'s allegations in part to argue to the jury in B.L.'s case that the jury in the first case made a mistake, while this second jury could rectify it. But we are not persuaded by this: the jury was clearly instructed that "[t]he defendant [was] on trial only for the crimes alleged herein," and that fact was pointed out to the jury by both the State and Lierman's counsel.

Nor is there any distinction between the allegations for which Lierman was convicted and those for which he was never charged. Other than arguing the State could have charged him earlier, Lierman does not explain how this fact would

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[12] See *State v. Kibbee, supra* note 10, 284 Neb. at 95, 815 N.W.2d at 891, quoting *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991).

prevent the use of the allegations per § 27-414. That statute allows conduct to be admitted, not convictions.

There is no merit to Lierman's first assignment of error.

2. Evidence of Alternative Reasons for B.L.'s Unhappiness

(a) Standard of Review

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 discretion a factor in determining admissibility.[13] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[14]

(b) Background

In his second assignment of error, Lierman argues that during the State's examination of B.L., it opened the door to the introduction of specific evidence that when considered together, showed that B.L. was not happy and that it was this unhappiness, and not any alleged sexual abuse, that resulted in B.L.'s attempted suicide. At issue was evidence that B.L. was (1) caught using the computer to access an adult dating website, (2) using social media to arrange a meeting with a boy her age, (3) using a tablet computer to access adult-oriented websites on dates when Lierman claims he was out of town, and (4) being bullied at school.

The district court sustained the State's objection to Lierman's attempts to present evidence of these instances.

(i) Use of Adult Dating Website

An offer of proof was made wherein Julie would have testified that sometime in 2013, she was on the family computer

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[13] *State v. Kibbee, supra* note 10.

[14] *Id.*

and noticed that B.L. had left her email account open. Julie discovered that B.L. had been creating a profile on a dating website. In response, Lierman and Julie summoned the county sheriff to explain to B.L. the dangers of this type of activity. Lierman also wanted to offer a portion of B.L.'s deposition in which she testified that she had not had contact with anyone on the website, but that she had only created a profile using false information. In her deposition testimony, B.L. testified that Lierman sexually assaulted her after Julie went to work the night that B.L.'s actions were discovered. In support of admitting this evidence, Lierman argued it was part of the res gestae of the crimes charged, because B.L. claimed that it led directly to another sexual assault.

The district court declined to admit this evidence, finding the implication was that B.L. had engaged in some type of sexual misconduct, violating Neb. Rev. Stat. § 27-412 (Reissue 2016). In addition, the court sustained the State's objection that Lierman's cross-examination of B.L. on this point was improper under § 27-403 and Neb. Rev. Stat. § 27-608(2) (Reissue 2016).

(ii) Social Media Message About Meeting With Classmates

A second offer of proof would have had Julie testify that one night when she was on the computer, an instant message for B.L. appeared. The message indicated that B.L. was attempting to arrange to meet classmates, including a particular boy, after school to go to another location and that this was a violation of the rules of the Lierman household. The district court refused to admit this evidence as well, again on the basis of §§ 27-412 and 27-608(2).

(iii) Websites Accessed on Tablet Computer

A third offer of proof involved a tablet computer used by B.L. Law enforcement examined the tablet and determined that it was used on several occasions to access pornographic websites. The offer of proof also established that there was

no way to know who had accessed the websites, but Lierman argued that his trucking logs would have established that it was not him. The district court found that this evidence was not relevant, because it could not be established that B.L. was the person who accessed the websites, and that in any case, the evidence was inadmissible under § 27-412.

(iv) Unhappiness at Home and School

In a final offer of proof, Lierman asserted that if admitted, testimony from family members would show that B.L. was being bullied at school. In addition, this testimony would show that B.L. was unhappy at home because, as the prior incidents indicated, she had trouble following the rules of the household. The district court found that the matter of B.L.'s not liking or following the rules of the household to be irrelevant and in violation of § 27-608(2). As for the bullying at school, the district court concluded it was not relevant, because B.L. had changed schools by the time of the suicide attempt.

(c) Analysis

Lierman's argument on appeal with respect to these various pieces of evidence is that the State opened the door to B.L.'s credibility and that he was then permitted to cross-examine her with respect to these incidents. "Opening the door" is a rule of expanded relevancy which authorizes admitting evidence that would otherwise be irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.[15]

Lierman contends that the State opened the door to B.L.'s truthfulness in the following exchange between the State's attorney and B.L.:

> Q. Another thing, during the — those times you described and generally, those things you described with . . . Lierman and you, did . . . Lierman always call you by his own name — by your own name, rather?
>
> A. No.

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[15] *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

Q. Explain, please.

A. Yeah. Well, I have nicknames, I mean, like Nanna and stuff.

Q. Speak up.

A. Like Nanna. But when he got mad at me or I did something like lie about doing the dishes and I didn't do them, he would call me . . .

Q. What I'm talking about is . . . during the times sex things were going on, was there another name used?

Lierman additionally argues that the State opened the door by offering into evidence exhibit 201, which he identified as a letter written to Lierman from B.L., detailing B.L.'s unhappiness and the bullying she was facing at school.

In fact, exhibit 201 is a photograph of a piece of lined notebook paper that repeats the sentence, "I will respeck [sic] my mom and dad." This exhibit was initially offered, but the State acknowledged that it was done so in error and it was withdrawn, though it had been published to the jury. (The letter was not sent back with the jury during its deliberations.) The letter from B.L. to Lierman was actually exhibit 246, and it was offered into evidence. With the exception of the salutation and the signature, which B.L. said did not look like her handwriting, B.L. agreed that she wrote the letter.

Lierman argues only about the letter from B.L. to Lierman, not about the "respeck" lines. But the record shows that this letter was offered and admitted and that B.L. was questioned about it. As for the other incident—the questioning about B.L.'s lying about doing the dishes—such did not "open the door" to questions about B.L.'s credibility. B.L.'s answer appears to be born of not understanding the question asked of her, and the State immediately redirected her testimony. Moreover, the specific instances of B.L.'s misbehavior were not relevant to B.L.'s truthfulness, because as the district court noted, those instances are excludable as specific instances of misconduct, or at worst, attempting to impugn B.L. by implying that she was involved in risky sexualized behavior.

Because the State did not open the door to the evidence which Lierman argues is admissible, there is no merit to Lierman's second assignment of error.

3. Sufficiency of Evidence

(a) Standard of Review

[6] In reviewing a criminal conviction for 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 the 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.[16]

(b) Analysis

In his third assignment of error, Lierman assigns that the district court erred in finding that the evidence was sufficient to convict him. Lierman argues that without the evidence pertaining to the allegations made by B.L., "it is highly unlikely that [Lierman] would have been convicted. The evidence pertaining to the allegations made by B.L. was very weak with no real physical evidence present and frequently changing allegations by B.L. during the course of the case."[17] In addition, Lierman asserts that "[t]here [was] no specificity in [B.L.'s] responses" as to the dates of the alleged offenses and that such was necessary because the only distinction between many of the offenses was B.L.'s age at the relevant time.[18]

We find that the evidence was sufficient to support Lierman's convictions. B.L. testified that she was sexually assaulted by Lierman during the relevant time periods. This court does not

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[16] *State v. Thomas*, 303 Neb. 964, 932 N.W.2d 713 (2019).

[17] Brief for appellant at 44.

[18] *Id.*

reweigh that evidence. Lierman's assignment of error to the contrary is without merit.

4. Recusal

(a) Standard of Review

[7] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.[19]

(b) Analysis

In his fourth assignment of error, Lierman contends that the district court erred in not recusing itself because of an ex parte communication with the State and because it presided at a hearing regarding a grant of immunity given to Julie without giving Lierman notice.

[8-11] An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.[20] A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal.[21] A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[22] A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.[23]

The first motion to recuse, filed on January 29, 2016, details events from earlier that same day. It appears there was an issue

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[19] *Thompson v. Millard Pub. Sch. Dist. No. 17*, 302 Neb. 70, 921 N.W.2d 589 (2019).

[20] *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018).

[21] *Id.*

[22] *Thompson v. Millard Pub. Sch. Dist. No. 17, supra* note 19.

[23] *Id.*

surrounding the taking of B.L.'s deposition. One of the State's attorneys went to the district court's courtroom while the judge was on the bench regarding matters in unrelated cases. At the conclusion of those matters, but before the court had adjourned, the State's attorney indicated that the parties were having an issue with the deposition and sought a hearing. The district court then asked his staff to contact defense counsel to see whether a hearing could be set for later that day. Defense counsel refused to do so based on just the State's oral motion, then filed the recusal motion.

A hearing was held on this motion on February 1, 2016. At the hearing, the court declined to hear evidence, but instead explained the facts, as set forth above, and denied the motion. During the hearing, Lierman made an oral motion to recuse, which the court requested be filed as a written motion.

A second hearing on the motions to recuse was held on February 5, 2016. The operative motion at that hearing was the amended second motion to recuse, which sought the district court's recusal because the court had failed to give notice to Lierman that his wife, Julie, was being offered immunity for her testimony. Following that hearing, the district court denied the motion to recuse, reasoning that Lierman was not entitled to notice of any grant of immunity to Julie.

We turn first to the issue of B.L.'s deposition. The record indicates that the State, not the court, initiated the conversation and that the conversation pertained to scheduling a hearing. The court's response was to have defense counsel contacted about the issue. This is not an improper ex parte communication that would give rise to a need for a judge's recusal.[24]

Nor was there error with respect to the grant of immunity to Julie. The language of the relevant statute, Neb. Rev. Stat. § 29-2011.02 (Reissue 2016), and our case law interpreting that statute,[25] provides that because the Legislature "has given courts the power to immunize a witness solely upon the request

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[24] Neb. Rev. Code of Judicial Conduct § 5-302.9.

[25] *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013).

of the prosecutor, it is not a power the court can exercise upon the request of the defendant or upon its own initiative."[26] The court is not obligated under § 29-2011.02 to notify a defendant when the State offers a witness immunity. As such, the district court did not show bias or prejudice against Lierman by failing to provide notice to him.

To the extent that Lierman is suggesting that the hearing in which Julie was given immunity might have been considered an ex parte communication, this argument is also without merit. The hearing took place in a separately docketed case, in open court, and on the record. There is no merit to Lierman's fourth assignment of error.

5. Excessive Sentences

(a) Standard of Review

[12,13] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[27] 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 evidence.[28]

(b) Analysis

In his fifth assignment of error, Lierman contends that the district court's sentences were excessive. Lierman argues that he is obese and in poor health, with no record of prior sexual assault convictions, and that at his age, his sentence total of 70 to 140 years' imprisonment amounts to a life sentence.

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

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[26] *Id*. at 989, 840 N.W.2d at 514.

[27] *State v. Lee*, 304 Neb. 252, 934 N.W.2d 145 (2019).

[28] *Id*.

(8) the violence involved in the commission of the crime.[29] 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.[30]

We have reviewed Lierman's sentences and conclude that they were not excessive. Lierman was convicted of multiple counts of sexual assault of his adolescent daughter over a period of several years. The sentences were within statutory limits and were not an abuse of discretion. This assignment of error is without merit.

6. Subpoenas Duces Tecum

(a) Standard of Review

[14] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[31]

(b) Analysis

In his sixth assignment of error, Lierman assigns that the district court erred in quashing the subpoenas duces tecum served upon several witness set for deposition. Lierman argues that in addition to their testimony, he ought to be permitted to ask deponents to provide materials relevant to B.L.'s allegations. In quashing the subpoenas duces tecum, the district court found that there was no statutory authority for such a request in criminal cases and that the lack of this procedure did not violate the constitution. Lierman argues on appeal that he is "concerned with the possibility that one of the witnesses may have some information that the State does not request or does not hand over pursuant to discovery. In that respect, [Lierman] can not obtain such information."[32]

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[29] *Id.*

[30] *Id.*

[31] *Griffith v. Nebraska Dept. of Corr. Servs.*, 304 Neb. 287, 934 N.W.2d 169 (2019).

[32] Brief for appellant at 51.

No reciprocal discovery order had been sought in this case as of the time of the issuance of these subpoenas, but a *Brady*[33] notice was filed. Lierman concedes that he does not accuse the State of failing to hand over *Brady* material.

Neb. Rev. Stat. § 29-1917(1) (Reissue 2016) provides for the issuance of a deposition subpoena in a criminal case:

> (1) Except as provided in section 29-1926, at any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense. The court may order the taking of the deposition when it finds the testimony of the witness:
>
> (a) May be material or relevant to the issue to be determined at the trial of the offense; or
>
> (b) May be of assistance to the parties in the preparation of their respective cases.

Both § 29-1917(3) and Neb. Rev. Stat. § 29-1905 (Reissue 2016) similarly provide that the taking of the deposition of a witness "shall be governed in all respects as the taking of depositions in civil cases."

The general procedures to be used in issuing subpoenas in a civil case are set forth in Neb. Rev. Stat. § 25-1223 (Cum. Supp. 2018). Neb. Rev. Stat. § 25-1224(1) (Cum. Supp. 2018) provides:

> A subpoena commanding an individual to appear and testify at a trial or deposition may command that at the same time and place specified in the subpoena for the individual to appear and testify, the individual must produce designated documents, electronically stored information, or tangible things in the individual's possession, custody, or control. The scope of a command to produce documents, electronically stored information, or tangible

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[33] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

> things pursuant to this section is governed by the rules of discovery in civil cases.

This section, when considered with §§ 29-1905 and 29-1917, forms the basis of Lierman's argument on appeal that "[t]he proceedings in taking the deposition of a witness pursuant to this section and returning it to the court shall be governed in all respects as the taking of depositions in civil cases."[34] Lierman suggests that the ability to seek "designated documents, electronically stored information, or tangible things in the individual's possession, custody, or control" is part of the procedure referenced in §§ 29-1905 and 29-1917.

Section 25-1223 generally sets forth the procedure for the issuance of trial and deposition subpoenas. The power to specifically issue a subpoena duces tecum is the topic of § 25-1224. It is § 25-1224(1) which explicitly notes that "[t]he scope of a command to produce documents, electronically stored information, or tangible things pursuant to this section is governed by the rules of discovery in civil cases."

The crux of Lierman's argument is that a subpoena duces tecum allows him to obtain records that he might not otherwise have known existed. But even assuming that the subpoena duces tecum is available in criminal cases in Nebraska, it is not intended to be used as a "'fishing expedition.'"[35] Generally, documents sought in such a way are subject to a showing of relevance and admissibility, with requested documents identified with adequate specificity.[36] Nebraska's rules of civil discovery provide that "the designation of the materials to be produced pursuant to the subpoena shall be attached to or included in the notice."[37]

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[34] § 29-1917(3).

[35] *United States v. Nixon*, 418 U.S. 683, 700, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

[36] 2 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 10:9 (15th ed. 1998 & Cum. Supp. 2019-20) (collecting cases).

[37] Neb. Ct. R. Disc. § 6-330(C)(1) (rev. 2016).

As an initial matter, we lack a complete record on this issue. The record before this court generally shows that Lierman sought deposition testimony and documents, but, with a few exceptions, the record does not include the pertinent notices of deposition or otherwise identify the witnesses upon whom notices were served. Moreover, Lierman failed to explain below or on appeal what documents he would have requested that witnesses bring to their depositions or what documents he believes they might have had in their possession, custody, or control. But without this showing, Lierman's subpoenas amount to no more than an impermissible fishing expedition.

For these reasons, we find no error in the district court's quashing of the subpoenas duces tecum, and Lierman's assignment of error is without merit.

7. Ineffective Assistance of Counsel

(a) Standard of Review and Propositions of Law

[15] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[38]

[16] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[39] Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[40]

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[38] *State v. Lee, supra* note 27.

[39] *Id.*

[40] *Id.*

[17,18] In order to know whether the record is insufficient to address assertions on direct appeal that trial counsel was ineffective, appellate counsel must assign and argue deficiency with enough particularity (1) for an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) for a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.[41] When a claim of ineffective assistance of trial counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.[42]

(b) Analysis

In his final assignment of error, Lierman assigns that his trial counsel was ineffective by (1) failing to call certain witnesses, (2) not utilizing evidence of Lierman's driving logs to form an alibi defense, (3) failing to file a motion in limine to exclude evidence regarding B.L.'s difficulties at school and general unhappiness, (4) not objecting to the order in which the State presented its evidence, and (5) not objecting to the State's use of B.L.'s suicide attempts and ideation.

(i) Failure to Call Certain Witnesses

Lierman first assigns that his counsel was ineffective in failing to call two particular witnesses: Dr. Ashutosh Atri, a doctor at the hospital where B.L. was admitted following her suicide attempt, and Dr. Hugo Gonzalez, another doctor who would have testified that B.L. never reported a sexual assault to him. Lierman alleges Atri would have testified that B.L. indicated early in her stay she was not a victim of sexual assault, that she participated in family counseling sessions, and, further, that

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[41] *Id.*

[42] *Id.*

she made no allegations of sexual assault until she learned she might be discharged to go home soon.

There is nothing in the record to explain why counsel did not call Atri and Gonzalez. As such, we lack the record to determine this issue on direct appeal.

We additionally note that Lierman argues that his trial counsel was ineffective in failing to ask certain questions of B.L.'s aunt. But we need not consider that argument, because Lierman did not separately assign that failure as error.[43]

(ii) Driving Logs as Alibi Defense

Lierman argues that his trial counsel erred in not pursuing an alibi defense through the use of Lierman's driving logs, which were apparently created by Lierman himself. Lierman claims those logs would have shown that he was on the road during some of the "relevant dates."

There is nothing in the record to explain why counsel chose not to introduce these driving records. As such, we lack the record to determine this issue on direct appeal.

(iii) Failure to File Motion in Limine Regarding B.L.'s School and Home Difficulties

Lierman argues that trial counsel was ineffective in failing to file pretrial motions in limine regarding "evidence that would call into question the credibility of the State's witnesses."[44] Lierman contends that had trial counsel done so, counsel would have known what evidence would have been admissible versus inadmissible and would have been better prepared for trial.

Lierman has not sufficiently pled this allegation. He does not identify what evidence should have been subject to a motion in limine or which witness' credibility would have been

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[43] See *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018).

[44] Brief for appellant at 54.

challenged by that evidence. As such, we find that this allegation of deficient conduct has not been pled with the specificity necessary to avoid a future procedural bar.

(iv) Failure to Object to Order of State-Presented Evidence

Lierman next contends that his counsel was ineffective in failing to object to the order in which the State presented its evidence. Specifically, Lierman argues that at the § 27-414 hearing held prior to trial, the evidence of A.L.'s allegations was found by the trial court to be conditionally admissible dependent upon a showing of sufficient factual similarities and trial counsel should have objected when the State offered that evidence prior to showing those similarities. Lierman argues that "counsel should have objected to the sequence of the evidence being presented because the Court gave counsel the opportunity to force the State to produce evidence in another order than the one it was comfortable with."[45] We have a sufficient record to determine this issue on direct appeal, and we find that trial counsel was not ineffective.

First, we observe that Neb. Rev. Stat. § 29-2016 (Reissue 2016) sets forth the procedure that a trial court should follow in conducting a criminal trial. There is nothing in that section, nor does Lierman direct us to other law, that might suggest that a criminal defendant has any control, directly or otherwise, over the order in which the State presents its evidence.

Lierman suggests that he had the ability to dictate the sequence of the State's evidence had counsel objected and held the State to the district court's earlier order finding the State's § 27-414 evidence to be only conditionally admissible. But having reviewed the record as a whole, we conclude that the State made a sufficient showing as to the similarities between A.L.'s and B.L.'s allegations such that A.L.'s allegations

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[45] *Id.*

were admissible. As such, Lierman cannot show that counsel was ineffective.

(v) Failure to Object to State's Use of Lierman's Suicide Attempts

Finally, Lierman asserts that his trial counsel was ineffective for failing to object to the admission into evidence of Lierman's two suicide attempts. One attempt occurred during a standoff between him and law enforcement when he returned home from a trucking job to find that A.L. had accused him of sexual abuse. The second attempt occurred while he was in jail on those charges.

The record indicates that these issues were addressed at a pretrial hearing on Lierman's motions to suppress, in limine, and for a determination of relevancy. The trial court, in its order largely denying Lierman's motions, found that the events were relevant and were admissible as evidence of Lierman's consciousness of guilt. In particular, Lierman now argues that while suicide attempts might be probative of "'conscious guilt,'" they also speak toward "potential mental illness," and that thus, the admission of this evidence was more prejudicial than probative.[46]

An analysis under § 27-403 consists of a balancing test, which is left to the sound discretion of the trial court.[47] That balancing test provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[48]

We find that the district court did not abuse its discretion in admitting evidence of Lierman's suicide attempts and ideation. Both suicide attempts were made contemporaneous to A.L.'s

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[46] *Id.* at 55.

[47] See *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

[48] § 27-403. See *State v. Stubbendieck, supra* note 47.

allegations, one immediately prior to Lierman's arrest at a time when he was aware that he was about to arrested. The second attempt was made at the jail when Lierman was incarcerated after his arrest and immediately following a visit with members of his family.

It was not an abuse of discretion for the district court to conclude that Lierman's actions were probative of his guilt and that this outweighed any possible prejudice. We decline Lierman's invitation to conclude that a suicide attempt can never be probative of consciousness of guilt; indeed, the facts in this case show that these suicide attempts were probative of Lierman's consciousness of guilt.

Because the district court did not err in admitting the evidence, counsel was not ineffective for failing to object. There is no merit to Lierman's argument to the contrary.

V. CONCLUSION

The judgment and sentences of the district court are affirmed.

Affirmed.

Freudenberg, J., not participating.

Cassel, J., concurring.

I write separately only to address Lierman's argument, which he makes at least implicitly, that the scope of discovery and, in particular, the scope of a subpoena duces tecum in a criminal case is as broad as in a civil case. He is wrong.

Civil and criminal cases have different limitations upon when depositions may be taken. In civil cases, depositions may be taken without leave of court, except within 30 days of service of summons.[1] And there are exceptions to the 30-day limitation.[2] In criminal cases, however, leave of court is always required.[3] Although this statute was amended in 2019, the same

[1] See Neb. Ct. R. Disc. § 6-330 (rev. 2016).

[2] See *id*.

[3] See Neb. Rev. Stat. § 29-1917(1) (Supp. 2019).

requirement for leave existed at all relevant times in the prosecution against Lierman.[4]

Section 29-1917 limits the scope of a discovery deposition in a criminal case in two significant ways. First, only a "person other than the defendant who may be a witness in the trial of the offense" may be deposed.[5] In other words, if the person could not possibly be called as a witness at the trial in the criminal case, no deposition is permitted.

The second limitation is more significant. A court is permitted to order the taking of a deposition in a criminal case only if the witness' testimony "[m]ay be material or relevant to *the issue to be determined at the trial of the offense*" or "[m]ay be of assistance to the parties in the preparation of their respective cases."[6] In a criminal case, the elements of the charged crime or crimes define the issues.[7] Thus, a court may grant leave to take a criminal case deposition only where the testimony would be material or relevant to the existence or nonexistence of an element of a charged offense or where the testimony would assist a party in preparing its case.

In contrast, the scope of discovery in civil cases extends much further. Generally, in a civil case, parties may obtain discovery "regarding any matter, not privileged, which is relevant to the *subject matter involved* in the pending action."[8] Further, the rule adds, "It is not ground for objection that the information sought will be inadmissible at the trial if *the information sought appears reasonably calculated to lead to the discovery of admissible evidence*."[9] Obviously, the civil discovery rule articulates a much wider scope for inquiry than is permitted in a criminal case.

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[4] See § 29-1917 (Reissue 2016).

[5] § 29-1917(1).

[6] § 29-1917(1)(a) and (b) (emphasis supplied).

[7] See *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988).

[8] Neb. Ct. R. Disc. § 6-326(b)(1) (emphasis supplied).

[9] *Id.* (emphasis supplied).

Neither statute upon which Lierman relies expands the scope of depositions in criminal cases. He cites two criminal procedure statutes: § 29-1917 and Neb. Rev. Stat. § 29-1905 (Reissue 2016). In both instances, his reliance is misplaced.

First, he reads too much into § 29-1905, which states: "The proceedings in taking the examination of such [deposition] witness and returning it to court shall be governed in all respects as the taking of depositions in all civil cases." In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[10] The plain language of § 29-1905 applies the civil procedures to criminal cases only in "taking the examination" and "returning it to court." In the context of civil discovery depositions under § 6-330, the procedures of "taking" and "returning" would include subsections (c)[11] and (f).[12]

Second, the text of § 29-1905 predates discovery depositions in criminal cases. It was first enacted in 1873[13] and has not been amended since the 1943 codification.[14] The criminal case discovery statute, § 29-1917, in contrast, was initially adopted only in 1969.[15] Section 29-1905 simply does not speak to the scope of discovery permitted in a deposition in a criminal case.

Lierman's reliance on § 29-1917(3) fares no better. At the relevant times in the court below, this subsection stated only, "The proceedings in taking the deposition of a witness pursuant to this section and returning it to the court shall be

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[10] *State v. Jedlicka, ante* p. 52, 938 N.W.2d 854 (2020).

[11] § 6-330(c) ("Examination and Cross-Examination; Record of Examination; Oath; Objections").

[12] § 6-330(f) ("Certification and Delivery by Officer; Copies; Notice of Delivery").

[13] Gen. Stat. ch. 58, § 463, p. 825 (1873).

[14] See § 29-1905 (1943).

[15] See 1969 Neb. Laws, ch. 235, § 6, p. 870.

governed in all respects as the taking of depositions in civil cases."[16] This language, like § 29-1905, is limited to the "taking" and "returning" of the deposition. It addresses procedural steps rather than the scope of discovery. In 2019, the Legislature appended the words, "including section 25-1223."[17] This was apparently done in light of a substantial rewrite of Neb. Rev. Stat. § 25-1223 (Cum. Supp. 2018) in 2017.[18] The changes in § 25-1223 speak mainly to the "nuts and bolts" of the procedures for issuance, service, and return of a subpoena. And nothing in the 2019 amendment of § 29-1917 to include provisions from § 25-1223 regarding "taking" and "returning" a deposition suggests, let alone dictates, any intention to modify the scope of inquiry permitted in a deposition in a criminal case.

These statutes, taken as a whole, demonstrate the Legislature's understanding that the issues in a criminal case are always circumscribed by the elements of the crime or crimes with which a defendant is charged. And the differences in scope and procedure prevent discovery from being used in a "fishing expedition" or an attempt to confuse the issues. Thus, while I agree with the outcome of the court's decision, I would squarely reject Lierman's attempt to judicially expand the scope of discovery in criminal cases beyond that clearly articulated by the Legislature.

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[16] § 29-1917(3) (Reissue 2016).

[17] § 29-1917(3) (Supp. 2019).

[18] See 2017 Neb. Laws, L.B. 509, § 1.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Frank Hochstein and Bow Creek Valley, LLC, appellants, v. Cedar County Board of Adjustment and Mark and Carla Goeden, appellees.

940 N.W.2d 251

Filed March 20, 2020. No. S-19-459.

1. **Zoning: Courts: Appeal and Error.** In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Zoning: Ordinances.** The interpretation of a zoning ordinance presents a question of law.
4. **Zoning: Statutes: Ordinances: Appeal and Error.** When interpreting zoning regulations, an appellate court applies the same rules utilized in statutory interpretation.
5. **Zoning: Statutes: Ordinances.** Just as statutes relating to the same subject are in pari materia and should be construed together, a county's zoning regulations should be read and construed together.
6. **Zoning: Ordinances.** Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
7. ____: ____. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.

8. **Zoning: Ordinances: Intent.** Restrictions in zoning ordinances and regulations should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.
9. **Zoning: Statutes: Ordinances.** In interpreting definitions in zoning statutes or ordinances, the court cannot supply what the municipal legislative body might have provided but which the court cannot by reasonable construction say that it did provide.
10. **Zoning: Ordinances: Intent.** In interpreting the language of an ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body, in favor of the property owner and against any implied extension of the restriction.

Appeal from the District Court for Cedar County: Paul J. Vaughan, Judge. Affirmed.

Stephen D. Mossman, of Mattson Ricketts Law Firm, for appellants.

Mark D. Fitzgerald, of Fitzgerald, Vetter, Temple, Bartell & Henderson, for appellee Cedar County Board of Adjustment.

Jeffrey L. Hrouda for appellees Mark and Carla Goeden.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

A county board of adjustment affirmed the grant of a zoning permit for construction of a new residence within an agricultural intensive district. The district court affirmed. The ultimate issue is whether the proposed residence was a "non-Farm residence" under the zoning regulations. Construing the regulations as a whole and giving them a reasonable construction, we find no abuse of discretion or legal error. Therefore, we affirm the judgment.

BACKGROUND

Parties and Proceedings

Frank Hochstein and Bow Creek Valley, LLC (collectively Hochstein), operated a 4,500 animal unit feedlot within the "'A-1' Agricultural - Intensive District" (A-1 District) of Cedar County, Nebraska. Under the Cedar County zoning regulations, Hochstein's cattle feedlot fell within the definition of a livestock feeding operation (LFO). For an LFO the size of Hochstein's, the regulations specify a setback distance of 1 mile for a residence.

Mark and Carla Goeden are neighboring landowners of Hochstein. They are involved in an agricultural operation in Cedar County consisting of the ownership and use of approximately 900 acres of farmland. Of the 900 acres, 240 acres are located in one platted section, including both a quarter section of 160 acres at the north end and an adjoining 80-acre tract on the south end.

The Goedens submitted an application for a zoning permit, seeking a permit to construct a new house on the 80-acre tract at the south end of their 240-acre farm. The Cedar County zoning administrator approved the permit.

Two days later, Hochstein filed a notice of appeal of the zoning administrator's decision with the Cedar County Board of Adjustment (the board). Hochstein alleged that the Goedens' zoning permit was for a "non-farm residence" and that the zoning regulations provided that "[n]ew non-Farm residences" shall not be located "closer to existing LFO's than the setback distances for LFO's from existing residences on the matrix set out above." Hochstein asserted that the Goedens' proposed residence was located 3,300 feet from Hochstein's LFO, but that the required setback was 1 mile, or 5,280 feet. By a 4-to-1 vote, the board affirmed the zoning administrator's decision.

Ten days later, Hochstein filed a complaint in district court. Hochstein alleged that the board's decision was illegal and not supported by the evidence and therefore was arbitrary, unreasonable, or clearly wrong. The district court held a hearing and received the verbatim transcript of the board hearing, exhibits offered to the board, and the board's written resolution. One of the exhibits was the Cedar County zoning regulations.

Zoning Regulations

The structure of the zoning regulations impedes a clear recitation. The regulations are divided into topics, each identified by a topic phrase. Within a topic, sections are numbered. But the same section numbers are used under other topics within the regulations. We organize this summary to omit confusing references.

We will first recall the regulations' definitions, identifying undefined terms and quoting definitions of other terms. Then we will quote regulations governing an A-1 District. These will include sections covering intent and purpose, principal permitted uses, conditional uses, and setback requirements. Finally, we will quote the regulation for an A-1 District imposing a setback requirement for "[n]ew non-Farm residences"—the regulation at the heart of the dispute.

As we begin with definitions, we first note key terms which are *not* defined. The zoning regulations provide no definitions of "non-farm residence," "farm residence," and "residence." With respect to such undefined terms, the regulations dictate that "[w]ords or terms not herein defined shall have their ordinary meaning in relation to the context."

Turning now to defined terms, we progress from general to specific. First, "agriculture" is defined as

> the use of a tract of land for the growing of crops, pasturage, nursery, or the raising of poultry, including the structures necessary for carrying out farming operations, the residence or residences of those owning or operating

> the premises, a member of the family thereof, or persons employed thereon, and the family thereof, but such use shall not include feedlots.

Second, a "farm" means

> an are[a] containing at least forty (40) acres or more which is used for growing of the usual farm products such as vegetables, fruit, and grain, and storage on the area, as well as for the raising thereon of the usual farm poultry and farm animals up to 300 animal units as defined in these regulations[.]

Third, "agricultural operations" are defined as "[f]armsteads of forty acres or more that produce one thousand dollars ($1,000.00) or more of farm products each year." Finally, "agricultural and farm buildings and structures" are defined to mean

> any building or structure *that is necessary or incidental to the normal conduct o*[*f*] *a farm* including but not limited to residence of the operator, residence of hired men, barns, buildings and sheds for housing livestock, poultry and farm machinery, buildings for the storage or shelter of grain, hay and other crops, silos, windmills and water storage tanks.

(Emphasis supplied.)

Turning to zoning regulations addressing an A-1 District, we first quote the language explaining its intent and purpose:

> The [A-1 District] regulations are intended to provide for the use and conservation of agricultural land, to protect the value of such land, and to *protect it from indiscriminate residential and urban development and other incompatible and conflicting land uses*: to conserve and protect the value of open space, wooded areas, streams, mineral deposits and other natural resources and to protect them from incompatible land uses and to provide for their timely utilization; to provide for the location and govern the establishment and operation of land uses which are compatible with agriculture and are of such nature

> that their location away from residential, commercial and industrial areas is most desirable; to *provide for the location and govern the establishment of residential uses which are accessory to and necessary for the conduct of agriculture and to provide for the location and govern the establishment and use of limited non-agricultural residential uses*. Such non-agricultural residential uses shall not be so located as to be detrimental to our [sic] conflict with other uses which are named as permitted or conditional uses in this district and are appropriate to other property in the area. The nature of the A-1 District and the uses allowed out right [sic] or by conditional use precludes the provision of services, amenities and protection from other land uses which are afforded to residential uses by the regulations of other districts, and it is not intended that the A-1 District regulations afford such services, amenities and protection to residential; [sic] uses located therein.

(Emphasis supplied.)

The regulations for an A-1 District list "permitted principal uses." One such use is "[a]gricultural operations, and the usual agricultural and farm buildings and structures, including the residence of the owners and their families and any tenants and employees who are engaged in agricultural operations on the premises." Another is "[n]ew single family dwellings on lots of eighty (80) acres or more."

The A-1 District regulations also itemize conditional uses. Conditional uses are those which the governing body "may, by conditional use permit, authorize . . . subject to such conditions as the [g]overning [b]ody deems necessary." One such conditional use is "[n]ew single-family dwellings on lots no less than forty (40) acres, provided the Intensity of Use and all other requirements of this district are met."

The regulations contain a matrix with setback distances from existing residences and LFOs. Following the matrix, a regulation states in part, "The distance requirements may be

decreased or waived by a waiver signed by all of the property owners of non-farm residence or other residence not on the owner's property or LFOs within the distances specified."

The last regulation contained in the A-1 District section is a focal point of these proceedings. It states: "New non-Farm residences, as defined in these Regulations, shall be located no closer to existing LFO's than the setback distances for LFO's from existing residences on the matrix set out above." But, as noted above, "non-Farm residences" is not defined in the regulations.

District Court's Decision

The district court affirmed the board's decision. The court recognized that permitted uses in an A-1 District included "'farm buildings and structures, including the residence of the owners'" and "'new single family dwellings on lots of eighty (80) acres or more.'" It noted that the Goedens were the owners of farmland, including a 240-acre tract, and that their land qualified as an "Agricultural Operation" under the zoning regulations.

The court reasoned that "using the plain meaning of the terms, a 'non-Farm' residence would be a residence which was not located on a farm." But, the court observed, the proposed residence would be constructed on a farm. The court emphasized that the zoning regulations specifically permitted as principal uses the residence of the owners and new single family dwellings on lots of 80 acres or more. It reasoned that "the only new residences subject to the setback requirements are non-Farm residences." The court concluded:

> The Goeden building permit is consistent with the overall manifest intention of the Cedar County Supervisors to protect agriculture. The residences of farmers, operators or mere landlords, are permitted principal uses in the district while the interests of a conditional use LFO are subordinated to farmer residences but protected to some degree by non-farm residences.

Hochstein filed a timely appeal, which we moved to our docket.[1]

ASSIGNMENTS OF ERROR

Hochstein alleges that the court erred in (1) interpreting the zoning regulations in determining whether the proposed residence qualified as a "non-farm residence," (2) finding the proposed residence was consistent with the intent of the zoning regulations, (3) affirming the decision of the board, and (4) finding the decision of the board was not arbitrary, unreasonable, or clearly wrong.

STANDARD OF REVIEW

[1] In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law.[2]

[2] An appellate court independently reviews questions of law decided by a lower court.[3]

ANALYSIS

[3] Although Hochstein makes four assignments of error, all ultimately rest upon a single contention—that the Goedens' new residence was not a "farm residence," or stated conversely, that it was a "non-farm residence." At oral argument, all of the parties characterized the question before us as one of law. We agree. The interpretation of a zoning ordinance presents a question of law.[4]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[2] *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014).

[3] *Drought v. Marsh*, 304 Neb. 860, 937 N.W.2d 229 (2020).

[4] *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991).

Before turning to Hochstein's points of emphasis and the Goedens' and the board's respective responses, we recall governing principles of law.

Governing Principles of Law

[4-6] One principle establishes a framework for interpretation: When interpreting zoning regulations, an appellate court applies the same rules utilized in statutory interpretation.[5] Just as statutes relating to the same subject are in pari materia and should be construed together,[6] a county's zoning regulations should be read and construed together. Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.[7] Nebraska's appellate courts have long followed this principle.[8]

[7] Another principle guides our understanding of specific words: Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.[9] The rule also enjoys a long pedigree.[10]

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[5] See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002).

[6] See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[7] *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment, supra* note 2.

[8] See, *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989); *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985); *City of Beatrice v. Goodenkauf*, 219 Neb. 756, 366 N.W.2d 411 (1985); *Beckman v. City of Grand Island*, 182 Neb. 840, 157 N.W.2d 769 (1968); *Thieman v. Cedar Valley Feeding Co.*, 18 Neb. App. 302, 789 N.W.2d 714 (2010).

[9] *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment, supra* note 2.

[10] See, *Mossman v. City of Columbus, supra* note 8; *City of Lincoln v. Bruce, supra* note 8; *City of Beatrice v. Goodenkauf, supra* note 8; *State v. Smiley*, 182 Neb. 211, 153 N.W.2d 906 (1967); *Henke v. Zimmer*, 158 Neb. 697, 64 N.W.2d 458 (1954); *Thieman v. Cedar Valley Feeding Co., supra* note 8.

[8-10] Several principles naturally follow. Restrictions in zoning ordinances and regulations should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.[11] In interpreting definitions in zoning statutes or ordinances, the court cannot supply what the municipal legislative body might have provided but which the court cannot by reasonable construction say that it did provide.[12] Thus, in interpreting the language of an ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body, in favor of the property owner and against any implied extension of the restriction.[13]

Application

Three things are indisputable: The Goedens' proposed building site is located on a "farm," they are the owners of that farm, and that farm constitutes an "agricultural operation[]." As we quoted more fully above, the regulations define "farm" as an "are[a] containing at least forty (40) acres or more which is used for growing of the usual farm products such as . . . grain." Hochstein does not dispute that the Goedens own the tract of land, that it is at least 40 acres in size, and that it is used for the growing of corn and soybeans, which are "grain[s]." Thus, it is a farm. Similarly, the farm fits the definition of an "agricultural operation[]," as it is a farmstead of 40 acres or more that produces $1,000 or more of farm products annually.

From an affidavit the Goedens submitted to the board, Hochstein draws a conclusion and emphasizes a fact. First,

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[11] *Beckman v. City of Grand Island, supra* note 8.

[12] *Id*.

[13] *Mossman v. City of Columbus, supra* note 8; *Beckman v. City of Grand Island, supra* note 8; *Dowd Grain Co. v. County of Sarpy Bd. of Adj.*, No. A-06-681, 2008 WL 2511150 (Neb. App. June 24, 2008) (selected for posting to court website).

Hochstein asserts, since 2007, "the Goedens have not *farmed* this tract," but instead have "cash leased" it to another corporate entity.[14] In the affidavit, the Goedens assert continuing involvement in the production of grain on the 240-acre farm. Specifically, they state: "In 2007, [they] engaged the services of [a corporate entity] to produce agricultural products on the Farm on a year to year basis. [The Goedens] maintain a supervisory role in the active production of the crops associated with the Farm." Second, Hochstein emphasizes that the Goedens' personal care and raising of pheasants and 11 head of livestock takes place on another site located approximately 3 miles east of the 240-acre farm.

As the board points out, Hochstein at least implicitly argues that because the definition of "agricultural and farm buildings and structures" includes the phrase "residence of the operator," an *owner's* residence is excluded. But this argument ignores the words "but not limited to" following the word "including."

Hochstein explicitly argues, quoting from the definition of "agricultural and farm buildings and structures," that the proposed residence is not "necessary or incidental to the normal conduct o[f] a farm." According to Hochstein, building a new residence is not "necessary" for the Goedens to "sign a lease or cash a rent check."[15] Likewise, Hochstein asserts, it is not "necessary" for the Goedens to construct a residence "over three miles east" of the location where they raise pheasants and 11 head of livestock.[16]

But Hochstein's initial brief ignored the words "incidental to"—the regulation's disjunctive alternative to "necessary." The definition required the board to consider whether the Goedens' proposed residence was "necessary *or incidental to* the normal conduct o[f] a farm." (Emphasis supplied.) In ordinary usage,

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[14] Brief for appellant at 10 (emphasis supplied).

[15] *Id.*

[16] *Id.*

"incidental to" means "liable to happen to" or "to which a thing is liable or exposed."[17] A definition of "incidental" is "being likely to ensue as a chance or minor consequence."[18]

Both the Goedens and the board point to the A-1 District permitted principal uses, emphasizing that the regulations endorse the "residence of the owners" as a permitted use. The Goedens' proposed residence falls within both of the permitted principal uses quoted above. It is difficult to understand how a permitted principal use in the A-1 District is not at least a use "incidental to" the normal conduct of a farm.

And Hochstein's reply brief merely proclaims that "the use of the [Goedens'] residence is not in any way incidental to agricultural operations."[19] Hochstein does not explain why this is so. Presumably, this argument rests upon the characterization of the Goedens' relationship with the other corporate entity as a cash lease and the Goedens' use of their other farm approximately 3 miles east of the 240-acre farm. Neither is dispositive. We reject Hochstein's notion that the Goedens' residence would not be "incidental to" their 240-acre farm.

To bolster the argument, Hochstein relies upon snippets from the section explaining the intent and purpose of the A-1 District regulations. Those snippets are emphasized in the full quotation of the section above. But we agree with the Goedens and the board that the zoning regulations must be read and construed together. In doing so, we give them a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. The regulations define "agriculture" as "the use of a tract of land for the growing of crops, . . .

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[17] "Incidental to," Oxford English Dictionary Online, http://www.oed.com/view/Entry/93467 (last visited Mar. 16, 2020).

[18] Merriam-Webster's Collegiate Dictionary 629 (11th ed. 2014).

[19] Reply brief for appellant at 2.

including the structures necessary for carrying out farming operations, the residence or residences of those owning or operating the premises, a member of the family thereof, or persons employed thereon, and the family thereof." The Goedens own the 240-acre tract, and their proposed residence falls within that definition.

CONCLUSION

Ultimately, the question is whether the Goedens' new residence is a "non-Farm residence" under the last section of the A-1 District regulations. Construing the zoning regulations as a whole, we hold that it is not. Although the last section of the A-1 District topic could have prohibited the construction of *all* new residences within the distance prescribed by the setback matrix, it did not do so. Because we find no abuse of discretion or legal error by the district court, we affirm its judgment.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. John E. Thelen, appellant.

940 N.W.2d 259

Filed March 20, 2020. No. S-19-604.

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. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.

7. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
8. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
9. **Statutes: Appeal and Error.** An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.
10. **Criminal Law: Statutes.** While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
11. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
12. **Highways: Words and Phrases.** A "public road" in Neb. Rev. Stat. § 39-301 (Reissue 2016) includes the entire area within the county's right-of-way.

Appeal from the District Court for Cedar County, Paul J. Vaughan, Judge, on appeal thereto from the County Court for Cedar County, Douglas L. Luebe, Judge. Judgment of District Court affirmed.

Bradley C. Easland, of Egley, Fullner, Montag, Morland & Easland, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The defendant landowner appeals from criminal misdemeanor convictions for violating Neb. Rev. Stat. § 39-301 (Reissue 2016), by repeatedly erecting an electric fence approximately 3 feet from the edge of a county gravel roadway and within the county's right-of-way that extends into the ditch. The central question is whether a county's right-of-way extending into a ditch along a county roadway is a "public road" for purposes of § 39-301.

BACKGROUND

In September 2016, John E. Thelen was charged with three counts of obstructing a public road in violation of § 39-301, based on repeated instances of erecting an electric fence within the ditch right-of-way of Cedar County, Nebraska (County), alongside a county road. Count I alleged that Thelen obstructed a public road on August 31, count II alleged that he obstructed a public road on September 6, and count III alleged that Thelen obstructed a public road on September 13. The pertinent language of § 39-301 provides, "Any person who . . . obstructs a public road . . . by encroaching upon the same with any fence . . . shall, upon conviction thereof, be guilty of a Class V misdemeanor . . . ." The complaint alleged that the County had incurred a total cost of approximately $400 in removing the obstructions.

A bench trial was held on stipulated evidence. The evidence was undisputed that the Cedar County Board of Commissioners (Board) had established pursuant to Neb. Rev. Stat. § 39-1702 (Reissue 2016) that the County's public roads' rights-of-way are 66 feet, measured from the centerline of the roadway on each side to a 33-foot distance to the ditch on each side. It was also undisputed that the County controls a public road running along the south side of Thelen's property and controls, maintains, and is responsible for its 66-foot right-of-way.

Both the County's highway superintendent, Carla Schmidt, and the chairman of the Board, David McGregor, averred that

since 2013, Thelen has continuously and repeatedly placed a fence within the County's right-of-way and has refused to voluntarily remove his fence after being given reasonable notice to do so.

According to Schmidt, for purposes of moving his cattle from one pasture to another, Thelen regularly placed his fence in the County's ditch right-of-way beginning in June and removed it in October or November. Schmidt noted that the fence had been repeatedly placed a mere 16½ feet from the roadway centerline.

McGregor averred that it was the County's duty to keep its public roads' rights-of-way free of debris, crops, fences, or any other obstructions. McGregor described that such obstructions presented a safety issue and that the County would subject itself to the loss of its tort liability insurance coverage if it failed to keep its ditches free of obstructions.

Schmidt similarly averred that the fences repeatedly placed by Thelen in the County's right-of-way endangered the traveling public and created liability for the County for the failure to comply with its statutory duty under § 39-301 to remove road obstacles.

According to Schmidt's and McGregor's affidavits, the County gave Thelen notices in August and October 2013 to remove his fence from the ditch right-of-way and he refused to comply. Instead, Thelen complained that other people in the County similarly obstructed the County's rights-of-way. Thelen sent a letter through his attorney requesting permission to place his fence in the County's right-of-way from June through October. In the letter, attached to Schmidt's affidavit, Thelen asserted that if his fence is removed by the County, his cattle would stray onto the roadway. The Board denied Thelen's request in October 2013.

Schmidt and McGregor both stated that, again, in March 2014, Thelen placed a newly erected fence in the right-of-way and refused to remove it after notice was given. Schmidt's affidavit, as well as other exhibits entered into evidence in

the 2016 actions, demonstrate that in September 2014, Thelen appeared before the Board at a regularly conducted meeting and the Board again denied Thelen's request for permission to erect a fence within the County's right-of-way.

In 2015, Thelen was found guilty of violating § 39-301 for erecting in July 2015 the same type of fence at the same location as alleged in the 2016 criminal complaint leading to the misdemeanor convictions presently on appeal. In its 2015 order, the county court found that the County's ditch right-of-way was encompassed by the term "public road." Further, the court explained that the law does not recognize as a defense the fact that others are violating the same law.

Thereafter, in September 2015, according to Schmidt and McGregor, Thelen placed his fence anew in the County's right-of-way. However, no additional criminal charges were filed against Thelen by the State in 2015 regarding the fence.

Chief Deputy Sheriff Chad Claussen averred that in 2016, he investigated the scene on July 18 and 21 and ascertained that Thelen had again erected an electric fence along the county road and in the County's right-of-way, which Thelen had previously been advised not to do. The fence was located approximately 16 to 31 feet from the centerline. The County gave notice to Thelen on July 26, directing him to remove the fence.

Claussen averred that on August 31, 2016, he again investigated the scene and found the fence still present. According to a report, the fence was no longer standing but was lying in the ditch right-of-way. Claussen seized as evidence approximately 1,500 feet of electric fence wire, 50 posts, and 68 electric fence insulators belonging to Thelen.

During the seizure, Thelen approached Claussen and "complained about the situation." When Claussen suggested that Thelen place the fence on his own property and outside of the right-of-way, Thelen advised Claussen that a prior county commissioner had given him permission to erect the fence there and that the new county commissioner, who he believed would

be elected in an upcoming election, would give him permission to do so in the future.

When Claussen attempted to give Thelen a receipt for the seized fence, however, he refused to take it, saying that "it was not his fence." Claussen left the receipt on a fencepost. The Cedar County Attorney averred that on September 1, 2016, Thelen came to his office requesting that the sheriff's office "return to him the fence seized" by Claussen on August 31.

Claussen averred that on September 4, 2016, he found that Thelen had erected another fence at the same location. He removed the fence and seized as evidence approximately 1,500 feet of single strand electric fence wire, 40 steel posts, and 40 electric fence insulators, which Claussen averred belonged to Thelen.

On September 13, 2016, Claussen observed that yet another fence had been erected in the same location. Claussen seized approximately 1,500 feet of single strand electric fence wire and an insulated gate belonging to Thelen.

According to McGregor, in July, August, and September 2016, the County received citizen complaints that Thelen was placing his fence in the County's ditch right-of-way, which led to Claussen's investigations. Schmidt summarized in her affidavit that in the spring of 2016, Thelen placed his fence in the County's right-of-way. Further, from July 2016 to the date of the affidavit, December 2016, Thelen had placed his fence in the County's right-of-way on three separate occasions and, each time, the County had removed the fence. According to Schmidt, Thelen "has indicated that he will continue to disregard my notices in the future because the fine is only $25.00, indicating cheap pasture rent."

The stipulated exhibits also included reports by Claussen and a deputy sheriff, describing their observations of the electric fence in the aforementioned right-of-way on August 31 and on September 4, 6, and 13, 2016. The deputy sheriff described that on September 4, he observed the "single strand hotwire" fence along the road approximately 3 feet from where the

gravel started, with multiple cows inside the fence. The affidavits and reports described the removal of the fence by county employees on September 6, as well as the removal on August 31 and September 13 of fencing that had been left lying in the ditch right-of-way.

Thelen submitted an affidavit in which he described the incident on September 1, 2016, when he went to the Cedar County Attorney's office to ask that the fencing materials taken be returned to him, because "my name was on the receipt." Thelen recounted that he had told both Claussen and the Cedar County Attorney that the materials were not his. Thelen did not, however, aver that the fencing materials were not his.

Finally, an exhibit entered into evidence by stipulation reflects $401 in labor costs by the County's road department for removal of fencing on August 31 and September 6, 2016, and for picking up wire in the ditch on September 13.

In August 2017, the county court convicted Thelen of three counts of violating § 39-301. Thelen was fined $100 for each violation. Thelen appealed to the district court, which, on May 22, 2019, affirmed the county court's judgment. Thelen appeals.

ASSIGNMENTS OF ERROR

Thelen assigns that the county court erred in finding him guilty of the crimes charged because (1) there was insufficient evidence presented to prove that he was the individual who placed the electric fence in the ditch and (2) the placement of an electric fence in a ditch does not violate § 39-301. Thelen assigns that for these same reasons, the district court erred in affirming the county court's judgment.

STANDARD OF REVIEW

[1] 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.[1]

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

[2] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[2]

[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, capricious, nor unreasonable.[3]

[4] We independently review questions of law in appeals from the county court.[4]

[5] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[5]

[6] In reviewing a criminal conviction for 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.[6] 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.[7]

[7] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[8]

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *State v. McCurdy*, 301 Neb. 343, 918 N.W.2d 292 (2018).

[7] *Id.*

[8] *Saylor v. State*, 304 Neb. 779, 936 N.W.2d 924 (2020).

ANALYSIS

Thelen asserts that the County's ditch right-of-way alongside the county roadway does not constitute a "public road" for purposes of § 39-301. He does not contest that an electric fence is a "fence" constituting an obstruction under the statute. He does, however, argue that the evidence was insufficient to find that he erected the fences in question.

Is Ditch Part of Public Road for Purposes of § 39-301?

The question of whether a ditch right-of-way is part of a "public road" for purposes of § 39-301 is a question of statutory interpretation. Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[9]

[8-10] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.[10] An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.[11] While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[12]

Chapter 39, article 3, of the Nebraska Revised Statutes sets forth duties, rules, and penalties related to the safety and maintenance of "roads" and, to a lesser extent, "highways." Section

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[9] *Id*.

[10] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[11] *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

[12] *State v. Stanko*, 304 Neb. 675, 936 N.W.2d 353 (2019).

39-301, the statute directly at issue in these appeals, provides in relevant part:

> Any person who injures or obstructs a *public road* by felling a tree or trees in, upon, or across the same, by placing or leaving any other obstruction thereon, by encroaching upon the same with any fence, by plowing or digging any ditch or other opening thereon, by diverting water onto or across such road so as to saturate, wash, or impair the maintenance, construction, or passability of such public road, or by allowing water to accumulate on the *roadway or traveled surface of the road* or who leaves the cutting of any hedge thereupon for more than five days shall, upon conviction thereof, be guilty of a Class V misdemeanor and, in case of placing any obstruction on the road, be charged an additional sum of not exceeding three dollars per day for every day he or she allows such obstruction to remain after being ordered to remove the same by the road overseer or other officer in charge of road work in the area where such obstruction is located, complaint to be made by any person feeling aggrieved.
>
> This section shall not apply to any person who lawfully fells any tree for use and will immediately remove the same out of the road nor to any person through whose land a public road may pass who desires to drain such land and gives due notice of such intention to the road overseer or other officer in charge of road work nor when damage has been caused by a mechanical malfunction of any irrigation equipment, when a sprinkler irrigation system had been set so that under normal weather conditions no water would have been placed upon *the right-of-way of any road*, when the county board grants permission for the landowner to divert water from one area to another along a *county highway right-of-way*, or when a municipality has granted permission along or across the *right-of-way under its jurisdiction*, except that if damage has been caused by a mechanical malfunction of irrigation

> equipment more than two times in one calendar year, the penalty provided in this section shall apply.

(Emphasis supplied.) Neb. Rev. Stat. § 39-304 (Reissue 2016) provides that "[a]ny person who willfully and maliciously injures any lawful public road in this state . . . shall, for every such offense, be guilty of a Class V misdemeanor . . . ."

Neb. Rev. Stat. § 39-310 (Reissue 2016), which refers to depositing materials on "public road[s]" or inside the "ditches of such road," provides:

> Any person who deposits any wood, stone, or other kind of material on any part of any lawful public road in this state, inside of the ditches of such road, or outside of the ditches but so near thereto as to cause the banks thereof to break into the same, causes the accumulation of rubbish, or causes any kind of obstruction, shall be guilty of (1) a Class III misdemeanor for the first offense, (2) a Class II misdemeanor for the second offense, and (3) a Class I misdemeanor for the third or subsequent offense.

Neb. Rev. Stat. § 39-311 (Reissue 2016) is a similar, but more extensive, provision related to depositing materials on "highway[s]."

On its face, § 39-301 clearly distinguishes between a "roadway," which is the "traveled surface of the road," and the "road," which is something greater than the "roadway." Section 39-310 clearly includes ditches as part of the "road." Section 39-301 also makes several references to the "right-of-way," describing the right-of-way "of any road," and states that a person does not violate the statute when a sprinkler irrigation system was set so that under normal weather conditions no water would have been placed upon the right-of-way of any road or by diverting water along or across a right-of-way with permission of "the county board [or] municipality."

Neb. Rev. Stat. § 39-101(11) (Reissue 2016) defines "[r]oadway" as that "portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm

or shoulder." "Shoulder," in turn, is defined in § 39-101(12) as that "part of the highway contiguous to the roadway and designed for the accommodation of stopped vehicles, for emergency use, and for lateral support of the base and surface courses of the roadway." There is no statutory definition of a "berm."

[11] The terms "road" and "public road" are not defined in chapter 39, article 1, of the Nebraska Revised Statutes. But components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[13] We have accordingly found it appropriate to consider in pari materia different articles in the same chapter, when they concern related matters.[14]

"Road" is defined in Neb. Rev. Stat. § 39-1302(32) (Reissue 2016), in chapter 39, article 13, relating to the state highway system, and expressly includes "the entire area within the right-of-way": "Road shall mean a public way for the purposes of vehicular travel, including the entire area within the right-of-way. A road designated as part of the state highway system may be called a highway, while a road in an urban area may be called a street."

This definition of "road" as including the entire area within the right-of-way is consistent with numerous other statutes in chapter 39. Section 39-1702(2) provides that the right-of-way for "[c]ounty road purposes" "shall be of such width as is deemed necessary by the county board," and it specifically

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[13] *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012). See, also, *Farmers Co-op v.* State, 296 Neb. 347, 893 N.W.2d 728 (2017), *modified on denial of rehearing* 297 Neb. 132, 898 N.W.2d 674; *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

[14] See, *Cookson v. Ramge*, 299 Neb. 128, 907 N.W.2d 296 (2018); *In re Application of Tail, Tail v. Olson,* 144 Neb. 820, 14 N.W.2d 840 (1944); *Greb v. Hansen*, 123 Neb. 426, 243 N.W. 278 (1932); *Brown Real Estate Co. v. Lancaster County*, 108 Neb. 514, 188 N.W. 247 (1922).

described the "right-of-way for such roads," providing in relevant part:

> County road purposes, as referred to in subsection (1) of this section, shall include provisions for, but shall not be limited to, the following: (a) The establishment, construction, reconstruction, relocation, improvement, or maintenance of any county road. *The right-of-way for such roads shall be of such width as is deemed necessary by the county board* . . . .

(Emphasis supplied.)

A "highway" under chapter 39 is just one form of a "road," and it is also consistently described as including the right-of-way. "Highway" is defined by § 39-101(3) as "*the entire width between the boundary limits* of any street, road, avenue, boulevard, or way which is publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." (Emphasis supplied.) Section 39-1302(22), which contains extensive provisions relating to the creation and maintenance of the state highway system, similarly defines "[h]ighway" as "a road or street, *including the entire area within the right-of-way*, which has been designated a part of the state highway system." (Emphasis supplied.)

"State highway system" is defined in § 39-1302(37) as

> the roads, streets, and highways shown on the map provided for in section 39-1311 as forming a group of highway transportation lines for which the [Nebraska Department of Transportation] shall be the primary authority. The state highway system *shall include, but not be limited to, rights-of-way*, connecting links, drainage facilities, and the bridges, appurtenances, easements, and structures used in conjunction with such roads, streets, and highways.

(Emphasis supplied.) In § 39-1302(31), "[r]ight-of-way shall mean land, property, or interest therein, usually in a strip, acquired for or *devoted to a road, street, or highway*." (Emphasis supplied.)

The "entire area" within the right-of-way is similarly included in the definitions in § 39-1302 of "[h]ighway" and "[s]treet" for purposes of cities of the metropolitan class. Under Neb. Rev. Stat. § 14-384(7) (Reissue 2012), pertaining to "highways" and "streets" in cities of the metropolitan class, "[h]ighway shall mean a road or street *including the entire area within the right-of-way* which has been designated a part of the State Highway System by appropriate authority," and under § 14-384(9), "[s]treet shall mean a public way for the purpose of vehicular and pedestrian travel in the city and *shall include the entire area within the right-of-way*." (Emphasis supplied.)

Under Neb. Rev. Stat. § 39-1309(3) (Reissue 2016), "highways" that are not part of the state highway system are part of the "county road system," with title "to the right-of-way *of such roads*" vesting with the county:

> Any highways not designated as a part of the state highway system as provided by sections 39-1301 to 39-1362 and 39-1393 shall be a part of the county road system, and the title to *the right-of-way of such roads* shall vest in the counties in which the roads are located.

(Emphasis supplied.)

The statutes pertaining to the county road system do not otherwise elaborate on county rights-of-way. Pertaining to the state highway system, however, Neb. Rev. Stat. § 39-1359 (Reissue 2016) describes rights-of-way acquired by the Department of Transportation as "inviolate for state highway and departmental purposes" and, with limited statutory exceptions or unless with written consent of the Department of Transportation, prohibits any "physical or functional encroachments, structures, or uses" within the right-of-way limits. Neb. Rev. Stat. § 39-1360 (Reissue 2016) provides that "[n]o person may use the drainage facilities of a highway for private purposes without first obtaining the written consent of the [Department of Transportation]."

[12] All these provisions in chapter 39 illustrate that a "road" includes the right-of-way, which cannot be obstructed

without express permission. Consistent with § 39-1302(32) and numerous other statutes in chapter 39, we hold that a "public road" in § 39-301 includes the entire area within the county's right-of-way. The object sought to be accomplished by § 39-301 is the maintenance for the public safety of the "road," the boundaries of which are designated by the county through its acquisition of the right-of-way. Thus, the area of the ditch here at issue, which was within the county's right-of-way, was part of the "public road" for purposes of § 39-301.

Did Thelen Erect the Fences?

Having determined that the area in question was a "public road," we address Thelen's contention that there was insufficient evidence for the trier of fact to conclude that he was responsible for erecting the fences obstructing the public road. 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.[15] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[16] 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.[17] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[18]

In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial,

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[15] *State v. McCave, supra* note 1.

[16] *Id.*

[17] *Id.*

[18] *Id.*

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.[19] 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.[20]

The evidence was sufficient to support the county court's finding that Thelen erected the fences or left them lying in the ditch right-of-way. The right-of-way in question adjoined Thelen's land, and Thelen repeatedly described that he used a fence there for his cattle. At least twice, Thelen expressly sought permission to erect a fence on the land in question. He was convicted of violating § 39-301 for erecting a fence on the same land the year prior to the violations at issue in this appeal. He indicated to Schmidt that he intended to keep erecting a fence there. Thelen asked for the return of fencing materials confiscated from the ditch right-of-way by law enforcement.

This evidence might be considered circumstantial evidence, which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.[21] As Thelen points out, there is no evidence that anyone observed Thelen erect the fence, nor is there a clear direct admission by Thelen. But a fact proved by circumstantial evidence is nonetheless a proven fact.[22] Circumstantial evidence is not inherently less probative than direct evidence.[23] We find the evidence sufficient to support the convictions in the criminal case of three counts of violating § 39-301.

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[19] *State v. McCurdy, supra* note 6.

[20] *Id.*

[21] See *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140 (1994).

[22] *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[23] *Id.*

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court affirming the judgment and convictions of the county court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

County of Cedar, Nebraska, a body politic and corporate, appellee, v. John E. Thelen, appellant.

940 N.W.2d 521

Filed March 20, 2020. No. S-19-605.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Injunction.** An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. **Trespass: Injunction: Equity.** In trespass cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.
6. **Injunction: Municipal Corporations: Statutes: Ordinances.** Evidence of a violation of a valid statute or ordinance is sufficient to warrant the issuance of a permanent injunction to a municipality or public entity seeking to prevent further violations.
7. **Municipal Corporations: Ordinances: Public Health and Welfare: Presumptions.** Irreparable harm to public rights, property, or welfare is presumed to result from actions which by municipal ordinance have been declared unlawful.
8. **Criminal Law: Injunction: Equity.** Where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction to prevent their commission, as courts of

equity will not exercise their power for the purpose of enforcing criminal laws.

9. ____: ____: ____. Because equity, as a general rule, has no criminal jurisdiction, equity will not interfere to punish crime. Something more than a violation of the law is required to justify the exercise of equity's powers.
10. **Injunction: Statutes: Ordinances: Public Health and Welfare.** A permanent injunction against repetitive unlawful violations of statutes or ordinances is not a form of punishment for what has been done, but the prevention of future irreparable harm to public rights, property, or welfare.
11. **Injunction: Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity, and a remedy at law is not adequate if the situation requires and the law permits preventative relief against the repetition and continuance of wrongful acts.
12. **Injunction: Equity: Nuisances.** A court of equity may, at the instance of properly constituted authority, issue an injunction in the case of a public nuisance, when its issuance will give more complete relief than can be afforded in a court of law.
13. **Injunction: Statutes: Public Health and Welfare: Nuisances.** An injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance.
14. **Criminal Law: Equity: Statutes.** The rule that equity will not interfere to enforce criminal law, which ordinarily provides an adequate remedy at law, does not have the force of denying such a remedy in the prevention of public wrongs arising out of either continuous or repeated violations of a penalty statute which harmfully affects the interests of the public.
15. **Criminal Law: Equity: Statutes: Public Health and Welfare.** There is a well-recognized exception to the general rule that enforcement of criminal laws provides an adequate remedy, namely, that where a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, at the instance of properly constituted authorities, afford relief by injunction in order to protect the public welfare.
16. **Criminal Law: Injunction: Equity.** A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution.

17. **Legislature: Intent: Highways: Public Health and Welfare.** The clear legislative intent in the regulatory scheme governing public roads, and in Neb. Rev. Stat. § 39-301 (Reissue 2016) specifically, is the protection of the public who use those roads.
18. **Criminal Law: Legislature: Highways: Public Health and Welfare.** It is in the interest of the public to prevent obstructions of the public roads, both for their maintenance and more direct safety, and the mere fact that the Legislature has enacted a criminal law addressing the subject does not mean that the subject matter is preempted.

Appeal from the District Court for Cedar County: Paul J. Vaughan, Judge. Affirmed.

Bradley C. Easland, of Egley, Fullner, Montag, Morland & Easland, P.C., for appellant.

Mark D. Fitzgerald, of Fitzgerald, Vetter, Temple, Bartell & Henderson, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

A landowner appeals from an order in a civil action granting a permanent injunction against encroaching on the public road right-of-way 33 feet in either direction from the centerline, including those road ditches within that distance from the centerline, by erecting or placing fences or by placing or leaving any type of obstruction or obstacle thereon, or by causing another to do these actions. The central question in this appeal is whether criminal misdemeanor proceedings provide an adequate remedy at law, which render injunctive relief improper.

BACKGROUND

The civil complaint for a permanent injunction in this case was brought at the same time as a criminal complaint charging

John E. Thelen with three counts of obstructing a public road in violation of Neb. Rev. Stat. § 39-301 (Reissue 2016), based on repeated instances of erecting an electric fence within the ditch right-of-way of Cedar County, Nebraska (County), alongside a county road. Thelen was ultimately convicted of three misdemeanors for re-erecting the same fence in the same location on August 31 and September 6 and 13, 2016. In *State v. Thelen,*[1] we affirmed Thelen's convictions on three counts of violating § 39-301.

Following a bench trial on stipulated evidence, the district court granted an injunction against Thelen's encroaching on the public road right-of-way 33 feet in either direction from the centerline, including those road ditches within that distance from the centerline, by erecting or placing fences or by placing or leaving any type of obstruction or obstacle thereon, or by causing another to do these actions. The court concluded that "the entire 33-foot area from the center of 870 Road to the north into the road ditch" was part of the "public road" described by § 39-301. The court found that Thelen had "repeatedly and flagrantly" violated Nebraska statutes relating to the road rights-of-way and that successive criminal prosecution had proved to be an inadequate remedy.

Like in the criminal case discussed in *Thelen*, the evidence presented for purposes of the County's complaint for injunctive relief established that the County controls a public road running along the south side of Thelen's property and controls, maintains, and is responsible for its 66-foot right-of-way. Both the County's highway superintendent, Carla Schmidt, and the chairman of the County's board of commissioners, David McGregor, averred that, since 2013, Thelen has continuously and repeatedly placed a fence within the County's right-of-way and has refused to voluntarily remove his fence after being given reasonable notice to do so.

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[1] *State v. Thelen, ante* p. 334, 940 N.W.2d 259 (2020).

According to Schmidt, for purposes of moving his cattle from one pasture to another, Thelen regularly placed his fence in the County's ditch right-of-way beginning in June and removed it in October or November. Schmidt noted that the fence had been repeatedly placed a mere 16½ feet from the roadway centerline.

McGregor averred that it was the County's duty to keep its public roads' rights-of-way, especially its ditches, free of debris, crops, fences, or any other obstructions. McGregor described that such obstructions presented a safety issue and that the County would subject itself to the loss of its tort liability insurance coverage if it failed to keep its ditches free of obstructions.

Schmidt similarly averred that the fences repeatedly placed by Thelen in the County's right-of-way endangered the traveling public and created liability for the County for the failure to comply with its statutory duty under § 39-301 to remove road obstacles.

Schmidt opined that an alternative solution would be for Thelen to remove or not plant four to six rows of corn in order for his cattle to reach his pasture by simply crossing his property "without trespassing on the county road." Schmidt asserted that she had repeatedly told Thelen that he cannot use the ditch right-of-way and asked him to move the fence onto his own property, "all to no avail."

According to the evidence submitted, Thelen has erected the same type of fence in the same location at least seven times and the County has repeatedly incurred the costs associated with removing the fence. Affidavits established that in 2013 and 2014, Thelen had re-erected the same type of fence in the same location within the County's right-of-way, refusing to remove it when asked to do so. Then, in 2015, Thelen was found guilty of violating § 39-301 for erecting the same type of fence in the same location in July. Thereafter, in September, Thelen placed his fence anew in the County's right-of-way. Thelen re-erected

the fence on August 31 and September 6 and 13, 2016, each time after law enforcement had removed it. These three acts led to the criminal convictions affirmed in *Thelen*.[2]

According to Schmidt, Thelen "has indicated that he will continue to disregard my notices in the future because the fine is only $25.00, indicating cheap pasture rent."

ASSIGNMENTS OF ERROR

Thelen assigns that the district court erred in (1) finding that placing the electric fence in the ditch violated § 39-301 and (2) failing to find that the County had an adequate remedy at law.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity.[3]

[2] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[4]

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[5]

ANALYSIS

Thelen asserts, as he did in the appeal from his misdemeanor convictions affirmed in *Thelen*, that the County's ditch right-of-way alongside the county roadway does not constitute a "public road" for purposes of § 39-301.[6] We have already discussed this question thoroughly in *Thelen*, wherein we held that a "public road" in § 39-301 includes the entire area within

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[2] See *State v. Thelen, supra* note 1.

[3] *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019).

[4] *Id.*

[5] *Saylor v. State*, 304 Neb. 779, 936 N.W.2d 924 (2020).

[6] See *State v. Thelen, supra* note 1.

the county's right-of-way.[7] We thus find no merit to Thelen's first assignment of error.

Thelen alternatively asserts in his second assignment of error that criminal misdemeanor proceedings provide an adequate remedy at law, which render the present injunctive relief improper despite his repeated violations of § 39-301. We disagree.

[4-7] An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.[8] In trespass cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.[9] We have consistently regarded evidence of a violation of a valid statute or ordinance as sufficient to warrant the issuance of a permanent injunction to a municipality or public entity seeking to prevent further violations.[10] Irreparable harm to public rights, property, or welfare is presumed to result from actions which by municipal ordinance have been declared unlawful.[11]

[8,9] Nevertheless, Thelen relies on the general rule that the prosecution of criminal offenses is normally a complete and sufficient remedy at law. It is the general rule that acts punishable by fine will not ordinarily be enjoined.[12] We have explained that where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction to prevent their commission, as

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[7] *Id.*

[8] See *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

[9] *Id.*

[10] *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[11] *Id.*

[12] *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 25 N.W.2d 824 (1947).

courts of equity will not exercise their power for the purpose of enforcing criminal laws.[13] Because equity, as a general rule, has no criminal jurisdiction, equity will not interfere to punish crime.[14] Something more than a violation of the law is required to justify the exercise of equity's powers.[15]

[10,11] A permanent injunction against repetitive unlawful violations of statutes or ordinances, however, is not a form of punishment for what has been done, but the prevention of future irreparable harm to public rights, property, or welfare.[16] An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity,[17] and a remedy at law is not adequate if the situation requires and the law permits preventative relief against the repetition and continuance of wrongful acts.[18]

[12,13] Thus, a court of equity may, at the instance of properly constituted authority, issue an injunction in the case of a public nuisance, when its issuance will give more complete relief than can be afforded in a court of law.[19] We have also held that an injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance.[20]

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[13] See *State, ex rel. Hunter, v. The Araho*, 137 Neb. 389, 289 N.W. 545 (1940).

[14] See *id.*

[15] F. Lee Bailey & Kenneth J. Fishman, Handling Misdemeanor Cases § 10:8 (2d ed. 1992).

[16] See, e.g., *State, ex rel. Hunter, v. The Araho, supra* note 13.

[17] *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[18] *Id.*

[19] See *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co.*, 121 Neb. 248, 236 N.W. 736 (1931).

[20] *State ex rel. City of Alma v. Furnas Cty. Farms, supra* note 10; *State ex rel. Meyer v. Knutson*, 178 Neb. 375, 133 N.W.2d 577 (1965).

[14,15] Stated another way, the rule that equity will not interfere to enforce criminal law, which ordinarily provides an adequate remedy at law, does not have the force of denying such a remedy in the prevention of public wrongs arising out of either continuous or repeated violations of a penalty statute which harmfully affect the interests of the public.[21] There is a well-recognized exception to the general rule that enforcement of criminal laws provides an adequate remedy, namely, that where a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, at the instance of properly constituted authorities, afford relief by injunction in order to protect the public welfare.[22]

[16] A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution.[23] Injunction is properly used for the protection of public rights, property, or welfare, whether or not such acts violate a penalty statute and whether or not they constitute a nuisance.[24]

There are numerous examples of this exception. In *State ex rel. Meyer v. Weiner*,[25] we upheld a permanent injunction against continuously engaging in unlicensed real estate practices, and in *State ex rel. Meyer v. Knutson*,[26] we upheld a permanent injunction against continuously engaging in the practice of professional architecture without a license, both

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[21] See, e.g., *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991); *State v. Chicago & N. W. Ry. Co.*, supra note 12.

[22] See *State, ex rel. Spellman, v. Heldt*, 115 Neb. 435, 213 N.W. 578 (1927).

[23] *State ex rel. Douglas v. Wiener*, 220 Neb. 502, 370 N.W.2d 720 (1985); *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). See *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205 N.W.2d 649 (1973).

[24] *State ex rel. Meyer v. Weiner, supra* note 23.

[25] *Id.*

[26] *State ex rel. Meyer v. Knutson, supra* note 20.

of which violated criminal statutes. In *State ex rel. Douglas v. Wiener*,[27] we upheld injunctive relief against a husband and wife who operated a private homeschool in continuing and flagrant violation of then-existing rules and regulations of the State Department of Education and Nebraska statutes. In *State ex rel. Douglas v. Faith Baptist Church*,[28] we upheld injunctive relief against a church, despite the fact that the church was subject to penal sanctions, for violations of the various statutory provisions relating to compulsory education and operation of private, denominational, and parochial schools.

In *City of Lincoln v. ABC Books, Inc.*,[29] we upheld injunctive relief against an adult bookstore operating fully enclosed viewing booths in picture arcades, in violation of a local ordinance that subjected the bookstore to fines. We noted that the successful prosecution of the bookstore on three separate occasions for violations of the ordinance had not resulted in the removal of the fully enclosed booths. In *State ex rel. Spellman, v. Heldt*,[30] we upheld injunctive relief to restrain and enjoin a cattle owner from interfering and preventing agents of the Department of Agriculture from entering his premises and carrying out the laws, rules, and regulations concerning bovine tuberculosis eradication, even though such same acts constituted a criminal offense punishable by fine.

In *State v. Chicago & N. W. Ry. Co.*,[31] we upheld injunctive relief against a railroad company from continuing to operate certain mainline switch stands without proper lights, in violation of a penal statute subjecting the railroad to a fine. We explained that an injunction was the proper remedy because the

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[27] *State ex rel. Douglas v. Wiener, supra* note 23.

[28] *State ex rel. Douglas v. Faith Baptist Church, supra* note 23.

[29] *City of Lincoln v. ABC Books, Inc., supra* note 21.

[30] *State, ex rel. Spellman, v. Heldt, supra* note 22.

[31] *State v. Chicago & N. W. Ry. Co., supra* note 12.

safety of the traveling public required that the regulations at issue be enforced. Similarly, in *State v. Pacific Express Co.*,[32] we upheld an injunction against the railroad company against unlawful, exorbitant, and unconscionable rates and charges in the use of eminent domain for the public, despite penal sanction statutes pertaining to the same conduct. We said that the state, in its sovereign capacity, can appeal to the courts for relief by injunction whenever either its property is involved or public interests are threatened and jeopardized by any corporation, especially one of a public nature like a railroad company, seeking to transcend its powers and to violate the public policy of the state.

[17,18] In *Thelen*, we discussed in detail the statutory scheme relating to the prohibition of obstructing a roadway found in § 39-301, of which Thelen has been convicted of violating numerous times.[33] We will not reiterate that analysis here. The clear legislative intent in the regulatory scheme governing public roads, and in § 39-301 specifically, is the protection of the public who use those roads. It is in the interest of the public to prevent obstructions of the public roads, both for their maintenance and more direct safety, and the mere fact that the Legislature has enacted a criminal law addressing the subject does not mean that the subject matter is preempted.[34] We find nothing in the statutes pertaining to obstruction of public roads that could be construed as demonstrating an intent to preempt the equitable remedy of injunctive relief.

In this case, where Thelen repeatedly erected an electric fence in the ditch right-of-way in violation of a valid statute, the preventative remedy of an injunction is the only manner in which to obtain a complete remedy. The remedy of injunctive relief here is not to punish Thelen, but to protect the public

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[32] *State v. Pacific Express Co.*, 80 Neb. 823, 115 N.W. 619 (1908).

[33] *State v. Thelen, supra* note 1.

[34] See *State ex rel. City of Alma v. Furnas Cty. Farms, supra* note 10.

from future repetitive acts. Multiple criminal prosecutions have done nothing to curb Thelen's behavior, and, indeed, Thelen has expressed the opinion that the fines associated with even repeated criminal misdemeanor convictions are "cheap pasture rent." It is in the interests of the public welfare to prevent this repetitive illegal act. We find no merit to Thelen's argument that injunctive relief was improper because criminal prosecution provides an adequate remedy at law.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Timothy J. Britt, appellant.

940 N.W.2d 270

Filed March 27, 2020. No. S-18-557.

1. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
2. **Trial: Photographs: Appeal and Error.** An appellate court reviews the decision by a trial court to admit photographs of the victims' bodies for abuse of discretion.
3. **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.
4. **Homicide: Photographs.** Gruesome crimes produce gruesome photographs. However, if the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.
5. ____: ____. In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
6. **Photographs: Rules of Evidence.** Neb. Evid R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), does not require the State to have a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it "substantially" outweighs the probative value of the evidence.
7. **Constitutional Law: Witnesses.** The right of an accused to confront the witnesses against him or her is guaranteed by the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Michael J. Wilson and Glenn Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Timothy J. Britt, pro se.

Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Bishop and Arterburn, Judges.

Miller-Lerman, J.

NATURE OF CASE

Following this court's reversal of his convictions in *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016), Timothy J. Britt was retried in Douglas County District Court and convicted of three counts of first degree murder, three counts of use of a deadly weapon to commit a felony, and one count of possession of a deadly weapon by a prohibited person. Britt appeals and claims that the district court erred when it admitted crime scene and autopsy photographs over his objection and violated the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution when it allowed the State to present its case at trial without the testimony of a separately tried alleged coconspirator, Anthony Davis. We find no merit to Britt's assignments of error and, accordingly, affirm his convictions and sentences.

STATEMENT OF FACTS

The charges in this case arise from the July 9, 2012, deaths of Miguel E. Avalos, Sr. (Avalos), and two of his sons, Jose Avalos and Miguel E. Avalos, Jr., in their Omaha, Nebraska, home during an apparent attempted robbery. Each of them was shot multiple times, and each died as a result of his wounds.

Avalos' oldest son, Francisco Avalos, was in the home in a downstairs bedroom with his wife and baby at the time the three victims were shot upstairs. He testified at trial that he woke up to the sound of gunshots. He locked the door to the bedroom, called the 911 emergency dispatch service, and while remaining on the telephone, heard more than one person come halfway down the stairs leading to the basement. He testified that a male voice unknown to him said "let's go," and he heard footsteps of multiple people running across the floor upstairs.

Police responded to Avalos' home around 3:45 a.m. and observed signs of forced entry at one of the entrances to the residence. A section of the doorjamb on the door to the north side of the residence was missing, and its strike plate was found lying at the bottom of the basement stairs, along with a wood screw. A second wood screw was found lying on the tile in the entryway near the door.

Inside Avalos' bedroom, police discovered methamphetamine, drug records, drug paraphernalia, over $5,000 in cash, and a defaced .40-caliber semiautomatic pistol. Several .40-caliber bullets were also recovered from various locations inside the residence. Bullets recovered from the victims' bodies were consistent with .22- and .40-caliber firearms.

The State contends that the three victims were killed by Davis and Britt during an attempted robbery. Avalos had been a known drug dealer. A plan to rob him originated with Greg Logemann, a drug dealer who resided in Council Bluffs, Iowa. Logemann testified for the State pursuant to several immunity agreements. Logemann was introduced to Avalos by Logemann's brother-in-law, who was Avalos' coworker. Logemann knew Avalos sold methamphetamine and, in mid-2012, approached Davis, a fellow drug dealer, about robbing Avalos. Logemann had known Davis for 20 years and had discussed robberies with him in the past. Logemann believed Avalos was an easy target and might have "[m]oney and dope." Logemann advised Davis that the best time to rob

Avalos was between 4 and 5 a.m., because Avalos would likely be going to work. Logemann testified that he was not aware of any children living in Avalos' home. Logemann did not intend to participate in the robbery, and he and Davis planned to divide the proceeds among themselves and others who would help execute the robbery.

On the night of July 8, 2012, Charice Jones, the roommate of Davis' friend, Crystal Branch, drove Davis, Logemann, and Branch to the area of 9th and Bancroft Streets where Logemann identified Avalos' home for Davis. A third male accompanied the group on this trip, and he was identified in the testimony as either Britt or another man named "Mike."

Later that night, Branch, Jones, Davis, and Britt returned to Branch's home where they remained for several hours using drugs and drinking alcohol. Britt was sitting on the couch "really quiet." The group remained at the residence until Davis said it was time to go. Davis asked Jones to drive him, Britt, and Branch back to the area of Avalos' home. According to Branch, Britt told Jones where to park down the street from Avalos' home, took possession of Jones' car keys, and told Branch and Jones to get in the back seat. Branch and Jones complied, and Davis and Britt walked north up 9th Street toward Avalos' home. Branch and Jones testified that they assumed the two men were going to buy more drugs.

Branch claimed that about 5 minutes later, Davis returned to the front passenger seat of the vehicle without saying a word. Branch did not see any weapons in Davis' possession. A few minutes after Davis returned, Britt came running back, entered the vehicle, and sat in the driver's seat. According to Branch, Britt wore gloves and a bandanna over his face. Britt drove "[f]ast" and "straight back" to Branch's home.

As soon as Davis, Britt, Branch, and Jones arrived at Branch's home, Davis and Britt left the vehicle and walked to the end of the block to argue about something. After returning, Davis "looked sick" and went to the bathroom, where it "sounded like he was getting sick" according to Branch. Britt sat silently

on the couch in the living room. When Davis emerged from the bathroom, he asked Branch for her address because "[h]e was trying to find a ride." At around 4 a.m., Davis began calling and sending text messages to his ex-girlfriend, Tiaotta Clairday. Branch testified that she spoke on a cell phone with an unknown woman to whom she provided directions to her home for Davis. An "older" gray or silver "Cutlass or Regal" pulled up, and Davis and Britt left together in it.

Clairday testified that she began receiving several messages from Davis around 4:30 a.m. Davis told Clairday in "hushed tones" that he needed her to pick him up. Clairday recalled that Davis sounded agitated and frustrated. When Clairday arrived in a borrowed Buick Regal, Davis entered the front seat. Clairday asked Davis why he had called her to pick him up. Davis stated that Britt needed to come along with them too, because Britt had a gun. Clairday had met Britt once before, but she did not know him and did not want him in her vehicle. She and Davis argued briefly before Britt entered the vehicle. Clairday questioned Britt, and Britt handed his .22-caliber revolver to Clairday.

Clairday stopped at a gas station and then proceeded to the apartment of her friend, Larry Lautenschlager, in Council Bluffs. At the apartment, Davis and Britt waited near the door as Clairday gave the .22-caliber revolver to Lautenschlager and asked him to get rid of it. Clairday also requested a change of clothing for both Davis and Britt, and then she took Davis to the bathroom to talk. Clairday testified that Davis was mumbling, appeared scared, and had apparently soiled himself. Clairday helped Davis change his clothes and noticed that he had blood on his shoe. After Clairday left the bathroom, she walked outside and observed Britt burning a pair of gloves on a grill.

Clairday transported Davis and Britt to Davis' apartment. She accompanied Davis upstairs, while Britt remained downstairs. Davis wanted to leave town, so Clairday helped him pack a bag. She also continued to speak with Davis, who still

appeared scared. They finished packing and went downstairs to load the vehicle.

Clairday, Davis, and Britt then drove to Logemann's apartment. Davis went inside alone. Back in the vehicle, Clairday asked Britt what was wrong with Davis, but Britt did not respond. When Davis returned, Clairday drove to a restaurant in Council Bluffs. Thereafter, she drove to the apartments behind another restaurant and waited in the vehicle while Davis and Britt went inside. Davis returned alone. Clairday testified that after this point, Davis appeared scared and was crying as he related to her why he had called her in the middle of the night and what had happened. Clairday then dropped Davis off at his apartment.

After Branch and Jones observed television news reports about the shootings the morning of July 9, 2012, Branch recognized the area of the crime and became concerned. Davis agreed to meet with Branch and Jones in Council Bluffs. After going to several different addresses given to them by Davis, they met with him later in the day on July 9. When they arrived at the final address, Davis sat in their vehicle and took their cell phones to search them and make sure they were not "trying to set him up." Davis, Branch, and Jones discussed what Branch and Jones saw on the news, and then Davis returned their cell phones. Branch and Jones expressed concern for their safety, and Branch felt that she and her children needed to get out of town. Following this conversation, and without an invitation, Britt began living with Branch and Jones and went everywhere they went. He lived in the basement with Jones for "[p]robably a month or better." The women never called police about their concerns.

A few days after the murders, Clairday drove out to the country near Ashland, Nebraska, where she disposed of several items, including the .22-caliber revolver. She asked Lautenschlager to drive her to a lake north of Ashland. Clairday exited the vehicle alone and, after waiting for Lautenschlager to drive out of sight, threw the revolver into a culvert. The

revolver was wrapped up in a tank top secured by a headband. A crime laboratory technician testified about her understanding to the effect that following Clairday's arrest, she led law enforcement to the hiding place where officers recovered the revolver, which was rusty and dirty and had a grip that was wrapped in black electrical tape. Comparisons of the revolver to the .22-caliber bullets recovered from the victims were inconclusive.

Logemann also testified about his observations of Davis and Britt after the murders. At about 4:30 or 5 a.m. on the day of the shootings, he received either a call or text from Davis in which Davis "told [Logemann] he couldn't do it because his girlfriend was tripping out on him." Later that same morning, an Omaha police officer contacted Logemann and asked him what he might know about a robbery at 9th and Bancroft Streets. Logemann met with police and lied to cover for himself during their initial questioning. After his initial contact with police, Logemann met with Davis in person at a location between their homes; Davis' girlfriend drove Davis to Logemann, picked Logemann up, and then Logemann and Davis discussed the robbery and what had happened.

Later that night, Britt accompanied Davis on an unexpected visit to Logemann's apartment. Davis requested to borrow Logemann's laptop computer, and Logemann loaned him a laptop computer. While in Logemann's apartment, Britt asked Logemann about a picture of his children that was hanging on his refrigerator. The questions made Logemann "uncomfortable," because he feared that Britt "might try to do something" to his children. Following this encounter with Davis and Britt, Logemann told Omaha police on July 20 and 24 and August 2 or 3, 2012, what he knew about Davis, Britt, and the shootings at 9th and Bancroft Streets.

The coroner who performed autopsies on the three victims determined that each died due to gunshot wounds to the head. Several crime scene and autopsy photographs were introduced by the State and received in evidence over Britt's objection.

Procedural History.

The State charged Britt with three counts of first degree murder (Class IA felony), Neb. Rev. Stat. § 28-303(1) and (2) (Reissue 2008); three counts of use of a deadly weapon (gun) to commit a felony (Class IC felony), Neb. Rev. Stat. § 28-1205(1)(a) and (c) (Reissue 2016); and one count of possession of a deadly weapon (gun) by a prohibited person (Class ID felony), Neb. Rev. Stat. § 28-1206(1)(a) and (3)(b) (Reissue 2016). The State also charged that Britt met the definition of a "habitual criminal" as described in Neb. Rev. Stat. § 29-2221 (Reissue 2016).

This case is related to *State v. Davis*, 290 Neb. 826, 862 N.W.2d 731 (2015). Davis and Britt were allegedly coconspirators who were tried separately for their involvement in the Avalos murders. Both defendants were convicted by their respective juries. However, on April 22, 2016, we filed our opinion in *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016), in which we found that the district court had reversibly erred when it admitted the hearsay statements of Davis which implicated Britt in the murders. Following our mandate, Britt was retried to a jury and found guilty on all counts as charged, as follows: (1) guilty as to count I, first degree murder, a Class IA felony; (2) guilty as to count II, use of a deadly weapon to commit a felony, a Class IC felony; (3) guilty as to count III, first degree murder, a Class IA felony; (4) guilty as to count IV, use of a deadly weapon to commit a felony, a Class IC felony; (5) guilty as to count V, first degree murder, a Class IA felony; (6) guilty as to count VI, use of a deadly weapon to commit a felony, a Class IC felony; (7) guilty as to count VII, possession of a deadly weapon by a prohibited person, a Class ID felony.

Sentencing.

Britt's sentencing hearing was conducted on May 3, 2018, at which time the district court received evidence relative to enhancement. The district court found that Britt met the definition of a "habitual criminal" within the meaning of § 29-2221.

With respect to each of the three first degree murder convictions, Britt received a sentence of life imprisonment. For each of the three use of a deadly weapon (gun) to commit a felony convictions, Britt received a sentence of 40 to 45 years' imprisonment. As to possession of a deadly weapon (gun) by a prohibited person, Britt received a sentence of 40 to 45 years' imprisonment. The sentences for all convictions were ordered to be served consecutively to one another. Britt received 2,108 days' credit for time served toward his sentence for possession of a deadly weapon by a prohibited person.

Britt appeals.

ASSIGNMENTS OF ERROR

On appeal, Britt claims, summarized and restated, that the district court (1) erred when it admitted crime scene and autopsy photographs over his objection and (2) violated his right of confrontation by allowing the State to proceed at trial without calling Davis to testify.

STANDARDS OF REVIEW

[1,2] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). An appellate court reviews the decision by a trial court to admit photographs of the victims' bodies for abuse of discretion. See *id*.

[3] 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. *State v. Smith*, 302 Neb. 154, 922 N.W.2d 444 (2019).

ANALYSIS

Crime Scene and Autopsy Photographs.

Britt claims generally that the district court erred when, over his objection, it admitted numerous crime scene and autopsy

photographs generally showing the bodies of the murder victims. He specifically claims that such admission violated Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016). Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We find no merit to this assignment of error.

Britt identifies 13 of the admitted photographs and argues their probative value was outweighed by their prejudicial nature. He focuses on their gruesome nature and also contends that many of the photographs are duplicative.

[4] We have often observed that gruesome crimes produce gruesome photographs. *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019). However, if the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome. *Id.*; *State v. Dubray, supra*.

With respect to homicide cases, other authorities have noted, and we agree, that

> murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant; and . . . many attorneys tend to underestimate the stability of the jury. A juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. There is nothing magic about being a member of the bench or bar which makes these individuals capable of dispassionately evaluating gruesome testimony which, it is often contended, will throw jurors into a paroxysm of hysteria. Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees. The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced.

People v. Long, 38 Cal. App. 3d 680, 689, 113 Cal. Rptr. 530, 536-37 (1974), *disapproved on other grounds, People v. Ray*, 14 Cal. 3d 20, 533 P.2d 1017 (1975).

[5] The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *Id.*

With respect to the crime scene and autopsy photographs challenged on appeal, the State has proffered a variety of purposes for their probative value. We agree with the State that the photographs show the positions of the bodies and wounds from several positions and were for the purpose of suggesting multiple shooters were present, corroborating testimony from Francisco Avalos that he heard footsteps of more than one shooter and countering Britt's suggestion that he was not involved in the shootings. The photographs also show the victims' wounds and spent shell casings. The State was able to use these photographs to connect the crimes to a .22-caliber revolver owned by Britt and featured in the alleged coverup of the crimes. The autopsy photographs document the manner and cause of the victims' deaths.

[6] Although several photographs depict similar scenes from different angles as compared to other photographs in evidence, the general rule is that when a court admits photographs for a proper purpose, additional photographs of the same type are not unfairly prejudicial. *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016). Rule 403 does not require the State to have a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it "substantially" outweighs the probative value of the evidence. *State v. Dubray, supra*. We determine that the district court admitted the photographs for a proper purpose and did not abuse its discretion

when it concluded that the photographs of the crime scene and autopsy were not unfairly prejudicial.

Right to Confront Davis.

[7] Britt, acting pro se, also claims that the district "court violated the confrontation clause when it did not call . . . Davis to the stand." Pro se supplemental brief for appellant at 12. The right of an accused to confront the witnesses against him or her is guaranteed by the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. Britt contends, restated, that his right of confrontation was violated because Davis, the alleged coconspirator, was not called to testify about who he was with during the timeframe during which the murders were committed. Britt contends that this testimony was necessary to protect his rights because the State's evidence was limited to individuals who did not claim to have directly witnessed the murders.

Britt did not present a confrontation claim to the district court. We note that regardless of whether this claim was preserved, Britt has directed us to no authority to the effect that the district court had an independent obligation to call a witness or require the State to call a witness. Davis did not testify at trial, and Britt had the opportunity to cross-examine the several witnesses against him at trial. We have not been directed to, and we are unaware of, a separate proposition of law that would apply in this case to support Britt's contention that the trial court should have independently required Davis to testify. And to the contrary, we have previously concluded that hearsay testimony from Davis was not admissible. *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

As noted above, a major component of Britt's argument on appeal is that the evidence against him was merely circumstantial and that this presented a confrontation issue without Davis' testimony. To the extent that Britt contends the evidence was insufficient to support his convictions or, in the absence of Davis' testimony, his Sixth Amendment rights were violated, we disagree. Testimony collectively showed that at least two

people were inside Avalos' home at the time of the murders; Britt was the only person with Davis immediately before and after the murders; Britt possessed a .22-caliber revolver, which was consistent with one of the two types of firearms used to commit the murders; and Britt was seen performing acts of concealment, including burning a pair of gloves he was wearing after the murders. The evidence presented by the State from other witnesses' personal observations, without direct testimony from Davis, was that Britt was Davis' accomplice. This assignment of error is without merit.

CONCLUSION

We determine that the admission of photographs of the crime scene and autopsy were not unfairly prejudicial and that the district court did not have an independent duty to call coconspirator Davis to testify. Accordingly, we affirm Britt's convictions and sentences for three counts of first degree murder, three counts of use of a deadly weapon to commit a felony, and one count of possession of a deadly weapon by a prohibited person.

Affirmed.

Heavican, C.J., and Freudenberg, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Victor Guzman, appellant.

940 N.W.2d 552

Filed March 27, 2020. No. S-19-056.

1. **Effectiveness of Counsel: Appeal and Error.** Assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity.
2. **Sentences: Appeal and Error.** When a defendant challenges a sentence imposed by the district court as excessive and the State believes the sentence to be erroneous but has not complied with Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2018) or Neb. Rev. Stat. § 29-2321 (Reissue 2016), the State may not assert such error via a cross-appeal.
3. **Appeal and Error.** An appellate court may, at its option, notice plain error.
4. **Sentences: Statutes: Appeal and Error.** A sentence that is contrary to the court's statutory authority is an appropriate matter for plain error review.
5. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
6. **Miranda Rights: Right to Counsel.** In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal.

7. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
8. **Trial: Prosecuting Attorneys: Appeal and Error.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
9. **Trial: Prosecuting Attorneys: Words and Phrases.** Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various conducts because the conduct will or may undermine a defendant's right to a fair trial.
10. **Witnesses: Impeachment.** Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.
11. ____: ____. One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions.
12. ____: ____. A party cannot impeach his or her own witness without limitation.
13. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
14. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
15. **Criminal Law: Evidence: Appeal and Error.** When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, 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.

16. **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.
17. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial is plainly evident from the record, affects a litigant's substantial right, and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
18. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
19. ____: ____. The failure to impose an indeterminate sentence when required by statute constitutes plain error.
20. ____: ____. An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Gregory A. Pivovar for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

Victor Guzman appeals from convictions, pursuant to jury verdict, and sentences for first degree sexual assault and tampering with a witness.

Two issues predominate. We again enforce our requirement that assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance. And we resolve the State's uncertainty whether

sentencing error in a criminal case tried in the district court can or must be raised by a cross-appeal—concluding that generally, a cross-appeal is not permitted.

We find no merit to Guzman's claims regarding a motion to suppress, a motion for a mistrial, insufficiency of the evidence, and an excessive sentence for the sexual assault conviction. But we find plain error in the sentence for witness tampering, which should have been an indeterminate rather than a determinate sentence. We vacate that sentence and remand the cause for resentencing, but we otherwise affirm Guzman's convictions and the sentence imposed for the sexual assault conviction.

II. BACKGROUND

We begin by setting forth the factual background for the crimes charged. Bearing in mind our standard of review, we summarize this evidence in the light most favorable to the State. Additional background relevant to particular errors assigned will be supplied in the analysis.

On September 22, 2017, B.G. held a party at her apartment, where she lived with her daughter. One of the invitees, Alexa Thomas, brought a group of eight or nine people whom B.G. did not know, including Guzman. B.G. consumed alcohol to the point of being "drunk." She also snorted cocaine. B.G. began to feel sick and told everyone to leave. She vomited and then lay down in her bedroom.

B.G. heard her bedroom door open and saw a group of unknown males standing in her doorway. She felt her clothing being removed and her arms and legs being held. B.G. testified: "I said no. I said stop. Then I just gave up . . . [b]ecause there was [sic] too many." Although B.G. did not give permission for anyone to have sex with her, she could tell that more than one male penetrated her vagina. Someone turned her head and inserted his penis in her mouth. According to an attendee at the party, Guzman said he had sex with B.G.

After B.G. began crying, the males left. B.G. checked on her daughter and then "passed out." When B.G. woke, she called

her mother and asked her to come to B.G.'s apartment. At some point, B.G. told her mother that she had a party and "got raped." B.G. went to a hospital and reported to a sexual assault nurse examiner that two assailants penetrated her vagina. A police officer spoke with B.G. at the hospital, and she told the officer that four to five males vaginally penetrated her with their penises.

Police conducted an investigation following B.G.'s report of the incident. Thomas shared with police text messages she exchanged with Guzman the morning after the party. In these text messages, Guzman told Thomas that he had video of a group of males having sex with B.G. Thomas asked if Guzman had sex with B.G., but he replied that he "was just [the] camera man." After meeting with Thomas, an officer prepared an affidavit for a search warrant for Guzman's cell phones.

The next day, officers went to Guzman's place of employment to interview him and obtain any of his digital devices capable of storing electronic media. Upon questioning by an officer, Guzman consistently denied having sex with B.G. After interviewing Guzman, police arrested him. A forensic examination of one of Guzman's cell phones uncovered three short videos taken between 6:41 and 6:49 a.m. on September 23, 2017, which showed penile-vaginal intercourse with B.G.; one video additionally showed a penis being inserted into B.G.'s mouth.

The tampering with a witness charge arose out of Guzman's October 2017 jail telephone call to Thomas. Thomas testified that Guzman wanted her to "tell [B.G.] to drop the charges." Thomas complied, telling B.G. that Guzman wanted B.G. to drop the charges.

The jury returned verdicts of guilty on first degree sexual assault and on tampering with a witness, and the court accepted the verdicts. The court imposed a sentence of 12 to 20 years' imprisonment for the sexual assault conviction and a concurrent sentence of 2 years' imprisonment for the witness tampering conviction.

Guzman appealed. The State filed a petition to bypass review by the Nebraska Court of Appeals—which we granted—and asserted a purported cross-appeal in its brief.

III. ASSIGNMENTS OF ERROR

1. Guzman's Appeal

Guzman assigns that the district court erred in (1) overruling his motion to suppress, (2) failing to grant his motion for mistrial based on prosecutorial misconduct, (3) failing to grant a directed verdict, and (4) imposing excessive sentences.

Guzman also assigns that he received ineffective assistance of trial counsel. However, he failed to comply with our pronouncement regarding the specificity required for assignments of error alleging ineffective assistance of counsel.

[1] We declared last year that assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance.[1] And we stated that an appellate court will not scour the remainder of the brief in search of such specificity.[2] Since announcing the requirement, we have repeated it in three published decisions.[3] The purpose of a concurring opinion released on October 11, 2019, was to "remind the practicing bar"[4] of the requirement and caution counsel that "briefs filed after April 19, 2019, which fail to comply may have consequences beyond loss of such claims."[5]

Guzman's brief—filed 3 months after our pronouncement—failed to comply. His assignment of error alleged merely that

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[1] See *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

[2] See *id.*

[3] See *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019); *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019); and *State v. Lee*, 304 Neb. 252, 934 N.W.2d 145 (2019). See, also, *State v. Weathers*, 304 Neb. 402, 935 N.W.2d 185 (2019).

[4] *State v. Lee, supra* note 3, 304 Neb. at 285, 934 N.W.2d at 168 (Cassel, J., concurring).

[5] *Id.* at 286, 934 N.W.2d at 168 (Cassel, J., concurring).

he "received ineffective assistance of trial counsel in numerous instances as more particularly set out hereinafter." In Guzman's reply brief, he argues that the assignment of error informed us that the particular allegations of ineffective assistance would be set forth with more particularity. And in the heading of his argument on the issue, Guzman identified five of the six particular deficiencies in all boldface and capital letters.

We decline to excuse counsel's failure to comply with our pronouncement. Recently, the Court of Appeals exercised judicial grace by examining a brief's argument section for the necessary specificity where the brief was filed 10 days after release of the opinion announcing the requirement.[6] No such grace ought to be afforded a brief filed 3 months after the pronouncement. Accordingly, we do not consider Guzman's assignment of error alleging ineffective assistance of counsel.

2. State's Purported Cross-Appeal

Using a belt-and-suspenders approach, the State raised a sentencing matter both as plain error in its responsive brief and in a purported cross-appeal. The State asserts that the court erred by imposing a determinate sentence for Guzman's witness tampering conviction. Its brief recognizes that the matter could be deemed one of plain error, but explains that "out of an abundance of caution and uncertainty, [the State] raise[d] the matter in a cross[-]appeal."[7] The State seeks guidance as to whether it can—and must—file a cross-appeal to raise an alleged error in sentencing where the district court was the trial court. We address this narrow question.

When a sentence imposed appeared to be erroneous and the appellant did not identify the error, the State's traditional practice has been to broach the issue in its brief as an assertion of plain error. With or without such an assertion, we have

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[6] See *State v. Knox*, No. A-19-266, 2020 WL 215849 (Neb. App. Jan. 14, 2020) (selected for posting to court website).

[7] Brief for appellee at 36.

considered whether a sentence constituted plain error.[8] The State presumably proceeded in this manner because of case law declaring that the State has no right to cross-appeal in a criminal case when the district court is the trial court.[9]

The State suggests the appellate courts have created uncertainty in this procedure by referencing the lack of a cross-appeal in opinions where the district court was the trial court. The Court of Appeals recently refused to address the State's suggestion of error in sentencing, because the State did not cross-appeal.[10] And in two cases that did not squarely present whether the State could cross-appeal, we stated "although the State did not file a cross-appeal"[11] before considering sentencing errors urged as plain error by the State. To the extent this language has created uncertainty, we disavow any suggestion that we were implying the State could have cross-appealed in those cases.

The preclusion of a cross-appeal by the State in a criminal case where the district court is the trial court relates to the State's limited right to appeal in a criminal case. Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.[12] The Legislature provided two avenues for such an appeal: an exception proceeding under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2018)

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[8] See, e.g., *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019); *State v. Lessley*, 301 Neb. 734, 919 N.W.2d 884 (2018); *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018); *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018); *State v. Kidder*, 299 Neb. 232, 908 N.W.2d 1 (2018); *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

[9] See, *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989); *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977); *State v. Schnell*, 17 Neb. App. 211, 757 N.W.2d 732 (2008). See, also, *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014).

[10] *State v. Magallanes*, No. A-18-934, 2019 WL 3934465 (Neb. App. Aug. 20, 2019) (selected for posting to court website).

[11] See *State v. Betancourt-Garcia*, 295 Neb. 170, 190, 887 N.W.2d 296, 312 (2016). Accord *State v. Aguallo*, 294 Neb. 177, 881 N.W.2d 918 (2016).

[12] *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018).

and an excessively lenient sentence appeal authorized by Neb. Rev. Stat. § 29-2320 (Reissue 2016).[13]

The right of appeal is purely statutory.[14] A court rule provides in part that "[t]he proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal."[15] But a court rule cannot provide a right to appeal that does not exist in statute. And here, the State did not comply with the statutory prerequisites to appeal,[16] the dictates of which are to be strictly construed against the government.[17] Thus, it could not assert a cross-appeal. We express no opinion as to whether the State could assert a cross-appeal if it had complied with those statutory requisites.

[2-4] When a defendant challenges a sentence imposed by the district court as excessive and the State believes the sentence to be erroneous but has not complied with § 29-2315.01 or § 29-2321, the State may not assert such error via a cross-appeal. We see no error in the traditional procedure where the State identifies any plain sentencing errors in its responsive brief. An appellate court may, at its option, notice plain error.[18] A sentence that is contrary to the court's statutory authority is an appropriate matter for plain error review.[19]

IV. ANALYSIS

1. Motion to Suppress

(a) Additional Background

Law enforcement officers interviewed Guzman and recorded the conversation. When Guzman was brought into a room at

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

[14] *State v. Thalken, supra* note 12.

[15] Neb. Ct. R. App. P. § 2-101(E) (rev. 2015).

[16] See, § 29-2315.01 and Neb. Rev. Stat. § 29-2321 (Reissue 2016).

[17] See *State v. Stafford*, 278 Neb. 109, 767 N.W.2d 507 (2009).

[18] See *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017), *modified on denial of rehearing* 296 Neb. 606, 894 N.W.2d 349.

[19] *State v. Kantaras*, 294 Neb. 960, 885 N.W.2d 558 (2016).

his place of employment, a detective identified himself as a police officer and read Guzman his *Miranda* rights. There is no dispute that from that point forward, Guzman was in custody.

Guzman moved to suppress his statements to police. He claimed that at almost 2 hours into the interview, he "clearly invoked his right to counsel, asking if he had the opportunity to get a lawyer, to which officers responded no."

At the hearing on the motion to suppress, a detective testified that Guzman began asking questions "about when he could get a lawyer." According to the detective, Guzman did not say he wanted a lawyer; rather, "he just asked about the process of getting one." The detective testified: "We were talking about the search warrant. Essentially he was asking questions if he could get an attorney to deal with . . . the search warrant, if it could be stopped."

The court overruled the motion to suppress. With regard to the invocation of a right to counsel, the court stated:

> [A]t the 1 hour, 54 minute mark, [Guzman] asked officers, "Can I talk to a lawyer first?" . . . [W]hen putting it in the context of what was occurring during said exchange, the Court finds that [Guzman] did not clearly invoke his rights. Specifically, law enforcement [officers were] in the process of searching [Guzman's] phone, and while doing so, [Guzman] was conversing with them about the search and asked if he could speak with a lawyer before they searched his phone. [They] informed him that they already had a search warrant and that he did not get to speak to an attorney before they conducted the search. Thus, the Court finds that [Guzman's] statement of "Can I talk to a lawyer first" was in the context of the search, rather than a clear invocation of his Miranda rights for purposes of the custodial interrogation.

(b) Standard of Review

[5] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law

enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[20] an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.[21]

(c) Discussion

On appeal, Guzman does not dispute that he waived his *Miranda* rights during the custodial interrogation. "[A]fter a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney."[22] And Guzman does not challenge the district court's factual findings. Rather, Guzman argues that he requested an attorney at the 1-hour-54-minute mark of the recorded interrogation and that thus, any statements he made should have been suppressed.

[6] In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal.[23] "Statements such as '"[m]aybe I should talk to a lawyer"' or '"I probably should have an attorney"' do not meet this standard."[24] Guzman contends that his question—"'Can I talk to a lawyer first?'"—was a clear invocation of the right to counsel. We disagree. "An expression of doubt or uncertainty cannot be considered unequivocal."[25] Similarly, an Arizona court determined that "'Do you think I

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[20] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[21] *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017).

[22] *Davis v. United States*, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

[23] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[24] *Id.* at 959, 774 N.W.2d at 744-45.

[25] *State v. Lynch*, 169 N.H. 689, 697, 156 A.3d 1012, 1019 (2017).

should get a lawyer?'" does not constitute an invocation of right to counsel.[26] Here, Guzman never explicitly stated that he wished to have an attorney present.

The circumstances surrounding an alleged invocation are part of the objective inquiry into whether such an invocation of the right to counsel was made. The U.S. Supreme Court explained that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [the Court's] precedents do not require the cessation of questioning."[27] Here, the officers perceived Guzman's question about an attorney to be in connection with the search for his cell phones and not an assertion that Guzman did not wish to speak without an attorney present. That perception was reasonable under the circumstances. The district court did not err in overruling Guzman's motion to suppress.

2. Motion for Mistrial

(a) Additional Background

In March 2018, Ruben Rodriguez was deposed on Guzman's behalf. At trial, the State called Rodriguez as a witness during the State's case in chief. When asked where he had lived in the past 5 years, Rodriguez provided information which was inconsistent with his deposition testimony. When Rodriguez testified that he saw B.G. at her party in October 2017, the prosecutor impeached him with his deposition testimony that the party was in September. When Rodriguez named seven people with whom he went to the party, the State pointed out that Rodriguez testified in his deposition that he went to the party with four individuals. During trial, Rodriguez also gave answers different from those in his deposition as to when he took an individual home, how may beers he consumed at the

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[26] See *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989).

[27] *Davis v. United States, supra* note 22, 512 U.S. at 459 (emphasis in original).

party, whether a certain individual was at the party, whether he saw Guzman walk B.G. up the stairs, and whether he made a "gas station run."

In a conversation out of the jury's presence and unprompted by defense counsel, the court raised a concern that Rodriguez provided no substantive evidence. The court opined that "the sole purpose for hi[s] being called was to discredit him in any testimony he may have," which the court did not think was permissible. The prosecutor responded that he expected Rodriguez would testify consistently with his deposition. Because Rodriguez did not, the prosecutor wanted "to make sure that the record's clear on what he's testifying to." The prosecutor stated that he did not call Rodriguez "simply to impeach him." The court then directed the parties to brief whether it is permissible to call a witness for the limited purpose of discrediting the witness. With the jury present, the court announced, "There ha[ve] been some conversations between Counsel and I need them to follow up on something for me, so we're going to be recessing for the weekend a little bit early today."

When trial resumed after the weekend break, Guzman moved for a mistrial. His counsel explained that he subpoenaed Rodriguez, because Rodriguez had exculpatory information, but that "what the State did was discredit that witness before [the defense] could call him and elicit the exculpatory information." The State argued that it "can't control whether someone is going to get up there and lie or not, and they [sic] had no reason to expect them [sic] to." The court found that there was not sufficient evidence that the State called Rodriguez for the purpose of impeachment.

(b) Standard of Review

[7] Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[28]

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[28] *State v. Schmaltz*, 304 Neb. 74, 933 N.W.2d 435 (2019).

(c) Discussion

Guzman argues that the court erred in not granting his motion for mistrial based on prosecutorial misconduct. Before considering whether a mistrial would be proper, we must determine whether there was misconduct by the prosecution.

[8,9] When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.[29] Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various conducts because the conduct will or may undermine a defendant's right to a fair trial.[30] Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.[31] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[32]

According to Guzman, the prosecutor engaged in misconduct by calling Rodriguez as a witness and impeaching him with testimony from his deposition on "trivial matters."[33] Guzman contends that the State attacked Rodriguez' credibility before Guzman could call Rodriguez as a witness.

[10-12] Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.[34] One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions.[35] But a party cannot impeach his or her own witness without limitation.[36]

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Brief for appellant at 25.

[34] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

[35] *Id.*

[36] *Id.*

The State's impeachment of Rodriguez does not amount to prosecutorial misconduct. The State called Rodriguez to testify, because he had information useful to the State's case. The State had no reason to anticipate that Rodriguez would not testify consistently with his sworn deposition testimony. Assuming without deciding that Guzman's motion for mistrial was timely, the court did not abuse its discretion in overruling the motion.

3. Motion for Directed Verdict

(a) Additional Background

[13] Guzman challenges the denial of his motion for directed verdict, but he waived the issue by presenting evidence. After the court overruled Guzman's motion for a directed verdict of acquittal on both charges, the defense proceeded to call a witness. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.[37] We consider Guzman's argument as one challenging the sufficiency of the evidence.

(b) Standard of Review

[14] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed,

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[37] *State v. Briggs, supra* note 8.

in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[38]

(c) Discussion

[15] When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, 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.[39] The State met its burden with respect to both charges.

With respect to the sexual assault charge, Guzman's brief does little more than attack the credibility of B.G. But an appellate court does not pass on the credibility of witnesses or reweigh the evidence. B.G. testified that she did not consent to having sex with anyone on the night of her party, and an attendee at the party testified that Guzman said he had sex with B.G. There was also abundant testimony about B.G.'s intoxication. Viewing the evidence most favorably to the State, a fact finder could conclude that Guzman subjected B.G. to sexual penetration without her consent or under circumstances when he knew or should have known that B.G. was mentally or physically incapable of resisting or appraising the nature of her conduct.[40]

Guzman also contends that the State failed to adduce sufficient evidence to support the charge of tampering with a witness. Under Neb. Rev. Stat. § 28-919(1) (Reissue 2016):

> A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to:

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[38] *State v. Case*, 304 Neb. 829, 937 N.W.2d 216 (2020).

[39] *Id.*

[40] See Neb. Rev. Stat. § 28-319(1) (Reissue 2016).

(a) Testify or inform falsely;

(b) Withhold any testimony, information, document, or thing;

(c) Elude legal process summoning him or her to testify or supply evidence; or

(d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

Guzman asserts that he merely relayed a message asking B.G. to drop the charges and that such action did not constitute tampering with a witness. He claims that he did not threaten or bribe B.G., did not ask her to testify falsely, and did not ask her not to go to court. But B.G. reported that she was sexually assaulted. By asking B.G. to drop the charges, Guzman was essentially asking her to inform falsely or to withhold information. The State adduced sufficient evidence at trial to support the conviction for tampering with a witness.

4. Sentences

(a) Additional Background

Finally, Guzman argues that his sentences were excessive. For first degree sexual assault, a Class II felony,[41] the court imposed a sentence of 12 to 20 years' incarceration. At the time of the crime and sentencing, tampering with a witness was a Class IV felony.[42] For that conviction, the court imposed a concurrent sentence of 2 years.

(b) Standard of Review

[16] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[43]

[17] Plain error may be found on appeal when an error unasserted or uncomplained of at trial is plainly evident from the

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[41] See § 28-319(2).

[42] See § 28-919(3).

[43] *State v. Iddings*, 304 Neb. 759, 936 N.W.2d 747 (2020).

record, affects a litigant's substantial right, and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[44]

(c) Discussion

[18] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[45] In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.[46] 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.[47]

Guzman argues that an examination of the presentence report shows the sentencing factors weigh in favor of a lighter sentence. Some do. According to the presentence report, Guzman was 21 years old, was a high school graduate, and was consistently employed prior to incarceration. His minimal criminal record consisted of traffic violations, an "MIP," and a curfew violation. But other considerations do not favor a light sentence. An instrument designed to determine a defendant's risk for recidivism put him in the high risk range to reoffend. With respect to the charges he stated: "'Bullshit. It's embarrassing and has affected everyone around me. This case has ruined

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[44] *State v. Briggs, supra* note 8.

[45] See *State v. Iddings, supra* note 43.

[46] *Id.*

[47] *Id.*

my character. It's the worst thing that could have happened to me.'" We cannot say that the court abused its discretion in sentencing Guzman.

However, the State asserts that the court's sentence for the witness tampering conviction was erroneous. Here, the court imposed a sentence for a Class II felony and a concurrent determinate sentence for a Class IV felony for offenses occurring in 2017. But a statute provides:

> *For any sentence of imprisonment for a Class . . . IV felony . . . imposed consecutively or concurrently with . . . a sentence of imprisonment for a Class . . . II . . . felony, the court shall impose an indeterminate sentence* within the applicable range in section 28-105 that does not include a period of post-release supervision, in accordance with the process set forth in section 29-2204.[48]

[19,20] The court plainly erred by imposing a determinate sentence for the Class IV felony. The failure to impose an indeterminate sentence when required by statute constitutes plain error.[49] An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.[50] We therefore vacate Guzman's sentence for tampering with a witness and remand the cause for resentencing on that conviction.

V. CONCLUSION

Because Guzman failed to include the required specificity in his assignment of error alleging ineffective assistance of trial counsel, we do not consider it. And we clarify that the State has no right to cross-appeal under these circumstances.

We conclude that the court did not err in overruling Guzman's motion to suppress and motion for mistrial. Viewing the evidence in the light most favorable to the State, we further

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[48] Neb. Rev. Stat. § 29-2204.02(4) (Reissue 2016) (emphasis supplied).

[49] *State v. Briggs, supra* note 8.

[50] See *State v. Kantaras, supra* note 19.

conclude that the evidence at trial supported Guzman's convictions. Finally, we determine that the court did not impose excessive sentences. However, because the court erred by imposing a determinate sentence for the witness tampering conviction, we vacate that sentence and remand the cause for resentencing on that count only.

Affirmed in part, and in part vacated and remanded for resentencing.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Evangelos A. Argyrakis, respondent.

940 N.W.2d 279

Filed March 27, 2020. No. S-19-059.

1. **Disciplinary Proceedings.** Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings: Rules of the Supreme Court.** Under Neb. Ct. R. § 3-304, the Nebraska Supreme Court may impose one or more of the following disciplinary sanctions: (1) disbarment; (2) suspension; (3) probation, in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
4. ____. Each attorney discipline case must be evaluated in light of its particular facts and circumstances.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
6. ____. In attorney discipline cases, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of disbarment.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

Evangelos A. Argyrakis, pro se.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

NATURE OF CASE

The issue in this attorney discipline proceeding is what discipline should be imposed on Evangelos A. Argyrakis for violating the Nebraska Rules of Professional Conduct.

Argyrakis pleaded no contest to knowing and intentional abuse, neglect, or exploitation of a vulnerable adult or senior adult, a Class IIIA felony. At the plea hearing, when asked for a factual basis for the plea, the prosecutor said that if the matter proceeded to trial, the State would show that Argyrakis, in the course of a verbal argument, repeatedly punched his 83-year-old father in the face, resulting in observable injuries. Neither Argyrakis nor his counsel objected to the factual basis.

The referee recommended disbarment, and after our review, we conclude that disbarment is the proper sanction.

BACKGROUND

Procedural History.

Argyrakis was admitted to the practice of law in Nebraska on September 14, 1992. At all times relevant to these proceedings, he was licensed to practice law in the State of Nebraska.

Argyrakis was initially charged in the district court for Douglas County with strangulation, a Class IIIA felony. The information, filed May 10, 2018, identified the victim as Argyrakis' father and alleged that the crime took place on April 8.

On June 25, 2018, the relator hand-delivered to Argyrakis a letter notifying him that he was under investigation in connection with the pending criminal case and asking him to provide a written response within 15 working days. A few days later, Argyrakis sent an email to the relator in which he stated that "[t]his matter was a domestic dispute where I was not the aggressor." He requested that the relator await the conclusion of the criminal proceedings before continuing the investigation. The relator notified Argyrakis that any further action would be withheld until the criminal case was resolved, but also asked that Argyrakis advise the relator as to the status of the case.

On September 24, 2018, Argyrakis pleaded no contest to an amended information charging him with knowing and intentional abuse, neglect, or exploitation of a vulnerable adult or senior adult, a Class IIIA felony. The amended information again identified the victim as Argyrakis' father and alleged that the crime was committed on April 8. He was sentenced to 3 years' probation, with terms that included chemical testing and a mental health evaluation. Argyrakis failed to report the plea and sentencing to the relator.

After the Committee on Inquiry of the Second Judicial District concluded that there were reasonable grounds for discipline of Argyrakis and that the public interest would be served by the filing of formal charges, formal charges were filed against Argyrakis on January 23, 2019. The formal charges alleged that Argyrakis had violated the Nebraska Rules of Professional Conduct by committing a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects. Argyrakis filed an answer to the formal charges in which he admitted allegations regarding the fact of his conviction and sentence, but failed to either admit or deny whether he violated the Nebraska Rules of Professional Conduct.

Hearing.

On May 3, 2019, a hearing on the formal charges was commenced. Argyrakis represented himself at the hearing.

The relator offered certified copies of documents reflecting the charges, plea agreement, and sentence in the criminal case. The relator also called Argyrakis to testify. In his testimony, Argyrakis admitted that he pleaded no contest to and was found guilty of vulnerable adult abuse against his father. Argyrakis denied that he was convicted of a crime of violence, because, in his words, he "was not the aggressor." Argyrakis also acknowledged that since 2010, he had seen five different doctors for mental health therapy and medication management; that he had undergone two mental health evaluations, one prior to the April 2018 incident and one after; and that he was currently taking three different medications for mental health issues.

After being questioned by counsel for the relator, Argyrakis made a statement under oath. He stated that during his childhood, his father physically and emotionally abused him and that he witnessed his father physically abusing his mother. He testified to his belief that he had always represented clients diligently and effectively and that no clients had ever complained about his services. He also testified that he did not intend to harm his father, that he had attempted to get help for the circumstances that led to the incident, and that he did not believe a similar incident would happen again.

Argyrakis also called Regina Schulze to testify. Schulze, a licensed independent mental health professional, testified that she began providing weekly mental health counseling to Argyrakis in December 2018. Schulze diagnosed Argyrakis with depressive disorder, panic disorder, and post-traumatic stress disorder. She testified to her opinion that these issues contributed to the incident between Argyrakis and his father and that she did not expect any physical altercations in the future. On cross-examination, she admitted that she based these

conclusions solely upon information provided by Argyrakis and that she had not reviewed any of his prior medical records, mental health evaluations, or other documentation concerning his condition.

Following the close of evidence, the referee directed the parties to file briefs addressing whether Argyrakis was convicted of a crime of violence. The referee expressed hesitation as to whether the crime of abuse of a vulnerable adult would always constitute a crime of violence. In particular, the referee observed that the crime could be committed through neglect or exploitation, and he noted that it was not clear that would amount to a crime of violence.

On May 9, 2019, the relator filed a motion to reopen the record. The relator sought to supplement the record with the transcript of the plea proceedings in Argyrakis' criminal case. The relator contended it was relevant to the issue of whether Argyrakis committed a crime of violence. The referee took the motion under advisement, but allowed the relator to conditionally proceed with the evidence.

When allowed to proceed with evidence, the relator introduced the transcript of the proceeding in which Argyrakis entered his plea in the criminal case. At that proceeding, the prosecutor said that the State was pursuing the charge against Argyrakis on the ground that he physically injured his father. Further, when asked for the factual basis for the plea, the prosecutor stated that if the matter proceeded to trial, the evidence would show that during an argument between Argyrakis and his 83-year-old father, Argyrakis repeatedly punched his father in the face, causing observable injuries. Neither Argyrakis nor his counsel objected to the factual basis for the plea, and Argyrakis stated on the record that he was satisfied with the representation provided by his counsel.

The referee later granted the motion to reopen the record.

Referee's Report.

The referee filed a report and recommendation. The referee found, by clear and convincing evidence, that Argyrakis

violated Neb. Ct. R. of Prof. Cond. § 3-508.4(b) (rev. 2016) and his oath of office as an attorney.

The referee specifically analyzed whether Argyrakis was convicted of a crime of violence. The referee concluded such analysis was necessary based on his understanding that this court ruled in *State ex rel. Counsel for Dis. v. Walz*[1] that disbarment is the appropriate sanction for conviction of a felony crime of violence "absent extraordinary mitigation." The referee concluded that Argyrakis was convicted of a crime of violence.

The referee also considered potential mitigating circumstances. He found that Argyrakis' lack of a prior disciplinary record in over 25 years of practice was a mitigating circumstance. He found that Argyrakis had not accepted responsibility for his misconduct and that thus, that was not available as a mitigating circumstance. He also found that Argyrakis' mental health diagnosis should not be considered in mitigation. The referee explained that under *State ex rel. Counsel for Dis. v. Thompson*,[2] in order for mental health to be considered in mitigation, Argyrakis was required to show (1) medical evidence that he is affected by a mental health condition, (2) that the condition was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the condition will substantially reduce the risk of further misconduct. The referee concluded that Argyrakis had not made the required showing under *Thompson*, explaining little weight could be afforded to Schulze's opinions that a mental health issue caused his misconduct and that treatment of the condition would substantially reduce the risk of further misconduct, because those opinions were formed solely on the basis of self-reporting by Argyrakis.

The referee recommended disbarment.

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[1] *State ex rel. Counsel for Dis. v. Walz*, 291 Neb. 566, 869 N.W.2d 71 (2015).

[2] *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

ASSIGNMENT OF ERROR

Neither party has taken exception to the report of the referee. Therefore, the only issue is the appropriate sanction under the circumstances. Argyrakis opposes the referee's recommendation and the relator's request for disbarment.

STANDARD OF REVIEW

[1] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[3]

ANALYSIS

Neither party filed exceptions to the referee's report and recommendation. In those circumstances, the court may, at its discretion, adopt the findings of the referee as final and conclusive.[4] We therefore adopt the referee's findings that clear and convincing evidence establishes that Argyrakis violated § 3-508.4(b) and his oath of office as an attorney. The only issue remaining for this court's consideration is the appropriate sanction.

[2-6] Under Neb. Ct. R. § 3-304, this court may impose one or more of the following disciplinary sanctions: (1) disbarment; (2) suspension; (3) probation, in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.[5] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of

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[3] *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017).

[4] Neb. Ct. R. § 3-310(L) (rev. 2014).

[5] *State ex rel. Counsel for Dis. v. Nimmer*, 300 Neb. 906, 916 N.W.2d 732 (2018).

the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[6] Each attorney discipline case must be evaluated in light of its particular facts and circumstances.[7] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[8] Furthermore, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[9] We will proceed to consider each of these issues in turn.

Consideration of Traditional Sanction Factors.

In *Walz*, we discussed how the factors we regularly consider in formulating an appropriate sanction for attorney misconduct apply when an attorney is convicted of a crime of violence.[10] In the course of discussing the nature of the offense and the need for deterrence, we observed that offenses involving violence require discipline and that the sanction must be tailored to maintain public confidence in the bar.[11] We also noted that the factor requiring consideration of protection of the public is not merely concern for a physical danger to the public, but also requires consideration of whether it is in the public interest to allow an attorney who has committed a crime of violence to keep practicing law. Finally, we emphasized that even if no clients are harmed, "an attorney's conviction of a felony for a crime of violence requires a severe sanction."[12]

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[6] *State ex rel. Counsel for Dis. v. Jorgenson*, 302 Neb. 188, 922 N.W.2d 753 (2019).

[7] *Nimmer, supra* note 5.

[8] *Id.*

[9] *Id.*

[10] *Walz, supra* note 1.

[11] *Id.* (citing § 3-508.4, comment 2).

[12] *Id.* at 576, 869 N.W.2d at 77.

The foregoing discussion from *Walz* regarding the appropriate sanction when an attorney is convicted of a crime of violence is applicable in this case. We classified the conviction at issue in *Walz* as a crime of violence when it did not involve actual physical violence, but the threat to commit such violence. Here, the factual basis offered for Argyrakis' no contest plea, to which Argyrakis did not object, was that Argyrakis committed an act of actual physical violence by repeatedly punching his 83-year-old father in the face.

This case is similar to *Walz* with respect to another traditional factor bearing on the appropriate sanction—the attitude of the respondent. In *Walz*, the attorney insisted on her innocence despite entering a no contest plea to making terroristic threats. We stated that it was not our task to review a criminal conviction in attorney disciplinary proceedings and that because the respondent insisted on her innocence, she had not accepted responsibility for her actions. For similar reasons, we cannot say that Argyrakis has accepted responsibility in this case. Although Argyrakis seems to concede that he did, in fact, inflict physical violence on his elderly father, throughout the proceedings, he has attempted to minimize his culpability by insisting that he was not the aggressor in the encounter and that his actions were in self-defense. As in *Walz*, it is not our task to review the conviction. And rather than accepting responsibility for that conviction, Argyrakis is attempting to assign at least partial responsibility for it to others.

Consideration of Mitigating Factors.

Also relevant to the appropriate sanction in an attorney discipline case is the existence of any mitigating factors. Here, the referee found one mitigating factor: the absence of any prior disciplinary issues in Argyrakis' over 25 years of practice. We agree with the referee that this is a factor to be considered in mitigation.

We also do not disagree with the referee's conclusion that Argyrakis' mental health issues were entitled to little weight in

mitigation. In *Thompson*, we held that in order for depression to be considered as a mitigating circumstance, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.[13] We see no reason not to require the same showing in order to consider other mental health conditions as a mitigating circumstance.

Argyrakis attempted to introduce evidence of his mental health issues through Schulze. And though Schulze testified that she had diagnosed Argyrakis with mental health conditions, that she believed those conditions caused his misconduct, and that treatment of those conditions would reduce the risk of further misconduct, we agree with the referee that there are compelling reasons that this testimony should be accorded little weight. Schulze did not begin seeing Argyrakis until after the incident underlying his criminal conviction. And despite Argyrakis' acknowledgment that he had been treated by multiple doctors for mental health issues several years before the incident and that he had undergone mental health evaluations before and after the incident, Schulze did not consider any of this information in forming her opinions. Rather, she admitted that her opinions were based solely on information reported by Argyrakis. Because Schulze's opinions were formed without considering what would seem to be highly relevant information and mindful of the fact that the referee heard and observed Schulze during her testimony and determined that it should be given little weight,[14] we find that Argyrakis has not made the required showing to allow his mental health issues to be considered in mitigation.

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[13] *Thompson, supra* note 2.

[14] See *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 599 N.W.2d 592 (1999) (while attorney discipline proceeding is trial de novo on record, court may give weight to referee's findings on matters of disputed fact).

In his brief before us and at oral argument, Argyrakis contended that other factors should be considered in mitigation. He claimed that he was not the aggressor in the incident with his father and that the decision to prosecute him was politically motivated. We see no other mitigating factors. As noted above, it is not our function to review his conviction. Further, there is no evidence in the record supportive of his theory of a politically motivated prosecution.

Comparison to Prior Cases.

Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[15] In addition, the propriety of a sanction must also be considered with reference to the sanctions imposed in prior similar cases.[16] *Walz* appears to be the only truly similar prior case for us to consider here. In *Walz*, we noted that there are few Nebraska cases of attorney discipline involving felony convictions of any kind and that *Walz* was the first case to involve a crime of violence.[17]

In *Walz*, the respondent was first charged with second degree domestic assault and use of a weapon to commit a felony. The State alleged that she assaulted her husband with a knife. Pursuant to a plea agreement, the respondent pleaded no contest to one count of making terroristic threats. The respondent maintained her innocence. We found that her felony conviction for a crime of violence damaged the reputation of the bar and threatened public confidence in the profession. We disbarred the respondent from the practice of law.

This case bears a number of similarities to *Walz*. Like the respondent in *Walz*, Argyrakis pleaded no contest to a felony crime of violence. And like the respondent in *Walz*, Argyrakis did not accept responsibility for his conviction.

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[15] *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

[16] *Id.*

[17] *Walz, supra* note 1.

There are, to be sure, differences between this case and *Walz*. As Argyrakis points out, the respondent in *Walz* also had no prior disciplinary history, but we pointed out that she had been in practice for only about 6 months before the misconduct occurred. This is obviously entitled to less weight than Argyrakis' over 25 years of practice without disciplinary issues. In addition, there was explicit testimony from the respondent's psychologist in *Walz* that she was not, at that time, fit to practice law. No similar testimony was offered in Argyrakis' case.

But not all of the differences between this case and *Walz* tilt in Argyrakis' favor. As we have previously noted, the conviction in *Walz* was for making threats to use violence, while the conviction here involves actual physical violence on an elderly person. Further, the conviction in this case was for a Class IIIA felony, more serious than the Class IV felony in *Walz*. In addition, although both the respondent in *Walz* and Argyrakis did not accept responsibility for their convictions, the respondent in *Walz* was found to be fully cooperative with the Counsel for Discipline. The same cannot be said for Argyrakis. Argyrakis failed to notify the Counsel for Discipline that he had entered a plea and been sentenced in his criminal case, despite the request to keep the Counsel for Discipline informed.

In sum, this case is highly similar to *Walz* and any differences that cut in favor of a less serious sanction are counterbalanced by differences that cut in the opposite direction.

Sanction.

In *Walz*, we observed that while we have not stated a "'bright line rule,'"[18] our cases regarding the appropriate discipline for felony convictions have generally concluded that such convictions reflect adversely upon a lawyer's fitness to practice law and that disbarment is the appropriate sanction. As in *Walz*, we believe it is necessary to convey the serious consequences

[18] *Id.* at 575, 869 N.W.2d at 77.

that attach to a conviction for a crime of violence. Such a conviction damages the reputation of the bar and threatens public confidence in the profession. For these reasons, we conclude, after considering the appropriate factors, that disbarment is the appropriate sanction in this case.

CONCLUSION

Argyrakis violated § 3-508.4(b) (misconduct) and his oath of office as an attorney. It is the judgment of this court that Argyrakis is disbarred from the practice of law in the State of Nebraska, effective immediately. He is directed to comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt.

Judgment of disbarment.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. William T. Kelley, appellant.

940 N.W.2d 568

Filed March 27, 2020. No. S-19-227.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law, which requires an appellate court to reach its conclusions independent from those of a trial court.
2. **Jurisdiction: Appeal and Error.** Before reaching the merits of the issues presented for review, it is an appellate court's duty to determine whether it has jurisdiction to decide them.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
4. **Criminal Law: Judgments: Sentences: Appeal and Error.** In a criminal case, the judgment from which the appellant may appeal is the sentence.
5. **Double Jeopardy: Pleadings: Final Orders.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), a plea in bar is a "special proceeding," and an order overruling a nonfrivolous double jeopardy claim affects a substantial right.
6. **Double Jeopardy.** The Double Jeopardy Clause protects 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.
7. **Double Jeopardy: Juries: Evidence: Pleas.** In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

Appeal from the District Court for Gage County: Vicky L. Johnson, Judge. Appeal dismissed.

Timothy S. Noerrlinger for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

William T. Kelley appeals the denial of his plea in bar, in which he claimed that charges that he committed sexual assaults should be barred because the State agreed not to prosecute him for those charges in a prior plea agreement. Kelley's plea in bar did not, however, present a colorable double jeopardy claim. Accordingly, we lack appellate jurisdiction and have no choice but to dismiss the appeal.

BACKGROUND

In August 2018, Kelley was charged by information with one count of first degree sexual assault and one count of third degree sexual assault of a child. Kelley was alleged to have committed the first degree sexual assault between June 1, 2007, and January 11, 2008. Kelley was alleged to have committed the third degree sexual assault of a child between September 1, 2007, and January 12, 2008. The victim of both crimes was alleged to be T.K.

Kelley filed a plea in bar. In the plea in bar, he asserted that in March 2009, he entered guilty pleas to multiple criminal charges in two different criminal cases. Kelley claimed that he pleaded guilty to those charges as part of an agreement in which the State agreed not to bring any charges alleging that he sexually assaulted T.K. Kelley contended that by filing criminal charges it had previously agreed not to bring, the State was violating rights guaranteed to him by the Double Jeopardy Clauses of the federal and the Nebraska Constitutions.

The district court held a hearing on Kelley's plea in bar. The evidence introduced at the hearing showed that in 2009,

after Kelley had been charged with multiple crimes in two different criminal cases, Kelley and the State entered into a written plea agreement. Pursuant to that agreement, Kelley pleaded guilty to various offenses, the court accepted his pleas, and he was found guilty and sentenced accordingly. The written plea agreement did not include a promise by the State not to prosecute Kelley for alleged assaults on T.K. It also included a clause that stated, "[t]he parties to this plea agreement state and acknowledge that this document contains all of the promises, agreements, and understandings between the parties."

Despite the absence of any indication in the written plea agreement that the State was agreeing not to charge Kelley with any charges pertaining to T.K., Kelley claimed that was, in fact, part of the agreement. In support of that argument, Kelley called his attorney in the prior criminal cases as a witness. That attorney testified that an agreement not to prosecute Kelley for alleged assaults on T.K. was part of the agreement he reached with the prosecutor and that Kelley's counsel had inadvertently omitted it from the written plea agreement. Kelley also testified and asserted that the "only reason" he agreed to the plea agreement was the State's agreement not to prosecute him for assaults on T.K. The prosecutor in the prior criminal cases, however, testified that an agreement not to prosecute Kelley for alleged assaults on T.K. was not part of the agreement.

The district court overruled the plea in bar. Kelley appealed.

ASSIGNMENTS OF ERROR

Kelley assigns two errors on appeal. He contends that the district court erred by overruling his plea in bar. He also asserts that he received ineffective assistance of counsel.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law, which requires an appellate court to reach its conclusions independent from those

of a trial court. *Griffith v. Nebraska Dept. of Corr. Servs.*, 304 Neb. 287, 934 N.W.2d 169 (2019).

ANALYSIS

[2] Before reaching the merits of the issues presented for review, it is our duty to determine whether we have jurisdiction to decide them. See *Green v. Seiffert*, 304 Neb. 212, 933 N.W.2d 590 (2019). As we will explain, after exercising that duty here, we find that we do not have jurisdiction.

[3,4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken. *State v. Paulsen*, 304 Neb. 21, 932 N.W.2d 849 (2019). In a criminal case, the judgment from which the appellant may appeal is the sentence. *Id.* Kelley has not been sentenced in this case, so we may only exercise jurisdiction if he has appealed from a final order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the four types of final orders which may be reviewed on appeal are (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; (3) an order affecting a substantial right made on summary application in an action after judgment is rendered; and (4) an order denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity or the immunity of a government official.

[5] Kelley contends that our precedent recognizes that an order overruling a plea in bar is a final order. We have held that a plea in bar is a "special proceeding," for purposes of § 25-1902, and that an order overruling a *nonfrivolous* double jeopardy claim affects a substantial right. See *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009). Based on this reasoning, we have reviewed several cases in which the trial court overruled a plea in bar, but the defendant presented a colorable double jeopardy claim. See, e.g., *State v. Huff*, 279 Neb. 68, 70, 776 N.W.2d 498, 501 (2009) ("[appellant's] plea in bar raises a colorable double jeopardy claim, and we

therefore have jurisdiction over this interlocutory appeal"). See, also, *State v. Bedolla*, 298 Neb. 736, 905 N.W.2d 629 (2018); *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017); *Williams, supra*.

In this case, however, we find that Kelley has not presented such a claim. Kelley does assert that the State could not, consistent with the Double Jeopardy Clauses of the federal and Nebraska Constitutions, charge him with sexually assaulting T.K. He claims that is the case because the State agreed in the plea agreement not to do so. He has never, however, explained why the State's alleged breach of the plea agreement amounts to a violation of double jeopardy.

[6] Not only has Kelley not made an argument that the Double Jeopardy Clauses preclude the State from charging him with sexually assaulting T.K., we cannot conceive of a colorable one. And that is true even if we assume that the State agreed in the plea agreement not to bring charges against Kelley alleging that he sexually assaulted T.K. The Double Jeopardy Clause protects 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. *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019). Nothing in our record indicates that Kelley has previously been acquitted, convicted, or punished for sexually assaulting T.K.

[7] Neither is there anything in our record indicating that Kelley will be twice placed in jeopardy for sexually assaulting T.K. In Nebraska, jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea. *Id.* As far as our record discloses, prior to the filing of the information in this case, Kelley had not ever been charged with sexually assaulting T.K. and proceedings had certainly not progressed to the point that jeopardy had attached with respect to such charges.

The fact that Kelley has assigned as error on appeal that he received ineffective assistance of counsel does not change our analysis. Kelley argues that his counsel in the prior criminal cases provided ineffective assistance by failing to include language in the written plea agreement that the State would not bring charges against Kelley alleging that he sexually assaulted T.K. We question whether a party can assert that counsel in a prior criminal case was ineffective in the context of a plea in bar, but even if that is set to the side and even if we assume that Kelley's ineffective assistance of counsel allegation has merit, we see no basis to say that rights guaranteed to Kelley by the Double Jeopardy Clauses have been violated.

Our decision today should not be read to hold that a defendant has no remedy if the State pursues charges it previously agreed not to bring as part of a plea agreement. Indeed, we have previously noted that "when the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea." *State v. Smith*, 295 Neb. 957, 972, 892 N.W.2d 52, 63 (2017). But as Kelley's counsel acknowledged in oral argument, the only remedy he has pursued is a plea in bar based on an alleged double jeopardy violation. Because Kelley has not asserted a colorable double jeopardy claim, however, we lack jurisdiction to decide anything else and are obligated to dismiss the appeal.

CONCLUSION

Because Kelley has not presented a colorable double jeopardy claim, the order overruling his plea in bar was not a final, appealable order. Accordingly, we dismiss the appeal for lack of jurisdiction.

Appeal dismissed.

Freudenberg, J., not participating.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Eddy D. Stabler, appellant.

940 N.W.2d 572

Filed March 27, 2020. No. S-19-360.

1. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **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.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the

defendant of the greater offense and convicting the defendant of the lesser offense.

7. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
8. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.
9. ____. 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: Andrew R. Jacobsen, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, Shawn Elliott, and Ella Newell, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Heavican, C.J.

INTRODUCTION

Defendant Eddy D. Stabler was convicted by a jury of second degree assault and use of a deadly weapon to commit a felony. He was sentenced to a total of 15 to 25 years' imprisonment. He appeals. We affirm.

FACTUAL BACKGROUND

Stabler and the victim, Jacinda Stabler, were married and resided together on B Street in Lincoln, Nebraska, with their

four children and the children of each of them from previous relationships with other individuals. In April 2016, Jacinda filed for divorce. Stabler moved out of the family home to live with his sister, who resided elsewhere in Lincoln.

At approximately this same time, Stabler began communicating via electronic messaging with a relative, Athea Stabler. Stabler and Athea were both members of the Omaha Tribe, and Athea lived in Macy, Nebraska.

As part of a cooperation agreement, Athea testified at trial as to her role in Jacinda's assault. According to Athea's testimony, in Stabler's messages, which she later deleted, Stabler told Athea that Jacinda had been "cheating on" him and asked Athea whether she would "handle the situation." Though by all indications Athea did not know Jacinda, she agreed to help Stabler because she viewed Jacinda as a threat to the family.

On May 28, 2016, Athea came to Lincoln to attend an event at a community center. While at this event, Athea communicated with Stabler, again via electronic messaging, who wondered if "she" was at the event. Athea took "she" to mean Jacinda. Athea told Stabler that "she" was not in attendance. Stabler then asked whether Athea was staying overnight. Athea indicated that she was driving back to Macy with her mother and stepfather. At this, Stabler invited Athea to a family birthday party at a local bar and offered to drive her back to Macy the next day "if u can handle this." Athea testified that she understood "this" to refer to assaulting Jacinda. Athea agreed, and Stabler and Athea established general terms for payment—"Yeah give u sum cash r sun chit either way half an half we can talk about it"—which Athea explained meant she was to earn some combination of money and drugs. Unlike the earlier messages, these messages were not deleted and are part of the record.

At the conclusion of the event at the community center, Athea met with Stabler and others at the home of Stabler's sister to attend the birthday party. Athea testified that she

spoke alone with Stabler prior to leaving for the party and that Stabler indicated, in conformity with his and Athea's electronic messaging communications, that Athea was to assault Jacinda that night. According to Athea's testimony, Stabler told Athea to "leave a scar on [Jacinda's] face and to cut off her mane." In return, Athea was to be paid $400 and 4 grams of methamphetamine.

After attending the birthday party, Stabler and Athea dropped another partygoer off at the home of Stabler's sister, then went to a different location to "get high." During the car ride to the other location, Stabler gave Athea a knife.

At some point, Stabler and Athea went to yet another home. Athea testified that the individuals who lived in that home drove her to Jacinda's house and waited in the car while Athea was inside. Athea located Jacinda in the home, where she was sleeping in a bed with some of her children. That Jacinda was with her children gave Athea pause, and she testified that she decided only to threaten Jacinda. As such, she put the knife to Jacinda's throat; this woke Jacinda, who began screaming. Athea grabbed Jacinda by her hair and began to hit her. Jacinda fought back and kicked at Athea, so Athea began stabbing Jacinda and tried to cut off her hair. Having stabbed Jacinda, though not cut her hair, Athea fled the house, dropping the knife on her way out.

Over the next few months, Stabler and Athea continued to communicate via electronic messaging. As with the messages sent on the day of the assault, these later messages are in the record. According to Stabler, the messages, reprinted in relevant part below, can be explained because Athea was seeking drugs. However, Athea testified that she initiated contact and attempted to meet with Stabler because she felt she was "gypped" by the compensation she received from Stabler for assaulting Jacinda. Athea further testified that she had received "some meth" and "just a hundred dollars," when she was promised $400 and more methamphetamine than she ultimately received. Athea did not think she would be successful simply

telling that to Stabler, so she wanted to force a face-to-face meeting with him.

During the course of these messages, Athea told Stabler that "iWent in With aKnife And Left WithOut It. My FingerPrints On That Shit. So Its Only aMatter Of Time." She also messaged, "Ya Hear AnyThing About That Knife? That Shit Got Me Worried Like aMuhFcka. Ugh." On another occasion, Stabler warned Athea, "Dude the cops . . . relax k" and "I got u . . . u have my word." In response, Athea asked, "Any Updates With The Investigation?" Stabler informed Athea that "jacinda is pointing fingers at me . . . lol . . . I got this shit I tel u more in person u just relax as best u can." Athea responded, "Im Tryin' Unk. Juzt Impatient. Cuz if AnyThing Comes Bck On Me iAint Trynna Be Broke or Sober." On yet another occasion, Athea asked for news updates. Stabler said that there were no updates, but that that was good news, and that the police were "Looking for a 6′ft tall 230lbs Mexican male," to which Athea responded, "Ha! With Dark Curly Hair." Stabler then replied, "Lol . . . shhh hit me up when ur in town."

Meanwhile, shortly after the assault, law enforcement received an anonymous tip that Athea had assaulted Jacinda. Athea was eventually questioned while being held on other charges. Athea admitted to assaulting Jacinda, but said that she would not have done so absent the arrangement with Stabler. Athea was convicted of second degree assault and sentenced to 18 to 20 years' imprisonment.

Stabler was found guilty on both counts. He appeals.

ASSIGNMENTS OF ERROR

Stabler assigns as error that the district court erred by (1) failing to give a limiting instruction when requested in response to the State's improper burden-shifting argument during rebuttal, (2) prohibiting Stabler from explaining that his prior convictions were for forgery, (3) failing to instruct the jury on the lesser-included offense of third degree assault, (4) finding that the evidence was sufficient to sustain Stabler's convictions, and (5) imposing excessive sentences.

STANDARD OF REVIEW

[1,2] Whether the jury instructions given by a trial court are correct is a question of law.[1] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[2]

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[3]

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[4]

ANALYSIS

Limiting Instruction.

Stabler first assigns that statements made by the State in rebuttal closing arguments effectively shifted the burden of proof from the State to the defense and that the district court erred in not giving a limiting instruction to correct this burden shifting.

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the

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[1] *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

[2] *Id.*

[3] *State v. Case*, 304 Neb. 829, 937 N.W.2d 216 (2020).

[4] *State v. Iddings*, 304 Neb. 759, 936 N.W.2d 747 (2020).

evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[5]

As relevant to this assignment of error, the record shows that during the State's case in chief, it offered the testimony of one of the investigating officers. That officer testified that the police were able to locate just one of the two individuals who drove Athea to Jacinda's home and that the individual refused to speak with them.

During closing arguments, defense counsel noted that the State was not able to produce any witnesses to corroborate Athea's testimony, including either of those two individuals. Defense counsel then noted that though the State claimed that neither individual would cooperate, it was "not an excuse" and did not change the State's burden of proof.

In response to this, the State commented in its rebuttal argument that it "[did not] deny [that] it's [the State's] burden to prove this case beyond a reasonable doubt, but parties have the power to subpoena, both parties have the power to compel witnesses," apparently suggesting that Stabler, too, could have called these witnesses. Defense counsel objected at this point and requested the jury to be instructed that the burden never shifts to the defendant. The district court sustained the objection and noted, "The comments of the State are stricken from the record, and the jury is not to consider those comments."

On appeal, Stabler argues that the district court erred in not giving a limiting instruction regarding burden shifting. While the district court did not immediately give the specific limiting instruction Stabler requested, it struck the comments in question and specifically instructed the jury that it should disregard the comments. And only a short time later, just prior to submission of the case, the trial court again so instructed the jury, both orally and in writing. The instructions informed the jury that it should not consider as evidence statements or arguments made by the attorneys, objections to questions, or testimony the jury

[5] *State v. Case, supra* note 3.

had previously been told to disregard. In addition, the jury was instructed that the State had the burden to prove Stabler's guilt. The jury was also informed about the State's burden throughout the trial.

We find no error in the district court's handling of this matter. And even if there was error, it was not prejudicial. Stabler's first assignment of error is without merit.

Admissibility of Stabler's Testimony Regarding Nature of His Prior Felony Convictions.

In his second assignment of error, Stabler assigns that the district court erred in finding that he could not testify on direct examination as to the basis of his prior felony convictions.

During the course of trial, and just prior to Stabler's taking the stand to testify in his own behalf, the State moved in limine to prohibit Stabler from testifying as to the nature of his two prior felony convictions. That motion was granted, and Stabler made an offer of proof that had he been permitted to testify, he would have stated his prior convictions were for crimes of dishonesty, specifically forgery.

As relevant to this issue, Neb. Rev. Stat. § 27-609(1) (Reissue 2016) states:

> For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of punishment.

The issue presented in this case was addressed by the Nebraska Court of Appeals in *State v. Howell*.[6] The Court of Appeals examined this court's case law regarding § 27-609, and it concluded:

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[6] *State v. Howell*, 26 Neb. App. 842, 924 N.W.2d 349 (2019).

> [W]e are constrained to find that the district court did not err in prohibiting [the defendant] from testifying as to the specifics of his prior felony conviction. Pursuant to [§ 27-609], [the defendant] was permitted to testify that he had previously been convicted of a felony or a crime involving dishonesty. He was not permitted to divulge the specifics of his prior conviction, as such information was not relevant to his credibility.[7]

Stabler argues in his brief that the district court erred, because without evidence on the nature of the felonies, "the jury was left to wonder about the nature of the prior felony convictions, in particular, left to wonder whether his felony convictions were for crimes of violence."[8] Stabler asks this court to reverse the Court of Appeals' decision in *Howell*.

We need not decide whether *Howell* was wrongly decided, because in this case, the evidence Stabler wished to admit was presented to the jury. The record shows that Stabler was permitted to testify, without objection or cross-examination, that his felonies were for crimes of dishonesty; thus, the jury was informed that Stabler's felonies were not for crimes of violence.

We decline to address Stabler's contention, made for the first time in oral arguments in this case, that there is a distinction between forgery and other crimes of dishonesty. This contention was not raised below, nor was it assigned or argued in his brief.

There is no merit to Stabler's second assignment of error.

Lesser-Included Instruction.

Stabler also assigns that the district court erred in refusing to give his requested instruction for the lesser-included offense of third degree assault. He contends Athea testified that after she entered Jacinda's home and found Jacinda sleeping with her children, she put the knife away and abandoned the

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[7] *Id.* at 869, 924 N.W.2d at 371.

[8] Brief for appellant at 37.

original plan. Stabler further notes that Athea attacked Jacinda only to keep her from screaming. Stabler argues that even then, Athea attacked at first only by punching Jacinda, and that Athea did not use the knife until Jacinda kicked her. Stabler argues that this created a causal break, that Athea's actions using the knife after this point cannot be attributed to Stabler, and that there was a "rational basis" to support a third degree assault instruction.[9]

[6] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[10] The State does not dispute, and our case law supports, that third degree assault is a lesser-included offense of second degree assault. A person commits the offense of second degree assault by committing the offense of third degree assault of causing, intentionally, knowingly, or recklessly, bodily injury to another by the use of a dangerous instrument.

In *State v. Al-Zubaidy*,[11] the defendant was charged with second degree assault. An issue on appeal was whether a lesser-included instruction on the offense of third degree assault was warranted. We held such an instruction was not warranted, because the uncontroverted evidence established that a knife was used in perpetration of the assault. We noted:

> Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence

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[9] *Id.* at 41.

[10] *State v. Oliveira-Coutinho*, 304 Neb. 147, 933 N.W.2d 825 (2019).

[11] *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

> to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.[12]

Here, the evidence was uncontroverted that Athea entered Jacinda's house with a knife that she intended to use, and in fact did use, to assault Jacinda. It was Stabler's duty to raise at least some evidence to dispute this issue. Stabler argues that Athea's decision not to assault Jacinda after seeing Jacinda with her children was a causal break that disputed the evidence of second degree assault and entitled him to an instruction for the lesser-included offense of third degree assault.

But this was not a causal break. Any momentary hesitation on Athea's part does not change the fact that Athea took a knife to Jacinda's home and attacked Jacinda with the knife and that the jury found Stabler guilty of that crime under an aiding and abetting theory. Moreover, in finding Stabler guilty of both second degree assault and of use of a weapon to commit a felony, the jury agreed that there was a connection between Stabler's arranging for the assault and Athea's use of the weapon.

There is no merit to Stabler's third assignment of error.

Sufficiency of Evidence.

Stabler next assigns that the district court erred in finding there was sufficient evidence to support his convictions. He argues first that Athea was not credible and that no other evidence supported Stabler's guilt. Stabler also argues that because Athea had second thoughts about using the knife to assault Jacinda when she saw the children in the room with Jacinda, such constituted an abandonment of the original plan and was a casual break in the chain of events. For that reason, the subsequent attack was attributed solely to Athea and there was no aiding and abetting liability on Stabler's part.

Stabler's contention that Athea was not credible is not relevant to our determination of whether there was sufficient

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[12] *Id.* at 607, 641 N.W.2d at 373-74.

evidence to support the conviction. It is not the role of an appellate court to pass on the credibility of the witnesses, or otherwise resolve conflicts in or reweigh the evidence.[13] Rather, if in viewing the evidence in a light most favorable to the State there was any evidence to support Stabler's guilt, such is sufficient to support the convictions.[14] In this case, Athea testified that she used a knife, given to her by Stabler, to stab Jacinda; that she did so at Stabler's request; and that she was paid to do so. This is enough to support Stabler's convictions.

Stabler's contention that there was insufficient evidence to support his convictions because Athea abandoned the original plan and thereafter was solely responsible for Jacinda's assault is also without merit. As noted above, this was not a causal break relieving Stabler of responsibility under an aiding and abetting theory. This conclusion is reinforced, again as noted above, by the fact that the jury found Stabler guilty of second degree assault and use of a weapon to commit a felony.

There is no merit to Stabler's fourth assignment of error.

Excessive Sentences.

Finally, Stabler assigns that the sentences imposed by the district court were excessive. Stabler was convicted of second degree assault, a Class IIA felony, and sentenced to 10 to 15 years' imprisonment. He was also convicted of use of a weapon to commit a felony, a Class II felony, and sentenced to 5 to 10 years' imprisonment. The sentences were to be served consecutively.

[7] Under Neb. Rev. Stat. § 28-105 (Reissue 2016), a Class IIA felony is punishable by a maximum of 20 years' imprisonment. There is no minimum. A Class II felony is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Where, as here, a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court

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[13] See *State v. Case, supra* note 3.

[14] See *id.*

abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[15]

[8,9] In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.[16] 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.[17]

A review of the record shows that not only were Stabler's sentences within statutory limits, they were imposed based on Stabler's plotting to have his wife, the mother of his children, assaulted. The sentences were not based on any inappropriate or irrelevant information. The district court did not abuse its discretion in sentencing Stabler, and there is no merit to his final assignment of error.

CONCLUSION

The convictions and sentences of the district court are affirmed.

Affirmed.

Freudenberg, J., not participating.

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[15] *State v. Iddings, supra* note 4.

[16] *Id.*

[17] *Id.*

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

In re Guardianship of Suzette G., an incapacitated person. Alvin G., Guardian, et al., appellees, v. Suzette G., appellant.

940 N.W.2d 829

Filed April 3, 2020. No. S-18-785.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Rules of the Supreme Court: Testimony: Guardians Ad Litem.** Neb. Ct. R. § 6-1469 (2017) does not prohibit testimony by a guardian ad litem and instead contemplates that a guardian ad litem can testify when such testimony is allowed by the Nebraska Rules of Professional Conduct.

Petition for further review from the Court of Appeals, Riedmann, Arterburn, and Welch, Judges, on appeal thereto from the County Court for Douglas County, Marcena M. Hendrix, Judge. Judgment of Court of Appeals affirmed.

James Walter Crampton for appellant.

Jayne Wagner and Emily J. Briski, of Legal Aid of Nebraska, for appellee Alvin G.

Denise E. Frost, of Johnson & Mock, for guardian ad litem.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Suzette G. appealed the order of the county court for Douglas County which appointed her brother, Alvin G., as her limited guardian. The Nebraska Court of Appeals affirmed the county court's order. We granted Suzette's petition for further review in which she claims that the Court of Appeals erred when it determined that the county court did not err when it allowed the appointed guardian ad litem (GAL) to testify at the trial. We affirm the decision of the Court of Appeals which affirmed the order of the county court.

STATEMENT OF FACTS

Suzette's brother, Alvin, filed petitions seeking temporary and permanent appointments as her limited guardian. Alvin alleged that because of mental health issues, Suzette was incapable of making responsible decisions regarding her person and her health, and he sought a limited guardianship related to those matters. A guardianship had been recommended by Suzette's doctor and was part of a plan formulated by the mental health board. The court appointed Alvin as temporary guardian and began proceedings to consider his petition for a permanent guardianship. At a hearing in February 2018, the county court appointed a GAL and also appointed a separate attorney to act as Suzette's legal counsel.

The trial on the permanent guardianship included appearances by counsel for Alvin and counsel for Suzette, and the GAL also appeared. Alvin called both Suzette and himself as witnesses when presenting his case as the petitioner, and the GAL was allowed to cross-examine both of them. Alvin also called the GAL as a witness. Suzette objected to the GAL's testifying, and she argued that the GAL could not act as an attorney by cross-examining witnesses and then act as

a witness by testifying in the same proceeding. In response, the GAL argued that under the guardian ad litem statutes and rules, the GAL could do both. The court allowed the GAL's testimony. During Alvin's direct examination of the GAL, Alvin offered and the court received the GAL's report into evidence without objection. Alvin questioned the GAL regarding information she reviewed in preparing her report and how she came to her recommendations. Suzette cross-examined the GAL.

In addition to cross-examining witnesses, the GAL was allowed to, and did, make objections throughout the trial. At the end of the trial, the GAL was allowed to make a closing statement. Following the trial, the court appointed Alvin as a permanent limited guardian for Suzette.

Suzette appealed to the Court of Appeals and claimed that the county court erred when it (1) found there was clear and convincing evidence that Alvin should be appointed as her guardian and (2) allowed the GAL to testify. The Court of Appeals rejected Suzette's assignments of error and affirmed the county court's order. See *In re Guardianship of Suzette G.*, 27 Neb. App. 477, 934 N.W.2d 195 (2019). Suzette does not seek further review regarding whether there was clear and convincing evidence to support the appointment, and so the Court of Appeals' resolution of that issue will not be discussed herein.

Regarding Suzette's claim that the GAL should not have been allowed to testify, the Court of Appeals concluded that the court did not err when it allowed the testimony. The Court of Appeals noted first that Neb. Rev. Stat. § 30-4203(2)(a) (Reissue 2016) provides that an appointed guardian ad litem may, inter alia, "[c]onduct discovery, present witnesses, cross-examine witnesses, present other evidence, file motions, and appeal any decisions regarding the person for whom he or she has been appointed." The Court of Appeals further noted Neb. Ct. R. § 6-1469(E)(4)(b) (2017), which provides that in court proceedings, "[t]he guardian ad litem may testify only

to the extent allowed by the Nebraska Rules of Professional Conduct." The Court of Appeals cited Neb. Ct. R. of Prof. Cond. § 3-503.7(a) and stated that the rule "prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness." *In re Guardianship of Suzette G.*, 27 Neb. App. at 487, 934 N.W.2d at 202. But the Court of Appeals also noted Neb. Ct. R. § 6-1469(C)(2), which provides that "[w]here a lawyer has already been or is appointed to represent the legal interests of the person, . . . the guardian ad litem shall function only to advocate for the best interests of the person."

The Court of Appeals reasoned that because the court had appointed both the GAL and a separate attorney to represent Suzette, "the GAL's duty was to advocate for Suzette's best interests" and "the GAL was not required to make a determination consistent with Suzette's preferences." *In re Guardianship of Suzette G.*, 27 Neb. App. at 488, 934 N.W.2d at 202. The Court of Appeals noted Neb. Ct. R. § 6-1469(C)(3)(a), which provides that when the guardian ad litem is "serving as advocate for the person's best interests, the guardian ad litem shall make an independent determination," and that "[s]uch determination is not required to be consistent with any preferences expressed by the person." The Court of Appeals reasoned that it was the responsibility of Suzette's separately appointed attorney, and not the GAL, to advocate for Suzette's preferences.

The Court of Appeals cited comment 1 to Neb. Ct. R. of Prof. Cond. § 3-503.7, which states in part that "[c]ombining the roles of advocate and witness can . . . involve a conflict of interest between the lawyer and client." The Court of Appeals reasoned that because the GAL was advocating for Suzanne's best interests rather than for Suzanne's preferences, "no conflict of interest arose between the GAL and Suzette" as a result of the GAL's acting as a witness. *In re Guardianship of Suzette G.*, 27 Neb. App. at 488, 934 N.W.2d at 202. The Court of Appeals concluded that the GAL's testimony "did not run

afoul of the Nebraska Rules of Professional Conduct" and that therefore the county court "did not err in permitting the GAL to testify." *In re Guardianship of Suzette G.*, 27 Neb. App. at 488, 934 N.W.2d at 202, 203.

We granted Suzette's petition for further review.

ASSIGNMENT OF ERROR

Suzette claims that the Court of Appeals erred when it determined that Neb. Ct. R. § 6-1469 allowed the GAL to testify over her objection.

STANDARDS OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in the county court. *In re Guardianship & Conservatorship of Alice H.*, 303 Neb. 235, 927 N.W.2d 787 (2019). 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. *Id*.

ANALYSIS

Suzette argues on further review that the relevant statutes and rules precluded the GAL's testimony in this case and that the analysis of the Court of Appeals to the contrary was error. Suzette's arguments necessarily implicate due process concerns and considerations of fairness to the parties to a guardianship proceeding. As explained below, we agree with the conclusion of the Court of Appeals that on the specific facts of this case, the statutes and rules did not prohibit the GAL's testimony, and we further note that due process and fairness concerns that might be present under another set of facts were not implicated here. Accordingly, we do not comment on other circumstances, such as where separate counsel has not been appointed and the guardian ad litem represents the subject or where the subject's rights, such as the right to cross-examine, have been denied.

[3] Section 30-4203 sets forth the duties and powers of a guardian ad litem; it does not specifically address whether a guardian ad litem may or should be a witness in a proceeding. As noted by the Court of Appeals, Neb. Ct. R. § 6-1469 sets practice standards for guardians ad litem in proceedings under the Nebraska Probate Code and provides in subsection (E)(4)(b) that in court proceedings, "[t]he guardian ad litem may testify only to the extent allowed by the Nebraska Rules of Professional Conduct." The rule therefore does not prohibit testimony by a guardian ad litem and instead contemplates that a guardian ad litem can testify when such testimony is allowed by the rules of professional conduct. We note that under Neb. Rev. Stat. § 30-4202(1)(a) (Reissue 2016), a guardian ad litem appointed pursuant to the Nebraska Probate Code must "[b]e an attorney in good standing admitted to the practice of law in the State of Nebraska," and it follows that an appointed guardian ad litem is subject to the rules of professional conduct.

Suzette relies on Neb. Ct. R. of Prof. Cond. § 3-503.7(a) to argue that a guardian ad litem may not simultaneously act as an advocate in a proceeding and testify as a witness in that same proceeding. Neb. Ct. R. of Prof. Cond. § 3-503.7(a) provides that, subject to certain exceptions not relevant here, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a . . . witness[.]" The comments to the rule elucidate the concerns behind the rule; Neb. Ct. R. of Prof. Cond. § 3-503.7, comment 1, states that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." In Neb. Ct. R. of Prof. Cond. § 3-503.7, comment 2, the concerns related to the tribunal and the opposing party are further explained: "The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation." Neb.

Ct. R. of Prof. Cond. § 3-503.7, comment 4, further notes that "[w]hether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses." Considering the nature and the specific circumstances of the present case, as we explain more fully below, we agree with the conclusion of the Court of Appeals that the GAL's testimony in this case "did not run afoul of the Nebraska Rules of Professional Conduct." *In re Guardianship of Suzette G.*, 27 Neb. App. 477, 488, 934 N.W.2d 195, 202 (2019).

In this case, the county court appointed separate counsel to represent Suzette as authorized by § 30-4202(3), which provides that the guardian ad litem may act as "counsel for the person who is the subject of the guardianship . . . unless . . . there are special reasons why . . . the person who is the subject of the proceeding should have separate counsel." The appointment of separate counsel for Suzette by the county court indicates the court's determination that the views of the GAL and those of Suzette had diverged. Given the existence of a conflict of interest between the GAL and Suzette, the court's logical remedy for the perceived conflict was to appoint separate counsel for Suzette, and it did so.

The presence of two lawyers and their split roles were fully contemplated by Neb. Ct. R. § 6-1469(C)(2), which provides that "[w]here a lawyer has already been or is appointed to represent the legal interests of the person, . . . the guardian ad litem shall function only to advocate for the best interests of the person." In such a situation, the separately appointed counsel represents the person who is the subject of the guardianship and his or her preferences whereas the guardian ad litem's role is to advocate for what he or she determines to be the person's best interests. Neb. Ct. R. § 6-1469(C)(3)(a) provides that when the guardian ad litem is "serving as advocate for the person's best interests, the guardian ad litem shall make an

independent determination," and that "[s]uch determination is not required to be consistent with any preferences expressed by the person."

The concern of Neb. Ct. R. of Prof. Cond. § 3-503.7(a) that a guardian ad litem's testifying might create a conflict of interest between the person who is the subject of the proceeding and his or her counsel is not implicated under the present circumstances. A conflict of interest between the GAL and Suzette already existed because their views of Suzette's best interests had diverged, and the court remedied that conflict by appointing separate counsel to represent Suzette. The GAL was therefore relieved of a duty to represent Suzette's wishes, and instead, the GAL's role was to advocate for what the GAL determined to be Suzette's best interests. At that point, the GAL was not acting as Suzette's counsel, and the concern of Neb. Ct. R. of Prof. Cond. § 3-503.7(a) that an attorney's testimony would create a conflict between the attorney and the person he or she represents was not present here. See *In re K Children*, 120 Haw. 116, 121, 202 P.3d 577, 582 (2007) (concluding that guardian ad litem's testimony was not improper and reasoning that relevant statute distinguishes between "'guardian ad litem'" and "'counsel'"). We conclude that the GAL's testifying in this case did not create a conflict of interest between counsel and client which did not already exist and that it therefore did not implicate Neb. Ct. R. of Prof. Cond. § 3-503.7(a) to the extent that such rule is concerned with creating conflicts between client and counsel.

The Court of Appeals ended its analysis of whether the GAL's testimony was allowed under Neb. Ct. R. of Prof. Cond. § 3-503.7(a) when it concluded that the testimony did not create a conflict of interest between Suzette and her counsel. But we find it necessary to consider the other concerns addressed in Neb. Ct. R. of Prof. Cond. § 3-503.7(a), that is, both the potential to prejudice the tribunal and the potential to prejudice the opposing party. In the present case, those concerns require us to consider the effect of the GAL's

testimony on the county court as fact finder and on Suzette, who could now be considered in the nature of an opposing party to the GAL.

As a preface to such analysis, we note that there have long been discussion and concern regarding the role of an attorney who serves as a guardian ad litem and in particular the application of professional rules of ethics in such a situation. See, Roger A. Eddleman & John A. DiNucci, *Due Process and the Guardian Ad Litem in Elder Law Disputes: Which Hat Will She Don With Her Cloak of Neutrality?* 13 Marq. Elder's Advisor 129 (2012); Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & Fam. Stud. 43 (2011); Robert L. Aldridge, *Ethics and the Attorney as Guardian Ad Litem*, 49 Advocate (Idaho State Bar) 21 (June 2006). See, also, *In re K Children*, 120 Haw. at 121, 202 P.3d at 582 (noting "nationwide" struggle to clarify roles of guardian ad litem and counsel). Such discussion informs our analysis in this case.

As to the first concern, regarding the potential to prejudice the tribunal, we note the portion of comment 2 to Neb. Ct. R. of Prof. Cond. § 3-503.7(a) which states that "[t]he tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness." In a different case, the focus of this concern would be on the effect the lawyer's testifying would have on a jury that was acting as the fact finder; in such a case, the potential for confusion is more apparent. In the present case, the county court was the fact finder, and therefore, we consider whether the court might have been confused by the GAL's serving both as an advocate for best interests and as a witness. We conclude that under the circumstances of this case, there was no such prejudice.

We do not think the concerns that are present where a jury serves as fact finder are present in cases such as the instant matter where the court acts as fact finder. We believe a court can be expected to understand the different roles of

an advocate and of a witness, and a court can be expected to distinguish when a guardian ad litem is acting in one role rather than the other. Generally, a court may view the guardian ad litem as an independent party to investigate and report on the subject's best interests. See Eddleman & DiNucci, *supra*. However, it has been observed that, at least in certain respects, a guardian ad litem "is viewed as an arm of the court." *Id*. at 162. Whereas here, when separate counsel has been appointed to represent the preferences of the subject of the proceeding, the court can be expected to understand the more limited role of the guardian ad litem as an advocate for the best interests of the subject. We conclude that the circumstances of the present case do not implicate the concern of Neb. Ct. R. of Prof. Cond. § 3-503.7(a) to the effect that the fact finder would be confused about the guardian ad litem's role in the proceedings and that the tribunal might be prejudiced by the GAL's testifying.

As to the second concern regarding the potential to prejudice the opposing party, we note the portion of comment 2 to Neb. Ct. R. of Prof. Cond. § 3-503.7(a) which states that "[t]he opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation." In the present case, because the GAL was representing what she determined to be Suzette's best interests and the GAL's views diverged from Suzanne's wishes, Suzanne could be considered in the nature of an opposing party to the GAL. We therefore consider whether the GAL's being allowed to testify prejudiced Suzanne's rights in this proceeding. We conclude that under the circumstances of this case, it did not.

As noted above, there has long been discussion of ethical concerns related to the role of a guardian ad litem, and those concerns relate in large part to the due process and other rights of the subject of a proceeding as well as other parties to the proceeding. Other courts have had concerns regarding how the guardian ad litem's role in a proceeding affects other parties' rights. For example, in *S.S. v. D.M.*, 597 A.2d 870, 878

(D.C. App. 1991), the District of Columbia Court of Appeals determined that error arose when a guardian ad litem was allowed to act as both the child's attorney and as a witness in an adoption proceeding; although the appellate court ultimately concluded that there was no miscarriage of justice, it stated that "because the guardian ad litem, who had been appointed as an advocate for the child, was called as a witness for one of the opposing parties, new counsel should have been appointed to represent the child." (Emphasis omitted.) In *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), the Supreme Court of Kentucky concluded that a mother's right to due process included the right to cross-examine the guardian ad litem when the trial court relied on the guardian ad litem's report to make custody decisions.

Contrary to the situations in the cases just cited, we think that similar concerns regarding the effect that the GAL's role in this proceeding had on Suzette's rights were adequately addressed. The appointment of separate counsel to represent Suzette was designed to protect her rights in this proceeding. The appointment of separate counsel allowed the GAL to focus on advocating for what she found to be Suzette's best interests without subordination to Suzette's divergent wishes. Meanwhile, the separate counsel was able to focus on protecting Suzette's rights by advancing her wishes without deference to the GAL's determination of Suzette's best interests. As part of protecting Suzette's rights, separately appointed counsel was able to cross-examine the GAL, as well as other witnesses, and to take the necessary steps in order to advance Suzette's arguments.

CONCLUSION

Under the circumstances of the present case—a guardianship proceeding in which separate counsel was appointed to represent the subject of the proceeding and the guardian ad litem's role was limited to advocating for the subject's best interests rather than representing the subject—the concerns of

Neb. Ct. R. of Prof. Cond. § 3-503.7(a) were not implicated. The GAL was therefore allowed to testify under the rules of professional conduct and, consequently, under Neb. Ct. R. § 6-1469(E)(4)(b), which provides that "[t]he guardian ad litem may testify only to the extent allowed by the Nebraska Rules of Professional Conduct." We therefore conclude that the Court of Appeals did not err when it concluded that the county court did not err when it allowed the GAL to testify, and we affirm the decision of the Court of Appeals which affirmed the order of the county court which appointed Alvin as Suzette's limited guardian.

Affirmed.

Nebraska Supreme Court
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Elena Reveiz, appellant, v.
Bassel El-Kasaby, appellee.
940 N.W.2d 582

Filed April 3, 2020. No. S-19-278.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Denise E. Frost, of Johnson & Mock, P.C., L.L.O., for appellant.

Cathy S. Trent-Vilim, and, on brief, Stacy L. Morris and Kate Geyer Johnson, of Lamson, Dugan & Murray, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Freudenberg, JJ.

Per Curiam.

The February 19, 2019, order of the Douglas County District Court is affirmed by an equally divided court.

Affirmed.

Papik, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v.
Jose A. Valdez, appellant.
940 N.W.2d 840

Filed April 3, 2020. No. S-19-475.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Prior Convictions: Motor Vehicles: Homicide: Sentences: Evidence.** Evidence of a prior conviction must be introduced in order to enhance a sentence for motor vehicle homicide.
3. **Sentences.** A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.
4. **Prior Convictions: Evidence: Appeal and Error.** Where an appellate court determines that the evidence was insufficient to establish a qualifying prior conviction, the appellate court's determination does not act as an acquittal or preclude a trial court from receiving additional evidence of a qualifying prior conviction.
5. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
6. **Waiver: Estoppel.** To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Sentence vacated, and cause remanded with direction.

Matthew A. Headley, Madison County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Funke, J.

Jose A. Valdez appeals his conviction and sentence from the district court for Madison County. Valdez pled guilty to enhanced motor vehicle homicide, a Class II felony. The court accepted Valdez' guilty plea, subject to enhancement, which the parties agreed to address at the time of sentencing. At the sentencing hearing, the issue of enhancement was not addressed and no evidence was adduced on the matter, but the court treated the offense as enhanced and sentenced Valdez to a period of 24 to 25 years' imprisonment and revoked his driver's license for 15 years.

Valdez argues that the district court erred in failing to receive evidence of a prior conviction, as required to subject him to enhancement penalties under Neb. Rev. Stat. § 28-306(3)(c) (Reissue 2016). Valdez contends that the sentence should be vacated and the matter remanded to the district court for resentencing as a Class IIA felony. The State agrees that the district court erred in failing to hold an enhancement hearing, but claims that the appropriate remedy is to remand for a new enhancement and sentencing hearing. We remand the cause with direction for a new enhancement and sentencing hearing.

BACKGROUND

On the evening of December 8, 2017, in Norfolk, Nebraska, Valdez attended a holiday gathering where he consumed alcohol to the point that his ability to operate a vehicle became appreciably diminished. He left the party and drove east on a highway until he attempted to turn left at an intersection. Valdez turned left and crashed into the driver's side of a vehicle traveling west in the outside lane of the highway.

Upon arrival, officers observed Valdez sitting in the passenger seat of his vehicle, which had extensive front-end damage and sat off the roadway. An officer spoke with Valdez and observed that he was slurring his words, that his eyes were bloodshot and watery, and that he had alcohol on his breath. Valdez admitted to drinking earlier. Another vehicle was located in the intersection which had its driver's side ripped open. The driver of the second vehicle was unresponsive at the scene. She was taken to a hospital and died from her injuries approximately 1 week later.

Valdez was transported to the emergency room of a Norfolk hospital. A police officer with the Norfolk Police Department had Valdez' blood drawn pursuant to a search warrant. Valdez had a blood alcohol content of .223 of a gram of alcohol per 100 milliliters of blood.

Valdez was charged with motor vehicle homicide. The State alleged that Valdez was operating the motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) or Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2016) and that Valdez had a prior conviction of § 60-6,196 or § 60-6,197.06, which would enhance the charge to a Class II felony. Valdez pled guilty to the offense, and in exchange for his plea, the State agreed to recommend a maximum sentence of 25 years' imprisonment and not pursue additional charges or restitution. The district court accepted Valdez' plea and found him guilty subject to an enhancement hearing. The parties agreed to take up the issue of enhancement at sentencing, and the court set the matter for a sentencing hearing. During sentencing, the court considered the offense to be enhanced to a Class II felony and sentenced Valdez to a period of 24 to 25 years' imprisonment, with 1 day of credit for time served, and revoked his driver's license for 15 years. However, although in its comments the court referred to the fact that Valdez has two prior convictions for driving under the influence (DUI), the court did not receive any evidence regarding the prior convictions and the parties did not address enhancement prior to the court's pronouncement of sentence.

ASSIGNMENTS OF ERROR

Valdez assigns that the district court erred in (1) finding him guilty of motor vehicle homicide, a Class II felony, absent proof of enhancement and (2) imposing an excessive sentence. Valdez also argues that his trial counsel was ineffective for failing to (3) file a motion to suppress the blood test results, (4) file a motion for recusal of the trial court, (5) object to evidence introduced by the State at sentencing, and (6) make an effective argument at sentencing.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[1]

ANALYSIS

The issue in this case is whether upon remand the trial court may conduct a new enhancement hearing. Valdez argues that his current sentence is invalid, because the court did not receive any evidence on the issue of enhancement, and that based on the State's failure to present evidence, the court should have found him guilty of a Class IIA felony and sentenced him accordingly. He requests that we remand with instructions for resentencing on the reduced charge. The State agrees that remand is required but claims that pursuant to *State v. Oceguera*,[2] the appropriate remedy is to remand for a new enhancement and sentencing hearing.

A person commits motor vehicle homicide when he or she causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance.[3] Pursuant to § 28-306(3)(b), if the proximate cause of the death of another is the operation of a motor vehicle in violation of § 60-6,196 (DUI) or § 60-6,197.06 (operating motor

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[1] *State v. Oceguera*, 281 Neb. 717, 798 N.W.2d 392 (2011).

[2] *Id*.

[3] § 28-306(1).

vehicle during revocation period), motor vehicle homicide is a Class IIA felony. Pursuant to § 28-306(3)(c), if the proximate cause of the death of another is the operation of a motor vehicle in violation of § 60-6,196 or § 60-6,197.06 and the defendant has a prior conviction for a violation of § 60-6,196 or § 60-6,197.06, motor vehicle homicide is a Class II felony.

In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions.[4] Usually, the State will prove a defendant's prior convictions by introducing certified copies of the prior convictions or transcripts of the prior judgments.[5] The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.[6]

[2] We find that enhancement of a motor vehicle homicide sentence is analogous to habitual criminal enhancement and enhancement of a DUI sentence. In each of these contexts, the Legislature has provided for the use of prior convictions to enhance a sentence.[7] Under § 60-6,197.02(2), the prosecutor is required to present as evidence for purposes of sentence enhancement a court-certified or authenticated copy of the defendant's prior conviction, which shall be prima facie evidence of such prior conviction. Under § 60-6,197.02(3), the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the convicted person's prior convictions. The convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior

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[4] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994).

[5] *Ristau, supra* note 4.

[6] *Thomas, supra* note 4.

[7] See, § 28-306(3)(c); Neb. Rev. Stat. § 29-2221(2) (Reissue 2016); Neb. Rev. Stat. § 60-6,197.02(2) (Cum. Supp. 2018).

to sentencing, and make objections on the record regarding the validity of such prior convictions.[8] We conclude that just as in the context of habitual criminal and DUI sentence enhancements, evidence of a prior conviction must be introduced in order to enhance a sentence for motor vehicle homicide.[9]

[3] The State charged Valdez with motor vehicle homicide, a Class II felony under § 28-306(3)(c). A Class II felony is punishable by 1 to 50 years' imprisonment.[10] Valdez claims that his offense was improperly enhanced to a Class II felony, because the State introduced no evidence of a prior conviction under § 60-6,196 or 60-6,197.06. He claims that without such evidence, the court could have found him guilty only of a Class IIA felony under § 28-306(3)(b). A Class IIA felony is punishable by 0 to 20 years' imprisonment.[11] A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.[12] It is undisputed that the trial court did not receive evidence necessary to subject Valdez to the enhanced penalties under § 28-306(3)(c) and that Valdez' sentence to a period of 24 to 25 years' imprisonment exceeds the statutory limits for a Class IIA felony. Therefore, Valdez' sentence is illegal and must be vacated.

The only question that remains is the appropriate remedy for the State's failure to adduce evidence of a prior conviction. Under our precedent, we have consistently remanded for a new enhancement hearing when the State has failed to produce sufficient evidence of the requisite prior convictions for enhancement purposes.[13] While we have not previously

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[8] § 60-6,197.02(3).

[9] See *Oceguera, supra* note 1.

[10] Neb. Rev. Stat. § 28-105(1) (Reissue 2016).

[11] *Id*.

[12] *State v. Kantaras*, 294 Neb. 960, 885 N.W.2d 558 (2016).

[13] See, *State v. Bruckner*, 287 Neb. 280, 842 N.W.2d 597 (2014); *Oceguera, supra* note 1; *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *Ristau, supra* note 4.

addressed this issue in the context of motor vehicle homicide, we have found in the context of habitual criminal enhancement and enhancement of a DUI sentence that the appropriate remedy is to remand for another enhancement hearing.[14]

In *Oceguera*, the State failed to present sufficient evidence of three valid prior DUI convictions to support a conviction for a fourth offense and we remanded for a new enhancement hearing.[15] In doing so, we recognized that neither our prior case law nor any federal constitutional law prohibits a new enhancement hearing.[16] An enhanced sentence imposed on a persistent offender is not viewed as either a new jeopardy or an additional penalty for the earlier crimes, but as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.[17]

The U.S. Supreme Court has said that except in capital cases, a failure of proof at an enhancement hearing is not analogous to an acquittal, and that such a failure of proof does not trigger double jeopardy protections.[18] Following U.S. Supreme Court precedent, numerous state appellate courts have held that double jeopardy protections do not apply to sentence enhancement hearings and do not prevent the presentation of evidence of a prior conviction at a new enhancement hearing on remand.[19]

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[14] See, *Oceguera, supra* note 1; *Nelson, supra* note 13.

[15] *Oceguera, supra* note 1.

[16] *Id*. (relying on *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998)).

[17] *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948).

[18] *Monge, supra* note 16.

[19] See, *Scott v. State*, 454 Md. 146, 164 A.3d 177 (2017); *State v. Salas*, 2017 NMCA 057, 400 P.3d 251 (2017); *People v. Porter*, 348 P.3d 922 (Colo. 2015); *State v. Collins*, 985 So. 2d 985 (Fla. 2008); *State v. Eggleston*, 164 Wash. 2d 61, 187 P.3d 233 (2008); *Com. v. Wilson*, 594 Pa. 106, 934 A.2d 1191 (2007); *Jaramillo v. State*, 823 N.E.2d 1187 (Ind. 2005); *State v. McLellan*, 149 N.H. 237, 817 A.2d 309 (2003); *Nelson, supra* note 13; *Bell v. State*, 994 S.W.2d 173 (Tex. Crim. App. 1999); *People v. Levin*, 157 Ill. 2d 138, 623 N.E.2d 317, 191 Ill. Dec. 72 (1993).

Even though Valdez has not raised a double jeopardy argument, we are guided by the U.S. Supreme Court's decision in *Monge v. California*,[20] which addressed a factual and procedural context similar to that presented in this case. *Monge* interpreted California's "'three-strikes'" law, which enhances a defendant's sentence based on a previous conviction for a "serious felony."[21] At the enhancement hearing, the State alleged that the defendant had been convicted for assault with a deadly weapon, but failed to support its allegation with any substantive evidence. Nonetheless, the court enhanced the defendant's sentence. On appeal, the U.S. Supreme Court held that insufficient evidence is not a bar to retrial of a defendant's enhanced status.[22]

[4] The Supreme Court of Pennsylvania has similarly concluded that the prosecution is permitted to present enhancement evidence at a sentencing hearing on remand after the original sentence is vacated due to insufficient evidence on the issue of enhancement.[23] The court reasoned that once the original sentence is vacated, the sentence is rendered a nullity and the trial court may treat the case anew for evidentiary purposes.[24] Where an appellate court determines that the evidence was insufficient to establish a qualifying prior conviction, the appellate court's determination does not act as an acquittal or preclude a trial court from receiving additional evidence of a qualifying prior conviction.[25]

[5,6] At oral argument before this court, Valdez contended that by failing to adduce evidence of enhancement at the original sentencing hearing, the State waived the issue of enhancement. A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated

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[20] *Monge, supra* note 16.

[21] *Id.*, 524 U.S. at 724.

[22] See, *id.*; *Salas, supra* note 19.

[23] *Wilson, supra* note 19.

[24] *Id.*

[25] *Scott, supra* note 19.

by or inferred from a person's conduct.[26] A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record.[27] To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.[28] Further, the waiving party must have full knowledge of all material facts.[29]

We find no evidence in our record that the State intended to forgo enhancing Valdez' sentence. The State's charging decision, as evidenced by the State's complaint filed in January 2018, was to prosecute Valdez for motor vehicle homicide under § 28-306(3)(c), a Class II felony. At the plea hearing, the State alleged as part of its factual basis that Valdez had a prior conviction that would subject him to enhancement. Valdez then entered a plea of guilty to the enhanced charge, a Class II felony, and the court accepted the plea subject to an enhancement hearing, and then scheduled that enhancement be taken up at sentencing per agreement of the parties.

The record indicates the court failed to recognize that enhancement had not been addressed. At the enhancement and sentencing hearing, the court opened by stating that "[t]his matter comes on for sentencing today for the crime of motor vehicle homicide, a Class II felony." The court proceeded directly to sentencing, possibly due to the fact that four witnesses were present to provide testimony on the issue of sentencing. In its closing comments articulating its reasons for Valdez' sentence, the court referenced Valdez' two prior convictions for DUI.

For Valdez' waiver argument to apply, he must show that at some point, the State intended to prosecute him for a Class IIA felony. Here, the State has never wavered from its position to prosecute Valdez for a Class II felony. Moreover, Valdez'

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[26] *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012).

[27] *Id.*

[28] *Nelssen v. Ritchie*, 304 Neb. 346, 934 N.W.2d 377 (2019).

[29] *Id.*

waiver argument arises in a context in which he has pled guilty to a Class II felony, in exchange for the State's agreeing to recommend a maximum sentence of 25 years' imprisonment, with no pursuit of additional charges or restitution. Were we to accept Valdez' argument that he be resentenced on a Class IIA felony, that would raise questions regarding the validity of the plea agreement, yet Valdez has not expressed a desire to alter the plea agreement. Therefore, we reject Valdez' waiver argument.

We vacate Valdez' sentence and remand the cause with directions for another enhancement and sentencing hearing. Because of the disposition of this assignment of error, we need not address the remainder of Valdez' assignments of error.

CONCLUSION

The district court erred when it enhanced Valdez' sentence for motor vehicle homicide absent evidence of a prior conviction. We vacate Valdez' sentence and remand the cause with direction for another enhancement and sentencing hearing.

Sentence vacated, and cause remanded with direction.

Freudenberg, J., not participating.

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Jeffrey Hessler, appellant.
940 N.W.2d 836

Filed April 3, 2020. No. S-19-652.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Affirmed.

Jerry M. Hug for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Stacy, J.

In October 2016, Jeffrey Hessler filed this motion for postconviction relief. The motion relies on the U.S. Supreme Court's decision in *Hurst v. Florida*[1] and alleges Hessler's death sentence is invalid because Nebraska's capital sentencing statutes violate Hessler's rights under the 6th, 8th, and

[1] *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

14th Amendments to the U.S. Constitution. We addressed an identical argument in *State v. Lotter*[2] and held *Hurst* was not a proper triggering event for the 1-year limitations period of the Nebraska Postconviction Act.[3] Citing *Lotter*, the district court found Hessler's motion was time barred and denied it without conducting an evidentiary hearing. Hessler appeals, and we affirm.

FACTS

In 2004, Hessler was convicted by a jury of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony. He was sentenced to death on the murder conviction. He unsuccessfully challenged his convictions and sentences on direct appeal[4] and in two prior postconviction proceedings.[5]

On January 12, 2016, the U.S. Supreme Court decided *Hurst*.[6] *Hurst* found that Florida's capital sentencing scheme was unconstitutional, because it required the trial court alone to find both that sufficient aggravating circumstances existed to justify imposition of the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Roughly 10 months after *Hurst* was decided, Hessler filed this successive motion for postconviction relief. The motion asserts:

> Jurisdiction is proper in this Court as the decision in *Hurst v. Florida* . . . was issued by the United States Supreme Court on January 12, 2016 and . . . Hessler is asserting that *Hurst* is applicable in his case and therefore has one year from the date of that decision to file this motion pursuant to . . . § 29-3001 . . . .

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[2] *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

[3] Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

[4] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[5] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

[6] *Hurst, supra* note 1.

Hessler's motion relies on *Hurst* and alleges that Nebraska's capital sentencing statutes[7] violate the 6th, 8th, and 14th Amendments. It specifically alleges the Sixth amendment is violated because the Nebraska statutes allow a panel of judges, and not a jury, to "make factual findings in imposing a death sentence." The motion further alleges "to the extent that Nebraska's death-penalty statutes do not require a unanimous recommendation from a jury regarding whether a sentence of death should be imposed, [the statutes] violate[] the 8th and 14th Amendments."

Identical 6th, 8th, and 14th Amendment claims based on *Hurst* were raised in a successive motion for postconviction relief in *Lotter*,[8] and we rejected them in an opinion released September 28, 2018. We reasoned that the Nebraska Postconviction Act contains a 1-year limitations period for filing a verified motion for postconviction relief, which runs from one of four triggering events or from August 27, 2011, whichever is later.[9] The triggering events under § 29-3001(4) are:

> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the

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[7] See Neb. Rev. Stat. §§ 29-2521 to 29-2522 (Cum. Supp. 2018).

[8] *Lotter, supra* note 2.

[9] § 29-3001(4).

> newly recognized right has been made applicable retroactively to cases on postconviction collateral review[.]

Like Hessler's postconviction claims, the claims alleged in *Lotter* regarding the 6th, 8th, and 14th Amendments were all based on *Hurst*, and the defendant in *Lotter* relied on the triggering event in § 29-3001(4)(d) to contend the claims were timely. We rejected this contention.

We held in *Lotter* that *Hurst* could not trigger the 1-year statute of limitations under § 29-3001(4)(d), because *Hurst* did not announce a new rule of law and merely applied the constitutional rule from the 2002 case of *Ring v. Arizona*.[10] *Lotter* also held that the "plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances."[11] Finally, *Lotter* reasoned that even if *Hurst* announced a new rule of law, it would not apply retroactively to cases on collateral review, because it was based on *Ring* and the U.S. Supreme Court has held that *Ring* announced a procedural rule that does not apply retroactively.[12] Having concluded in *Lotter* that *Hurst* did not announce a new rule of law, we rejected the defendant's contention that *Hurst* could trigger the 1-year statute of limitations under § 29-3001(4)(d), and we found the defendant's postconviction claims were time barred.[13] The defendant's petition for a writ of certiorari was denied by the U.S. Supreme Court on June 17, 2019.[14]

Citing to our analysis and holding in *Lotter*, the district court here found that Hessler's motion was time barred, and it dismissed the motion without an evidentiary hearing. Hessler timely appealed.

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[10] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[11] *Lotter, supra* note 2, 301 Neb. at 144, 917 N.W.2d at 864.

[12] *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[13] Accord *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019).

[14] *Lotter v. Nebraska*, ___ U.S. ___, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019).

ASSIGNMENT OF ERROR

Hessler assigns, restated, that the district court erred in denying his postconviction motion without an evidentiary hearing, because Nebraska's capital sentencing scheme violates *Hurst* and the 6th, 8th, and 14th Amendments to the U.S. Constitution.

STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[15]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[16]

ANALYSIS

At oral argument before this court, Hessler conceded the claims made in his successive motion for postconviction relief are identical to those raised and rejected by this court in *Lotter*. Hessler further conceded there was no factual distinction between his postconviction claims and those asserted in *Lotter*, and he pointed to no change in the relevant law since our decision in *Lotter*.

Our decision in *Lotter* is dispositive of the issues presented in this appeal, and Hessler does not contend otherwise. *Hurst* did not announce a new rule of law, and thus it cannot trigger the 1-year statute of limitations under § 29-3001(4)(d). Because this is the only triggering event relied upon by Hessler in contending that his postconviction claims are timely, we agree with the district court that Hessler's postconviction claims are time barred.

For the sake of completeness, we note that even if Hessler's claims were not time barred, they would not entitle him to

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[15] *Mata, supra* note 13.

[16] *Id.*

postconviction relief. After oral arguments in this case, the U.S. Supreme Court decided *McKinney v. Arizona*.[17] *McKinney* explained:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.[18]

As such, *McKinney* makes clear there is no merit to the underlying premise of Hessler's postconviction claims.

We thus affirm the district court's order denying postconviction relief without an evidentiary hearing.

Affirmed.

Freudenberg, J., not participating.

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[17] *McKinney v. Arizona*, 589 U.S. 139, 140 S. Ct. 702, 206 L. Ed. 2d 69 (2020).

[18] *Id.*, 589 U.S. at 144.

Nebraska Supreme Court
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HBI, L.L.C., appellee, v. Walter D. Barnette, appellant.

941 N.W.2d 158

Filed April 10, 2020. No. S-19-147.

1. **Constitutional Law: Statutes.** The constitutionality of statutes and statutory interpretation present questions of law.
2. **Tax Sale: Time.** Tax sale proceedings are governed by the law in effect at the time the tax sale certificate was sold.
3. **Tax Sale: Time: Liens.** Under Neb. Rev. Stat. § 77-1801 (Reissue 2009), properties with delinquent real estate taxes on or before the first Monday of March may be sold at a tax sale. The tax sale purchaser acquires a lien on the property, which is represented by a tax certificate.
4. **Tax Sale.** A property owner may redeem a property after a tax certificate has been issued with payment of the amount noted on the tax certificate, other taxes subsequently paid, and interest.
5. **Tax Sale: Time: Deeds: Foreclosure.** If, after 3 years of the issuance of a tax certificate, a property has not been redeemed, there are two methods by which the holder of the tax certificate may acquire a deed to the property: the tax deed method and judicial foreclosure.
6. **Tax Sale: Deeds: Notice.** A tax deed acts to convey the property and may be issued by the county treasurer after proper notice is provided.
7. **Tax Sale: Foreclosure: Liens.** Judicial foreclosure requires the holder of a tax certificate to foreclose on the lien for taxes in the district court of the county where the property is located.
8. **Dismissal and Nonsuit.** Under Neb. Rev. Stat. §§ 25-601 and 25-602 (Reissue 2016), a plaintiff has the right to dismiss an action without prejudice any time before final submission of the case, so long as no counterclaim or setoff has been filed by an opposing party.
9. **Tax Sale: Deeds: Dismissal and Nonsuit.** The language used to distinguish between the two methods of converting a tax certificate into a deed in *Neun v. Ewing*, 290 Neb. 963, 863 N.W.2d 187 (2015), did not

abrogate the tax certificate holder's right to voluntary dismissal under Neb. Rev. Stat. §§ 25-601 and 25-602 (Reissue 2012).

10. **Tax Sale: Notice.** If a titled owner cannot be found upon diligent inquiry, Neb. Rev. Stat. § 77-1834 (Reissue 2009) permits the purchaser or his or her assignee to publish the notice in some newspaper published in the county and having a general circulation in the county or, if no newspaper is printed in the county, then in a newspaper published in Nebraska nearest to the county in which the real property is situated.
11. **Tax Sale: Notice: Proof: Words and Phrases.** The word "found" in Neb. Rev. Stat. § 77-1834 (Reissue 2009) means able to be served, and the statute authorizes the holder of a tax certificate to provide notice by publication if the record owner was unable to be served by certified mail at the address where the property tax statement was mailed, upon proof of compliance with Neb. Rev. Stat. § 77-1832 (Reissue 2009), if the owner in fact lived at such address.
12. **Tax Sale: Statutes.** Even the misidentification of the purchaser on an actual tax deed does not render it void. If a tax deed is in compliance with the statutory requirements, the misidentification would, at most, necessitate reformation of the tax deed.
13. **Tax Sale: Deeds.** There is no language in Neb. Rev. Stat. § 77-1831 (Reissue 2009) requiring that the party applying for the tax deed be included.
14. **Constitutional Law: Statutes: Presumptions: Proof.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
15. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly established before it will be declared void.
16. **Tax Sale: Notice.** Neb. Rev. Stat. § 77-1832 (Reissue 2009) requires service at the address where the property tax statement is mailed, and thus, it is reasonably calculated to provide notice to the property owner.
17. ____: ____. Notice by publication under Neb. Rev. Stat. § 77-1834 (Reissue 2009) is limited to circumstances where the record owner resides at the address where the property tax statement is mailed, but he or she is unable to be served there.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Edward F. Noethe, of McGinn, Springer & Noethe, P.L.C., for appellant.

Jeffrey J. Blumel and Gretchen L. McGill, of Dvorak Law Group, L.L.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

I. INTRODUCTION

This is an appeal from an action to quiet title after issuance of a tax deed. Appellant, Walter D. Barnette, argues that a notice of application for a treasurer's deed was defective and that the statutory scheme relating to notice requirements for obtaining a tax deed is unconstitutional on due process grounds. We affirm.

II. BACKGROUND

On March 5, 2013, Pontian Land Holdings LLC (Pontian) purchased a certificate of tax sale for real property after Barnette failed to pay real estate taxes on the property. The property was located at "Lot 2, Swaney's Addition Replat I, an Addition to the City of Bellevue, as surveyed, platted and recorded, Sarpy County, Nebraska." After waiting the statutorily required 3 years, Pontian initially filed a judicial foreclosure action on the property, but later dismissed the action and filed an application for a treasurer's tax deed.

As required by Neb. Rev. Stat. § 77-1831 (Reissue 2009), Pontian sent notice of its intent to apply for a treasurer's deed for the property by certified mail, return receipt requested, to the address where the property tax statement was mailed. This address was Barnette's residence, which was located in Pottawattamie County, Iowa. The notice listed Pontian as the purchaser of the real property, but erroneously stated that Guardian Tax Partners Inc. (Guardian) would apply for the treasurer's tax deed. The notice also listed Guardian as the sender of the certified mail. Although Barnette resided at the address where the notice was sent, the notice was returned as "unclaimed." Handwriting on the certified mail receipt

indicates the post office had made three attempts to deliver the notice prior to returning it as unclaimed. Pontian subsequently published notice in a Sarpy County newspaper for 3 consecutive weeks.

On August 29, 2016, the Sarpy County treasurer issued a treasurer's tax deed in Pontian's name. Pontian filed a complaint, seeking to quiet title on the property. Barnette filed a counterclaim to quiet title in his name. Pontian later transferred the property to HBI, L.L.C., and HBI was substituted as plaintiff in the case. On October 31, 2017, Barnette filed a motion for summary judgment that was later withdrawn. On January 30, 2018, HBI filed a motion for summary judgment. On February 14, Barnette filed a second motion for summary judgment. Both motions were denied by the district court as being premature.

On October 12, 2018, HBI filed a second motion for summary judgment. On October 22, Barnette filed a third motion for summary judgment. Barnette later amended his counterclaim with leave from the district court. The counterclaim alleged Pontian's notice was defective and challenged the constitutionality of the notice requirements set forth in Neb. Rev. Stat. §§ 77-1832 to 77-1835 (Reissue 2009) on due process grounds. Specifically, Barnette argued that because Pontian knew Barnette lived in Pottawattamie County, Iowa, notice by publication in Sarpy County violated his right to due process.

On January 15, 2019, the district court granted HBI's amended second motion for summary judgment and denied Barnette's third motion for summary judgment. The district court quieted title in favor of HBI after finding that Barnette was given sufficient notice in compliance with Nebraska law and that the notice did not violate the due process requirements of the U.S. Constitution or the Nebraska Constitution.

Barnette now appeals the district court's order granting summary judgment in favor of HBI and denying Barnette's third motion for summary judgment.

III. ASSIGNMENTS OF ERROR

Barnette assigns that the district court erred in (1) not finding that Pontian's original election of foreclosure barred the tax deed process, (2) finding the notice provided complied with Nebraska statutes, (3) not finding the Nebraska tax sale statutory scheme violated the U.S. Constitution and the Nebraska Constitution, (4) finding Barnette's due process rights under the U.S. Constitution and the Nebraska Constitution were not violated, and (5) not quieting title to Barnette.

IV. STANDARD OF REVIEW

[1] The constitutionality of statutes and statutory interpretation present questions of law.[1]

V. ANALYSIS

1. Original Election of Judicial Foreclosure

In his first assignment of error, Barnette argues Pontian's claim for a tax deed was barred by its original election to proceed to judicial foreclosure.

[2-7] The Legislature's recent amendments to tax sale statutes notwithstanding, the proceedings at issue in this case are governed by the law in effect on December 31, 2009.[2] Under Neb. Rev. Stat. § 77-1801 (Reissue 2009), properties with delinquent real estate taxes on or before the first Monday of March may be sold at a tax sale. The tax sale purchaser acquires a lien on the property, which is represented by a tax certificate.[3] A property owner may redeem a property after a tax certificate has been issued with payment of the amount noted on the tax certificate, other taxes subsequently paid, and

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[1] *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[2] See Neb. Rev. Stat. § 77-1837.01(2) (Cum. Supp. 2016).

[3] See Neb. Rev. Stat. § 77-1818 (Reissue 2009).

interest.[4] If, after 3 years, the property has not been redeemed, there are two methods by which the holder of a tax certificate may acquire a deed to the property: the tax deed method and judicial foreclosure.[5] A tax deed acts to convey the property and may be issued by the county treasurer after proper notice is provided.[6] Judicial foreclosure requires the holder of a tax certificate to foreclose on the lien for taxes in the district court of the county where the property is located.[7]

Barnette relies on language in *Neun v. Ewing*[8] to support his argument that Pontian's application for a tax deed was barred by its initial filing of a foreclosure action. In *Neun*, property owners attempted to redeem their property after a foreclosure action had been filed using the procedure set forth in § 77-1824, authorizing redemption from a tax sale prior to the issuance of a tax deed. This court held that once judicial foreclosure has begun, only the separate redemption procedure established by Neb. Rev. Stat. § 77-1917 (Reissue 2009) is available.[9] Recognizing that the two procedures for converting a tax sale certificate into a deed are not interchangeable, the court concluded that

> once the holder has elected to proceed under chapter 77, article 19, the provisions of such article govern the rights of the parties in relation to the tax sale certificate. In other words, after the election to proceed by judicial foreclosure has been made, both the holder and the property owner are bound by that election.[10]

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[4] See Neb. Rev. Stat. § 77-1824 (Reissue 2009). See, also, *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 850 N.W.2d 745 (2014).

[5] See *SID No. 424, supra* note 4.

[6] See § 77-1831 and Neb. Rev. Stat. § 77-1837 (Reissue 2009).

[7] See Neb. Rev. Stat. § 77-1902 (Reissue 2009).

[8] *Neun v. Ewing*, 290 Neb. 963, 863 N.W.2d 187 (2015).

[9] See *id.*

[10] *Id.* at 970, 863 N.W.2d at 194.

In arriving at its holding, the court articulated: "'Although the overall objective of both procedures is the recovery of unpaid taxes on real property, these [procedures] "are two separate and distinct methods for the handling of delinquent real estate taxes"' which are 'neither comparable nor fungible.'"[11]

[8] Barnette argues that this language precluded Pontian from applying for a tax deed because it initially filed a foreclosure action. *Neun* is distinguishable. The issue in *Neun* was the manner of *redemption* permitted once the holder of a tax sale certificate had elected to proceed with judicial forfeiture. Moreover, Barnette's interpretation of *Neun* is inconsistent with a plaintiff's statutory right to voluntary dismissal. Under Neb. Rev. Stat. §§ 25-601 and 25-602 (Reissue 2016), a plaintiff has the right to dismiss an action without prejudice any time before final submission of the case, so long as no counterclaim or setoff has been filed by an opposing party.

[9] Here, Pontian's foreclosure action was dismissed prior to a summons being issued, and no complaint was served on Barnette in that action. Thus, Pontian had a statutory right to voluntarily dismiss its initial filing without prejudice. We hold that Pontian's election to initially file and dismiss the judicial foreclosure action did not preclude his application for a tax deed. In addition, we clarify that the language used to distinguish between the two methods of converting a tax certificate into a deed in *Neun* did not abrogate the tax certificate holder's right to voluntary dismissal under §§ 25-601 and 25-602. In this case, Pontian had a right to voluntary dismissal under §§ 25-601 and 25-602 because no counterclaim or setoff had been filed.[12]

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[11] *Id.*

[12] See *id.* See, also, *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016) (stating that existence of different procedures available to holder to convert tax sale certificate into deed does not affect meaning of tax sale certificate).

2. Notice Under § 77-1831

(a) Publication in Sarpy County

In his second assignment of error, Barnette first argues that publication in Sarpy County was insufficient notice because Pontian knew Barnette lived in Pottawattamie County, Iowa.

A tax sale purchaser is not entitled to a tax deed unless he or she provides sufficient notice to the property owner at least 3 months prior to the application for the tax deed.[13] A tax deed is presumptive evidence that notice has been served or published as statutorily required.[14]

[10] Although the Legislature has since amended § 77-1832, the version of the statute governing the proceedings at issue here provided, in relevant part, that "[s]ervice of the notice provided by section 77-1831 shall be made by certified mail, return receipt requested, upon the person in whose name the title to the real property appears of record to the address where the property tax statement was mailed . . . ." If the titled owner could not be found upon diligent inquiry, § 77-1834 permitted the purchaser or his or her assignee to publish the notice "in some newspaper published in the county and having a general circulation in the county or, if no newspaper is printed in the county, then in a newspaper published in this state nearest to the county in which the real property is situated."

In *Wisner v. Vandelay Investments*,[15] this court addressed whether the applicable language in §§ 77-1832 and 77-1834 permitted the holder of a tax certificate to serve a property owner by publication after being unable to serve her by certified mail when the holder had actual knowledge of the property owner's location. In that case, the holder had sent notice by certified mail, return receipt requested, but the notice was returned as "'unclaimed.'"[16] This court held that the

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[13] See § 77-1831.

[14] See Neb. Rev. Stat. § 77-1842 (Reissue 2009).

[15] *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018).

[16] *Id.* at 853, 916 N.W.2d at 721.

holder had completely complied with the notice requirements of § 77-1832 by proceeding to service by publication after the owner was unable to be served by certified mail at the address where the property tax statement was mailed.[17]

[11] We further held that the word "found" in § 77-1834 meant "'able to be served'" and that the statute authorized the holder of a tax certificate to provide notice by publication if the record owner was unable to be served by certified mail at the address where the property tax statement was mailed, upon proof of compliance with § 77-1832, if the owner in fact lived at such address.[18] The court warned that a contrary holding would permit a property owner that was already deficient in paying real estate taxes to force a judicial foreclosure proceeding by avoiding the notice.[19]

Here, Pontian sent notice of its application for a tax deed by certified mail, return receipt requested, to the address where the property tax statement was mailed—Barnette's residence in Pottawattamie County, Iowa. Barnette had continuously resided at this address for 4 years and had received notices of taxes due on the property at this address. However, Pontian's notice was returned as "unclaimed." Pontian then published the notice in Sarpy County as required by § 77-1834. The tax deed was issued after Pontian had complied with both §§ 77-1832 and 77-1834. Section 77-1834 only authorized service by publication in the county where the property was located.[20] Because Pontian was not required to publish notice in any other county except Sarpy County, Pontian's actual knowledge of Barnette's location is irrelevant for purposes of this assignment of error.[21] We hold that Barnette has not met his burden of rebutting the statutory presumption that Pontian's

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[17] See *id.*

[18] See *id.*

[19] See *Wisner, supra* note 15.

[20] See *id.*

[21] See *id.*

notice was sufficient and that his second assignment of error is accordingly without merit.

(b) Misidentification of Guardian

In his second assignment of error, Barnette further argues that the notice was defective because it showed Guardian, rather than Pontian, as the party who would apply for the deed. HBI maintains that the error in listing Guardian was immaterial and did not negate the sufficiency of the notice.

Section 77-1831 provides:

> No purchaser at any sale for taxes or his or her assignees shall be entitled to a deed from the treasurer for the real property so purchased unless such purchaser or assignee, at least three months before applying for the deed, serves or causes to be served a notice stating when such purchaser purchased the real property, the description thereof, in whose name assessed, for what year taxed or specially assessed, and that after the expiration of three months from the date of service of such notice the deed will be applied for.

[12] Pontian's notice included the information required and correctly listed Pontian as the party who had purchased the property. Further, this court has held that even the misidentification of the purchaser on the *actual* tax deed does not render it void. In *Ottaco Acceptance, Inc. v. Larkin*,[22] the purchaser of a tax certificate had later assigned the tax certificate to another entity. The assignee requested, and was issued, a tax deed for the property, but the tax deed incorrectly identified the assignee as the original purchaser of the property.[23] This court held that the tax deed was in compliance with the statutory requirements and that the misidentification would, at most, necessitate reformation of the tax deed.[24]

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[22] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

[23] See *id.*

[24] See *id.*

[13] We hold that the inclusion of Guardian as the party that would apply for the tax deed does not render the notice defective, as there is no language in § 77-1831 requiring that the party applying for the tax deed be included. This court will not read into a statute a meaning that is not there.[25]

As previously stated, Barnette's second assignment of error is without merit.

3. Constitutionality of Nebraska's Tax Sale Notice Requirements and Barnette's Due Process Rights

In his third and fourth assignments of error, Barnette argues Nebraska's statutory scheme for tax sales is unconstitutional on due process grounds. Specifically, Barnette asserts that his due process rights were violated when Pontian published its notice in Sarpy County pursuant to § 77-1834, knowing Barnette resides in Pottawattamie County, Iowa. The district court found that Pontian had complied with the statutory notice requirements before applying for the tax deed and that the procedures used did not violate Barnette's due process rights.

(a) Presumption of Constitutionality

[14,15] A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[26] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[27] The unconstitutionality of a statute must be clearly established before it will be declared void.[28]

(b) Notice Requirement

Before the government may deprive a person of their property, the government must provide "notice reasonably

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[25] See *Wisner, supra* note 15; *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017); *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014).

[26] *State ex rel. Bruning v. Gale*, 284 Neb. 257, 817 N.W.2d 768 (2012).

[27] *Id.*

[28] *Id.*

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[29] In *Mullane v. Central Hanover Tr. Co.*,[30] the U.S. Supreme Court held that when a recipient's address is known, the determination of whether the method of notice is "reasonably calculated" is analyzed at the time the notice is sent.[31]

(c) *Jones v. Flowers*

In his brief, Barnette cites *Jones v. Flowers*[32] in support of his argument that Nebraska's tax deed notice requirements are unconstitutional. In that case, the U.S. Supreme Court held that the government's attempt at providing notice of a tax sale was insufficient to satisfy due process when the notice was returned as unclaimed and that the government failed to take additional reasonable steps to provide notice to the property owner before the property was sold.[33]

In *Jones*, the property owner had moved from his home in Little Rock, Arkansas, into an apartment in Little Rock after he and his wife were separated. The mortgage company had been paying the property taxes until the mortgage was paid off, and then the taxes became delinquent. Three years later, the Commissioner of State Lands (Commissioner) sent the owner, by certified mail, notice of the tax delinquency and information about his right to redeem the property. The certified letter was sent to the address of the property where the owner's wife still lived and was returned as "'"unclaimed."'"[34]

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[29] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

[30] *Mullane, supra* note 29.

[31] *Id.*, 339 U.S. at 318 ("[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency").

[32] *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

[33] *Id.*

[34] *Id.*, 547 U.S. at 224.

Two years later, the Commissioner published a notice of public sale in the newspaper. The publication occurred a few weeks prior to the public sale. The Commissioner mailed a second certified letter after receiving a purchase offer for the home, warning the house would be sold if the delinquent taxes were not paid. Again, the letter was returned as "'unclaimed.'"[35] The owner was eventually notified of the sale when the purchaser had an unlawful detainer notice delivered to the property, and the notice was served on the owner's daughter.

The owner in *Jones* filed a lawsuit against the Commissioner and the purchaser, alleging that the Commissioner's failure to provide notice of the tax sale and the right to redeem constituted a taking of his property without due process. The trial court granted summary judgment in favor of the Commissioner and the purchaser, and the Arkansas Supreme Court affirmed, holding that the Commissioner's attempt to provide notice by certified mail satisfied due process. The U.S. Supreme Court reversed, holding 5 to 3 that under the circumstances presented, "[t]he Commissoner's effort to provide notice to [the owner] of an impending tax sale of his house was insufficient to satisfy due process . . . ."[36]

The Court in *Jones* recognized that Arkansas' statutory scheme for providing notice of a tax sale likely satisfied the requirements for due process because sending certified mail to an address that the owner was required by law to keep updated is reasonably calculated to reach the property owner. However, in examining the "'practicalities and peculiarities of the case,'"[37] the Court compared the Commissioner's knowledge of ineffective service to sending notice with actual knowledge that the notice was unlikely to reach the recipient because he was imprisoned or incompetent. Because the letter concerned the "important and irreversible" prospect

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[35] *Id.*

[36] *Id.*, 547 U.S. at 239.

[37] *Id.*, 547 U.S. at 230 (quoting *Mullane, supra* note 29).

of losing one's home, the Court held that additional steps were required.[38]

(d) Constitutionality of §§ 77-1832 and 77-1834

In the present case, Barnette has failed to meet his burden of establishing Nebraska's statutory notice requirements are unconstitutional. Section 77-1832 authorizes notice by certified mail, return receipt requested, to the address where the property tax statement is mailed. If the record owner is unable to be served by certified mail, § 77-1834 authorizes notice by publication upon proof of compliance with § 77-1832 if the record owner lives at the address where the property tax statement was mailed.[39]

[16,17] Because § 77-1832 requires service at the address where the property tax statement is mailed, it is reasonably calculated to provide notice to the property owner.[40] Further, notice by publication under § 77-1834 is limited to circumstances, such as those presented here, where the record owner resides at the address where the property tax statement is mailed, but he or she is unable to be served there.[41] For these reasons, we hold that the applicable notice requirements are constitutionally sufficient.

(e) Barnette's Right to Due Process

Barnette has also failed to establish that issuance of the tax deed was in violation of his due process rights. In *Dusenbery v. United States*,[42] the U.S. Supreme Court recognized that the use of the postal service to send certified mail is "a method our cases have recognized as adequate *for known addresses*."[43]

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[38] *Id.*, 547 U.S. at 230.

[39] See *Wisner, supra* note 15.

[40] See *Jones, supra* note 32.

[41] See *id.*

[42] *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

[43] *Id.*, 534 U.S. at 169 (emphasis supplied).

The Court confirmed that in determining whether due process requirements are satisfied, it is the *method* of notice that is analyzed and not the result.[44] In *Jones*, the Court articulated that "the failure of notice in a specific case does not establish the inadequacy of the attempted notice."[45] And, when assessing the adequacy of notice, "unique information about an intended recipient" must be considered.[46]

The test in *Jones* for the constitutional sufficiency of notice is case specific and analyzes whether the action was something that someone "'desirous of actually informing'" the homeowner would do.[47] Because additional reasonable steps were available to the State, given the circumstances, the Commissioner's effort to provide notice to the owner was insufficient to satisfy due process. What is "reasonable in response to new information depends upon what the new information reveals."[48]

The dissent, and the authority it cites, interprets *Jones* as establishing a new rule requiring the government to make additional attempts at providing notice each time notice is returned as unclaimed. However, the *Jones* Court explicitly stated: "[W]e disclaim any 'new rule' that is 'contrary to *Dusenbery* and a significant departure from *Mullane*.'"[49]

(i) Sufficient Notice Under Dusenbery *and* Mullane

The test in *Dusenbery* for the constitutional sufficiency of notice is whether the chosen method is "'reasonably calculated' to apprise a party of the pendency of the action."[50] As discussed above, both *Dusenbery* and *Mullane* recognized that

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[44] See *Dusenbery, supra* note 42.

[45] *Jones, supra* note 32, 547 U.S. at 231.

[46] *Id.*, 547 U.S. at 230.

[47] *Id.*

[48] *Id.*, 547 U.S. at 234.

[49] *Id.*, 547 U.S. at 238.

[50] *Dusenbery, supra* note 42, 534 U.S. at 170.

when a recipient's address is known, sending notice by certified mail satisfies due process.[51]

Under the circumstances presented here, Pontian's attempt to provide Barnette with notice of its intent to apply for a tax deed failed; however, under both *Dusenbery* and *Mullane*, the attempted notice was adequate. Pontian had actual knowledge of Barnette's address in Iowa and sent notice to that address. This knowledge is one of the "'practicalities and peculiarities of the case'"[52] and must be taken into account when assessing the adequacy of notice. Because Pontian had actual knowledge of Barnette's address, the method of service was reasonably calculated to apprise Barnette of Pontian's intent to apply for a tax deed. Accordingly, we hold that the notice was constitutionally sufficient.

The dissent contends that the focus of *Jones* was on the *fact* that the certified mail went unclaimed. We disagree. In *Jones*, the Court was clearly focused on two "'practicalities and peculiarities of the case'"[53] that may vary the notice required:[54] the government's knowledge and the fact that the property interest at stake was the owner's *home*.

(ii) "New Wrinkle" in Jones

The "new wrinkle" presented in *Jones* was whether the government's knowledge that notice has failed vitiates the reasonableness of the method used under the circumstances presented. This is demonstrated by the Court's extensive reliance on two of its prior holdings: *Robinson v. Hanrahan*[55] and *Covey v. Town of Somers*.[56]

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[51] See, *Dusenbery, supra* note 42; *Mullane, supra* note 29.

[52] See *Jones, supra* note 32, 547 U.S. at 230.

[53] *Id.*

[54] *Id.*, 547 U.S. at 227 ("question presented is whether such knowledge on the government's part is a 'circumstance and condition' that varies the 'notice required'").

[55] *Robinson v. Hanrahan*, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972).

[56] *Covey v. Town of Somers*, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956).

Robinson involved a forfeiture proceeding where the State had complied with the statutory requirements for providing notice, but knew the owner was incarcerated at the time. The Court held that the State's manner of service was not reasonably calculated to apprise the owner of the proceeding because the State knew the individual was not at the address to which the notice was mailed and knew that the individual was unable to get to that address at the time the notice was sent.[57] Similarly, in *Covey*, the Court held that notice of foreclosure by mailing, posting, and publication did not satisfy due process requirements because government officials knew that the property owner was incompetent and that she did not have the protection of a guardian.

Jones did not create a formulaic test for deciding when additional attempts at notice are required. The Court determined the return of the owner's letter as unclaimed constituted "new information" revealed to the government.[58] That information must then be taken into account as one of the "'practicalities and peculiarities of the case'" when determining whether the attempt at notice was adequate.[59] If the attempt was not adequate, there is an obligation to take additional steps that are reasonable under the circumstances, "if practicable to do so."[60]

The new information presented in *Jones* was that the owner had either (1) moved from the address or (2) failed to retrieve the certified letter from the post office. Based on this conclusion, the Court provided examples of reasonable steps that could have been implemented after the letter's return. In doing so, the Court advised: "What steps are reasonable in response to new information depends upon what the new information reveals."[61]

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[57] *Robinson, supra* note 55.

[58] *Jones, supra* note 32, 547 U.S. at 234.

[59] See *id.*, 547 U.S. at 230.

[60] See *id.*, 547 U.S. at 234.

[61] *Id.*

(iii) Balancing Interests

"'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[62] In *Mathews v. Eldridge*,[63] the U.S. Supreme Court instructed that in determining whether the procedures used in providing notice are constitutionally sufficient, the governmental and private interests are analyzed using three distinct factors. These factors include:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[64]

In *Jones*, the Court reaffirmed that the reasonableness of notice requires "[b]alancing a State's interest in efficiently managing its administrative system and an individual's interest in adequate notice . . . ."[65] When concluding that notice to the owner was inadequate, the Court gave special importance to the fact that the property owner was "in danger of losing his house."[66] The Court stated:

> In this case, the State is exerting extraordinary power against a property owner—taking and selling *a house* he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed."[67]

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[62] *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

[63] *Mathews, supra* note 62.

[64] *Id.*, 424 U.S. at 335.

[65] *Jones, supra* note 32, 547 U.S. at 240.

[66] *Id.*, 547 U.S. at 238.

[67] *Id.*, 547 U.S. at 239 (emphasis supplied).

And, "when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. . . . This is especially true when . . . the subject matter of the letter concerns such an important and irreversible prospect as the loss of *a house*."[68] The Court emphasized: "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of *a house* he owns would do nothing when a certified letter sent to the owner is returned unclaimed."[69]

While the property at issue is one factor to be considered, we do not, as the dissent suggests, limit *Jones* to cases involving houses. The fact that *Jones* involved an occupied house was information that must be considered when determining whether the notice was adequate. "[A]ssessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment.'"[70]

In *Jones*, the Court was balancing the government's interest against the owner's interest in an occupied home, and evidence was presented to show that Arkansas' statutes already required a homeowner to be served by personal service if certified mail is returned. Here, Barnette is attacking the constitutionality of the tax deed issued to Pontian. There is a presumption of constitutionality, and Barnette has the burden of establishing that his due process rights were violated.[71]

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[68] *Id.*, 547 U.S. at 230 (emphasis supplied).

[69] *Id.*, 547 U.S. at 229 (emphasis supplied). See, also, *id.*, 547 U.S. at 229 ("we evaluate the adequacy of notice prior to the State extinguishing a property owner's interest in *a home*") (emphasis supplied); *id.*, 547 U.S. at 238 ("at the end of the day, that someone who actually wanted to alert [the owner] that he was in danger of losing his *house* would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done") (emphasis supplied).

[70] *Id.*, 547 U.S. at 229 (quoting *Mullane, supra* note 29).

[71] See *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

Because the particular situation dictates what procedural due process protections are required,[72] it is Barnette's burden to demonstrate that he is entitled to the same procedural safeguards as those required in *Jones*. Yet, the record is void of any evidence regarding the burden on the government, and Barnette has presented no evidence demonstrating his property was anything more than a vacant lot.

(iv) Reasonable Steps

Based on the specific facts presented in *Jones*, the Court suggested sending a letter by regular mail so that a signature was not required, posting notice on the front door of the property, or addressing mail to "occupant" would be reasonable. These additional steps were deemed reasonable because Arkansas' statutes already required a homeowner to be served by personal service if certified mail is returned. And, the property at issue was an occupied home.

Balancing the State's interest in efficiency against the owner's property interest in his home, the Court in *Jones* rejected as unreasonable the suggestion that the government should conduct a search for the owner's new address in the local phonebook and government records. The Court determined the government was not required to go that far because such a requirement would impose too great a burden. The Court also noted that "'[i]t is not [the Court's] responsibility to prescribe the form of service that the [government] should adopt.'"[73]

(v) Desirous of Actually Informing

In *Jones*, the Court explained that "'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'"[74] Thus, if the return of the notice

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[72] See *Mathews, supra* note 62.

[73] *Jones, supra* note 32, 547 U.S. at 238 (quoting *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982)).

[74] *Id.* (quoting *Mullane, supra* note 29).

as unclaimed is new knowledge indicating the chosen method of service is not "desirous of actually informing," additional reasonable steps are required—but only if such steps are practicable.[75]

In the present case, Pontian's knowledge that the certified letter had been returned as unclaimed did not indicate that its method of service was not desirous of actually informing Barnette. Pontian sent notice to Barnette by certified mail, return receipt requested, to the address where the property tax statement was mailed, as required by § 77-1832. Prior to returning the notice as unclaimed, the post office had made three attempts to deliver the notice. After it was returned as unclaimed, Pontian proceeded to notice by publication in a Sarpy County newspaper, as permitted by § 77-1834.

(vi) Practicalities and Peculiarities of Case

Jones does not preclude the conclusion we reach today. This case involves substantially different facts and circumstances from those presented in *Jones*. Other states have rejected the argument that additional steps are required after notice sent to a property owner's last known and actual address was returned as unclaimed or where property owners have failed to present evidence that they were either not home or not available to claim the notice.

The North Carolina Court of Appeals rejected a property owner's argument that *Jones* required additional steps after a notice was returned as unclaimed and held that the notice sent to the property owner's last known and actual address complied with due process requirements.[76] The Supreme Court of New York, Appellate Division, recognized that when mailings had been sent to the property owners' current and correct addresses but returned as unclaimed, the lack of evidence indicating

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[75] *Id.*

[76] *St. Regis of Onslow County v. Johnson*, 191 N.C. App. 516, 663 S.E.2d 908 (2008).

property owners were not home or legitimately unavailable to sign for the letter was "'unique information about [the] intended recipient[s]'" to be taken into account when determining whether notice was reasonable.[77]

Addressing the sufficiency of notice in a breach of contract action, the Pennsylvania Court of Common Pleas has also held that "[w]hen a letter is returned as 'refused' or 'unclaimed,' the notice is sufficient if it is apparent that the address was valid and could be located by the postal office."[78] In *Mikhaylov v. U.S.*,[79] the U.S. District Court for the Eastern District of New York similarly recognized that in the context of asset forfeiture, "[a] written notice sent, via certified mail, to any known addresses, combined with published notices, ordinarily satisfies the *Mullane* standard." The court stated:

> The only arguable exceptions are: where the government knows or should know that the written notice will not reach the intended recipient (*e.g.*, the written notice is returned as undeliverable), *and* it can obtain the recipient's correct address internally (*e.g.*, the recipient is already in the government's custody). . . . Or, where the government knows or should know that the intended recipient will not understand the written notice (*e.g.*, the recipient lacks the mental capacity).[80]

Here, Barnette's actual address was known and the notice was correctly sent to that address. In contrast to *Jones*,[81] the property at issue in this case was not Barnette's home. Barnette's home is in Council Bluffs, Iowa, where he has

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[77] *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 393, 820 N.Y.S.2d 104, 106 (2006) (quoting *Jones, supra* note 32).

[78] *Masergy Communications, Inc. v. Atris, Inc.*, No. 06-24948, 2007 WL 5479856 (Pa. Com. Pl. Oct. 4, 2007).

[79] *Mikhaylov v. U.S.*, 29 F. Supp. 3d 260, 267 (E.D.N.Y. 2014).

[80] *Id.* at 267-68.

[81] *Jones, supra* note 32.

continuously resided throughout the entire tax sale process and admits to having received tax notices for the property at issue there. Because Pontian's notice was sent to Barnette's actual address, the only new information revealed by the return of the letter was that either (1) Barnette had not been home during the attempts at delivery, and then failed to retrieve the letter from the post office, or (2) Barnette had been avoiding service.

The dissent cites two cases in support of its position. However, there is a distinct difference between the factual circumstances in those cases and the one before us today. In each case, the property owner had denied having actual notice of the pending proceedings. Moreover, in *Schlereth v. Hardy*,[82] the court found that the property owner "was not offered a certified letter by the postal worker that she refused to accept—she simply failed to retrieve a letter, the substance of which was unknown to her."

Again, it is Barnette's burden to establish issuance of the tax deed was unconstitutional.[83] However, he has not offered any evidence to show that the notice was not reasonably calculated to apprise him of Pontian's intent to apply for a tax deed. During oral argument, Barnette's counsel admitted there was no evidence in the record regarding why Barnette had not accepted the letter. Barnette has not alleged that he was unaware of the attempts at service or that he was unavailable to claim the letter. Barnette has also not alleged a lack of actual knowledge of Pontian's intent to apply for a tax deed. This differs from the property owner in *Jones* who had demonstrated that he had only learned of the pendency of the proceedings after his home had already been sold.[84]

Sending notice to Barnette at his actual residence demonstrates Pontian was desirous of actually informing Barnette of its intention to apply for a tax deed. Accordingly, we hold that

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[82] *Schlereth v. Hardy*, 280 S.W.3d 47, 52 n.4 (Mo. 2009).

[83] See *Stenger, supra* note 71.

[84] See *Jones, supra* note 32.

the notice was constitutionally sufficient under the standard articulated in *Jones*.

The dissent correctly asserts that sending Barnette notice by regular mail would have imposed little burden on Pontian. However, regardless of the level of burden imposed, Pontian was not obligated to do so. The Court of Appeals of New York rejected a similar argument when holding that the government was not required to take additional steps under *Jones* after tax bills and a notice of foreclosure proceeding were sent by regular mail, but returned as undeliverable because the owners had not shown that there were any steps that would have yielded the owners' new address.[85] Here, the burden lies on Barnette, and he has presented no evidence to show that there were additional reasonable steps and that these additional steps would be practicable.

Even assuming the dissent's interpretation of *Jones* is correct, and the return of notice as unclaimed independently triggers an obligation to take additional reasonable steps when notice is sent to the property owner's actual residence, these steps are still not constitutionally required unless it is "practicable to do so."[86] The Oxford English Dictionary defines "practicable" as "[a]ble to be done or put into practice successfully; feasible; able to be used; useful, practical, effective."[87]

The U.S. Court of Appeals for the Seventh Circuit has recognized: "The Constitution does not require that an effort to give notice succeed. . . . If it did, then people could evade knowledge, and avoid responsibility for their conduct, by burning notices on receipt—or just leaving them unopened . . . ."[88]

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[85] *Mac Naughton v. Warren County*, 20 N.Y.3d 252, 982 N.E.2d 1237, 959 N.Y.S.2d 104 (2012).

[86] See *Jones, supra* note 32, 547 U.S. at 234.

[87] "Practicable," Oxford English Dictionary Online, http://www.oed.com/view/Entry/149217 (last visited Apr. 4, 2020).

[88] *Ho v. Donovan*, 569 F.3d 677, 680 (7th Cir. 2009) (citing *Dusenbery, supra* note 42).

In this case, regular mail (or mail addressed to "occupant") would not likely have been useful or effective, especially given the fact Barnette has not alleged that he was unaware of the delivery attempts or that he was unavailable to claim the letter.

To the extent the dissent discusses Neb. Rev. Stat. § 25-520.01 (Reissue 2016) and its requirement that along with publication, parties must mail a copy of the published notice to all parties having a direct legal interest in the action when the party's name and address are known, the Legislature has not included the same requirement when publishing under § 77-1834. While the inclusion of such a requirement may be appropriate, its absence does not affect the constitutionality of the notice provided in the case before us.

Under the totality of circumstances presented, Pontian's attempt at notice was "'desirous of actually informing'" Barnette of its intent to apply for a tax deed.[89] Pontian complied with §§ 77-1832 and 77-1834 and was not required to publish notice anywhere other than Sarpy County. Accordingly, we hold that the notice was constitutionally sufficient.

There is no merit to Barnette's third and fourth assignments of error.

4. Action to Quiet Title

In his fifth assignment of error, Barnette reasserts his claims of defective notice and service and argues the statutory time period for obtaining a deed to the property has expired. As set forth above, Pontian's notice of its intent to apply for a tax deed was not defective. This argument is meritless.

VI. CONCLUSION

Pontian complied with the statutory notice requirements for obtaining a tax deed. Because the requirements are reasonably calculated to apprise a property owner of a tax certificate holder's intent to apply for a tax deed, they are constitutionally

[89] See *Jones, supra* note 32, 547 U.S. at 230.

sufficient. Barnette has failed to meet his burden of establishing the tax deed is invalid. The judgment of the district court is affirmed.

Affirmed.

Cassel, J., concurring.

I agree with the court that HBI correctly followed Neb. Rev. Stat. § 77-1831 (Reissue 2009) regarding notice that must be given upon tax deed issuance. And I agree that under the circumstances here, there was no due process violation.

But I write separately to suggest that the Legislature may wish to follow the example of Neb. Rev. Stat. § 25-520.01 (Reissue 2016), which was adopted in response to *Mullane v. Central Hanover Tr. Co.*[1] The Legislature may find it prudent to amend Neb. Rev. Stat. § 77-1835 (Supp. 2019) to provide that where notice by publication is given, the party giving such notice shall send by U.S. mail a copy of the first such published notice to the record owner of the property.

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[1] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Papik, J., dissenting.

"Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" *Jones v. Flowers*, 547 U.S. 220, 223, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). I believe that under the U.S. Supreme Court's opinion in *Jones*, Pontian provided constitutionally inadequate notice of its intent to apply for a treasurer's deed for Barnette's property. While the majority finds this case distinguishable from *Jones*, I do not.

In this dissent, I will first explain how I read *Jones* and how I understand it to apply here. I will then address the majority's position that my reading of *Jones* is incorrect.

Jones v. Flowers *and Unclaimed Certified Mail.*

As the majority explains, *Jones* involved a fact pattern similar to the one before us. After the longtime owner of a house separated from his wife and moved out, taxes on the house were not paid. A government official later sent notice of the delinquency and information about how to redeem the property by certified mail to the address where the owner no longer lived. It was returned unclaimed. Two years later, the government official published a notice of public sale of the house in a local newspaper. When a purchase offer was received for the home, the government official sent another certified letter, warning that the house would be sold if the delinquent taxes were not paid. Once again, the certified mail was returned unclaimed. The owner did not learn of the sale until the purchaser had an unlawful detainer notice sent to the property, which was served on the owner's daughter.

The owner's lawsuit alleging that his house was being taken without due process eventually reached the U.S. Supreme Court. In an opinion authored by Chief Justice Roberts, the Court first acknowledged that due process does not require actual notice before the government may take property and that in prior cases, it had deemed notice constitutionally adequate if it was reasonably calculated to reach the intended recipient when sent. The Court also noted its precedent, including *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002), and *Mullane, supra*, generally permitting service by mail.

The Court explained, however, that *Jones* presented a "new wrinkle": whether due process requires additional steps "when the government becomes aware prior to the taking that its attempt at notice has failed." 547 U.S. at 227. The Court concluded that reasonable followup measures are required in such circumstances, reasoning that no one who "actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified

letter sent to the owner is returned unclaimed." *Jones v. Flowers*, 547 U.S. 220, 229, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

The Court went on to conclude that there were reasonable, additional steps the government official could have taken, including resending the notice by regular mail or posting notice on the front door. The Court explained that such steps would increase the likelihood of a property owner receiving actual notice. Finally, the Court concluded that following up by publication was constitutionally inadequate.

I agree with Barnette that under *Jones*, the notice here was constitutionally inadequate. The notice sent by certified mail was returned unclaimed. I read *Jones* to tell us rather plainly that in that circumstance, the State must take additional, reasonable steps to provide notice if it is practicable to do so. 547 U.S. at 225 ("[w]e hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so").

Because I believe this case is controlled by *Jones*, I would go on to consider, as the Court did in *Jones*, whether Pontian took additional, reasonable measures to notify Barnette after the certified mail went unclaimed. It quickly becomes clear to me it did not.

As noted above, *Jones* concluded there were other, reasonable steps that could have been taken after the attempt to provide notice by certified mail failed. The Court mentioned resending the notice by regular mail or posting notice on the front door. The Court explained that such steps would increase the likelihood of the property owner receiving actual notice whether the property owner had moved or had simply not retrieved the certified mail.

I see no reason why those reasonable, additional steps could not have been taken here. Pontian, for example, could have followed the normal practice in Nebraska of sending the published notice to those with an interest in a proceeding by

regular mail at the same time the notice was published. In most instances in which a party is allowed to provide notice by publication, Nebraska law requires that, along with publication, the party mail a copy of the published notice to "each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him." Neb. Rev. Stat. § 25-520.01 (Reissue 2016). A mailing of published notice does not appear to have been statutorily required in this unique context, see Neb. Rev. Stat. § 25-520.02 (Reissue 2016), but sending the published notice by regular mail would have required little more of Pontian and would have eliminated any argument that it provided constitutionally inadequate notice under *Jones*. As the majority acknowledges, sending Barnette notice by regular mail after the certified mail went unclaimed would have imposed little burden on Pontian. Pontian, however, did nothing except publish notice after the certified mail was returned unclaimed. In *Jones*, publication was deemed to be inadequate. See *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

Because Pontian did not, after the certified mail was returned unclaimed, take reasonable, additional steps to attempt to notify Barnette when it was practicable to do so, I do not believe it provided constitutionally adequate notice. The majority, however, finds the notice was adequate based on a different reading of *Jones*. I explain why I disagree with that reading below.

Majority's Understanding of Jones.

The majority concludes that the notice sent by certified mail that was returned unclaimed was sufficient to satisfy due process notwithstanding *Jones*. As I understand the majority opinion, it concludes that *Jones* does not apply in this circumstance because it is not clear that the piece of property being taken and sold by the government includes a house, because the certified mail that went unclaimed was addressed to the place where Barnette lived, and because it finds that the additional steps discussed in *Jones* likely would have failed.

I do not read the application of *Jones* to turn on the facts identified by the majority. Take first, the majority's determination that *Jones* has no bearing here because *Jones* involved the taking of a house and, as the majority puts it, nothing in the record demonstrates the property being taken here "was anything more than a vacant lot." The majority identifies a number of occasions in which the U.S. Supreme Court in *Jones* referred to the fact that the property being sold was a house and that such an action is an important and extraordinary act. For multiple reasons, I understand these references to emphasize the significance and irreversibility of the government's taking property from its owner and selling it, not to, in the majority's words, attribute "special importance" to the fact that the property being sold was a house.

Not only is that, in my view, a more natural reading, in many other places in *Jones*, the U.S. Supreme Court frames its analysis in terms of the taking of property in general. The Court stated that it granted certiorari "to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking *the owner's property*." *Jones*, 547 U.S. at 223 (emphasis supplied). It further explained that it took the case "to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the government to take additional reasonable steps to notify *a property owner* when notice of a tax sale is returned undelivered." *Id.*, 547 U.S. at 225 (emphasis supplied). And in stating its holding, the Court said, "We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to *the property owner* before selling *his property*, if it is practicable to do so." *Jones v. Flowers*, 547 U.S. 220, 225, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (emphasis supplied).

I would also note that I find the conclusions the majority draws from a house being at issue in *Jones* difficult to square

with the facts of *Jones* itself. As the majority emphasizes, the property owner in *Jones* did not actually reside at the house that was being taken and sold by the government. The interest of the property owner in *Jones* was thus not that of someone whose *residence* was being sold out from under him. And while a nonresident owner undoubtedly has a significant interest in a house he or she owns, I do not see how such an interest would, for due process purposes, be more significant than a property owner's interest in, say, a building used for business purposes, farmland, or any other piece of real property, even "a vacant lot."

Neither am I persuaded by the majority's conclusion that *Jones* does not apply when, as here, the unclaimed certified mail was sent to the address at which the property owner lives. I concede that, at least at first blush, this distinction identified by the majority seems meaningful. A compelling argument can certainly be made that a person like the homeowner in *Jones* who never has the opportunity to accept certified mail is more deserving of additional attempts at notice than Barnette who, for reasons that are not clear, did not sign for certified mail sent to the home where he resides. One might add to that argument that a finding that Barnette was provided with inadequate notice could create an incentive for delinquent taxpayers to evade certified mail. See *Jones*, 547 U.S. at 248 (Thomas, J., dissenting) ("[t]he meaning of the Constitution should not turn on the antics of tax evaders and scofflaws"). But as compelling as I might find the policy arguments for the majority's position, I do not believe that *Jones* can fairly be read to allow for it.

In holding that knowledge that notice has been returned unclaimed requires the State to consider additional action, *Jones* does not focus on the *reason* that the certified mail went unclaimed. Its focus is instead on the *fact* that the certified mail went unclaimed. The Court concluded that because the certified mail went unclaimed, the government official knew the attempt to actually notify the homeowner had failed and

therefore, if practicable, additional steps were required. See *id.*, 547 U.S. at 225 ("when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice . . . if it is practicable to do so").

But not only does *Jones* not focus on the owner's living somewhere other than the address where the certified mail was sent, it explicitly discusses the possibility that certified mail might go unclaimed by a person residing at the address where the certified mail is sent. 547 U.S. at 234 ("[t]he return of the certified letter marked 'unclaimed' meant either that [the owner] still lived at [the address where the certified mail was sent], *but was not home when the postman called and did not retrieve the letter at the post office*, or that [the owner] no longer resided at that address") (emphasis supplied). The opinion does not, however, conclude that a person who does not retrieve certified mail sent to his or her residence has received constitutionally adequate notice. To the contrary, it discusses how the required additional attempts at providing notice such as resending the notice by regular mail or posting notice on the front door would address both the possibility that the homeowner no longer lived at the address but also that he "had simply not retrieved the certified letter." *Jones v. Flowers*, 547 U.S. 220, 235, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). For better or for worse, *Jones* treats alike property owners who do not claim certified mail because they have moved and property owners who simply fail to retrieve certified mail—neither receive notice when certified mail goes unclaimed and the additional steps are aimed at providing notice to both types of parties.

For this reason, I cannot agree with the majority that Pontian's attempt at notice was "desirous of actually informing" Barnette of its intent to apply for a tax deed. The majority focuses exclusively on whether Pontian's attempt to notify Barnette of an impending tax sale was "desirous of actually informing" when the certified mail was sent. Under *Jones*,

however, that is not the end of the inquiry, at least when certified mail is returned unclaimed. Under *Jones*, once certified mail is returned unclaimed, it is not enough that the notice by certified mail was "desirous of actually informing" when sent.

I also do not believe the majority is correct to conclude that even if *Jones* applies, Pontian was not required to take additional steps after the certified mail went unclaimed. The majority concludes Pontian was not required to do so because, it says, any additional steps would not likely have succeeded because there is nothing in the record that indicates why the certified mail went unclaimed in the first place. I do not believe that is relevant. When *Jones* concluded that additional steps such as sending the notice by regular mail or posting the notice on the front door were reasonable and available, it did not do so by considering whether those steps would have provided notice to the property owner in the case before it. It concluded that such steps were "practicable" because they would "increase the chances of actual notice" whether the property owner had moved or had simply not retrieved the certified mail sent to his home. *Id.*, 547 U.S. at 234, 235. I do not believe we can second-guess that determination here.

Other Authority.

The majority also relies on a number of cases in support of its more limited understanding of *Jones*. Just as I disagree with the majority's understanding of *Jones*, I am not persuaded by its reliance on other cases.

In my view, many of the cases cited by the majority do not even speak to the issues at hand. For example, the majority notes that in *St. Regis of Onslow County v. Johnson*, 191 N.C. App. 516, 663 S.E.2d 908 (2008), the North Carolina Court of Appeals rejected a property owner's argument that *Jones* required additional steps after a notice was returned unclaimed. That is true enough, but the court did not do so for any of the reasons the majority relies on here. The court concluded that

notice was sufficient because in that case the notices were returned unclaimed *after* the property had been sold and thus the obligation to take additional steps to effect notice was never triggered.

The majority also cites language from a Pennsylvania trial court decision to the effect that even if letters are returned unclaimed, the notice is sufficient if sent to a valid address. See *Masergy Communications, Inc. v. Atris, Inc.*, No. 06-24948, 2007 WL 5479856 (Pa. Com. Pl. Oct. 4, 2007). In support of that proposition, however, the court cited cases that predated *Jones*. The court only mentioned *Jones* in a footnote, also distinguishing it on grounds not relied on by the majority here.

I also cannot agree that *Mikhaylov v. U.S.*, 29 F. Supp. 3d 260 (E.D.N.Y. 2014), supports the majority's position. At issue in that case was whether the government provided notice consistent with due process before seizing property in a drug forfeiture case. The government sent notice of the forfeiture to the property owner's last known address by certified mail. The property owner had moved away, but someone else signed for it. The property owner argued that he was entitled to actual notice, and the court disagreed. Because the notice was not returned unclaimed, the court's opinion, unsurprisingly, does not discuss *Jones*.

Despite the absence of any mention of *Jones* in *Mikhaylov*, the majority splices together two quotes from the opinion and appears to suggest those quotes support its position. The first quote is a recitation of a principle of blackletter law with which neither I nor anyone else could quibble: "A written notice sent, via certified mail, to any known addresses, combined with published notices, *ordinarily* satisfies the *Mullane* standard." *Mikhaylov*, 29 F. Supp. 3d at 267 (emphasis supplied). In the next sentence of the majority opinion, the majority quotes from language appearing *two paragraphs later* in *Mikhaylov* discussing "[t]he only arguable exceptions." *Id.* To the extent the majority intends to suggest that *Mikhaylov*

was articulating "[t]he only arguable exceptions" to its earlier statement that certified mail sent to a known address ordinarily satisfies *Mullane*, it is mistaken. The two paragraphs in between the portions quoted by the majority make clear that the court was discussing "arguable exceptions" to the rule that actual notice is not required to satisfy due process. *Mikhaylov*, 29 F. Supp. 3d at 267. *Jones* did not require actual notice, and no one is suggesting that actual notice is required here.

The majority does cite two cases, *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2006), and *Mac Naughton v. Warren County*, 20 N.Y.3d 252, 982 N.E.2d 1237, 959 N.Y.S.2d 104 (2012), that appear to align with the majority's understanding of *Jones* to some degree. But *Temple Bnai Shalom of Great Neck* declined to apply *Jones* based, in part, upon the reason certified mail went unclaimed and *Mac Naughton* declined to do so based upon a determination that additional efforts would not have resulted in notifying the owners in the case before it. As I have already explained, I do not believe either approach is consistent with *Jones*.

While on the subject of authority, I note that others have read *Jones* as I do. In *Schlereth v. Hardy*, 280 S.W.3d 47 (Mo. 2009), the Missouri Supreme Court confronted a case like ours. In that case, certified mail was sent to the delinquent taxpayer's residence; the taxpayer received notifications of the attempt to deliver, but she failed to pick it up; and it was returned unclaimed. The person seeking to buy the delinquent taxpayer's home did not provide additional forms of notice. The Missouri Supreme Court unanimously held that, under *Jones*, the notice did not comply with due process. It concluded that after the certified mail was returned unclaimed, the sender was required to take reasonable, additional measures as articulated in *Jones*. With respect to the fact that the delinquent taxpayer received notification of the certified mail and failed to retrieve it, the court stated: "*Jones* did not concern itself with why the addressee failed to claim the certified letter. In

fact, the Supreme Court allowed for the possibility that the addressee, like [the delinquent taxpayer] simply would ignore the requests to pick up the certified letter." *Schlereth*, 280 S.W.3d at 51.

Similarly, in *VanHorn v. Florida*, 677 F. Supp. 2d 1288 (M.D. Fla. 2009), a federal district court concluded that, under *Jones*, the government was required to attempt additional reasonable steps at service, if practicable, even though the certified mail that went unclaimed was sent to the address where the property owner resided. The court pointed to the language in *Jones* discussed above that the government was required to "account not only for the possibility that (as in [*Jones*]) an unclaimed letter was delivered to an address at which the property owner did not reside but also 'that he had simply not retrieved the certified letter.'" *VanHorn*, 677 F. Supp. 2d at 1297, quoting *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

Conclusion.

In closing, I respond to the majority's assertion that I read *Jones* to create a new rule when the *Jones* Court disavowed doing so. In fact, *Jones* did not altogether disavow the creation of a new rule; the Court said it was not creating a rule that "is contrary to *Dusenbery* and a significant departure from *Mullane*." 547 U.S. at 238. The dissent in *Jones* felt that this was not an accurate account of the opinion. 547 U.S. at 244 (Thomas, J., dissenting) ("[t]he majority's new rule is contrary to *Dusenbery* and a significant departure from *Mullane*"). And, as a matter of description, perhaps that is debatable.

But regardless of how *Jones* characterized its holding, we are bound to follow it. See, e.g., *State v. Thieszen*, 295 Neb. 293, 297, 887 N.W.2d 871, 875 (2016) ("[u]pon questions involving the interpretation of the U.S. Constitution, the decision of the U.S. Supreme Court is the supreme law, by which state courts are bound"). Respectfully, I do not believe the majority opinion does. For that reason, I dissent.

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

TransCanada Keystone Pipeline, LP, appellant, v. Arthur R. Tanderup and Helen J. Tanderup, husband and wife, and John Doe, appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Frank C. Morrison, also known as Frank Morrison, and Lynn H. Morrison, husband and wife, and John Doe, appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Jerry Carpenter and Charlayne Carpenter, husband and wife, et al., appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Germaine G. Berry et al., appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Cottonwood Ridge LLC et al., appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Cheri G. Blocher and Michael J. Blocher, wife and husband, et al., appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Frankie Maughan, also known as Frankie Maughan, Jr., et al., appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Todd J. Stelling and Lisa J. Stelling, husband and wife, and John Doe, appellees.

TransCanada Keystone Pipeline, LP, appellant, v. Karen G. Berry and John Doe, appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. Richard E. Stelling et al., appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. Joshua R. Stelling and John Doe, appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. Robert R. Krutz and Beverly J. Krutz,
husband and wife, et al., appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. CHP 4 Farms, LLC, et al., appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. Carol J. Manganaro, Personal Representative
of the Estate of Florian W. Dittrich,
et al., appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. Carol J. Manganaro et al., appellees.

TransCanada Keystone Pipeline, LP, appellant,
v. Tree Corners Farm, LLC, et al., appellees.

941 N.W.2d 145

Filed April 10, 2020. Nos. S-19-493 through S-19-508.

1. **Judgments: Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Courts: Appeal and Error.** In cases where no statement of errors was filed and the district court reviewed for plain error, the higher appellate court likewise reviews for plain error only.
3. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
4. ____: ____. In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order.

5. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
6. **Judgments: Appeal and Error.** A reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is a general remand and the parties stand in the same position as if the case had never been tried.
7. **Courts: Judgments: Appeal and Error.** The exception to this general rule placing the parties back where they stood before the appeal after such a general remand order is that if the undisputed and admitted facts are such that but one judgment could be rendered, the trial court should enter such a judgment, notwithstanding the mandate did not specifically direct the trial court's action.
8. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
9. **Courts: Judgments: Appeal and Error.** A district court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.
10. ____: ____: ____. A lower court may not modify a judgment directed by an appellate court; nor may it engraft any provision on it or take any provision from it.
11. **Judgments: Appeal and Error.** No judgment or order different from, or in addition to, the appellate mandate can have any effect.
12. **Courts: Judgments: Jurisdiction: Appeal and Error.** Because a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court, any order attempting to do so is entered without jurisdiction and is void.
13. **Courts: Judgments.** Each person who takes part in the judicial process has a substantial right to have the courts' orders enforced.

Appeals from the District Court for Antelope County, James G. Kube, Judge, on appeal thereto from the County Court for Antelope County, Donna F. Taylor, Judge. Judgment of District Court affirmed.

James G. Powers and Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellees.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

This is a series of consolidated cases in which TransCanada Keystone Pipeline, LP (TransCanada), is seeking review of intermediate appellate orders entered by the Antelope County District Court, which reversed the Antelope County Court's denial of appellees' motions for attorney fees. These consolidated cases are factually related to a series of cases already decided by this court.[1] The question at issue in these cases is whether the county court plainly erred by entering a judgment on remand without holding an evidentiary hearing.

BACKGROUND

These appeals are from a series of condemnation proceedings initiated by TransCanada. Proceedings took place in several counties through which TransCanada planned to construct an oil pipeline, including Antelope County. TransCanada ultimately voluntarily dismissed all of its condemnation actions without prejudice, because several landowners in York County challenged the constitutionality of the proceedings and TransCanada elected to pursue approval for the pipeline route by the Public Service Commission.

As in the actions filed in other counties, the condemnees in the Antelope County actions moved for an award of attorney fees and costs under Neb. Rev. Stat. § 76-726 (Reissue 2018). Following a hearing, the Antelope County Court originally found in favor of the condemnees on their motions for attorney fees. In making its decision, the county court reviewed the

[1] See *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

condemnees' affidavits that were received, over TransCanada's objections. TransCanada made several objections, including foundation, as well as a general hearsay objection to all of the affidavits submitted. The Antelope County Court overruled a majority of the objections. It agreed to disregard the last paragraph of each of the condemnees' affidavits, which contained gratuitous praise for their counsel, but otherwise received the affidavits into evidence. All of the evidence on the motion for attorney fees was presented via affidavit.

TransCanada appealed the Antelope County Court's order granting attorney fees to the Antelope County District Court, which determined that the Antelope County condemnees' affidavits submitted in support of their motions were inadmissible hearsay. The district court reversed the award of attorney fees, but stated that it was unsure to what extent the county court had relied on the affidavits. In each case, the district court remanded the matter for a "rehearing on the merits." The district court's orders to remand were not appealed.

In similar cases in Holt and York Counties, the respective district courts had similarly held that the affidavits were inadmissible hearsay and remanded for a new hearing. However, unlike the Antelope County District Court's order, TransCanada appealed the orders of remand of the Holt County District Court and the York County District Court. Accordingly, TransCanada requested to stay the mandate of remand from the district courts of Holt and York Counties.

In contrast, TransCanada did not request to stay the mandates from the Antelope County District Court. The Antelope County Court received the district court's mandates on March 21, 2017, and entered orders spreading the mandates on March 29.

Before the mandated rehearing was held, the parties made a stipulated request for a continuance to await resolution of *TransCanada Keystone Pipeline v. Nicholas Family*.[2] The

[2] See *id.*

stipulated request stated: "These cases are closely associated with cases in the Nebraska Court of Appeals, and the Court of Appeals' rulings on those cases may impact the matters before this Court." The Antelope County Court granted the continuance.

Nicholas Family consisted of 40 appeals from 40 different condemnation actions, which we consolidated into 4 appeals decided in 1 opinion. At issue in the appeals was the fact that the condemnees had requested attorney fees and costs under § 76-726. The condemnees, and their counsel, had in all cases submitted affidavits in support of the motions attesting to the fees and their reasonableness, and TransCanada had objected to all the affidavits on the basis of hearsay.[3] The county courts had overruled the objections and granted the requests for attorney fees. The district courts were split on affirming the awards of attorney fees and rejecting the affidavits as hearsay.

We held in *Nicholas Family* that the submission of affidavits was an acceptable way to introduce evidence in a motion for attorney fees. However, we also found that the evidence presented by the condemnees in those cases was insufficient to support the award of attorney fees.[4] We explained:

> No written fee agreement or invoice for legal services was offered as evidence in support of the motions for attorney fees and costs. Nor did the landowners, in their affidavits, aver any specific amount owed by them to counsel.
>
> We observe that affidavits from one or both counsel of record regarding the attorney fees actually incurred by the landowners were offered and admitted as evidence before each of the county courts. Under certain circumstances, such affidavits might supplement other evidence admitted at an attorney fees hearing and support the award of fees.

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[3] See *id.*

[4] See *id.*

> But in this case, these affidavits from counsel were not specific as to any individual landowner and—with respect to work done and fees charged—were virtually identical to one another, including seeking payment of the same amount of money based upon the same number of hours of work. In fact, these affidavits raised more questions than they answered, notably about the nature of the fee agreement between the landowners and counsel, whether any fee agreement was akin to a contingency agreement, and the nature of how attorney fees sought in these eminent domain proceedings might be related to the York County constitutional challenge. As such, we conclude that on these facts, these affidavits are insufficient to support the award of attorney fees.
>
> Because the landowners' affidavits did not allege the amount each had actually incurred, and because there was no other evidence sufficient to support the award of attorney fees, we find that the county courts' awards were in error.[5]

Following our ruling in *Nicholas Family*, the Antelope County Court held a preliminary hearing to consider the arguments of counsel with regard to how these matters should be reheard. The condemnees argued that the district court ordered a rehearing on the merits and that the county court should conduct a new evidentiary hearing before ruling on the motions for attorney fees.

Relying on *Jeffres v. Countryside Homes*,[6] TransCanada argued that the county court should exercise its discretion to limit the scope of the evidence presented at a new hearing to the same content that was in the original affidavits. In *Jeffres*, we said that when a case is remanded for consideration of damages, it is within the sound discretion of the trial court to decide the issue on evidence contained in the record already

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[5] *Id.* at 287-88, 908 N.W.2d at 68.

[6] *Jeffres v. Countryside Homes*, 220 Neb. 26, 367 N.W.2d 728 (1985).

made at the first trial, or to take additional evidence or to try the case de novo.

TransCanada then relied on *deNourie & Yost Homes v. Frost*[7] to argue that the county court was not required to hold a rehearing because, under the facts limited to the same content that was in the original affidavits, it was undisputed that only one judgment could be rendered. In *deNourie & Yost Homes*, we discussed an exception to the general rule that a remand on the merits resets the parties back to their position before the trial. We said that if the facts are not in dispute and only one judgment could be rendered, a lower court could enter an order without holding a rehearing.[8]

After considering the arguments at the preliminary hearing, the county court concluded a rehearing was unnecessary because *Nicholas Family* already established that the type of evidence to be presented by the condemnees was insufficient to support awards of attorney fees. The county court concluded that the affidavits in this case were very similar to those in *Nicholas Family*, because they were all prepared by the same counsel and used nearly identical language save for the names of the landowners and the paragraph identifying their property. The court noted that, in fact, both TransCanada and the condemnees had stipulated in the motion for continuance that the present cases "were closely associated with the cases pending on appeal and the appellate court's ruling may impact matters before this court." The court relied on *State v. Henk*[9] to determine that a new hearing would be limited to presentation of the same evidence found in the original affidavits. In *Henk*, we held that when a postconviction claim is remanded, the lower court does not have discretion to accept evidence on claims different from the claim in the remand order.

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[7] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

[8] See *id.*

[9] *State v. Henk*, 299 Neb. 586, 909 N.W.2d 634 (2018).

The condemnees appealed the county court's decision denying their request for attorney fees to the district court, but failed to file a statement of errors. Accordingly, the district court's review was limited to plain error. The district court found that the county court had plainly erred by not having an evidentiary hearing on attorney fees as directed in the district court's original mandates. The district court reversed the county court's decision and remanded the matter with instructions to conduct an evidentiary hearing. TransCanada now appeals the district court's rulings.

ASSIGNMENTS OF ERROR

TransCanada asserts that the district court erred by holding (1) that the county court's denial of the motion for attorney fees was plain error and (2) that the county court was required to hold a new evidentiary hearing in which additional evidence could be offered.

STANDARD OF REVIEW

[1] The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[10]

[2] In cases where no statement of errors was filed and the district court reviewed for plain error, the higher appellate court likewise reviews for plain error only.[11]

[3] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[12]

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[10] *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

[11] *Houser v. American Paving Asphalt*, 299 Neb. 1, 907 N.W.2d 16 (2018).

[12] *Id.*

ANALYSIS

As the district court pointed out in the second order, once the affidavits were ruled as inadmissible, no evidence remained to support a decision from the county court. And because TransCanada did not appeal the district court's orders of remand after the first appeal, with the specific mandate for a "rehearing on the merits" that became the law of the case, the county court lacked the power to ignore that mandate. We agree with the district court's second orders that it was plain error for the county court to fail to hold a new evidentiary hearing in accordance with the district court's mandates.

[4,5] In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order.[13] After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.[14] We have consistently held that when a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate.[15]

The duty of the lower court springs from the public interest in having a finality to the litigation process and final judgments of the court. In *Jurgensen v. Ainscow*,[16] we explained this duty in the context of an appeal from a district court order that entered judgment from a mandate by the Supreme Court. In that case, we said:

> "When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that

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[13] *Molina v. Salgado-Bustamante*, 21 Neb. App. 75, 837 N.W.2d 553 (2013).

[14] *Id*.

[15] See *id.* See, also, *Henk, supra* note 9; *Robertson v. Jacobs Cattle Co.*, 292 Neb. 195, 874 N.W.2d 1 (2015); *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

[16] *Jurgensen v. Ainscow*, 160 Neb. 208, 69 N.W.2d 856 (1955).

> superior says it shall do, it must do, and that alone. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, the court to which such mandate is directed has no power to do anything but to obey the mandate; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law. . . ."[17]

Application of this rule in the present cases places the responsibility on the county court to comply with the district court's mandates, which ordered it to hold a new hearing.

[6,7] TransCanada argues that in each case the order was not a specific mandate, but a general remand, and that an exception applies such that no further hearing is necessary because the undisputed facts are such that but one judgment could be rendered. A reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is a general remand and the parties stand in the same position as if the case had never been tried.[18] The exception to this general rule placing the parties back where they stood before the appeal after such a general remand order is that if the undisputed and admitted facts are such that but one judgment could be rendered, the trial court should enter such a judgment, notwithstanding the mandate did not specifically direct the trial court's action.[19]

Thus, under this exception, in *Bohmont v. Moore*,[20] we upheld a district court order applying a rule of law concerning negligence to enter judgment without holding a trial after

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[17] *Id.* at 211, 69 N.W.2d at 858.

[18] *deNourie & Yost Homes, supra* note 7.

[19] *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942).

[20] *Id.*

the court received a general remand order. *Bohmont*, and a series of related cases, initially involved a breach of a bailment contract action when cash placed inside the plaintiff's safety deposit box at the bank went missing.[21] The plaintiff named the bank and two employees as defendants. The trial court directed a verdict in favor of the two employees, and the complaint against the bank proceeded to trial. At trial, the jury held the bank responsible for the loss of the money in the safety deposit box.[22] On appeal, we applied tort law and concluded that the bank could not be held responsible and remanded.[23] Our mandate stated that "'the judgment rendered by you be reversed . . . and the cause remanded for further proceedings.'"[24]

On remand, the plaintiff pointed out that our decision reversing the judgment relied on tort law and that the action was brought as a breach of contract; thus, portions of our opinion *implied* that he should have a new trial.[25] The trial court reviewed the plaintiff's argument and determined that the rule from tort law applied to the action because the plaintiff's breach of contract claim also asserted negligence. The trial court entered a directed verdict in favor of the bank without holding a new trial. The plaintiff again appealed and argued that portions of our first opinion implied that the plaintiff should have received a new trial.[26] In our opinion from the second appeal, we held that nothing in our first remand order prevented the trial court from applying the rule of law to the undisputed facts and entering judgment in favor of the bank. Thus, we affirmed the district court's decision.[27]

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[21] See *Bohmont v. Moore*, 138 Neb. 784, 295 N.W. 419 (1940); *Bohmont v. Moore*, 138 Neb. 907, 297 N.W. 559 (1941); and *Bohmont, supra* note 19.

[22] See *Bohmont, supra* note 19.

[23] See *id.*

[24] *Id.* at 92, 2 N.W.2d at 600.

[25] See *Bohmont, supra* note 19.

[26] *Id.*

[27] *Id.*

In contrast, we found in *deNourie & Yost Homes* that this exception did not apply to the general remand order in that case.[28] A contractor had sued a homeowner and a bank for several claims, including breach of contract, fraud, and civil conspiracy related to the construction of a home. The trial court originally granted summary judgment in favor of the homeowner and the bank, and the contractor appealed. In the first appeal, we found that summary judgment was inappropriate on the claims of fraud and civil conspiracy and remanded for "further proceedings on D & Y's claims of fraud and civil conspiracy."[29]

On remand, the district court allowed the contractor to amend his complaint and the court considered a new motion for summary judgment on the amended complaint.[30] The district court granted the motion for summary judgment and the contractor again appealed, arguing in the second appeal that summary judgment on remand was inappropriate because our general mandate *implied* that the contractor was entitled to a trial only on the claims that were remanded. In *deNourie & Yost Homes*, we clarified that the general rule did not require a trial, only that the parties be put in the same position as if the case had never been tried.[31] Under the procedural facts of *deNourie & Yost Homes*, that meant the district court was free to consider new pretrial motions and was not obligated to proceed to a trial if summary judgment on a new motion was warranted.[32] We also noted in *deNourie & Yost Homes* the exception to the rule, stated above, and then concluded that the exception was not applicable under the facts of the case.[33] Instead,

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[28] *deNourie & Yost Homes, supra* note 7.

[29] See *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 163, 854 N.W.2d 298, 320 (2014).

[30] *deNourie & Yost Homes, supra* note 7.

[31] See *id.*

[32] See *id.*

[33] See *id.*

the remand had left open a number of possible actions: the court was free to hold a trial, to receive additional evidence, or to decide the case without receiving additional evidence.[34]

We find no merit to TransCanada's assertion in each case that the district court's remand order was a general remand and that the county court correctly applied the exception articulated in *Bohmont* and vacated the award of attorney fees and dismissed the motions without a hearing. Most fundamentally, we find no merit to this argument because the district court's orders were not a general remand. It was not a remand of the cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do. Rather, the district court remanded the causes for a "rehearing on the merits." In each case, the opinion issued by the district court specified: "The Order on attorney fees and costs is reversed. The matter is remanded to the County Court for *rehearing* consistent with the Order herein," after stating in the order that "a rehearing on the merits is appropriate." (Emphasis supplied.) In the context of the rest of the opinion in each case, it is clear that the district court's order was a specific mandate for a new evidentiary hearing on attorney fees. When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate to determine the judgment to be entered or the action to be taken thereon.[35]

The county court erred in circumventing this specific mandate by concluding that if a rehearing were held, the condemnees would be limited to presenting the same evidence that was presented in the original affidavits, and that the facts would be undisputed under such evidence that the motion for attorney fees would be unsupported. The county court arrived at its conclusion after reasoning that "the evidence in these Antelope County cases is so substantially similar to those facts

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[34] See *id.*

[35] *Henk, supra* note 9.

discussed and referred to in the [*Nicholas Family*] case as to be identical." Because the county court believed that the evidence was identical, it also reasoned that the same judgment was required in the present cases as in *Nicholas Family*.[36]

To support this assertion, the county court order cited to our decision in *Henk*, but *Henk* is inapposite to the cases at bar.[37] In *Henk*, we had previously decided in a memorandum opinion on appeal from the denial of an evidentiary hearing that the defendant was entitled to an evidentiary hearing on a postconviction claim stated in his original postconviction application, and we remanded the cause for that specific purpose. After our mandate was spread and before the hearing on remand, the district court granted the defendant leave to amend his postconviction application to include additional claims for postconviction relief. In an appeal by the defendant following denial of postconviction relief, we concluded that the district court erred in hearing evidence on issues for which the case was not remanded.[38]

Henk thus precludes a lower court from hearing evidence of claims outside the scope of the remand. It reiterates that the lower court must comply with a specific mandate and neither do less nor more than what the mandate orders. Nothing in our holding in *Henk* indicates that a court should narrow the scope of evidence to prevent a party from presenting all evidence relevant to the issue specified to be reheard on remand, let alone that the evidence should be limited to the substance of that presented in an original hearing. Indeed, in *Henk*, no hearing was held prior to the appeal. *Henk* illustrates simply that the parties cannot use remand as an opportunity to expand the issues by amending the pleadings and holding a hearing on claims beyond those specified in the mandate remanding for an evidentiary hearing.

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[36] *Nicholas Family, supra* note 1.

[37] *Henk, supra* note 9.

[38] See *id.*

Nothing in the Antelope County District Court's specific mandates for a rehearing on the merits of the motions for attorney fees suggested that the evidence presented in the new hearing should be limited to the evidence presented in the first. By concluding that the ordered "rehearing" was pointless, because the evidence would be so limited and would be insufficient, the county court deviated from the district court's mandates, which it lacked the authority to do.

The *Bohmont* exception could not apply, because the district court's mandates were not a general remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do.[39] Rather, they were specific mandates.

But even if the *Bohmont* exception could apply, the county court erred in concluding the evidence was undisputed, because the district court ruled on appeal that the affidavits were inadmissible hearsay. The county court reasoned that "the evidence in these Antelope County cases is so substantially similar to those facts discussed and referred to in the [*Nicholas Family*] case as to be identical." But instead, it was true that before the appeals to the district court, which ruled the evidence inadmissible and remanded for a rehearing, the evidence was so substantially similar to those facts discussed in *Nicholas Family* as to be identical.[40] Upon the district court's rulings as an appellate court, however, the affidavits were no longer in evidence. Upon remand and before any new evidentiary hearing was held, there was no evidence on the record concerning the attorney fees at issue. Without evidence of the work done and the amounts of fees incurred by each landowner, the county court had no basis for concluding that the facts to support the motion were undisputed.

[8] And although *Nicholas Family* has since indicated that the district court's orders would have been reversed, had

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[39] See *Bohmont, supra* note 19.

[40] See *Nicholas Family, supra* note 1.

they been appealed, which would have led to the ultimate result the county court reached, the district court's orders in these cases were not appealed. Because TransCanada did not appeal the district court's orders remanding the causes for rehearing on the merits of the motions for attorney fees, those orders became final and the law of the case.[41] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.[42] The *Nicholas Family* appeals, while factually similar, are still separate cases. They have no effect on the law of the case governing the present appeals. Because neither TransCanada nor the condemnees appealed the orders of the district court, the county court was left with a binding specific remand instruction, regardless of whether the district court's judgments were correct.

We agree with the district court that it was plain error in each case for the county court to fail to follow the district court's first mandate that became the law of the case and hold an evidentiary hearing on the issue of attorney fees. In cases where no statement of errors was filed and the district court reviewed for plain error, the higher appellate court likewise reviews for plain error only.[43] Plain error exists where there is an error, plainly evident from the record, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[44]

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[41] See *Rhoden Auto Center v. Oakley*, 2 Neb. App. 84, 507 N.W.2d 51 (1993).

[42] *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998).

[43] *Houser, supra* note 11.

[44] See *id.*

[9-13] As stated, a lower court has no authority to disregard a mandate of an appellate court. This principle is fundamental to our appellate process:

> A district court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court. A lower court may not modify a judgment directed by an appellate court; nor may it engraft any provision on it or take any provision from it. No judgment or order different from, or in addition to, the appellate mandate can have any effect. Because a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court, any order attempting to do so is entered without jurisdiction and is void.[45]

Each person who takes part in the judicial process has a substantial right to have the courts' orders enforced.[46] And it is fundamental that the last utterance of an appellate court determines the law of the case, and upon remand for another trial subsequent to the appeal, the trial court is bound to follow the law as stated by an appellate court.[47] We have long held that when a lower court fails to follow the directions of a superior court, the parties to such action have a right to use the appellate court to coerce compliance with the mandate.[48] In *State v. Dickinson*,[49] we said that the actions of the lower court can be reviewed, either by error or appellate proceedings, or by mandamus, explaining the importance of enforcing a mandate in order to prevent parties from appealing ad infinitum:

> The force and effect of the provisions of a mandate ought not thus to be overcome and neutralized. If permissible,

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[45] *Henk, supra* note 9, 299 Neb. at 591, 909 N.W.2d at 638-39.

[46] See *State v. Dickinson*, 63 Neb. 869, 89 N.W. 431 (1902).

[47] *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999).

[48] See *Dickinson, supra* note 46.

[49] *Id.* at 875-76, 89 N.W. at 433.

> it would, in many instances, deprive a party litigant of a substantial right earned after tedious and expensive litigation, and require useless and needless expense and time in correcting the injustice done him by the prosecution of a new proceeding on appeal to establish that which has already been adjudicated.

Disregarding an appellate court's mandate affects a substantial right of the litigant the mandate was issued in favor of. When the parties declined to appeal the first district court order, the condemnees had earned the substantial right, via the judicial process, to have a rehearing.

Since there was no appeal in each case of the district court's first mandate, which became the law of the case, the county court could not disregard the final mandate of the district court, acting as an appellate court. Once the mandate was issued in each case, the county court had an unqualified duty to follow the mandate and hold a hearing. To leave such an error uncorrected prejudicially affects the condemnees' substantial right to the enforcement of the judgment rendered by the appellate court and would result in damage to the integrity, reputation, and fairness of the judicial process.

We find no merit to TransCanada's argument that the stipulated motion for a continuance changed the county court's power and responsibilities in light of the orders on remand. Even assuming a stipulation could operate in such a manner, the stipulation here did not purport to do so. The stipulation was merely a continuance requested by both TransCanada and the condemnees because the present cases "were closely associated with the cases pending on appeal and the appellate court's ruling may impact matters before this court."

For purposes of the district court's order in each case remanding the matter for a new hearing, both TransCanada and the condemnees are treated as if the motion for attorney fees has not been heard and they should have a meaningful opportunity to present whatever evidence they have that is relevant to the motion for attorney fees. This evidence may

be similar to the evidence originally presented or it may be new evidence; the county court should consider all relevant evidence before making its determination on the motions for attorney fees.

CONCLUSION

We conclude that in each case the district court was correct to find plain error and to remand with instructions for the county court to hold an evidentiary hearing. We affirm in each case the district court's order remanding the matter to the Antelope County Court to conduct an evidentiary hearing on the issue of the condemnees' request for attorney fees and costs and to make a final determination on that issue based on the evidence submitted.

Affirmed.

Miller-Lerman, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Braden M. Galvan, appellant.

941 N.W.2d 183

Filed April 10, 2020. Nos. S-19-623, S-19-624.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court.
2. **Sentences: Probation and Parole: Appeal and Error.** An appellate court will not disturb a decision to impose imprisonment up to the remaining period of post-release supervision after revocation absent an abuse of discretion by the trial court.
3. ____: ____: ____. Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
6. **Sentences: Probation and Parole: Time.** When determining the amount of time remaining on a term of post-release supervision, the court may include any period in which the probationer absconded.
7. **Appeal and Error.** An appellate court may, at its option, notice plain error.
8. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of

justice or result in damage to the integrity, reputation, and fairness of the judicial process.

9. **Sentences: Appeal and Error.** A sentence that is contrary to the court's statutory authority is an appropriate matter for plain error review.
10. **Sentences.** A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.
11. ____. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. This is so even when offenses carry a mandatory minimum sentence, unless the statute requires that consecutive sentences be imposed.
12. **Criminal Law: Probation and Parole.** The violation of probation is not itself a crime, but merely a mechanism which may trigger the revocation of a previously granted probation.
13. ____: ____. A motion to revoke probation is not a criminal proceeding.
14. **Probation and Parole.** A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant has breached a condition of his or her existing probation, not to convict that individual of a new offense.
15. **Sentences.** Presentence credit is to be applied only once when the defendant has multiple charges or multiple cases pending simultaneously.
16. **Sentences: Records.** When a court grants a defendant more or less credit for time served than the defendant actually served, that portion of the pronouncement of sentence is erroneous and may be corrected to reflect the accurate amount of credit as verified objectively by the record.

Appeals from the District Court for Hall County: Mark J. Young, Judge. Sentences affirmed in part as modified, and in part vacated.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

In this appeal, Braden M. Galvan argues that the district court for Hall County exceeded its authority under Neb. Rev. Stat. § 29-2268(2) (Reissue 2016) by imposing consecutive 5-month terms of imprisonment following Galvan's revocation from post-release supervision in two cases. Upon review of the record, we find that Galvan's second 5-month term of imprisonment must be vacated. In addition, we find that Galvan is entitled to jail time credit. Thus, regarding Galvan's sentences, we affirm in part as modified, and in part vacate.

BACKGROUND

In October 2017, Galvan entered a plea of no contest to operating a motor vehicle to avoid arrest, a Class IV felony, and driving during suspension, first offense, a Class III misdemeanor. In December, the district court for Hall County sentenced Galvan to 2 years' imprisonment and 12 months' post-release supervision on the operating a motor vehicle to avoid arrest conviction and to 90 days' imprisonment on the driving during suspension conviction. The court ordered the sentences to be served concurrently and awarded 76 days' credit for time served.

In January 2018, in a new case in Hall County, Galvan pled no contest to assault by a confined person, a Class IIIA felony. The court sentenced Galvan to 180 days' imprisonment and 12 months' post-release supervision, to be served consecutively to the sentences in the prior case.

Although his sentences were ordered to be served consecutively, Galvan began serving the post-release supervision portion of his sentences in both cases on October 10, 2018. The State moved to revoke Galvan's post-release supervision in both cases on December 6, alleging that Galvan had failed to report to his probation officer, abstain from the use of controlled substances, and follow an individualized treatment plan.

The court held a hearing on the motions to revoke on April 16, 2019. Pursuant to an agreement with the State,

Galvan admitted to the violations in both cases, and the court revoked his post-release supervision in both cases. The court revoked Galvan's bond and remanded him into custody pending sentencing.

At the sentencing hearing, on June 19, 2019, Galvan's counsel stated that the maximum sentence available to the court upon revocation from post-release supervision would be a term of imprisonment lasting until October 10, plus 70 days due to the time that Galvan had absconded from supervision. The court imposed a sentence of 5 months' imprisonment in each case and ordered the sentences to run consecutively. The court awarded no credit for the time that Galvan spent in custody between the date his post-release supervision was revoked and the date of sentencing. Galvan appealed.

ASSIGNMENTS OF ERROR

Galvan assigns that the district court erred in (1) imposing consecutive sentences and (2) failing to award credit for time served after revocation, prior to sentencing.

STANDARD OF REVIEW

[1-3] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court.[1] An appellate court will not disturb a decision to impose imprisonment up to the remaining period of post-release supervision after revocation absent an abuse of discretion by the trial court.[2] Whether a defendant is entitled to credit for time served and in what amount are questions of law, subject to appellate review independent of the lower court.[3]

ANALYSIS

Galvan contends that the court exceeded its authority under § 29-2268(2) in sentencing him to two consecutive terms of 5

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[1] *State v. Phillips*, 302 Neb. 686, 924 N.W.2d 699 (2019).

[2] *Id.*

[3] *Id.*

months' imprisonment upon his revocation from post-release supervision. He further contends that the court should have awarded him credit for the time he spent in custody awaiting sentencing after his revocation.

[4,5] In considering Galvan's arguments, we are guided by familiar rules of statutory construction. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[4] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[5]

Post-release supervision is a form of probation.[6] Post-release supervision is defined by statute as "the portion of a split sentence following a period of incarceration under which a person found guilty of a crime . . . is released by a court subject to conditions imposed by the court and subject to supervision by the [Office of Probation Administration]."[7] Once a court revokes a probationer's post-release supervision, it must then determine the appropriate term of imprisonment to be imposed. The controlling statute is § 29-2268, which provides:

> (2) If the court finds that a probationer serving a term of post-release supervision did violate a condition of his or her post-release supervision, it may revoke the post-release supervision and impose on the offender a term of imprisonment up to the remaining period of post-release supervision. The term shall be served in an institution under the jurisdiction of the Department of Correctional

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[4] *State v. Wal*, 302 Neb. 308, 923 N.W.2d 367 (2019).

[5] *Id*.

[6] See, Neb. Rev. Stat. § 29-2246(4) (Reissue 2016); *Phillips, supra* note 1.

[7] § 29-2246(13).

Services or in county jail subject to subsection (2) of section 28-105.[8]

[6] We held in *State v. Phillips*[9] that in order to calculate a probationer's "remaining period of post-release supervision," the court must subtract the number of days actually served from the number of days ordered to be served. When a court has pronounced the period of post-release supervision in terms of months, that period will need to be converted to a number of days in order to calculate the "remaining period of post-release supervision" under § 29-2268(2).[10] A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.[11] "Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run."[12] When determining the amount of time remaining on a term of post-release supervision, the court may include any period in which the probationer absconded.[13]

Plain Error

[7-10] Before we address Galvan's argument regarding the "remaining period of post-release supervision" under § 29-2268(2), we must first address the district court's plain error in revoking Galvan's second term of post-release supervision and in imposing a 5-month term of imprisonment for that term. An appellate court may, at its option, notice plain

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[8] But see 2019 Neb. Laws, L.B. 686, § 8 (amending "remaining" to "original" in § 29-2268(2), operative September 1, 2019).

[9] *Phillips, supra* note 1.

[10] *Id.*

[11] *Id.*

[12] Neb. Rev. Stat. § 25-2221 (Reissue 2016).

[13] *Phillips, supra* note 1.

error.[14] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[15] A sentence that is contrary to the court's statutory authority is an appropriate matter for plain error review.[16] A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.[17]

Galvan was convicted of two separate felonies, and as part of his sentence in each case, he was ordered to serve a 12-month term of post-release supervision. Even though Galvan's sentences were ordered to be served consecutively, after he completed the initial incarceration portion of his sentences, he began serving both terms of post-release supervision on the same date. Upon the State's motions to revoke each term, the court sustained the motions and revoked both terms and imposed imprisonment for both terms. The court's revocation and imposition of imprisonment in Galvan's second felony case constitutes plain error, because the court was required by law to require that Galvan serve his sentences consecutively.

[11] Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.[18] Such discretion applies equally to terms of imprisonment and terms of post-release supervision[19] and presumably includes discretion to make one form consecutive and the other concurrent. This is so even

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[14] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[15] *Id*.

[16] *State v. Kantaras*, 294 Neb. 960, 885 N.W.2d 558 (2016).

[17] *Id*.

[18] *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018).

[19] See *id.* See, also, *State v. Peters*, 231 Neb. 242, 435 N.W.2d 675 (1989).

when offenses carry a mandatory minimum sentence, unless the statute requires that consecutive sentences be imposed.[20] Here, Galvan was convicted of assault by a confined person, in violation of Neb. Rev. Stat. § 28-932(1) (Reissue 2016). With regard to sentencing, § 28-932(2) provides: "Sentences imposed under subsection (1) of this section shall be consecutive to any sentence or sentences imposed for violations committed prior to the violation of subsection (1) of this section . . . ." The use of the word "shall" in § 28-932(2) mandates consecutive sentencing.[21] In this matter, 1 month prior to his sentence in the assault by a confined person case, Galvan was sentenced on one count of operating a motor vehicle to avoid arrest. Under the plain language of § 28-932(2), the district court was required by law to order the assault by a confined person sentence to run consecutive to the prior sentence.

In January 2018, the court ordered that Galvan serve his sentences consecutively. Because Galvan's sentences were to be served consecutively, and a term of post-release supervision was imposed as a part of each sentence, Galvan was required to serve the terms of post-release supervision consecutively. Although post-release supervision remains a relatively new concept in Nebraska sentencing law, we have previously recognized that terms of post-release supervision may be served consecutively. For example, as relevant here, in *State v. Vanness*,[22] this court approved consecutive sentences of 12 months' imprisonment and 9 months of post-release supervision and 10 months' imprisonment and 9 months of post-release supervision. We described the later 9-month term of post-release supervision as "a period of 9 months of successive and additional post[-]release supervision."[23]

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[20] *Vanness, supra* note 18.

[21] See *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995).

[22] *Vanness, supra* note 18.

[23] *Id.* at 170, 912 N.W.2d at 746.

When a consecutive sentence is imposed, the second sentence begins only upon the termination of the prior term of imprisonment.[24] A prisoner who receives multiple consecutive sentences does not serve all sentences simultaneously, but serves only one sentence at a time.[25] As referenced above, § 29-2268(2) provides: "If the court finds that a probationer *serving a term of post-release supervision* did violate a condition of his or her post-release supervision, it may revoke the post-release supervision and impose on the offender a term of imprisonment . . . ." (Emphasis supplied.) According to the plain and ordinary meaning of § 29-2268(2), a court's authority to revoke a probationer and impose a term of imprisonment extends only to the single term of post-release supervision that the probationer is serving, provided that the probationer has not otherwise been ordered to serve multiple terms concurrently.

Our understanding that Galvan had not yet begun serving his second term of post-release supervision is further confirmed by Neb. Rev. Stat. § 29-2204.02(7)(d) (Reissue 2016), which states that "[i]f the offender has been sentenced to two or more determinate sentences and one or more terms of post-release supervision, the offender shall serve all determinate sentences before being released on post-release supervision." In this case, Galvan received determinate sentences of 2 years' imprisonment for operating a motor vehicle to avoid arrest and 180 days' imprisonment for assault by a confined person. Even though the split sentences were ordered to run consecutively, Galvan complied with the requirements of § 29-2204.02(7)(d) by completing the incarceration portion of his sentences before being released on post-release supervision. To hold otherwise would grant prisoners sentenced to consecutive determinate sentences freedom

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[24] *U.S. v. Randall*, 472 F.3d 763 (10th Cir. 2006), citing *Price v. State*, 28 Kan. App. 2d 854, 21 P.3d 1021 (2001).

[25] *Id.*

from confinement during intervening periods of post-release supervision.[26] However, once the court revoked Galvan's post-release supervision in his first case and sentenced him to a 5-month term of imprisonment, he received another determinate sentence, and because the terms were ordered to run consecutively, the court erred by not requiring him to complete serving the 5-month term of imprisonment in his first case before releasing him on post-release supervision in his second case. Under § 29-2204.02(7)(d), Galvan should not have been permitted to commence serving his second term of post-release supervision. Because Galvan was not serving his second term of post-release supervision, the court was not yet authorized to act upon that second term under § 29-2268(2). Galvan was required by law under § 28-932(2) to serve the terms of post-release supervision consecutively. The court's revocation of Galvan's second term of post-release supervision and imposition of imprisonment for that term, prior to Galvan's completion of his first term, is plain error. This affected a substantial right of Galvan, and to leave this error uncorrected would amount to a miscarriage of justice. We therefore vacate the court's revocation and imposition of imprisonment in Galvan's assault by a confined person case.

Because the court had no discretion regarding the consecutive nature of Galvan's sentences, we need not address the issue of whether a court may in its discretion order terms of imprisonment imposed upon revocation to be served consecutively.

No Abuse of Discretion Under § 29-2268(2)

We next address Galvan's argument that the court exceeded its statutory authority under § 29-2268(2), to the extent that it remains at issue. For purposes of calculating the "remaining period of post-release supervision" under § 29-2268(2), we consider only the time Galvan served on his first term of post-release supervision.

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[26] See *State v. Malone*, 928 S.W.2d 41 (Tenn. Crim. App. 1995).

Regarding Galvan's operating a motor vehicle to avoid arrest conviction, a Class IV felony, he received the maximum sentence of 2 years' imprisonment and 12 months' post-release supervision. While there is limited information in our record regarding Galvan's completion of the incarceration portion of his split sentence, it is undisputed that he began serving post-release supervision on October 10, 2018, and was originally scheduled to complete serving this term on October 10, 2019. The court revoked Galvan's post-release supervision on April 16, 2019. At that point, Galvan had served 188 days of the original term of 12 months, or 365 days, with 177 days remaining to be served. In addition, the parties agree that the district court correctly extended Galvan's "remaining period of post-release supervision" by 70 days due to his period of abscondment. Therefore, at the time the court revoked Galvan's post-release supervision, he had 247 days remaining to be served. As of Galvan's sentencing on June 19, 2019, the court was authorized under § 29-2268(2) to impose a term of imprisonment up to February 21, 2020, or a term of 8 months 2 days. The court imposed a 5-month term of imprisonment in Galvan's operating a motor vehicle to avoid arrest case.

Galvan acknowledges that based on the calculation above, the court had the authority to impose a single 5-month term of imprisonment under § 29-2268(2). Because the maximum term of imprisonment under § 29-2268(2) applies to a single conviction, and because the court had the authority to impose a 5-month term of imprisonment for Galvan's operating a motor vehicle to avoid arrest conviction, Galvan's argument is without merit.

Credit for Time Served

Here, Galvan contends the trial court was required to credit him for the 64 days he spent in custody awaiting sentencing after he had been revoked from post-release supervision. As a matter of statute and case law, we agree with Galvan.

Neb. Rev. Stat. § 47-503(1) (Reissue 2010) provides credit for "time spent in jail as a result of the criminal charge for

which the jail term is imposed." Galvan's revocation from post-release supervision did not result in new criminal charges.[27] The 64 days Galvan spent in confinement after he was revoked from post-release supervision was a result of the original criminal charges.

[12-14] The violation of probation is not itself a crime, but merely a mechanism which may trigger the revocation of a previously granted probation.[28] A motion to revoke probation is not a criminal proceeding.[29] A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant has breached a condition of his or her existing probation, not to convict that individual of a new offense.[30] Accordingly, jail time after revocation of post-release supervision, a form of probation, constitutes continuing punishment for the crime for which post-release supervision was originally imposed.

Postrevocation penalties are attributable to the original conviction.[31] The post-release supervision portion of Galvan's sentence included the contingency that he could be imprisoned if the post-release supervision was revoked. Galvan triggered that contingency when he violated the terms of post-release supervision and it was revoked, but he did not commit a new crime or receive a sentence on a new crime. The length of time Galvan spent in jail after revocation relates back to the sentence originally imposed for the criminal conviction.[32]

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[27] See *State v. Corkum*, 224 N.C. App. 129, 735 S.E.2d 420 (2012).

[28] *State v. Caniglia*, 272 Neb. 662, 724 N.W.2d 316 (2006); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994); *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986).

[29] *In re Interest of Rebecca B.*, 280 Neb. 137, 783 N.W.2d 783 (2010).

[30] *Id*.

[31] *Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).

[32] See *Medina v. State*, 418 P.3d 861 (Alaska App. 2018).

Therefore, § 47-503(1) applies to the time Galvan spent in jail after revocation.

[15] Section 47-503 is intended to ensure that defendants receive all the credit against their jail sentence to which they are entitled—no less, and no more.[33] Presentence credit is to be applied only once when the defendant has multiple charges or multiple cases pending simultaneously.[34] Here, Galvan's days of confinement have not been credited to any other sentence. That fact distinguishes this case from the jail time credit issue addressed in *Phillips*.[35] In that case, the defendant did not spend any time in jail after revocation and before sentencing under § 29-2268(2). Rather, the court revoked the probationer's post-release supervision and sentenced him on the same day. The defendant requested credit for time spent in custody prior to revocation, but on appeal, we concluded that his confinement time was an aspect of the administration of his sentence of post-release supervision, and not as a result of the original charge.[36] As such, the defendant's confinement time was credited against his remaining term of post-release supervision. This is unlike the present case, in which Galvan's confinement time has not been credited against his remaining term of post-release sentence or any other sentence. Failing to award Galvan jail time credit would be double punishment.[37]

It is worth noting that since our opinion in *Phillips*, the Legislature amended § 29-2268(2), operative September 1, 2019, after Galvan's June 2019 sentencing, to state that "[i]f a sentence of incarceration is imposed upon revocation of post-release supervision, the court shall grant jail credit for any days

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[33] *State v. Harms*, 304 Neb. 441, 934 N.W.2d 850 (2019).

[34] See, *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013); *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[35] *Phillips, supra* note 1.

[36] *Id*.

[37] See *State v. Rawls*, 219 N.J. 185, 97 A.3d 1142 (2014).

spent in custody as a result of the post-release supervision, including custodial sanctions."

[16] We determine that Galvan is entitled to 64 days of jail time credit. When a court grants a defendant more or less credit for time served than the defendant actually served, that portion of the pronouncement of sentence is erroneous and may be corrected to reflect the accurate amount of credit as verified objectively by the record.[38] In addition to vacating a portion of the court's sentencing order, as discussed above, we modify the order to reflect the correct number of days of credit for time served.

CONCLUSION

We vacate the 5-month term of imprisonment imposed upon revocation in Galvan's assault by a confined person case. Galvan will not commence serving the post-release supervision term in his assault by a confined person case until he has completed serving his post-release supervision term in his operating a motor vehicle to avoid arrest case. We affirm the 5-month term of imprisonment imposed in Galvan's operating a motor vehicle to avoid arrest case, as modified by crediting Galvan with 64 days of time served.

Sentences affirmed in part as modified, and in part vacated.

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[38] *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Patrick W. Schroeder, appellant.

941 N.W.2d 445

Filed April 17, 2020. No. S-18-582.

1. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
2. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
3. ____: ____: ____. A sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by the Nebraska Supreme Court.
4. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
5. **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 discretion a factor in determining admissibility.
6. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.
7. **Sentences: Death Penalty: Homicide: Aggravating and Mitigating Circumstances: Appeal and Error.** Under Nebraska law, the death

penalty is imposed for a conviction of murder in the first degree only in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances.

8. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to new matters first introduced by the opposing party and limited to that which explains, disproves, or counteracts the opposing party's evidence.
9. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Evidence.** In a death penalty case, a sentencing panel has the discretion to hear evidence to address potential mitigating circumstances regardless of whether the defendant presents evidence on that issue.
10. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
11. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Evidence.** In a death penalty case, a sentencing panel may permit the State to present evidence to contradict potential mitigators even though a defendant failed to present affirmative evidence.
12. **Sentences: Death Penalty: Homicide.** A sentencing order in a death penalty case must specify the factors the sentencing panel relied upon in reaching its decision and focus on the individual circumstances of each homicide and each defendant.
13. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** The U.S. Constitution does not require the sentencing judge or judges to make specific written findings in death penalty cases with regard to nonstatutory mitigating factors.
14. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** The Nebraska Supreme Court will not fault a sentencing panel for failing to discuss a nonstatutory mitigating circumstance that it was not specifically asked to consider.
15. **Death Penalty: Aggravating and Mitigating Circumstances.** During the consideration of statutory mitigating factors in a death penalty case, the mere identification of a history of incarceration, without more, is insufficient to allege unusual pressures or influences or establish extreme mental or emotional disturbance.
16. **Sentences: Homicide: Aggravating and Mitigating Circumstances: Judgments: Juries: Presentence Reports.** When an offender has been convicted of first degree murder and waives the right to a jury determination of an alleged aggravating circumstance, the court must order a presentence investigation of the offender and the panel must consider a written report of such investigation in its sentencing determination.

17. **Presentence Reports.** A presentence investigation and report shall include, when available, any submitted victim statements and an analysis of the circumstances attending the commission of the crime and the offender's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits.
18. **Presentence Reports: Probation and Parole.** A presentence investigation and report may include any matters the probation officer deems relevant or the court directs to be included.
19. **Constitutional Law: Criminal Law: Sentences: Right to Counsel.** An accused has a state and federal constitutional right to be represented by an attorney in all critical stages of a criminal prosecution which can lead to a sentence of confinement.
20. **Right to Counsel: Waiver.** A defendant may waive the right to counsel so long as the waiver is made knowingly, voluntarily, and intelligently.
21. **Constitutional Law: Right to Counsel.** The same constitutional provisions that provide a defendant the right to counsel also guarantee the right of the accused to represent himself or herself.
22. **Attorney and Client.** The right to self-representation plainly encompasses certain specific rights of the defendant to have his voice heard, including that the pro se defendant must be allowed to control the organization and content of his own defense.
23. **Sentences: Death Penalty: Attorney and Client: Aggravating and Mitigating Circumstances: Evidence: Waiver.** Control of the organization and content of a defense may include a waiver of the right to present mitigating evidence during sentencing in a death penalty case.
24. **Criminal Law: Sentences: Death Penalty: Appeal and Error.** Because a death sentence is different from any other criminal penalty and no system based on human judgment is infallible, the Nebraska Supreme Court has taken, and should continue to take, the extra step to ensure fairness and accuracy with the imposition of the death penalty.
25. **Criminal Law: Statutes.** Penal statutes are to be strictly construed in favor of the defendant.
26. **Sentences: Evidence: Presentence Reports.** Even if the State presents evidence in favor of a specific sentence and the defendant declines to present contrary evidence, a court receives and must consider independent information from a presentence investigation report.
27. **Sentences: Death Penalty: Evidence: Presentence Reports.** In a death penalty case, a sentencing panel is required to review a presentence investigation report and determine whether it contradicts the State's evidence of aggravating factors and whether any mitigating circumstances exist, including specifically delineated statutory mitigators.

28. **Death Penalty: Aggravating and Mitigating Circumstances: Proof.** While the State must prove aggravating circumstances beyond a reasonable doubt in a death penalty case, there is no burden of proof with regard to mitigating circumstances.
29. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Judgments.** Once a sentencing panel in a death penalty case makes its determinations about the existence of aggravating and mitigating circumstances, the panel is then required to undertake a proportionality review.
30. **Criminal Law: Sentences: Death Penalty: Words and Phrases.** A proportionality review in a death penalty case looks at whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review is not constitutionally mandated.
31. **Sentences: Death Penalty: Statutes: Appeal and Error.** The proportionality review in a death penalty case exists in Nebraska by virtue of statutes which direct the Nebraska Supreme Court to conduct a proportionality review in each appeal in which a death sentence is imposed.
32. **Sentences: Death Penalty.** A court's proportionality review spans all previous cases in which a sentence of death is imposed and is not dependent on which cases are put forward by the parties.
33. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Judgments: Juries.** Even when a jury determines the existence of an aggravating circumstance, a sentencing panel is required to put in writing its consideration of whether the determined aggravating circumstance justifies the imposition of a sentence of death, whether mitigating circumstances exist, and whether a sentence of death would be excessive or disproportionate to penalties imposed in similar cases.
34. ____: ____: ____: ____: ____. A sentencing panel's order imposing a sentence of death where a jury has determined the existence of an aggravating circumstance must specifically refer to the aggravating and mitigating circumstances weighed in the determination of the panel.
35. **Sentences: Death Penalty: Statutes.** Nebraska's capital sentencing scheme provides additional statutory steps and considerations to ensure fairness and accuracy, and these safeguards exist regardless of a defendant's strategy at the penalty phase.
36. **Sentences: Death Penalty.** Due to Nebraska's statutory capital sentencing scheme, a defendant cannot "choose" the death penalty.
37. **Courts: Sentences: Death Penalty.** A sentencing decision in a death penalty case rests with the court alone.
38. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Evidence: Presentence Reports.** In order to sentence a

defendant to death, the statutory scheme requires that a sentencing panel consider not only evidence and argument presented by the parties but also an independently compiled presentence investigation report to determine whether the alleged aggravating circumstance exists, determine whether any mitigating factors are present which would weigh against the imposition of the death penalty, and conduct a proportionality review weighing the aggravating and mitigating factors and comparing the facts to previous cases where the death penalty was imposed.

39. **Trial: Parties.** A defendant is entitled to present a defense and is guaranteed the right to choose the objectives for that defense.
40. **Attorney and Client.** A self-represented defendant must be allowed to control the organization and content of his own defense.
41. **Constitutional Law: Right to Counsel: Sentences: Aggravating and Mitigating Circumstances: Evidence: Waiver.** When a defendant waives counsel and the presentation of mitigating evidence, the appointment of an advocate to present evidence and argue against the imposition of a sentence overrides that defendant's constitutional right to control the organization and content of his or her own defense during sentencing.
42. **Right to Counsel: Waiver.** A criminal defendant has the right to waive counsel and present his or her own defense.
43. **Sentences: Death Penalty: Right to Counsel: Evidence: Waiver.** In a death penalty case, a defendant's right to waive counsel and present his or her own defense includes the right of the defendant to elect not to present additional evidence or argument during the penalty proceedings.
44. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
45. ____: ____: ____: ____. In reviewing a sentence of death, the Nebraska Supreme Court considers whether the aggravating circumstances justify imposition of a sentence of death and whether any mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.
46. ____: ____: ____: ____. The Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a court imposed the death penalty.
47. **Sentences: Death Penalty.** The purpose of a proportionality review in a death penalty case is to ensure that the sentences imposed in a case are

no greater than those imposed in other cases with the same or similar circumstances.

48. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** The Nebraska Supreme Court's proportionality review looks only to other cases in which the death penalty has been imposed and requires the court to compare the aggravating and mitigating circumstances of the case on appeal with those present in those other cases.
49. **Death Penalty.** A proportionality review in a death penalty case does not require that a court "color match" cases precisely.
50. **Sentences: Death Penalty.** The question when conducting a proportionality review in a death penalty case is simply whether the cases being compared are sufficiently similar, considering both the crime and the defendant, to provide the court with a useful frame of reference for evaluating the sentence in the instant case.
51. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** One aggravating circumstance may be sufficient under Nebraska's statutory system for the imposition of the death penalty.
52. ____: ____: ____. In a proportionality review, the evaluation of whether the death penalty should be imposed in a specific case is not a mere counting process of "X" number of aggravating circumstances and "Y" number of mitigating circumstances and, instead, asks whether the reviewed cases are sufficiently similar to provide a useful reference for that evaluation.

Appeal from the District Court for Johnson County: Vicky L. Johnson, Judge. Affirmed.

Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellee.

Christopher L. Eickholt, of Eickholt Law, L.L.C., Cassandra Stubbs, of American Civil Liberties Union Foundation, and Amy A. Miller, of ACLU of Nebraska Foundation, for amicus curiae ACLU and ACLU of Nebraska.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ., and Moore, Chief Judge.

Funke, J.

Patrick W. Schroeder appeals his sentence of death for first degree murder of Terry Berry, Jr. This is a mandatory direct appeal pursuant to Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2018) and article I, § 23, of the Nebraska Constitution. Schroeder waived counsel, pled guilty without a plea agreement, waived the right to a jury on the issue of aggravating factors, declined to present evidence of aggravating or mitigating factors, and declined to cooperate for the preparation of the presentence investigation report.

On appeal, Schroeder was appointed counsel and now contends that the sentencing panel erred in allowing the State to introduce evidence to refute unpresented mitigating evidence, failing to consider and weigh mitigating evidence from the presentence investigation report, failing to request documentation from the Department of Correctional Services (DCS) of Schroeder's time in custody for mitigation purposes, sentencing Schroeder to death with insufficient safeguards to prevent arbitrary results, and finding Schroeder should be sentenced to death after balancing the aggravating evidence and mitigating evidence. For the reasons set forth herein, we affirm.

BACKGROUND

Factual Background

At the time of the events leading to Schroeder's instant conviction, Schroeder was incarcerated at Tecumseh State Correctional Institution (TSCI). This incarceration was pursuant to a 2007 conviction for the first degree murder of Kenneth Albers in which Schroeder was sentenced to life imprisonment.

In March 2017, while housed in a cell intended for one occupant, Schroeder was asked if he would consider a roommate due to overcrowding. Schroeder agreed but wanted a roommate with whom he was compatible. Prison officials assigned Berry to Schroeder's cell. Schroeder did not consider Berry to be compatible with him and told prison officials that he did not want Berry as a cellmate. Schroeder did not know

Berry personally before the assignment but knew of Berry as "'a loudmouth, a punk.'" Berry was 22 years old and convicted of second degree forgery and a confined person violation. Berry was due for release approximately 2 weeks after his assignment to Schroeder's cell.

Schroeder had described Berry as a constant talker with extremely poor hygiene. During their shared confinement, Schroeder would urge Berry to be quieter and clean up after himself. Schroeder alleged that he had told prison staff that placing Berry with him would be an unworkable, bad arrangement. Schroeder described that prison staff who came by his cell would acknowledge the poor fit and even joke that it was surprising Schroeder had not killed Berry yet. By April 13, 2017, Schroeder decided to himself that "'[s]omething was gonna happen'" if Berry was not moved.

On April 15, 2017, Berry was watching "UFC" on television in the cell and, as Schroeder explained, Berry "'would not shut up.'" Schroeder instructed Berry to move his chair to face the television with his back to Schroeder. Schroeder proceeded to put Berry in a chokehold and locked his hands. He continued to choke Berry for about 5 minutes until his arms got tired and then took a nearby towel, wrapped it around Berry's neck, and continued to choke him for about 5 more minutes. At that point, Schroeder let up on the towel, believing Berry was dead. Schroeder claimed he then tried to push the call button in his cell to alert staff to Berry's condition. Around 30 minutes later, Schroeder alerted a passing guard that Berry was on the floor by asking, "'How do you deal with a dead body in a cell?'" The guard believed Schroeder was joking until Schroeder picked up and dropped Berry's leg. Schroeder has stated that he summoned the guard not for Berry's benefit, but because he wanted Berry's body removed from the cell.

Berry was transported to a medical facility. On April 19, 2017, Berry died, having been declared brain dead. A search of the cell revealed a torn "kite," a form inmates use to communicate with prison staff, dated April 13, 2017, and located in

the trash. The discarded kite stated that prison staff had to get Berry out of the cell before he got hurt.

Procedural Background

Pursuant to these events, Schroeder was charged in April 2017 with first degree murder and use of a weapon to commit a felony. Within an information filed in June, the State submitted a notice of aggravation alleging Schroeder had been convicted of another murder, been convicted of a crime involving the use or threat of violence to the person, or had a substantial prior history of serious assaultive or terrorizing criminal activity.[1] Schroeder was appointed counsel and entered a plea of not guilty.

A hearing was held following Schroeder's subsequent request to dismiss counsel and represent himself. The court granted Schroeder's motion and discharged his counsel but also appointed that same counsel to act in a standby role. Representing himself, Schroeder withdrew a pending motion to quash and requested leave to withdraw his prior plea of not guilty. The court granted Schroeder leave to withdraw his prior plea and rearraigned him. Thereafter, Schroeder pled guilty to both counts and the court found him guilty of those charges beyond a reasonable doubt.

Presentence Investigation Report

The court ordered a presentence investigation report. Schroeder declined to answer questions or participate in its preparation. However, the current report did attach the 2007 presentence investigation report from Schroeder's earlier convictions, which supplies more background information.

According to the report, Schroeder was born in June 1977. Schroeder's biological father abandoned his family when Schroeder was an infant. Schroeder's mother and stepfather raised him in his early years. Schroeder described his stepfather as an alcoholic. Schroeder's mother and stepfather separated

[1] See Neb. Rev. Stat. § 29-2523(1)(a) (Cum. Supp. 2018).

when Schroeder was 9 years old, and Schroeder moved with his mother to Kearney, Nebraska. Schroeder has not had contact with his stepfather since he was 12 years old. Schroeder has two older brothers but, at the time of the 2007 report, was not close to either of them. While Schroeder's biological father did take him in for a brief period of time when he was 12 years old, Schroeder was removed and sent to a juvenile facility because his father caught him smoking marijuana. Schroeder denied being abused or neglected and described his childhood as "'typical.'" Schroeder has a history of "placement in foster care and group home situations including a number of runaways." At one point as a teenager, Schroeder was placed with his grandparents for a period of time.

Schroeder was married in 1998 and has one child from that marriage, but the couple has since divorced. At the time of the 2007 report, Schroeder described that the child was adopted by his ex-wife's present husband and that Schroeder has no contact with the child. Schroeder remarried in 2003, and his wife had three children from prior relationships. However, Schroeder said in the 2007 report that while the couple was then together, he expected the situation to change under the circumstances.

The presentence investigation report provides that Schroeder has an eighth grade education. Before he was incarcerated in 2007, he had been employed in various farmwork and construction jobs.

Schroeder reported that he first used alcohol when he was 13 years old and that he experimented with marijuana and cocaine when he was 15 years old. Schroeder also admitted he had used methamphetamine on a daily basis for approximately 3 to 4 months, with the last use in 2003. While Schroeder denied receiving treatment, previous prison records indicated he was placed in substance abuse programming in 1991. Schroeder asserted that from April 2005 until his 2006 arrest, he was "'hooked on opiates'" and was taking between 500 and 800 pills per month, some of which were prescribed and some of which were not.

The report explained that in 1985, Schroeder was first charged with criminal mischief in juvenile court when he was 12 years old. Between 1987 and 1992, Schroeder was also charged in juvenile court with aiding and abetting, escape, theft, minor in possession of alcohol, and theft by exercising control. He was ordered to serve probation as well as being placed in the Youth Rehabilitation and Treatment Center in Kearney.

Since reaching the age of majority, in addition to his 2007 convictions, Schroeder has been convicted of bank robbery, forgery, escape, theft, assault, driving under suspension, contributing to the delinquency of a child, driving under the influence, and issuing bad checks. He has been sentenced to multiple terms of incarceration and terms of supervision. He has had two of his terms of probation revoked and completed others unsatisfactorily.

Sentencing Proceedings

A scheduling hearing was held in August 2017. Schroeder waived his right to a jury for a determination of the aggravation allegation. The court accepted this waiver after making inquiry and finding, beyond a reasonable doubt, that Schroeder was competent and that his decision was made freely, voluntarily, knowingly, and intelligently. Thereafter, a three-judge panel was convened for a sentencing hearing on Schroeder's first degree murder conviction.

On the aggravation allegation, the State presented evidence of Schroeder's 2007 conviction for Albers' murder. A sergeant with the Nebraska State Patrol testified that he was the lead investigator for that case. His testimony and a video of his interview with Schroeder described that Albers was a 75-year-old farmer who had previously employed Schroeder. Believing Albers had several thousand dollars in cash at his residence, Schroeder had driven to Albers' house, rung the doorbell, entered the home, and awakened Albers. Schroeder demanded money, threatened Albers, and hit him in the head with a nightstick. Albers recognized Schroeder during this

exchange and called him by name. Schroeder forced Albers to open a lockbox in which Schroeder believed the cash was kept, after which Schroeder took Albers outside to an adjacent shop. At the shop, Albers turned toward Schroeder, attempting to defend himself. Schroeder struck Albers with the nightstick four or five times. With Albers on the floor, Schroeder dragged him out of the shop, tied him up with battery cables, and placed him in the back of Albers' pickup. Schroeder then drove Albers, who was still alive, to an abandoned well on the property and dumped him into it. Schroeder explained to the sergeant that he had made the decision to kill Albers a few days before the robbery. The doctor who performed the autopsy on Albers testified that the cause of Albers' death was blunt force trauma to his head.

Schroeder declined to cross-examine the State's witnesses, present rebuttal evidence, or argue against the State's claim on the aggravation allegation.

As to mitigating factors, Schroeder again declined to present any evidence or argument. However, the State requested, and the court granted, permission to present evidence to negate possible statutory mitigating circumstances. Here, the State presented evidence related to Berry's murder. Investigator Stacie Lundgren of the Nebraska State Patrol testified to her interview with Schroeder where he described how and why he killed Berry. This interview was also described in the presentence investigation report. The doctor who performed the autopsy of Berry opined that the cause of death was compressional asphyxia, a form of strangulation where the structures of the neck are compressed. Cpl. Steve Wilder explained that he was the correctional officer whom Schroeder flagged down to remove Berry after Schroeder had choked him. Cpl. Joseph Eppens testified he had moved Schroeder from his cell following the incident. Eppens explained that Schroeder told him he had previously informed correctional staff he did not want a cellmate and that he joked, "[T]his is what happens when we watch UFC." Finally, a TSCI employee testified that he had notarized a writing in which Schroeder stated:

> My name is Patrick Schroeder. I'm 40 years old and I killed Terry Berry on April 15[,] 2017[.] I killed Berry because I wanted to, I knew I was going to kill him the moment staff put him in my cell on April 10[,] 2017. . . .
>
> I'm writing this statement to inform the court that if given another life term I will kill again and we will be right back in court doing this all over again.

The court allowed the parties to make arguments. Schroeder declined. On the aggravation allegation, the State noted that it provided a certified copy of Schroeder's previous murder conviction and testimony concerning the events leading to that conviction. As to mitigating circumstances, the State stated, in part:

> [T]he State has offered evidence considering the statutory mitigating circumstances, and the purpose of the evidence was to affirmatively show that there were no statutory mitigators that exist in this case.
>
> The circumstances to be considered for mitigation include whether or not the defendant acted under unusual pressure or influence. I want to emphasize the word "unusual." His justification[s] for his actions are more of a nuisance than they are unusual pressure.
>
> It was displeasure or disagreement with a roommate and how the roommate either talked too much or his hygiene wasn't appropriate for . . . Schroeder's standards, and I don't think that constitutes unusual pressure or influence.
>
> He's not under the . . . dominion of another. . . . Schroeder acted by himself, and I would say he probably was the boss in the cell.
>
> There is no undue influence of extreme mental or emotional disturbance. . . . Schroeder was clear thinking, and by the evidence that's been presented, his thought process started almost immediately upon . . . Berry becoming his cellmate. And in his written statement, that is really clear. And even in his interview with the investigator, he

started thinking about this several days before it actually happened.

So he wasn't under any influence of extreme mental or emotional disturbance. This was a thought process deliberate and pretty cold blooded.

. . . .

The evidence shows that he was the sole person committing this crime. There is no accomplice. And his participation is the . . . death-causing participation.

The State would argue that . . . Berry's habits as described by [Schroeder do] not make him a participant [in the incident].

. . . .

[Schroeder] was a prisoner at the institution. No evidence of impairment. The only evidence is that he's clear-headed, he's thinking, and he planned.

Order of Sentence

In the panel's order of sentence, the panel found the State proved the aggravation allegation beyond a reasonable doubt, citing Schroeder's previous conviction and the testimony describing the events leading to that conviction.

The panel also addressed possible statutory mitigating circumstances, noting, "The State was allowed to present evidence that is probative of the non-existence of statutory or non-statutory mitigating circumstances, and did so[, and Schroeder] was allowed to present evidence that is probative of the existence of a statutory or non-statutory mitigating circumstance[, but] chose not to . . . ." After analyzing each of the mitigating grounds defined by § 29-2523(2) and giving Schroeder the benefit of all inferences, the panel did not find there were any statutory mitigating circumstances.

The panel addressed various nonstatutory mitigating factors. The panel found two of these factors existed and weighed in Schroeder's favor, including that Schroeder's guilty plea spared Berry's family the trauma of a trial and the State the expense of

a trial and that Schroeder's childhood and family were dysfunctional. While finding three other factors did not exist, the panel noted the following: Schroeder is not well educated, but there is no evidence of a borderline intellect or diminished cognitive ability and he clearly knows right from wrong; Schroeder takes medication for depression, but there is nothing to suggest that this depression contributed to his actions and there is no evidence that his psychiatric or psychological history rises to the level of a mitigating circumstance; and the record does not suggest Schroeder has generally been a problem to officials during his confinement, but this prior conduct does not rise to the level of a mitigating factor. The panel acknowledged that Schroeder apparently "expressly welcomes a death sentence" but explained this was not considered and that "[i]t is the law, and not [Schroeder's] wishes, that compels this Panel's ultimate conclusion."

The panel concluded that the two nonstatutory mitigating circumstances were given little weight because these two factors did not approach or exceed the weight given to the aggravating circumstance. The panel then conducted a proportionality review and found that a sentence of death is not excessive or disproportionate to the penalty imposed in similar cases. Based upon all of the above, the panel sentenced Schroeder to death.

ASSIGNMENTS OF ERROR

Schroeder assigns, restated, that the sentencing court erred in (1) allowing the State to introduce evidence to rebut unpresented mitigating evidence, (2) failing to consider and properly weigh mitigating evidence from the presentence investigation report, (3) failing to request DCS documentation of Schroeder's time in custody for mitigation purposes, (4) sentencing Schroeder to death with insufficient safeguards to prevent arbitrary results, and (5) sentencing Schroeder to death after balancing the aggravating evidence and mitigating evidence and conducting the proportionality review.

STANDARD OF REVIEW

[1] In a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.[2]

[2-4] When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.[3] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[4] In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.[5]

[5] 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 discretion a factor in determining admissibility.[6]

[6] The constitutionality of a statute presents a question of law, which an appellate court independently reviews.[7]

ANALYSIS

Rebuttal of Mitigating Circumstances

[7] Under Nebraska law, the death penalty is imposed for a conviction of murder in the first degree only in those

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[2] *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

[3] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[4] *Jenkins, supra* note 2.

[5] *Id*.

[6] *Torres, supra* note 3.

[7] *Jenkins, supra* note 2.

instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances.[8] When, as here, a defendant waives the right to a jury determination of alleged aggravating circumstances, the process for a sentencing panel to consider, find, and weigh the applicable aggravating and mitigating circumstances is set out by Neb. Rev. Stat. § 29-2521(2) (Cum. Supp. 2018). Section 29-2521(2) states:

> In the sentencing determination proceeding before a panel of judges when the right to a jury determination of the alleged aggravating circumstances has been waived, the panel shall . . . hold a hearing. At such hearing, evidence may be presented as to any matter that the presiding judge deems relevant to sentence and shall include matters relating to the aggravating circumstances alleged in the information, to any of the mitigating circumstances set forth in section 29-2523, and to sentence excessiveness or disproportionality. The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances. Each aggravating circumstance shall be proved beyond a reasonable doubt. Any evidence at the sentencing determination proceeding which the presiding judge deems to have probative value may be received. The state and the defendant or his or her counsel shall be permitted to present argument for or against sentence of death.

The mitigating circumstances required to be considered under § 29-2521 and set forth in § 29-2523(2) include:

> (a) The offender has no significant history of prior criminal activity;
>
> (b) The offender acted under unusual pressures or influences or under the domination of another person;
>
> (c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;
>
> (d) The age of the defendant at the time of the crime;

[8] Neb. Rev. Stat. § 29-2519 (Cum. Supp. 2018).

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

[8] Schroeder initially claims that the sentencing panel erred by allowing the State to present evidence to rebut the statutory mitigating circumstances even though Schroeder did not offer any evidence on mitigation. In making this claim, Schroeder cites the proposition that rebuttal evidence is confined to new matters first introduced by the opposing party and limited to that which explains, disproves, or counteracts the opposing party's evidence.[9]

[9-11] Contrary to Schroeder's assertions under this assignment, a sentencing panel has the discretion to hear evidence to address potential mitigating circumstances regardless of whether the defendant presents evidence on that issue. As quoted above, § 29-2521(2) allows a sentencing panel to receive "[a]ny evidence" at the sentencing proceeding which the presiding judge deems to have probative value relevant to the sentence including to any of the statutory mitigating circumstances.[10] A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[11] Although § 29-2521(2) dictates that the Nebraska Rules of Evidence

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[9] See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). See, also, *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[10] See *Jenkins, supra* note 2.

[11] *Id*.

apply when determining the aggravating circumstances alleged by the information, it contains no such requirement for consideration of mitigating circumstances. Because a sentencing panel is required to consider and weigh any mitigating circumstances in imposing a sentence of death, the introduction of evidence of the existence or nonexistence of these potential mitigators has probative value to the sentence. Thus, the panel could permit the State to present evidence to contradict potential mitigators even though Schroder failed to present affirmative evidence.

Schroeder argues the State's evidence purported to rebut the statutory mitigating circumstances was actually offered to support uncharged aggravating circumstances. Specifically, Schroeder alleges the State's evidence was offered to show the nonstatutory aggravating circumstance of future dangerousness and "both prongs"[12] of § 29-2523(1)(d), which provides a statutory aggravator when a murder was especially heinous, atrocious, or cruel or manifested exceptional depravity by ordinary standards of morality and intelligence.

During the portion of the hearing devoted to mitigating circumstances, the State's evidence related to Berry's murder. Lundgren testified about her interview with Schroeder where he described how and why he killed Berry. This same interview was also described in the presentence investigation report. The doctor who performed the autopsy on Berry explained that Berry was killed by strangulation. Wilder explained the events surrounding his discovery of Berry's murder and Schroeder's reaction. Eppens explained that Schroeder told him he had previously informed correctional staff he did not want a cellmate and joked, while Eppens was moving him following the discovery of Berry's unconscious body, "[T]his is what happens when we watch UFC." Additionally, through the testimony of a TSCI employee, the State introduced a notarized writing in which Schroeder confessed, explained his reasons for killing Berry, and stated he would kill again if given another life term.

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[12] Brief for appellant at 28.

This evidence surrounding Berry's murder was relevant to the statutory mitigating circumstances the panel was required to consider. The mitigating circumstances listed under § 29-2523(2) involve, in part, circumstances surrounding the underlying crime. These circumstances include pressure or influences which may have weighed on the defendant, potential influence on the defendant of extreme mental or emotional disturbance at the time of the offense, potential victim participation or consent to the act, the defendant's capacity to appreciate the wrongfulness of the act at the time of the offense, and any mental illness, defect, or intoxication which may have contributed to the offense.[13] The State's evidence informed the panel's analysis and was relevant to consideration of these mitigators; and, as explained above, the panel had discretion to hear this evidence.

Schroeder fails to allege that the introduction of this evidence influenced the panel's finding of the existence of the charged aggravator—namely that Schroeder had been convicted of another murder, been convicted of a crime involving the use or threat of violence to the person, or had a substantial prior history of serious assaultive or terrorizing criminal activity.[14] It is undisputed that Schroeder had previously been convicted of the murder of Albers and was incarcerated for that crime at the time of Berry's killing. Schroeder does not challenge the presentation of evidence related to this aggravating circumstance for failing to comply with the Nebraska Evidence Rules.[15]

The panel had discretion to hear any evidence relevant to sentencing, the panel was required to consider mitigating circumstances even though Schroeder failed to allege or present evidence in support of them, and the evidence presented by the State was relevant to the panel's review of these mitigators. As such, the panel did not err in allowing the State to present evidence on the existence of mitigating circumstances.

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[13] § 29-2523(2).

[14] § 29-2523(1)(a).

[15] See § 29-2521(2).

Weighing of Mitigating Circumstances

Schroeder next assigns the panel failed to properly consider mitigating information contained within the presentence investigation report and available from the State's evidence. Schroeder claims proper consideration of this evidence would have led the panel to find additional statutory and nonstatutory mitigating circumstances.

[12] As explained, § 29-2521 requires a sentencing panel to consider mitigating circumstances. Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2018) describes the weighing of the aggravating and mitigating circumstances in imposing a sentence of death and requires that the determination be in writing and refer to the aggravating and mitigating circumstances weighed. Accordingly, the sentencing order must specify the factors it relied upon in reaching its decision and focus on the individual circumstances of each homicide and each defendant.[16]

We first address Schroeder's claims that the panel should have applied additional nonstatutory mitigating evidence, including (1) that the State had ulterior motives for pursuing the death penalty to avoid and detract from potential civil liability for failing to protect Berry, (2) that Schroeder was institutionalized from consistent incarceration, and (3) that Schroeder had used money elicited from his murder of Albers to provide clothes and food for his family.

[13,14] The U.S. Constitution does not require the sentencing judge or judges to make specific written findings with regard to nonstatutory mitigating factors.[17] In *State v. Jenkins*,[18] we addressed an assignment of a sentencing panel failing to address nonstatutory mitigators and explained that

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[16] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[17] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). Accord *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, *cert. granted and judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[18] *Jenkins, supra* note 2.

we will not fault the panel for failing to discuss a nonstatutory mitigating circumstance that it was not specifically asked to consider.

Additionally, the underlying facts Schroeder uses as support for these nonstatutory mitigators are included in the presentence investigation report which the panel explained it considered in determining his sentence. The panel also specifically acknowledged many of these facts in its sentencing order. On the allegation that the State had ulterior motives due to potential liability, the panel explained the cell Schroeder and Berry shared was intended for a single inmate, Berry was set for release 2 weeks after moving in with Schroeder, Schroeder was serving a life sentence for Albers' murder, and Schroeder warned that issues might arise if he were incompatible with whoever was assigned as his roommate. As to institutionalization, the panel described Schroeder's current incarceration for Albers' murder and noted his dysfunctional childhood and that "[h]e was involved in the juvenile court at a young age." Finally, on the use of money he attained from Albers' murder, the panel described that he took several thousand dollars from Albers after leaving him for dead and "drove around the area, paying off bills and making purchases." It is clear the panel considered and weighed these facts even though it did not state a finding that they led to the specific nonstatutory mitigating circumstances Schroeder presently claims.

Because the panel was not required to make specific written findings on the application of nonstatutory mitigating factors, and taking into account the panel's consideration of the facts Schroeder alleges support these factors, Schroeder's claims involving the nonstatutory mitigators do not demonstrate reversible error.

We next turn to Schroeder's claim that the panel failed in its analysis of statutory mitigating circumstances. Of the statutory mitigating factors, Schroeder claims the panel should have determined the following applied: Schroeder acted under unusual pressures or influences or under the domination

of another person,[19] Berry's murder was committed while Schroeder was under the influence of extreme mental or emotional disturbance,[20] and Berry was a participant in Schroeder's conduct or consented to the act.[21]

For Schroeder's claims that he was under unusual pressures or influences and extreme mental or emotional disturbance, he first alleges the panel failed to acknowledge his efforts to get Berry removed as a cellmate and his incompatibility with Berry. He supports this allegation by referencing the panel's determination that Schroeder had calculated Berry's murder for several days and chose no method of obviating his annoyance. Schroeder further quoted the panel's explanation that finding the kite in the trash "suggests a premeditative and depraved mentality" in that Schroeder "did not ask that [Berry] be moved" and in that Schroeder "did not tell the guards that . . . Berry was in mortal danger if he were not moved."

Schroeder contends this determination and the findings supporting it are contradicted by the evidence. Specifically, Schroeder points to the summaries of his interviews with Lundgren, included in the presentence investigation report, wherein he told Lundgren that he had "'told all of the staff'" that he did not want Berry as a cellmate, that he told staff members he was not compatible with Berry when they assigned him to Schroeder's cell, that a TSCI caseworker had tried to get the assignment switched prior to Berry's moving in, and that corrections officers would laugh at the arrangement and joke they were surprised Schroeder had not killed Berry yet. Schroeder also points to Lundgren's case synopsis noting that the TSCI caseworker Schroeder described in his interview explained that she did have concerns prior to Berry's moving into the cell based on a "'gut feeling'" that the arrangement would be "'a bad idea'" but that she was unsuccessful in getting it switched.

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[19] See § 29-2523(2)(b).

[20] See § 29-2523(2)(c).

[21] See § 29-2523(2)(f).

However, the panel's statements that Schroeder did not ask for Berry to be moved and did not warn that Berry was in mortal danger are not contradicted by Lundgren's summaries. Lundgren's summary of Schroeder's interview only described Schroeder's assertions that he told staff prior to Berry's moving in that he did not want Berry as a cellmate and was incompatible with him. Lundgren's summary did not describe that Schroeder asserted he continued these complaints after the move was made and did not allege he made any actual requests for Berry to be moved. Moreover, there is nothing in Schroeder's description of his interactions with TSCI officials where he indicated Berry was in mortal danger if they continued to share the cell. While Schroeder alleged corrections officers would joke they were surprised he had not killed Berry yet, such statements do not imply that Schroeder requested that Berry be moved or that they believed or had reason to believe that Berry was actually in mortal danger. Similarly, while the TSCI caseworker attempted to get Berry's assignment to Schroeder's cell switched prior to his move, there is nothing indicating that she was doing so at Schroeder's request or that her "'gut feeling'" was based upon a belief such an arrangement might lead to Berry's death.

The panel reviewed the presentence investigation report and Lundgren's summaries prior to determining whether there were mitigating circumstances. The panel's findings that Schroeder did not request Berry's removal from his cell and did not warn officials of potential danger to Berry is uncontradicted by the report. Instead, the report shows that Schroeder acted with premeditation and depravity in that Schroeder explained he had made up his mind to kill Berry days before he did so and in that he made no real attempts to avoid this result, even having made the decision to discard the kite which could have helped avoid the killing.

Schroeder's explanations in his interview that he killed Berry because he was unclean and annoying do not rise to the level of accounts of unusual pressure or influence or extreme

mental or emotional disturbance. Nothing in the record indicates that Schroeder continually sought Berry's removal from the cell or that any such requests were unheeded by TSCI staff.

Schroeder references the effect incarceration can have on inmates in support of his unusual pressures or influences and extreme mental or emotional disturbance claims. Schroeder cites to several articles, while acknowledging he did not provide them to the court because he did not present any evidence, which discuss the effects of institutionalization and incarceration in solitary confinement on an inmate's mental health as well as articles and reports of security and staffing issues at TSCI and DCS.

[15] We have previously addressed the effect incarceration and, specifically, isolated confinement can have on individuals. In *Jenkins*, we analyzed the application of a nonstatutory mitigating factor of solitary confinement and quoted the understanding that "'[y]ears on end of near-total isolation exact a terrible price.'"[22] However, we also noted that prison officials must have discretion to decide that in some instances, temporary solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates.[23] Because of the defendant's own extensive and violent actions in that case, the prison officials needed to have some recourse to deal with such an inmate, and we found that it was reasonable in not rewarding such behavior by considering the resulting confinement as a mitigating factor.[24] For the same reasons, the mere identification of a history of incarceration, without more, is insufficient to allege unusual pressures or influences or establish extreme mental or emotional

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[22] *Jenkins, supra* note 2, 303 Neb. at 727, 931 N.W.2d at 888, quoting *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (Kennedy, J., concurring).

[23] *Jenkins, supra* note 2.

[24] *Id*.

disturbance. Schroeder's incarceration was due to his own actions, including, most recently, his murder of Albers.

Contrary to Schroeder's assertions and as discussed in our analysis of Schroeder's claims of the nonstatutory mitigating factors of institutionalization and the State's alleged ulterior motive to avoid possible litigation, the underlying facts of Schroeder's claims were acknowledged and weighed by the court. In its order, the panel acknowledged that the cell Schroeder and Berry shared was intended for a single inmate, Berry was set for release 2 weeks after moving in with Schroeder, Schroeder was serving a life sentence for Albers' murder, and Schroeder had a history of incarceration including his history within the juvenile court system and his current sentence for Albers' murder. The panel reasonably found that on their own, these facts and the reality of the effect incarceration can have on individuals were insufficient to establish that Schroeder acted under unusual pressures or influences or was under extreme mental or emotional disturbance. Under our de novo review, we reach the same conclusion.

Schroeder's remaining claim, that the panel erred in failing to find Berry was a participant in Schroeder's conduct or consented to the act, is without merit. Schroeder supports this proposition by noting, "Berry complied with Schroeder's request that he turn the chair around and face away from Schroeder after Schroeder expressed extreme annoyance with his behavior."[25] However, Berry's facing away from Schroeder does not indicate participation or consent to his murder. Schroeder expressed frustration and requested Berry to turn away from him. How Berry would have understood this as Schroeder's asking for aid in his strangulation and not as a method to avoid conflict is unclear. Schroeder offers no further argument to support this mitigating circumstance, and we agree with the panel's finding that there was no evidence establishing this mitigating factor.

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[25] Brief for appellant at 40.

Duty to Request DCS Chapter 83 Custody Reports

Schroeder claims the panel had a duty to request additional records of Schroeder's incarceration from DCS. These records are required to be kept by DCS under Neb. Rev. Stat. § 83-178 (Reissue 2014) and include records concerning Schroeder's background, conduct, associations, and family relationships; records regarding Schroeder's "Central Monitoring,"[26] which may be relevant to the propriety of his placement with Berry; and any medical or mental health records.

[16-18] When an offender has been convicted of first degree murder and waives the right to a jury determination of an alleged aggravating circumstance, the court must order a presentence investigation of the offender and the panel must consider a written report of such investigation in its sentencing determination.[27] The presentence investigation and report shall include, when available, any submitted victim statements and an analysis of the circumstances attending the commission of the crime and the offender's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits.[28] The investigation and report may also include any other matters the probation officer deems relevant or the court directs to be included.[29]

In this case, the court ordered a presentence investigation and report, a report was prepared, and the panel considered it during its sentence determination. Schroeder does not allege this report failed to analyze and present any of the areas required by § 29-2261(3). Instead, Schroeder claims the court had a duty to request the presentence investigation report to include specific incarceration records. Schroeder relies on *State*

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[26] *Id.* at 42.

[27] § 29-2521(2) and Neb. Rev. Stat. § 29-2261(1) (Reissue 2016).

[28] § 29-2261(3).

[29] *Id*.

v. Dunster[30] for this claim that the panel should have requested additional documents.

In that case, the defendant was sentenced to death after pleading guilty to first degree murder.[31] Prior to sentencing, the district court instructed the probation officer conducting the presentence investigation to include information in the possession of DCS as part of the report.[32] The court explained that access to this information was restricted by law and that it would not be released to the public except upon written order.[33] On appeal, the defendant assigned the district court's consideration of this information, which included confidential mental health information provided by DCS, as reversible error.[34] However, we found the district court had given adequate notice to the defendant of its intent to consider such evidence to satisfy his due process rights.[35]

Additionally, when the bill of exceptions was completed in that case, the DCS records were not included. As a result, we determined that in our de novo review, we could request and consider the additional documents just as the district court had requested and considered them.[36] In reaching this determination, we noted that our request of these documents did not indicate in advance how we would rule on appeal but merely followed our statutory requirements for review and honored the intent of the Legislature to provide "'the most scrupulous standards of fairness and uniformity'" in reviewing the imposition of a sentence of death.[37]

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[30] *Dunster, supra* note 16.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 372, 631 N.W.2d at 913.

Dunster neither explicitly nor implicitly required a lower court to receive and review documents of a defendant's prior incarceration. Instead, it only evaluated the process of a district court seeking to consider specific documents during a sentencing proceeding and our ability to review the same information upon which the lower court relied.[38] Accordingly, *Dunster* did not add further requirements for the preparation of a presentence investigation report under § 29-2261(3).

Because the district court complied with its duties under § 29-2261(1) in requesting the presentence investigation and report, because the presentence report included the requisite analysis of the § 29-2261(3) elements, and because there is no requirement that a sentencing court must request access to specific § 83-178 DCS records, the district court did not err by not requesting that the DCS records be included in the presentence investigation report.

Sufficiency of Safeguards to Prevent Arbitrary Results

Schroeder claims Nebraska's death penalty is unconstitutional as applied to him under the 8th and 14th Amendments to the U.S. Constitution and article I, §§ 3, 9, and 15, of the Nebraska Constitution. Schroeder argues that insufficient safeguards exist to prevent arbitrary results when, as here, a defendant waives his right to counsel and refuses to introduce mitigating or proportionality evidence or argument.

[19,20] An accused has a state and federal constitutional right to be represented by an attorney in all critical stages of a criminal prosecution which can lead to a sentence of confinement.[39] However, a defendant may waive this right to counsel

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[38] *Dunster, supra* note 16.

[39] See, U.S. Const. amends. VI and XIV; Neb. Const. art. I, § 11; *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Jenkins, supra* note 2; *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

so long as the waiver is made knowingly, voluntarily, and intelligently.[40]

[21-23] The same constitutional provisions that provide a defendant the right to counsel also guarantee the right of the accused to represent himself or herself.[41] This right to self-representation plainly encompasses certain specific rights of the defendant to have his voice heard, including that the pro se defendant must be allowed to control the organization and content of his own defense.[42] We have previously explained that such control may include a waiver of the right to present mitigating evidence during sentencing in a death penalty case.[43]

Schroeder does not challenge the validity of his waiver of counsel for the penalty phase or his election not to present mitigating evidence or proportionality argument. Instead, Schroeder argues that the exercise of the right to self-representation and, derived therefrom, the right to waive the presentation of evidence and argument conflicted with the constitutional restrictions against cruel and unusual punishment. Specifically, Schroeder addresses the effect such waivers have on the proportionality review by the sentencing panel. To establish the cruelty and unusualness of such punishment, Schroeder notes first that the proportionality requirement under Neb. Rev. Stat. §§ 29-2521.01 to 29-2521.04 (Cum. Supp. 2018) only requires the sentencing panel to review those cases in which the death penalty was imposed. Schroeder also asserts proportionality review is further limited depending on whether jury determinations in the reviewed cases were waived because,

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[40] *Jenkins, supra* note 2; *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[41] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Jenkins, supra* note 2; *Wilson, supra* note 39; *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991).

[42] *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *Dunster, supra* note 16; *Wilson, supra* note 39.

[43] *Dunster, supra* note 16.

when they are waived, a sentencing panel is required to issue written findings of fact as to any proven aggravating circumstances, but when there is no waiver, the jury does not issue such analysis. Schroeer argues that when a defendant waives counsel and refuses to meaningfully participate, the record on which the panel makes its proportionality determination is limited to what it requests and the State presents, which has the potential to be limited and biased in favor of the imposition of a death sentence.

[24,25] Because a death sentence is different from any other criminal penalty[44] and no system based on human judgment is infallible, we have taken, and should continue to take, the extra step to ensure fairness and accuracy with the imposition of the death penalty.[45] Taking this into account, the Legislature has enacted a statutory scheme to provide additional safeguards,[46] and in interpreting these statutes, we have followed the fundamental principle of statutory construction that penal statutes are to be strictly construed in favor of the defendant.[47]

[26] Part of this statutory scheme, as explained, requires a court to order a presentence investigation report.[48] The sentencing panel must consider this report in reaching its sentence. Thus, contrary to Schroeder's argument, even if the State presents evidence in favor of a specific sentence and the defendant declines to present contrary evidence, the court receives and must consider independent information from the report.

[27,28] In a death penalty case, the sentencing panel is required to review this report and determine whether it contradicts the State's evidence of aggravating factors and whether any mitigating circumstances exist, including specifically

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[44] *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001).

[45] *Id*.

[46] Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Cum. Supp. 2018).

[47] *Hochstein and Anderson, supra* note 44.

[48] §§ 29-2261(1) and 29-2521(2).

delineated statutory mitigators.[49] While the State must prove the aggravating circumstances beyond a reasonable doubt,[50] there is no burden of proof with regard to mitigating circumstances.[51] Accordingly, the panel's evaluation of the independently compiled presentence investigation report and any evidence the defendant chooses to introduce is under the less restrictive mitigation standard and provides another safeguard to ensure fairness and accuracy in a death penalty determination.

[29-32] Once the panel makes its determinations about the existence of aggravating and mitigating circumstances, the panel is then required to undertake a proportionality review. This review looks at whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[52] Proportionality review is not constitutionally mandated.[53] It exists in Nebraska by virtue of §§ 29-2521.01 to 29-2521.04, which direct this court to conduct a proportionality review in each appeal in which a death sentence is imposed.[54] A court's proportionality review spans all previous cases in which a sentence of death is imposed and is not dependent on which cases are put forward by the parties.[55]

Schroeder takes issue with proportionality review requiring a panel to compare only those cases in which the death penalty was imposed.[56] Instead, Schroeder argues the statutory scheme explicitly requires review of all homicide cases regardless of the resulting sentence.

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[49] §§ 29-2521 to 29-2523.

[50] *Torres, supra* note 3.

[51] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990).

[52] § 29-2522(3).

[53] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[54] *Id.*

[55] See *id.*

[56] See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *overruled on other grounds, State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989).

It is unclear how Schroeder is arguing this fits under his assignment alleging unconstitutionality in the interplay of his waiver of counsel and election not to present evidence or argument with Nebraska's capital sentencing scheme. The introduction of further evidence or whether or not Schroeder was represented by counsel does not affect what previous cases the panel was required to consider. In any case, we decline Schroeder's invitation to overrule our decision in *State v. Palmer*[57] which interpreted §§ 29-2521.01 to 29-2521.04 to only require review of previous cases in which the death penalty was imposed.

Additionally, we are unconvinced by Schroeder's claim that the proportionality review is unconstitutionally flawed due to having less analysis of the reviewed cases in which a jury determines the existence of the aggravating circumstance than of the reviewed cases in which a sentencing panel makes the determination. Again, it is unclear how Schroeder relates this alleged flaw to this assignment. If Schroeder is claiming that waiver of counsel and lack of argument would prohibit the panel from taking into account that previous aggravation determinations were decided by juries, this information would be apparent from the previous opinions and would be able to be considered by the panel independently of whether the defendant or an advocate explained such difference to the panel.

[33,34] Moreover, even when a jury determines the existence of an aggravating circumstance, a sentencing panel is required to put in writing its consideration of (1) whether the determined aggravating circumstance justifies the imposition of a sentence of death, (2) whether mitigating circumstances exist, and (3) whether a sentence of death would be excessive or disproportionate to penalties imposed in similar cases.[58] This writing must specifically refer to the aggravating and mitigating circumstances weighed in the determination of the panel.[59]

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[57] *Id.* See, also, *State v. Gales, supra* note 53.

[58] § 29-2522.

[59] *Id.*

As such, the basis of Schroeder's argument that cases where a jury determines the existence of aggravating circumstances provide insufficient information for comparison in a proportionality review is without merit.

[35-38] Considering all of the above, Nebraska's capital sentencing scheme provides additional statutory steps and considerations to ensure fairness and accuracy, and these safeguards exist regardless of a defendant's strategy at the penalty phase. Due to this statutory scheme, a defendant cannot "choose" the death penalty. The sentencing decision rests with the court alone.[60] In order to exercise this authority, the statutory scheme requires that a sentencing panel consider not only evidence and argument presented by the parties but also an independently compiled presentence investigation report to determine whether the alleged aggravating circumstance exists, determine whether any mitigating factors are present which would weigh against the imposition of the death penalty, and conduct a proportionality review weighing the aggravating and mitigating factors and comparing the facts to previous cases where the death penalty was imposed.[61] These considerations exist and are weighed regardless of the evidence presented by the parties or their arguments.

[39,40] A defendant is entitled to present a defense and is guaranteed the right to choose the objectives for that defense.[62] As previously stated, the self-represented defendant must be allowed to control the organization and content of his own defense.[63] However, Schroeder suggests that in a death penalty case, the substantial nature of the proceedings requires an advocate in opposition to a sentence of death irrespective of the defendant's chosen objective. To this end, he suggests §§ 29-2519 to 29-2546 implicitly require the appointment of a

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[60] *Dunster, supra* note 16.

[61] See *Torres, supra* note 3.

[62] *McCoy v. Louisiana*, 584 U.S. 414, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018); *Jenkins, supra* note 2.

[63] *Dunster, supra* note 16.

guardian ad litem to present evidence and argument as to why the death penalty should not be imposed.

[41] This suggestion is similar to that addressed in *Dunster*.[64] The defendant therein had waived trial counsel for the penalty stage and chose not to present any mitigating evidence. On appeal, he claimed the court should have appointed "amicus counsel" to advocate against the imposition of the death penalty by presenting evidence and "'argu[ing] for life,'" which is identical to the role Schroeder now envisions for an appointed guardian ad litem.[65] As noted in *Dunster*, when a defendant waives counsel and the presentation of mitigating evidence, the appointment of an advocate to present evidence and argue against the imposition of a sentence overrides that defendant's constitutional right to control the organization and content of his or her own defense during sentencing.

[42,43] A criminal defendant has the right to waive counsel and present his or her own defense.[66] In a death penalty case, this includes the right of the defendant to elect not to present additional evidence or argument during the penalty proceedings. Even if a defendant makes such waiver and election, the Legislature has enacted safeguards to ensure fairness and accuracy in the resulting sentence. As explained above, these safeguards apply regardless of the defense strategy an individual defendant implements. Therefore, Schroeder's assignment that Nebraska's capital sentencing scheme is unconstitutional due to insufficient safeguards to prevent arbitrary results when a defendant waives counsel and elects not to present evidence or argument fails.

Excessiveness and Proportionality Review

[44,45] In reviewing a sentence of death, we conduct a de novo review of the record to determine whether the

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[64] *Id.*

[65] *Id.* at 361, 631 N.W.2d at 906.

[66] See *Dunster, supra* note 16.

aggravating and mitigating circumstances support the imposition of the death penalty.[67] In so doing, we consider whether the aggravating circumstances justify imposition of a sentence of death and whether any mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.[68]

We first note Schroeder does not contest the factual basis for the § 29-2523(1)(a) aggravation allegation that Schroeder was convicted of Albers' murder. It is undisputed that in 2006, Schroeder murdered Albers, who was at the time Schroeder's 75-year-old previous employer. It is also undisputed that Albers was robbed and that Schroeder had made the decision to kill Albers days before the robbery. Schroeder threatened and beat Albers, tied him up, threw him in the back of a pickup, and dumped him in an abandoned well, leaving him for dead. Based upon our de novo review, we determine this murder conviction, which was proved beyond a reasonable doubt at the sentencing hearing, is sufficient as an aggravating circumstance under § 29-2523(1)(a) to justify the imposition of the death penalty. In coordination with our analysis concerning the panel's mitigating circumstance findings, we also agree with the panel's determination that the applicable statutory and nonstatutory circumstances apparent from the record do not approach or exceed the aggravating circumstance in this case.

[46-48] In addition, we are required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a court imposed the death penalty.[69] The purpose of this review is to ensure that the sentences imposed in this case are no greater than those imposed in other cases with the same or similar

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[67] *Torres, supra* note 3.

[68] *Id.*

[69] *Id.*

circumstances.[70] Our proportionality review looks only to other cases in which the death penalty has been imposed and requires us to compare the aggravating and mitigating circumstances of the case on appeal with those present in those other cases.[71]

In this case, we have reviewed our relevant decisions on direct appeal from other cases in which the death penalty was imposed.[72]

Like the sentencing panel, we find *Dunster* particularly pertinent to our review.[73] The defendant therein was convicted of murdering his cellmate by strangling him with an electrical cord.[74] The defendant had previously been convicted of the earlier murder of a woman while attempting to collect a debt from her husband, and he had confessed to a different murder of another inmate while incarcerated for the first murder.[75] At the penalty phase, the State alleged a single aggravating circumstance of § 29-2523(1)(a) and presented evidence of the two previous killings.[76] After the trial court sentenced the defendant to death, we affirmed.[77] Such factual basis is similar to that in the instant case. As did the defendant in *Dunster*, Schroeder murdered his cellmate by strangulation. Schroeder's previous murder of Albers was also pursuant to a plan to take money from his victim.

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[70] See *id*.

[71] *Id*.

[72] See, e.g., *Jenkins, supra* note 2; *Torres, supra* note 3; *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *Hessler, supra* note 40; *Dunster, supra* note 16; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979).

[73] *Dunster, supra* note 16.

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *Id*.

Schroeder attempts to differentiate his case from *Dunster* by emphasizing that while only one aggravating circumstance was alleged in *Dunster*, the allegation therein concerned two previous murders. Additionally, Schroeder argues those underlying murders were committed with more serious facts, including that there was suspected sexual assault of one of the victims.

First, it is not evident that the underlying murders in *Dunster* included any more or less serious facts surrounding their execution. Schroeder threatened, beat, and robbed Albers and threw him bound and alive into a well to die. The murders the defendant in *Dunster* committed involved binding, beating, killing, and possible sexual assault. In both cases, the defendants acted with violence toward the persons.

[49,50] Additionally, while there were two underlying murders in *Dunster*, this does not mean *Dunster* cannot be used in a proportionality review. A proportionality review does not require that a court "color match" cases precisely.[78] It would be virtually impossible to find two murder cases which are the same in all respects.[79] Instead, the question is simply whether the cases being compared are sufficiently similar, considering both the crime and the defendant, to provide the court with a useful frame of reference for evaluating the sentence in this case.[80] As the factual connections show, *Dunster* is sufficiently similar for purposes of evaluating proportionality.

[51-53] Along the same lines, Schroeder attempts to distinguish his case from others cited by the sentencing panel and reviewed on appeal by noting that the majority of those cases had multiple aggravating factors. However, we have established that one aggravating circumstance may be sufficient under our statutory system for the imposition of the death penalty.[81] In

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[78] *Ellis, supra* note 72.

[79] *Id.*

[80] *Id.*

[81] *Dunster, supra* note 16.

our proportionality review, the evaluation of whether the death penalty should be imposed in a specific case is not a mere counting process of "X" number of aggravating circumstances and "Y" number of mitigating circumstances and, instead, asks whether the reviewed cases are sufficiently similar to provide a useful reference for that evaluation.[82] Thus, even though other cases may involve additional or different aggravating circumstances, they may still be sufficiently similar to provide such reference.

Having reviewed our previous cases which have affirmed the imposition of a death penalty and compared the aggravating and mitigating circumstances present in those cases, we are persuaded that the sentence imposed in this case is not greater than those imposed in other cases with the same or similar circumstances. Accordingly, we affirm Schroeder's death sentence.

CONCLUSION

In consideration of all of the above, Schroeder's conviction and sentence for first degree murder are affirmed.

Affirmed.

Freudenberg, J., not participating.

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[82] See, *Ellis, supra* note 72; *Dunster, supra* note 16.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Brandon B. Hanson, respondent.

941 N.W.2d 193

Filed April 17, 2020. No. S-19-355.

1. **Disciplinary Proceedings: Appeal and Error.** Attorney discipline cases are original proceedings before the Nebraska Supreme Court. As such, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings: Proof.** Violations of disciplinary rules must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline evaluated under the particular facts and circumstances of the case.
4. ____. With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated in light of its particular facts and circumstances.
5. ____. When no exceptions to the referee's findings of fact in an attorney discipline case are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
6. **Disciplinary Proceedings: Rules of the Supreme Court.** Under Neb. Ct. R. of Prof. Cond. § 3-501.2(c) (rev. 2016), a "Prepared By" notation is required only when an attorney actually prepares for a client a pleading, brief, or other document that is to be filed with the court.
7. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.
8. **Disciplinary Proceedings: Rules of the Supreme Court.** The failure to include a "Prepared By" notation as required by Neb. Ct. R. of Prof.

Cond. § 3-501.2(c) (rev. 2016) does not itself constitute a violation of Neb. Ct. R. of Prof. Cond. § 3-504.3.

9. **Disciplinary Proceedings: Intent.** Proof of actual intent to deceive or defraud is not required to demonstrate an attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. Instead, the focus of the inquiry is on the effect of the lawyer's conduct.
10. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances.
11. ____. Each attorney discipline case must be evaluated in light of its particular facts and circumstances. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.
12. ____. In an attorney disciplinary proceeding, it is necessary to consider the discipline that the Nebraska Supreme Court has imposed in cases presenting similar circumstances.

Original action. Judgment of public reprimand.

Julie L. Agena, Deputy Counsel for Discipline, for relator.

Brandon B. Hanson, pro se.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

This is an original action brought by the Counsel for Discipline of the Nebraska Supreme Court against attorney Brandon B. Hanson. This action alleges Hanson violated several provisions of the Nebraska Rules of Professional Conduct and his oath as an attorney by preparing legal documents for his girlfriend without including a "Prepared By" notation as required by Neb. Ct. R. of Prof. Cond. § 3-501.2(c) (rev. 2016). At the time, Hanson was employed as the Valley County Attorney and Hanson's girlfriend, a former Valley County employee, was involved in a lawsuit as a self-represented litigant regarding the reasons for her termination from the Valley

County sheriff's office. This is the first time Hanson has been the subject of a disciplinary action.

BACKGROUND

Hanson was admitted to practice law in Nebraska in 2011 and served as the county attorney for Valley County, Nebraska, from January 2015 to January 2019. At all times relevant to this case, Hanson was engaged in the practice of law in Ord, Nebraska, and in a personal relationship with his girlfriend, C.S. C.S. was previously employed by the Valley County sheriff's office as a jailer/dispatcher, but was involuntarily terminated from her employment in January 2018.

At the time C.S.' employment was terminated, Hanson was running for reelection as the Valley County Attorney in a contested primary election. Hanson's opponent, Kayla Clark, established a campaign social media account on which a private individual, G.B., posted a comment stating C.S. had been terminated from her employment with the sheriff's office because she had been intoxicated at work. G.B. was an active supporter of Clark's political campaign.

In April 2018, C.S., as a self-represented litigant, filed two lawsuits in the Valley County Court against G.B., both related to the social media comment. The documents filed by C.S. contained indexing notations that were consistent with notations on other legal documents that had been prepared by Hanson. On May 2, C.S., as a self-represented litigant, filed an amended complaint and demand for jury trial with the notation "Prepared By: Brandon B. Hanson, NSBA #24675."

On May 29, 2018, the Counsel for Discipline initiated a preliminary inquiry into Hanson's actions. The inquiry came after Clark filed a grievance against Hanson, alleging that Hanson had prepared pleadings for C.S. without including the required notation, which was a concurrent conflict of interest with his position as the Valley County Attorney, and that he had used his political office to harass or intimidate Clark's supporters.

Clark also asserted that if Hanson was representing C.S. in the matter, Hanson had misrepresented that C.S. was a self-represented litigant.

Valley County was not a party to C.S.' lawsuit against G.B. However, on June 5, 2018, G.B. deposed the Valley County sheriff regarding the reason for C.S.' termination of employment and reports made after the termination. Hanson did not enter an appearance, nor did he represent the sheriff at the deposition as the Valley County Attorney. A deputy county attorney for Custer County, Nebraska, was appointed to serve as counsel for the sheriff.

A subpoena was issued for Hanson's deposition, individually, in which G.B. requested Hanson produce legal materials that he produced on behalf of C.S. in the matter. On July 23, 2018, Hanson filed a motion to quash the deposition on the grounds of attorney-client privilege. The motion was sustained after the Valley County Court found that Hanson had prepared legal documents for C.S. in the case and, thus, that an attorney-client privilege existed.

The Counsel for Discipline filed formal charges against Hanson, alleging he violated § 3-501.2(c) (scope of representation and allocation of authority between client and lawyer) and Neb. Ct. R. of Prof. Cond. §§ 3-501.7(a) and (b) (rev. 2019) (conflict of interest and current clients), 3-501.11(c) (special conflicts of interest for former and current government officers and employees), 3-503.3(a) (rev. 2016) (candor toward tribunal), 3-504.3 (dealing with unrepresented person), and 3-508.4(a) and (c) (rev. 2016) (misconduct). The Counsel for Discipline also alleged Hanson violated his oath of office under Neb. Rev. Stat. § 7-104 (Reissue 2012).

In his response to the formal charges, Hanson admitted that he violated § 3-501.2(c) by assisting C.S. in preparing legal documents without including a "Prepared By" notation. Hanson also admitted that the violation constituted misconduct under § 3-508.4(a). Hanson apologized for the error. He

explained that after learning of his mistake, he added the notation in the amended complaint filed May 2, 2018, and stopped providing legal assistance to C.S. in the case. Hanson did not address the allegation that he had violated his oath of office, but denied the remaining allegations.

An evidentiary hearing was held on the charges. The only two witnesses called were Hanson and C.S. The referee found Hanson had violated his oath of office under § 7-104 and the following rules of professional conduct: §§ 3-501.2(c), 3-501.7(a) and (b), 3-504.3, and 3-508.4(a) and (c).

The referee concluded that Hanson had not violated §§ 3-501.11(c) and 3-503.3(a). There was no evidence that Hanson had confidential information regarding C.S.' termination, or information regarding G.B., and there was insufficient evidence to find that Hanson's failure to notify the court of his involvement was misleading.

Regarding sanctions, the referee determined that because Hanson was an elected county attorney, "his assistance to [C.S.] was an abuse of his public office" and "the need to deter others is great." The referee further concluded that self-represented individuals, such as G.B., are "especially vulnerable to . . . Hanson's behind-the-scenes assistance to [C.S.]" The referee recommended Hanson be suspended from the practice of law for a period of 6 months.

Hanson filed six exceptions to the referee's report and recommendation. The relator filed no exceptions.

ASSIGNMENTS OF ERROR

Hanson admits to violating §§ 3-501.2(c) and 3-508.4(a) by failing to include a "Prepared By" notation. However, he argues that the facts and law do not support finding violations of §§ 3-501.7(a) and (b), 3-504.3, 3-508.4(c) or statements made by the referee regarding the need for sanctions. Hanson also asserts that the recommended 6-month suspension is excessive.

STANDARD OF REVIEW

[1,2] Attorney discipline cases are original proceedings before the Nebraska Supreme Court.[1] As such, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[2] Violations of disciplinary rules must be established by clear and convincing evidence.[3]

ANALYSIS

[3,4] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline evaluated under the particular facts and circumstances of the case.[4] With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated in light of its particular facts and circumstances.[5]

[5] When no exceptions to the referee's findings of fact in an attorney discipline case are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.[6] Because the relator filed no exceptions, we consider the referee's findings that Hanson did not violate §§ 3-501.11 and 3-503.3 final and conclusive. Likewise, Hanson did not file an exception to the finding that he violated his oath of office. We therefore consider the finding that Hanson violated § 7-104 to be final and conclusive.

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[1] *State ex rel. Counsel for Dis. v. Chvala*, 304 Neb. 511, 935 N.W.2d 446 (2019).

[2] *Id.*

[3] *Id.*

[4] *State ex rel. Counsel for Dis. v. Jorgenson*, 302 Neb. 188, 922 N.W.2d 753 (2019).

[5] *State ex rel. Counsel for Dis. v. Ubbinga*, 295 Neb. 995, 893 N.W.2d 694 (2017).

[6] *Id.*

Scope of Representation.

Section 3-501.2(c) provides:

> A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that said filings are "Prepared By" and the name, business address, and bar number of the lawyer preparing the same. Such actions by the lawyer shall not be deemed an appearance by the lawyer in the case. Any filing prepared under this rule shall be signed by the litigant designated as "pro se," but shall not be signed by the lawyer preparing the filing.

Hanson admits to violating this rule by drafting pleadings and providing legal advice to C.S. regarding her termination of employment from the sheriff's office without including the required "Prepared By" notation. He asserts that he was merely trying to ensure C.S.' documents were well drafted and that his failure to include the notation was an inadvertent mistake. Hanson also notes that after the mistake had been brought to his attention, he corrected it on the amended complaint and terminated his assistance to C.S. Although we find that Hanson's failure to include the required notation was unintentional, he clearly violated § 3-501.2(c).

[6] This court is mindful of the increase in self-represented litigants and the need for limited scope representation. Attorneys who are willing to answer questions, discuss the information required on court forms, and provide advice on how to draft and file legal documents provide an invaluable resource in promoting greater access to justice. We are not suggesting that § 3-501.2(c) requires a "Prepared By" stamp every time a lawyer assists a self-represented litigant in this way. Rather, under § 3-501.2(c), a "Prepared By" notation is required only when an attorney actually prepares for a client a pleading, brief, or other document that is to be filed with the court. Here, however, Hanson's involvement was not limited in this way. He does not dispute that he actually prepared the

documents in question or that an attorney-client privilege relationship existed.

Conflict of Interest.

Under § 3-501.7(a),

> a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Section 3-501.7(b) provides:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

The referee found Hanson's representation of C.S. was a conflict of interest and, thus, a violation of § 3-501.7(a) and (b). The referee determined that Hanson had represented C.S. as a client, based on Hanson's assertion of attorney-client privilege. The referee further found that this representation was a concurrent conflict of interest with Hanson's employment as the Valley County Attorney. The referee noted that Valley

County was not a party to C.S.' lawsuit against G.B. However, the referee concluded that preparing pleadings for C.S. and advising her posed a significant risk that Hanson's representation of the county would be materially limited by his duty to C.S., because the lawsuits involved the reasons for C.S.' termination from the Valley County sheriff's office.

Hanson filed an exception to the referee's finding that a conflict of interest existed. Hanson asserted that no conflict of interest existed, because the relevant lawsuit was not against Valley County; the lawsuit was between two private individuals, C.S. and G.B. At oral argument, however, Hanson acknowledged that his assistance to C.S. was likely a conflict of interest with his duties as the Valley County Attorney.

[7] The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.[7] Hanson testified that as the county attorney, he provided advice to county agencies and their officials and spoke to the sheriff about general employment issues. He also admitted to assisting C.S. with advice about pleading theories and courtroom decorum in regard to the lawsuits.

While Valley County was not a party to the lawsuit, the underlying issues focused on C.S.' termination from the Valley County sheriff's office and subsequent statements made regarding her termination. Further, the Valley County sheriff was deposed during the litigation, and outside counsel had been appointed. Based on the evidence presented, along with Hanson's own admissions, we find there is clear and convincing evidence demonstrating that Hanson's assistance to C.S. was a concurrent conflict of interest with his representation of Valley County, in violation of § 3-501.7(a) and (b).

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[7] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

Dealing With Unrepresented Persons.

Section 3-504.3 provides, in relevant part:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Hanson argues that failing to include the "Prepared By" notation does not constitute a statement of disinterest. He further asserts that § 3-504.3 was not violated, because he made no statements to G.B. regarding the case and had no personal interaction with G.B. to imply that he was disinterested.

The referee found that Hanson's failure to include the notation was unintentional and that when Hanson learned of the failure, he corrected the error. But the referee concluded that Hanson violated § 3-504.3 after finding Hanson had not notified G.B. that he was assisting C.S. until he filed the motion to quash deposition. The referee reasoned that Hanson had an affirmative duty to inform G.B. of his involvement and that his failure to do so caused the lawsuit to proceed in a "fundamentally unfair manner" for G.B. However, the record demonstrates G.B. was aware of Hanson's involvement before the subpoena for deposition was issued.

The initial complaint regarding the lawsuit between C.S. and G.B. was filed on April 9, 2018. G.B. was notified of Hanson's involvement on May 2, when, after learning of his error, Hanson included the following notation on the amended complaint: "Prepared By: Brandon B. Hanson, NSBA #24675." Hanson's motion to quash deposition was not filed until July 23. G.B. was clearly aware of Hanson's assistance to C.S. prior to Hanson's assertion of attorney-client privilege, because the subpoena for deposition issued by G.B. requested that

Hanson bring the legal documents he had prepared for C.S. to the deposition.

Moreover, the American Bar Association (ABA) has advised that an attorney's failure to disclose behind-the-scenes assistance to a pro se litigant "will not secure unwarranted 'special treatment' for that litigant or otherwise unfairly prejudice other parties to the proceeding."[8] The ABA has stated that in the absence of a law requiring disclosure, "[a] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance."[9]

[8] In this case, there was no evidence presented to refute Hanson's claim that he neither made statements to G.B. regarding the case nor had personal interaction with G.B. The failure to include a "Prepared By" notation does not itself constitute a violation of § 3-504.3. Therefore, we find that the evidence presented does not establish a violation of § 3-504.3.

Misconduct.

Pursuant to § 3-508.4, it is professional misconduct for a lawyer to "(a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another; [or] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Hanson admits that failing to include a "Prepared By" notation constitutes misconduct under § 3-508.4(a), but denies violating § 3-508.4(c). He asserts that he merely forgot to include the notation and that he had no intent to mislead, be dishonest, or otherwise be deceitful.

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[8] ABA Comm. on Ethics & Prof. Responsibility, Formal Op. 07-446 at 3 (2007) (discussing undisclosed legal assistance to pro se litigants).

[9] *Id.*, Formal Op. 07-446 at 1.

The referee found Hanson had violated both subsections (a) and (c) of § 3-508.4. The referee concluded that Hanson's failure to notify G.B. of his attorney-client relationship until being issued a subpoena constituted misrepresentation under § 3-508.4(c).

[9] This court has held that proof of actual intent to deceive or defraud is not required to demonstrate an attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.[10] Instead, "[t]he focus of the inquiry is on the effect of the lawyer's conduct . . . ."[11]

In this case, there was no evidence presented to show that G.B. was unaware of Hanson's assistance to C.S. Further, as discussed above, the record refutes the referee's conclusion that Hanson failed to notify G.B. of his involvement prior to being issued a subpoena.

We find that Hanson violated § 3-508.4(a) by failing to include the required notation, but we further conclude that there is insufficient evidence to demonstrate Hanson violated § 3-508.4(c). This conclusion is supported by the ABA's Formal Opinion 07-446,[12] in which the ABA opined that an attorney's failure to disclose the preparation of documents for a pro se litigant does not constitute conduct involving dishonesty, fraud, deceit, or misrepresentation.

Sanctions.

[10] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances.[13] Neb. Ct.

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[10] *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003).

[11] *Id.* at 336, 665 N.W.2d at 623.

[12] Formal Op. 07-446, *supra* note 8.

[13] *State ex rel. Counsel for Dis. v. Ubbinga, supra* note 5.

R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.[14]

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[15]

[11] As stated above, each attorney discipline case must be evaluated in light of its particular facts and circumstances.[16] For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.[17]

In this case, the evidence establishes that while he was the county attorney for Valley County, Hanson produced legal documents for C.S., his self-represented girlfriend, without

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[14] See, also, Neb. Ct. R. § 3-310(N) (rev. 2019).

[15] *State ex rel. Counsel for Dis. v. Ubbinga, supra* note 5.

[16] *State ex rel. Counsel for Dis. v. Pivovar*, 288 Neb. 186, 846 N.W.2d 655 (2014).

[17] *State ex rel. Counsel for Dis. v. Island*, 296 Neb. 624, 894 N.W.2d 804 (2017).

including a "Prepared By" notation as required by § 3-501.2(c). The legal documents were filed by C.S. in the county court for Valley County between April 9 and May 2, 2018. While Valley County was not a party to the lawsuit, a concurrent conflict of interest existed because the issues involved focused on the reasons for C.S.' termination from the Valley County sheriff's office.

As mitigating factors, we note that Hanson has had no prior disciplinary complaints; he was cooperative throughout these disciplinary proceedings; he has accepted responsibility for his actions; and there was no evidence of harm to Valley County, G.B., or C.S. We also find, as did the referee, that Hanson is fit to practice law, his violations were unintentional and arose from an isolated incident, he corrected his error when it was brought to his attention, and he appears to have learned his lesson. Notably, we find no aggravating factors.

[12] We have said that it is necessary to consider the discipline that we have imposed in cases presenting similar circumstances.[18] For cases involving conflicts of interest and no other violations, the relator correctly notes that this court has generally imposed just a public reprimand.[19] While this case also involves the violation of § 3-501.2(c), we recognize the violation was unintentional, and we have no comparative cases, because the failure to include a "Prepared By" notation is an issue of first impression in Nebraska.

Taking into account all of the mitigating factors, the absence of aggravating factors, the short period of time during which the violations occurred, and the unique nature of this case, we determine that the appropriate sanction is a public reprimand.

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[18] *State ex rel. Counsel for Dis. v. Seyler*, 283 Neb. 401, 809 N.W.2d 766 (2012).

[19] See, *State ex rel. Counsel for Dis. v. Peppard*, 291 Neb. 948, 869 N.W.2d 700 (2015); *State ex rel. NSBA v. Frank*, 262 Neb. 299, 631 N.W.2d 485 (2001).

CONCLUSION

This court finds by clear and convincing evidence that Hanson violated his oath of office and §§ 3-501.2(c), 3-501.7(a) and (b), and 3-508.4(a) of the Nebraska Rules of Professional Conduct. It is the judgment of this court that Hanson should be, and hereby is, publicly reprimanded. Hanson is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Lorenzo Montoya, appellant.

941 N.W.2d 474

Filed April 17, 2020. No. S-19-660.

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. ____: ____: ____. When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
3. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
4. **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 discretion a factor in determining admissibility.
5. **Judges: Evidence: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the sufficiency of a party's foundation for admitting evidence.
6. **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.

7. **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.
8. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.
9. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.
10. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Words and Phrases.** The investigatory stop is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning; it is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.
11. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Arrests: Search and Seizure: Probable Cause.** Arrests are characterized by highly intrusive or lengthy search or detention, and the Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
12. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
13. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
14. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.

15. **Investigative Stops: Motor Vehicles.** The witnessing of a driving violation, however minor, is sufficient to support a stop.
16. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Reasonable proof of the accuracy of the radar equipment indicating to the law enforcement officer that the defendant was speeding need not be demonstrated in order to support reasonable suspicion for a stop of the vehicle for speeding.
17. ____: ____: ____: ____. The appropriate inquiry for an investigatory stop for speeding is whether a reasonable police officer had a minimal level of objective justification for the belief that speeding had occurred.
18. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
19. **Blood, Breath, and Urine Tests: Drunk Driving: Evidence: Proof.** The four foundational elements which the State must establish by reasonable proof as foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied.
20. **Administrative Law: Blood, Breath, and Urine Tests: Records: Proof.** Where the records of the maintenance of a machine are relied on to prove that the machine was properly maintained for purposes of providing foundation for breath test results, the records admitted at trial must show by satisfactory evidence that the inspections complied with all requirements of title 177, chapter 1, of the Nebraska Administrative Code.
21. **Administrative Law: Appeal and Error.** The construction of the regulations is a matter of law in connection with which an appellate court has an obligation to reach an independent determination regardless of the ruling of the court below.
22. **Administrative Law.** For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.
23. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.
24. **Statutes: Legislature: Intent.** A collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively

considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.

25. **Statutes.** It is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects a statute's purpose.
26. **Administrative Law: Blood, Breath, and Urine Tests: Proof.** Amended certificates of analysis to correct clerical errors provide satisfactory evidence that the inspections of an approved breath testing device complied with the requirements of title 177 of the Nebraska Administrative Code.
27. **Constitutional Law: Hearsay.** Only testimonial statements cause the declarant to be a witness within the meaning of the Confrontation Clause.
28. **Rules of Evidence.** Unless the regularly conducted activity of a business is the production of evidence for use at trial, business records are not testimonial.
29. **Constitutional Law: Hearsay: Blood, Breath, and Urine Tests.** Neither original simulator solution certifications relating to maintenance of breath testing devices nor amended certifications are testimonial for purposes of the Confrontation Clause, because the simulator solution certifications are prepared in a routine manner without regard to any particular defendant.
30. **Sentences: Appeal and Error.** Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.
31. ____: ____. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
32. **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 evidence.
33. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.
34. ____. 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.

35. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
36. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
37. **Sentences.** It is permissible for a sentencing court to consider the information that a defendant has been charged with but not yet tried for allegedly illegal acts committed after the offense for which the defendant is being sentenced.
38. **Drunk Driving.** Whether or not there are passengers in a vehicle, driving under the influence presents a serious threat to public safety.
39. **Sentences: Appeal and Error.** It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.

Appeal from the District Court for Lancaster County, Andrew R. Jacobsen, Judge, on appeal thereto from the County Court for Lancaster County, Thomas E. Zimmerman, Judge. Judgment of District Court affirmed.

Joe Nigro, Lancaster County Public Defender, and Sarah J. Safarik, for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The defendant appeals his conviction and sentence for driving under the influence, which were affirmed on intermediate appeal to the district court. The defendant argues that the

county court should have granted his motions to suppress challenging his stop for lack of reasonable suspicion, his arrest for lack of probable cause, and the results of the test of his breath alcohol content because the machine used was not at the time of its calibration accompanied by a certificate of analysis of the wet bath solutions containing the name of the person who actually tested the solutions as required by the rules and regulations of Nebraska's Department of Health and Human Services. Amended certificates of analysis were later obtained, which listed the correct name of the person who tested the solutions. The defendant also asserts that the evidence was insufficient to support his conviction and that his sentence was excessive.

BACKGROUND

Lorenzo Montoya was charged in the county court for Lancaster County with one count of operating a motor vehicle while under the influence, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010), by operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or of any drug or when he had "a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath," on or about March 12, 2017. Montoya was also charged with having one or more prior convictions under Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2018), having committed one prior offense in November 2008 and another in April 2008.

Stop and Arrest

At trial, Trooper Michael Thorson of the Nebraska State Patrol testified that he first observed Montoya's vehicle on March 12, 2017, at approximately 1:50 a.m., traveling in front of him going the same direction. Montoya's vehicle appeared to be traveling faster than the 35-mile-per-hour speed limit. Thorson also observed the vehicle cross over the center line. According to Thorson, the road was curved, but the weather and road conditions were normal.

Thorson waited until the vehicle was at a good location for radar detection and used his radar to detect the vehicle's speed. Thorson testified that he is trained at estimating speeds and is certified in the operation of radar devices. Thorson testified that, as required, he had checked his radar at the beginning of his shift on March 12, 2017, with tuning forks to ensure it was working properly. The radar displayed that the vehicle was traveling at 50 miles per hour.

Thorson initiated a traffic stop. Montoya was the driver of the vehicle. There were passengers in the front passenger seat and in the back. When Thorson approached the stopped vehicle, he immediately detected a distinct odor of alcoholic beverage. He noticed that Montoya's eyes were bloodshot and glossy, which Thorson explained was "typical for someone who's been drinking."

Thorson asked Montoya to sit in the passenger seat of the police cruiser, where Thorson administered a horizontal gaze nystagmus test. Thorson testified that it is his usual practice to conduct this test inside his police cruiser in order to eliminate outside distractions such as lights. Thorson described that he and Montoya faced each other during the test. Thorson testified that Montoya demonstrated six out of six of the possible clues the test looks for. According to Thorson, observation of four out of the six impairment clues indicates a high probability that the individual "is under the influence of alcohol at a .10 or above." Observing more clues indicates that the individual has an even higher breath alcohol concentration.

Thorson also conducted the walk-and-turn test on Montoya. Thorson testified that Montoya exhibited two out of two of the standardized clues for intoxication during the instructional phase of the test and five out of eight of the clues during the walking phase of the test. According to Thorson, demonstrating only two out of these eight clues is considered failing the test.

After conducting the horizontal gaze nystagmus and the walk-and-turn tests, Thorson asked Montoya if he wished to participate in the one-legged stand test. Montoya declined.

Montoya had initially reported to Thorson during the stop that he had consumed only one "tall boy." Montoya later reported during the stop that, between 11:30 p.m. and 1:45 a.m., he had consumed three "tall boys," each containing 24 to 32 ounces of beer.

Thorson arrested Montoya and took him to a nearby facility where Montoya's breath alcohol content could be tested by a DataMaster machine. The DataMaster tests a sample of a person's breath with an infrared detector to determine a person's breath alcohol content. The test was conducted approximately 1 hour after Montoya's last reported drink. Thorson followed the appropriate checklist to ensure proper operation of the test. The test showed that Montoya had a concentration of .134 of a gram of alcohol per 210 liters of breath.

Thorson testified that he is trained in driving under the influence investigation and certified in performing a DataMaster test. He has 12 years of experience in which he has conducted approximately 3,000 driving under the influence investigations. Thorson opined that Montoya was under the influence of alcohol when he operated his motor vehicle on March 12, 2017.

DataMaster

Officer Grant Powell testified at trial that he is the DataMaster maintenance supervisor for Lancaster County. He conducted the inspections and calibration check of the DataMaster that tested Montoya's breath sample.

The purpose of calibration verification is to ensure that the DataMaster machine is accurately reading the alcohol content of breath samples. Rules and regulations of the Department of Health and Human Services, which appear in title 177 of the Nebraska Administrative Code, require that calibration must occur within 40 days prior to the subject sample. Powell described that the process utilized by Lancaster County law enforcement and approved under title 177 involves two tests with wet bath water and alcohol mixtures, one containing a target value of .080 and the other of .150. The solutions produce

a vapor at the target values when heated to the approximate temperature of exhaled breath.

The wet bath simulator solutions used by Lancaster County law enforcement are provided by a company in North Carolina, RepCo Marketing (RepCo). When shipped, the simulator solutions are accompanied by certificates of analysis which contain information required by the regulations, including the name of the person who prepared, tested, and supplied the solution.

Powell conducted an inspection of the DataMaster subsequently used to test Montoya's breath alcohol content within the required 40-day period. The digital display, operational lights, operational condition, and printer all passed their required testing. Powell testified that the DataMaster machine used to test Montoya's breath sample was calibrated within the required 40-day period and that it passed both the internal check and the wet bath solution check. Powell signed a certification so reflecting.

Powell elaborated that the DataMaster in question was calibrated using simulator solutions from lots 16801 and 16104, which were accompanied by certificates of analysis from RepCo certifying that the solutions were accurate for their target values. The certificates of analysis originally accompanying the simulator solutions stated that a RepCo employee, Alma Palmer, had prepared, tested, and supplied the simulator solutions contained in those lots. On April 19, 2018, Powell became aware that the person who had tested the solutions in lots 16801 and 16104 was not the person whose name appeared on the certificates of analysis. On May 7, RepCo sent amended certificates of analysis for those lots stating that a RepCo employee, Colby Hale, not Palmer, was the person who had prepared, tested, and supplied the simulator solutions. The amended certificates were created to put the person's name on them who had actually tested those solutions. Nothing else in the amended certificates was different from the original certificates of analysis.

Powell testified that he had no concerns about the accuracy of the target values for the simulator solutions in lots 16801 and 16104 or about whether the solutions were working correctly when he conducted the relevant calibration of the DataMaster used to conduct the test on Montoya's breath sample. Powell noted that the solutions were tested not just at RepCo, but also by a separate company. Further, the solutions were run through four different DataMaster machines, each with their own unique internal reference standards, and the solutions did not test outside of the 5-percent margin of error on any of the four machines.

Powell noted that the "test card" for Montoya's breath sample showed a normal breath flow rate, a successful blank test and internal standard check, two analyses of the breath sample without any noted errors, and then another successful blank test. Powell testified that in his professional opinion the DataMaster utilized to test Montoya's breath alcohol content was in proper working order on the date of the test, March 12, 2017.

Motion to Suppress Evidence Obtained as Result of Stop

Before trial, on October 31, 2017, Montoya had moved to suppress all fruits of the stop of his vehicle that was allegedly without reasonable suspicion or probable cause, in violation of the 4th and 14th Amendments to the U.S. Constitution, article 1, section 7, of the Nebraska Constitution; and Nebraska statutes.

Thorson's testimony at the pretrial hearing on the motion largely mirrored that given at trial. He testified in more detail regarding his training in the operation of the radar and how the radar in his police cruiser works. He described the annual, more sophisticated calibration test of his radar.

Thorson testified at the pretrial hearing that Montoya's vehicle was 300 to 500 feet ahead of him when he first saw it. Thorson was traveling the speed limit and saw the vehicle getting further and further away from him. There were no

other vehicles in the area. Thorson testified that it was his usual practice to visualize the speed of a vehicle before taking a Doppler reading and to put that in his report. Thorson noted that "[f]or whatever reason," he did not include his visual estimation of Montoya's speed in his report, and that therefore, "I'm not going to sit up here and speculate as to what my visual estimation was at the time." Thorson testified that a "good Doppler tone" is a consistent high-pitched noise, which indicates that there are no outside influences such as obstacles or bad weather interfering with the device's readings. There was a good Doppler tone when he took the radar reading of Montoya's vehicle.

The court overruled the pretrial motion to suppress. At the beginning of trial, Montoya asked for a standing objection based on an alleged lack of reasonable suspicion for the stop, which the court granted. Also, during Thorson's testimony at trial, Montoya renewed his objection to any admission of evidence derived from the stop. The trial court overruled the renewed objections.

Motion to Suppress Evidence Obtained as Result of Arrest

Montoya had also moved before trial to suppress all evidence resulting from his warrantless arrest, because law enforcement lacked probable cause and, therefore, the arrest violated Montoya's rights under the 4th and 14th Amendments to the U.S. Constitution; article 1, § 7, of the Nebraska Constitution; and Nebraska statutes.

At the pretrial hearing on the motion, Thorson did not dispute defense counsel's assertion that the National Highway Traffic Safety Administration training manual specifies that the horizontal gaze nystagmus test shall be conducted while the subject is standing. Thorson testified, however, that during his training course he was told it would not negatively impact the validity of the test if the subject was seated rather than standing.

Thorson further testified at the pretrial hearing that after Montoya failed the horizontal gaze nystagmus test and the walk-and-turn test, he had Montoya sit in his vehicle for a 15-minute observation period before administering a preliminary breath test. Thorson checked Montoya's mouth both at the beginning and at the conclusion of the observation period. At the conclusion of the observation period, Thorson asked Montoya if he had regurgitated any stomach fluid, belched, eaten anything, or put anything into his mouth while Thorson was not looking. Montoya responded that he had burped. Thorson asked Montoya if he had regurgitated "any type of stomach fluid whatsoever" when he burped, and Montoya answered that he had not. Thorson then administered the preliminary breach test, which showed a breath alcohol content of .176.

Thorson explained that it is not part of the mandatory protocol for the observation period to ask whether the subject has regurgitated stomach fluid or belched. Thorson explained that it was his understanding based on consultations with others in law enforcement that burping without regurgitating stomach fluid does not affect the test. Thorson agreed with defense counsel, however, that it could impact the test if the subject burped up something that was not solid like vomit or regurgitation, and which contained alcohol. Thorson testified that if the subject in any way indicates that something may have come up out of the subject's stomach, then he restarts the observation time.

Defense counsel argued that the results of the horizontal gaze nystagmus test could not support probable cause because Montoya was not standing during the test. Further, recorded conversation in the video, wherein Thorson asked Montoya to "[t]ry to straighten your head out," indicated there were issues with Montoya's being positioned correctly for the test. Defense counsel also argued that the preliminary breath test could not create probable cause because Montoya had burped. Though Montoya had indicated upon Thorson's questioning that he had

not "regurgitated in his mouth," Montoya had elaborated that he would have let it out and not swallowed it, had he done so. According to defense counsel, this exchange did not eliminate the possibility that something had come up into Montoya's mouth that could have impacted the test. According to defense counsel, without the results of the preliminary breath test and the horizontal gaze nystagmus test, the remaining indicia of impairment observed by Thorson would be insufficient to establish probable cause.

The court overruled the pretrial motion to suppress. At trial, Montoya did not renew the motion to suppress the fruits of the arrest for an alleged lack of probable cause.

Motion to Suppress Datamaster Results for Lack of Foundation

In a separate motion, Montoya had also moved before trial to suppress the results of the DataMaster breath test for the reason that the test was administered without proper compliance with Neb. Rev. Stat. §§ 27-104 and 29-822 (Reissue 2016) and 60-6,201 (Reissue 2010), as well as title 177. The pretrial motion specifically challenged the DataMaster results on the ground that the 40-day check of the DataMaster was conducted without valid certificates of analysis for either lot 16801 or lot 16104, because the certificates of analysis falsely listed Palmer as the person who tested the solutions. The evidence presented at the pretrial hearing was similar to that at trial. The court overruled the motion.

At the beginning of trial, Montoya asked for a standing objection based on the failure of the certificates of analysis to comply with title 177, which was granted. Montoya renewed his objection at trial during the admission of the results of Montoya's breath test, on the grounds that (1) the DataMaster test was out of compliance with title 177, (2) the amended certificates contained inadmissible hearsay and were not business records because they were not created near the time of the event, and (3) the failure to have Hale available for

cross-examination violated the Confrontation Clause. The court again overruled the motion.

Verdict and Sentence

Montoya was found guilty. At the sentencing hearing, the court found that Montoya had two prior convictions of driving under the influence, making this his third offense. The State noted at sentencing that Montoya had been arrested twice since March 12, 2017, the date of the underlying offense; once for driving under the influence and the other time for driving during revocation and false reporting. Defense counsel brought to the court's attention the fact that Montoya had recently received a diagnosis of "alcohol use disorder" and that he had an upcoming job interview. Defense counsel also pointed out that Montoya had not yet been convicted of the charged crimes relating to the arrests occurring after March 12.

The trial court noted that it was giving "consideration" to the charges Montoya was currently facing, "which certainly you haven't been convicted of." The court sentenced Montoya to a jail term of 180 days, a fine of $1,000, and a 15-year license revocation with the ability to apply for an interlock device permit.

Appeal to District Court

Montoya appealed to the district court, assigning that the county court erred in overruling his three motions to suppress, in finding the evidence sufficient to support the jury's verdict, and by imposing an excessive sentence. The district court affirmed the conviction and sentence. Montoya appealed to the Nebraska Court of Appeals, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Montoya assigns that the district court erred by (1) affirming the county court's order that denied his motion to suppress fruits of the stop, (2) affirming the county court's order that

denied his motion to suppress fruits of his arrest, (3) affirming the county court's order that denied his motion to suppress the DataMaster results for lack of foundation, (4) finding sufficient evidence to support Montoya's conviction, and (5) finding that Montoya's sentence was not excessive.

STANDARD OF REVIEW

[1] 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.[1]

[2] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[2]

[3] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[3]

[4] 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 discretion a factor in determining admissibility.[4]

[5] We review for abuse of discretion a trial court's evidentiary rulings on the sufficiency of a party's foundation for admitting evidence.[5]

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

[2] *Id*.

[3] *State v. Hartzell*, 304 Neb. 82, 933 N.W.2d 441 (2019).

[4] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[5] *Id*.

[6] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.[6]

[7] 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.[7]

[8] In reviewing a criminal conviction for 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.[8] 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.[9]

ANALYSIS

Montoya asserts that the district court erred by affirming the county court's orders denying his motions to suppress the fruits of the stop, to suppress the fruits of the arrest, and to suppress the DataMaster test results for lack of foundation. He also asserts that there was insufficient evidence to support his conviction and that his sentence was excessive. We disagree with Montoya's arguments and affirm the judgment of the district court.

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[6] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[7] *State v. Smith*, 302 Neb. 154, 922 N.W.2d 444 (2019).

[8] *State v. McCurdy*, 301 Neb. 343, 918 N.W.2d 292 (2018).

[9] *Id.*

Motions to Suppress Under Fourth Amendment

[9] Montoya's motions to suppress the fruits of the stop and to suppress the fruits of the arrest were brought under the Fourth Amendment. Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[10] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[11]

There are three tiers of police encounters under Nebraska law.[12] The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through non-coercive questioning.[13] This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection.[14] Only the second and third tiers of police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[15]

[10] The second category, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*,[16] is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[17] This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to

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[10] *State v. Hartzell, supra* note 3.

[11] *Id.*

[12] *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[17] *State v. Schriner, supra* note 12.

give rise to reasonable suspicion that a person has committed or is committing a crime.[18]

[11] The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention.[19] The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.[20]

The stop of Montoya's vehicle after the radar detected he was speeding was a second-tier encounter. Montoya argues that the evidence was insufficient to support reasonable suspicion for the stop because Thorson did not memorialize in his police report his visual estimation of Montoya's traveling speed and because his radar gun could, in theory, have malfunctioned. We find no merit to this argument.

[12-14] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.[21] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.[22] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[23]

[15] The witnessing of a driving violation, however minor, is sufficient to support a stop.[24] Although we have held that the accuracy of the radar equipment must be demonstrated in order to support a conviction for speeding—if the evidence was based

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017).

[22] *Id.*

[23] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[24] See *State v. Barbeau*, 301 Neb. 293, 917 N.W.2d 913 (2018).

on the radar readings[25]—we have never held that a police report containing a preradar visual estimation of speed is necessary to demonstrate such accuracy. Rather, reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.[26]

[16,17] More to the point, reasonable proof of the accuracy of the radar equipment indicating to the law enforcement officer that the defendant was speeding need not be demonstrated in order to support reasonable suspicion for a stop of the vehicle for speeding.[27] The appropriate inquiry for an investigatory stop for speeding is whether a reasonable police officer had a minimal level of objective justification for the belief that speeding had occurred.

Thorson testified that he had checked his police cruiser's radar device at the beginning of his shift to ensure it was working properly, he waited until the best moment to take the radar reading, there was a good Doppler tone, and the radar read that Montoya was driving 50 miles per hour in a 35-mile-per-hour zone. This provided ample circumstances demonstrating that the stop was based on more than an inchoate and unparticularized hunch.

We conclude, like the county court and the district court on intermediate appeal, that the radar reading gave Thorson reasonable suspicion to stop Montoya's vehicle for speeding. We find it unnecessary to reach the question of whether Thorson's observation of the vehicle crossing the centerline also supported reasonable suspicion for the stop. And Montoya does not challenge the continuation of the second-tier detention based on Thorson's observations that led him to administer the field sobriety tests. The county court did not err in overruling Montoya's motion to suppress the fruits of the stop, and the district court did not err in affirming that ruling.

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[25] See *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969).

[26] *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988).

[27] See *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001).

Montoya also asserts on appeal that the fruits of the third-tier encounter, the arrest, should have been suppressed because Thorson lacked probable cause. Montoya argues that Thorson lacked probable cause to arrest him for driving under the influence because Montoya was seated while Thorson performed the horizontal gaze nystagmus, there was no video of Thorson's administering the horizontal gaze nystagmus test to confirm it was performed correctly, and Thorson did not know if Montoya had regurgitated anything containing alcohol during the observation period for the preliminary breath test.

[18] Montoya did not preserve this error for appellate review. A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.[28]

Foundation for DataMaster Results and Confrontation Clause

Montoya next argues that the county court should have granted his motion to suppress the DataMaster test results, because the certificates of analysis accompanying the calibration solutions originally did not contain the name of the person who actually tested them. Montoya argues that the test results were thus supported by insufficient foundation because there is no authority under title 177 for amended certificates and the amended certificates did not "accompany" the solutions in strict compliance with title 177.[29] He also argues that the admission of the amended certificates violated the Confrontation Clause because he had no opportunity to confront Hale.

[19] The four foundational elements which the State must establish as foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the

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[28] *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019).

[29] Brief for appellant at 30.

testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied.[30] Reasonable proof is all that is required to meet the foundational requirements.[31]

[20] Section 60-6,201(3) provides that "[t]o be considered valid," breath tests "shall be performed according to methods approved by the Department of Health and Human Services." The rules and regulations of the Department of Health and Human Services relating to the analysis for the determination of alcohol content in blood or breath are contained in title 177, chapter 1, of the Nebraska Administrative Code. We have held with regard to the admission of breath sample test results where the records of the maintenance of a machine are relied on to prove that the machine was properly maintained, the records admitted at trial must show by satisfactory evidence that the inspections complied with all requirements of title 177.[32]

[21-25] The construction of the regulations is a matter of law in connection with which an appellate court has an obligation to reach an independent determination regardless of the ruling of the court below.[33] For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.[34] An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.[35] A collection of statutes pertaining to a single subject matter are in pari materia and should be

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[30] *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017).

[31] See *State v. Kudlacek, supra* note 26.

[32] *State v. Bullock*, 223 Neb. 182, 388 N.W.2d 505 (1986).

[33] See *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

[34] *State v. McIntyre*, 290 Neb. 1021, 863 N.W.2d 471 (2015).

[35] *Shelter Mut. Ins. Co. v. Freudenburg*, 304 Neb. 1015, 938 N.W.2d 92 (2020).

conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[36] It is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects a statute's purpose.[37]

The DataMaster is an approved breath testing device[38] and, under the regulations, must be calibrated by the maintenance officer every 40 days and within 40 days prior to an analysis.[39] Section 008 encompasses the "List of Approved Methods, Breath Testing Instruments, Calibration Devices, and Internal Reference Standards." Before placement into service at a testing site, the "internal quartz standard" of the DataMaster shall have the calibration checked with an alcohol wet bath simulator solution or dry gas standard.[40] The regulations outline how testing device calibration and calibration verification shall be performed.[41] The regulations further specify that the wet bath simulator solution "must be accompanied by a certificate of analysis" and that the certificate of analysis "must contain" certain information, including the "[n]ame of the person who tested the solution."[42]

In *State v. Krannawitter*,[43] we held in the context of a motion for new trial that the discovery that the wrong name had been listed in the original calibration certificates did not mean the DataMaster test results would probably have been inadmissible. We explained that the discovery of the name error was

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[36] *Id.*

[37] *Id.*

[38] See 177 Neb. Admin. Code, ch. 1, § 008 (2016).

[39] See 177 Neb. Admin. Code, ch. 1, §§ 009 and 010 (2016).

[40] See 177 Neb. Admin. Code, ch. 1, § 008.03A (2016).

[41] See 177 Neb. Admin. Code, ch. 1, § 008.04 (2016).

[42] See 177 Neb. Admin. Code, ch. 1, § 008.04A (2016).

[43] *State v. Krannawitter, ante* p. 66, 939 N.W.2d 335 (2020).

accompanied by amended calibration certificates containing the correct name, which we held were independent foundational evidence supporting the admission of the DataMaster test results. We noted that whether there is sufficient foundation is a question for the trial court, and the trial court had found that the foundational elements were met by the amended certificates.

The trial court likewise found here that the foundational elements for the admission of Montoya's breath test results had been met, and we find no error in its judgment. In considering whether the trial court properly overruled a renewed objection at trial to evidence on the ground of lack of foundation, we consider the evidence submitted at trial as well as the evidence submitted at the pretrial hearing on the objection.[44] Though the name listed for the person who tested the solutions was originally incorrect, the certificates of analysis listed the correct name of the person who tested them by the time of the admission of the test results at trial.

[26] In this context of a clerical error, we disagree with Montoya's suggestion that to "accompan[y]" under § 008.04A is limited to the moment the solution is shipped to the relevant law enforcement agency. Although Montoya is correct that there is no reference to "amended certificates" in title 177, it does not follow that they are impermissible. The solutions utilized in calibrating the DataMaster within 40 days prior to the test of Montoya's breath sample have at all times been accompanied by certificates of analysis containing all the categories of information required under title 177. There is nothing in title 177 suggesting that clerical errors in certificates of analysis cannot be corrected. The inflexibility Montoya proposes could have the absurd consequence that a DataMaster test could be deemed unreliable despite undisputed evidence at the time of trial that the records of maintenance of the machine complied with all regulatory requirements. We hold that amended certificates of analysis

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[44] See *State v. Piper, supra* note 23.

to correct clerical errors provide satisfactory evidence that the inspections of an approved breath testing device complied with the requirements of title 177.

[27] We also disagree with Montoya's suggestion that the amended certificates were inadmissible to provide foundation for the DataMaster test results because they violated the Confrontation Clause. The Confrontation Clause provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[45] Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."[46] "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[47] If the statements are nontestimonial, then no further Confrontation Clause analysis is required.[48]

[28,29] In *Melendez-Diaz v. Massachusetts*,[49] the U.S. Supreme Court said that unless the regularly conducted activity of a business is the production of evidence for use at trial, business records are not testimonial. We have accordingly held that neither original simulator solution certifications[50] nor amended certifications[51] are testimonial for purposes of the Confrontation Clause. In either case, the simulator solution certifications are prepared in a routine manner without regard to any particular defendant.[52] In *Krannawitter*, we explained that there was no

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[45] U.S. Const. amend. VI. Accord *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

[46] *Davis v. Washington, supra* note 45, 547 U.S. at 821.

[47] *Id.*

[48] *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

[49] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[50] See *State v. Fischer, supra* note 48.

[51] See *State v. Krannawitter, supra* note 43.

[52] See *State v. Fischer, supra* note 48.

indication either on the face of the amended certificates or in the testimony at trial that the amended certificates at issue in that case were prepared for a particular criminal proceeding.[53] That is also true here.

The amended certificates provided satisfactory evidence that the inspections of the DataMaster complied with the requirements of title 177, and their admission did not violate the Confrontation Clause. The trial court did not err in overruling Montoya's motion to suppress the DataMaster test results for lack of foundation, and the district court did not err in affirming the order of the county court.

Sufficiency of Evidence

Montoya's challenge to the sufficiency of the evidence depends upon the success of his argument that the DataMaster test results were inadmissible. Having concluded that the DataMaster test results demonstrating .134 of a gram of alcohol per 210 liters of Montoya's breath were admissible, we find the evidence sufficient to support Montoya's conviction for driving under the influence.

Excessive Sentence Challenge

Lastly, Montoya argues that his sentence to a jail term of 180 days was excessive. Montoya's sentence was within the statutory limits. The statutory penalty range was a mandatory minimum of 90 days' imprisonment and a $1,000 fine and a maximum of 1 year's imprisonment and a $1,000 fine.[54] It is also required that a person convicted of driving under the influence who has had two prior convictions shall, as part of the judgment of conviction, have his or her operator's license revoked for a period of 15 years.[55]

[30-32] Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the

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[53] *State v. Krannawitter, supra* note 43.

[54] See Neb. Rev. Stat. § 28-106(1) (Reissue 2016).

[55] Neb. Rev. Stat. § 60-6,197.03(4) (Cum. Supp. 2018).

statutory limits.[56] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[57] 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 evidence.[58]

[33,34] In determining a sentence to be imposed, relevant factors customarily considered and applied are 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.[59] 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.[60]

[35-37] Montoya asserts that the county court improperly considered the fact that he committed acts after March 12, 2017, leading to charges of crimes related to driving under the influence, but on which he has not been tried. The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.[61] A sentencing court has broad discretion as to the source and type of evidence and

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[56] *State v. Iddings*, 304 Neb. 759, 936 N.W.2d 747 (2020).

[57] *State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (2019).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[62] It is permissible for a sentencing court to consider the information that a defendant has been charged with but not yet tried for allegedly illegal acts committed after the offense for which the defendant is being sentenced.[63] And the court's statements from the bench indicate it gave appropriate weight to the fact that Montoya had not actually been convicted of the charged crimes.

Montoya also argues that his sentence was excessive in light of his efforts at obtaining employment and his recent diagnosis with an "alcohol use disorder" as a result of his initiative to receive treatment. Montoya asserts, further, that the court did not adequately take into account that no one was injured during the commission of his crime, no children were in the vehicle, and he was cooperative with law enforcement after he was stopped.

[38] Causing bodily injury while driving under the influence is a separate crime with a different sentencing range;[64] the sentencing range for the crime Montoya was charged with already takes into account that no one was physically harmed. Although Montoya did not have children in the vehicle, there were two adult passengers placed at risk. And whether or not there are passengers in a vehicle, driving under the influence presents a serious threat to public safety.[65]

[39] Montoya's cooperation and his efforts toward employment and treatment were weighed by the sentencing court against the gravity of this third-time offense endangering public safety. It is not the function of an appellate court to conduct a

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[62] *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

[63] See, *State v. Becker, supra* note 57; *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[64] See Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2018).

[65] See *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

de novo review of the record to determine whether a sentence is appropriate.[66]

Like the district court, we find no abuse of discretion in the sentence imposed.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court, which found no error in the challenged rulings by the trial court.

Affirmed.

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[66] *State v. Gibson*, 302 Neb. 833, 925 N.W.2d 678 (2019).

Nebraska Supreme Court
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Great Northern Insurance Company, an Indiana corporation, appellee, v. Transit Authority of the City of Omaha, a governmental subdivision of the State of Nebraska individually and doing business as Metro Area Transit, appellant, and Jessica Johnson, an individual, appellee.

941 N.W.2d 497

Filed April 17, 2020. No. S-19-913.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes. But where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal.
3. ____: ____. Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
4. **Statutes: Words and Phrases.** A substantive amendment is one that creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised.

Petition for further review from the Court of Appeals, on appeal thereto from the District Court for Douglas County, Thomas A. Otepka, Judge. Judgment of Court of Appeals reversed and remanded for further proceedings.

Robert M. Schartz and Timothy Mulliner, of Abrahams, Kaslow & Cassman, L.L.P., for appellant.

Matthew D. Hammes, of Locher, Pavelka, Dostal, Braddy & Hammes, and Cheri MacArthur, of Cozen O'Connor, for appellee Great Northern Insurance Company.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The Transit Authority of the City of Omaha, doing business as Metro Area Transit (Metro), moved for summary judgment based on sovereign immunity in a suit brought by Great Northern Insurance Company (Great Northern). The district court denied this motion, and Metro appealed. The Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction, explaining that the denial of a motion for summary judgment is interlocutory and not a final order. However, after the order denying summary judgment was entered but before the 30-day period to file a timely appeal expired and before Metro filed its notice of appeal, Neb. Rev. Stat. § 25-1902 (Reissue 2016) was amended to add denials of summary judgment based on a claim of sovereign immunity to the definition of a final order.[1] Metro petitioned for further review, and we granted the petition.

BACKGROUND

The underlying claim, not at issue here, is a subrogation action in which Great Northern is seeking compensation from Metro under the Political Subdivisions Tort Claims Act.[2] In the proceedings below, Metro challenged Great Northern's compliance with the notice requirements of the Political Subdivisions Tort Claims Act.

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[1] See 2019 Neb. Laws, L.B. 179, § 1.

[2] Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012).

Metro moved for summary judgment based on sovereign immunity. Metro claimed that Great Northern did not properly comply with the Political Subdivisions Tort Claims Act and that the failure to comply with the notice requirements meant that Metro never waived sovereign immunity. On August 23, 2019, the district court denied Metro's motion on the ground that Metro was estopped from asserting immunity after Metro's outside counsel responded to Great Northern's notice. On September 3, Metro moved to reconsider. The motion was denied, and Metro filed an appeal on September 19. Metro's notice of appeal stated that it was appealing the original order denying summary judgment. On October 11, the Court of Appeals summarily dismissed the appeal, explaining that a denial of a motion for summary judgment is interlocutory and not a final order pursuant to § 25-1902.

However, § 25-1902 was amended effective September 1, 2019.[3] This change added language specifying that an order denying summary judgment when the motion is based on sovereign immunity is a final order. The relevant sections were amended to read:

> (1) The following are final orders which may be vacated, modified, or reversed:
>
> . . . .
>
> (d) An order denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity or the immunity of a government official.
>
> (2) An order under subdivision (1)(d) of this section may be appealed pursuant to section 25-1912 within thirty days after the entry of such order or within thirty days after the entry of judgment.[4]

Because the change to § 25-1902 took effect before the appeal was filed, but after the order itself was issued, the question presented is which version of the final order statute should apply.

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[3] Neb. Rev. Stat. § 25-1902 (Supp. 2019).

[4] See *id.*

ASSIGNMENT OF ERROR

Metro argues that the Court of Appeals erred by failing to recognize that the denial of Metro's motion for summary judgment asserting sovereign immunity was a final order under § 25-1902 as of September 1, 2019.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[5]

ANALYSIS

The sole issue in this case is whether the Court of Appeals had jurisdiction when the notice of appeal was filed on September 19, 2019. We find that the Court of Appeals did have jurisdiction when the notice of appeal was filed because the amended version of § 25-1902 had taken effect.

In order to vest the court with appellate jurisdiction, the party seeking the appeal must comply with several statutory requirements. Section 25-1902 provides the definition of what is a final order, and Neb. Rev. Stat § 25-1912 (Cum. Supp. 2018) provides the methodology for how an appeal is perfected. In interpreting the requirements of § 25-1912, we have said that "[s]ection 25-1912 sets forth the only method by which a party may invoke the jurisdiction of an appellate court . . . ."[6] There are three steps required to invest the court with jurisdiction: (1) there must be a judgment or final order entered by the court from which the appeal is taken,[7] (2) a party must timely file a notice of appeal,[8] and (3) the appealing

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[5] *Green v. Seiffert*, 304 Neb. 212, 933 N.W.2d 590 (2019).

[6] *State v. Schmailzl*, 248 Neb. 314, 316, 534 N.W.2d 743, 745 (1995).

[7] See, § 25-1902 (Supp. 2019); *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

[8] See, § 25-1912; *Green v. Seiffert, supra* note 5.

party must pay the docket fee to the clerk of the court or file in forma pauperis.[9]

[2,3] The order entered on August 23, 2019, did not meet the definition of a final order when entered. However, the amendment to § 25-1902 took effect before Metro's 30-day window to appeal had expired. It is a well-established principle that statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes.[10] But where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal.[11] Thus, procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.[12]

[4] We have explained that a substantive amendment is one that creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover.[13] A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised.[14]

At issue in the larger case is the substantive question of whether Metro waived sovereign immunity under the Political Subdivisions Tort Claims Act. The change to § 25-1902 does not affect the substance of that claim. Rather, it changes the procedure governing when Metro can request review. By making the denial of a claim of sovereign immunity a final order, the amendment allows a sovereign to file an interlocutory appeal within 30 days of the order instead of waiting until the

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[9] See § 25-1912.

[10] *Dragon v. Cheesecake Factory*, 300 Neb. 548, 915 N.W.2d 418 (2018).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

final judgment to seek review of the lower court's decision on sovereign immunity. We hold that the amendment to § 25-1902 which took effect September 1, 2019, was a procedural change that was binding upon its effective date.

Because Metro filed its notice of appeal after the effective date of the amendment to § 25-1902, the amendment governed whether that notice of appeal succeeded in divesting the lower court of jurisdiction and in bringing the matter of the lower court's ruling on sovereign immunity to the Court of Appeals. Subsection (2) of the amended version of § 25-1902 provides that any order that meets the definition under subsection (1)(d) may be appealed pursuant to § 25-1912. The order subject to Metro's notice of appeal meets that definition. Thus, the amended language of § 25-1902 allowed for Metro to file a notice of appeal based on the August 23, 2019, order.[15]

The amended change to § 25-1902 allows for the appeal from an order denying summary judgment based on a claim of sovereign immunity as long as the appealing party complied with the requirements of § 25-1912. Metro has otherwise complied with the requirements for perfecting an appeal under § 25-1912. As such, the Court of Appeals erred in denying the appeal for a lack of jurisdiction.

CONCLUSION

We find that the Court of Appeals had jurisdiction pursuant to § 25-1902 (Supp. 2019), which was effective September 1, 2019. We reverse the dismissal of the appeal by the Court of Appeals and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

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[15] See § 25-1902(2) (Supp. 2019).

Nebraska Supreme Court
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Mary A. Jones, appellant, v. Curtis L. Jones, appellee.

941 N.W.2d 501

Filed April 23, 2020. No. S-18-093.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Modification of Decree: Child Custody: Proof.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action.
4. ____: ____: ____. The showing required to modify custody is a two-step process: First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
5. **Modification of Decree: Words and Phrases.** A material change in circumstances is the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
6. **Modification of Decree: Child Custody.** If a change in custody is to be made, it should appear to the court that the material change in circumstances is more or less permanent or continuous and not merely transitory or temporary.
7. **Modification of Decree: Child Custody: Evidence: Appeal and Error.** Even when a finding of a material change in circumstances is

not expressly made by the trial court, an appellate court, in its de novo review, may make such a finding if the evidence supports it.

8. **Modification of Decree: Child Custody: Evidence: Time.** As a general rule, when determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the complaint to modify is considered most significant.
9. **Child Custody.** When determining the best interests of the child in the context of custody, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse. Other relevant considerations include stability in the child's routine, minimalization of contact and conflict between the parents, and the general nature and health of the individual child. No single factor is determinative, and different factors may weigh more heavily in the court's analysis, depending on the evidence presented in each case.
10. **Child Support.** All orders concerning child support, including modifications, should include the appropriate child support worksheets.
11. ____. Attaching a child support worksheet to the child support order allows the trial court to show the parties, and the appellate courts, that it has "done the math" required by the child support guidelines.
12. ____. The purpose of setting nominal support is to maintain information on the obligor in the child support system and, hopefully, encourage such person to understand the necessity, duty, and importance of supporting his or her children.
13. **Child Support: Rules of the Supreme Court.** The absence of a child support worksheet requires the parties and appellate courts to speculate about the trial court's conclusions and calculations in awarding support; therefore, even in very low income cases, courts awarding nominal support under Neb. Ct. R. § 4-209 (rev. 2020) should attach a child support worksheet, and the reason for any deviation from the minimum support amounts required by § 4-209 should be contained either in the court's decree or order or on worksheet 5.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann and Welch, Judges, on appeal thereto from the District Court for Lancaster County,

Andrew R. Jacobsen, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and remanded with directions.

David V. Chipman, of Monzón, Guerra & Associates, for appellant.

Mark J. Krieger and Terri M. Weeks, of Bowman & Krieger, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

In this appeal from an order modifying custody, the primary question is whether there was sufficient evidence of a material change in circumstances affecting the best interests of the minor child. The Nebraska Court of Appeals found sufficient evidence to support modifying legal custody, but not physical custody.[1] It also found the evidence did not support the need for a safety plan addressing parental substance use. On further review, we reverse only that portion of the Court of Appeals' opinion pertaining to the modification of physical custody. In all other respects, we affirm.

I. BACKGROUND

Mary A. Jones and Curtis L. Jones were married in 2003 and had one son, Kasey Jones, born in December 2004. Mary filed for divorce in 2005. The parties eventually entered into a property settlement and custody agreement that resolved all disputes. At the final hearing in 2006, the court approved the parties' property settlement and custody agreement in its entirety and entered a consent decree that awarded Mary legal and physical custody of Kasey, subject to Curtis' reasonable parenting time. The parties did not agree to a set parenting time

[1] *Jones v. Jones*, No. A-18-093, 2019 WL 446636 (Neb. App. Feb. 5, 2019) (selected for posting to court website).

schedule, and the original decree did not establish one. Curtis was ordered to pay monthly child support of $550.

1. Stipulated Modification of Custody

In 2011, Curtis filed a complaint to modify custody. He alleged there had been a material change in circumstances, in that Mary was no longer able to provide a stable and consistent environment for Kasey and the lifestyle in her home was no longer in Kasey's best interests. Eventually, Mary and Curtis entered into a written stipulation agreeing there had been "a material change in circumstances necessitating a change in the custody and support obligations" without elaborating on the nature of the changed circumstances. In November 2011, the court approved the parties' stipulation and entered a modified decree awarding them joint legal and physical custody pursuant to a week-on-week-off parenting schedule. Curtis' monthly child support obligation was reduced to $500. One year later, pursuant to another joint stipulation of the parties, Curtis' child support obligation was reduced to $257.

2. 2016 Complaint to Modify

Curtis filed the instant complaint to modify in April 2016, alleging there had been a material change in circumstances warranting a change in the joint custody arrangement. His complaint generally alleged that residing with Mary 50 percent of the time was no longer in Kasey's best interests because, since the last modification, Mary had failed to provide a stable and structured home for Kasey or properly care for his mental, physical, and educational well-being. Mary's answer denied these allegations and included a counterclaim seeking to increase Curtis' monthly child support payments.

3. Trial

In August 2017, the court held a 2-day trial on Curtis' complaint to modify custody and Mary's counterclaim to increase

child support. As pertinent to the issues before this court on further review, the following evidence was adduced.

(a) Parties' Employment

When the parties divorced in 2006, Mary was working at a law firm. She resigned that position in 2007 to return to school, and in 2011, she earned a degree in paralegal studies. In November 2011, when the stipulated order modifying custody was entered, Mary was working part time as a paralegal and office manager. In 2012, she began working as a paralegal for a different attorney, earning $18 an hour, and it was during that period that the parties stipulated to a reduction in Curtis' child support obligation. Mary continued working in that position until 2014, when the attorney was suspended.

For the next 3 years, Mary was basically unemployed, and the testimony at trial provided no clear explanation for why she was unable to obtain employment. In the months leading up to trial, Mary applied for approximately 25 different jobs, and in May 2017, she began working 10 hours per week as a caregiver, earning $9 per hour. Two weeks before trial, Mary started a second temporary job, working part time for an attorney, entering client data into a legal software program.

Curtis has worked as a drywaller for the past 25 years. He currently owns his own drywall business and has a steady income. Curtis remarried in 2014, and his current wife has worked for the same employer for the past 23 years. Curtis has a flexible work schedule that allows him to take time off work when necessary.

(b) Parties' Substance Use

Both Mary and Curtis have a history of substance use. Mary denied any current substance use, but she admitted using controlled substances in the past. Mary testified that in 2011, she was being routinely drug tested and someone from the Nebraska Department of Health and Human Services lived in her home "[t]wenty-four hours a day for one year" to make sure she "stayed on the straight and narrow." It was during

this time period that the parties agreed to change Mary's primary physical custody of Kasey, and move to a joint legal and physical custody arrangement with week-on-week-off parenting time.

Curtis also admitted to abusing alcohol and using controlled substances during the parties' marriage. He testified that he stopped consuming alcohol when Kasey was about 2 years old and stopped using controlled substances shortly thereafter.

At trial, there was no evidence that either party is currently abusing alcohol or controlled substances. Both parties submitted to court-ordered testing for illicit drugs and alcohol, and the tests were negative.

(c) Mary's Health

Mary testified that she has been diagnosed with "ADD/ADHD," bipolar disorder, and Lyme disease. She also suffers from chronic back pain. In addition to taking prescribed medication for these conditions, Mary is prescribed an antidepressant and regularly treats with a mental health practitioner. There was no evidence that any of Mary's health issues have directly impacted her ability to parent, nor did Mary testify that her health issues have interfered with her ability to obtain or keep stable employment.

(d) Parties' Housing

At the time of the stipulated modification in 2011, Mary lived in her own residence. At some point, her boyfriend moved in and helped pay the rent, but Mary admitted that he was not a good influence on Kasey. Her boyfriend used marijuana and was verbally, mentally, and physically abusive to Mary. Following an assault in 2014, Mary obtained a domestic abuse protection order against her boyfriend and he was removed from the residence.

In 2015, Mary was evicted from her residence. She lived with friends for a month or two after the eviction, then moved in with her adult daughter and lived there for another couple of

months. Mary then moved again, living in a friend's basement for about a month.

In the fall of 2015, Mary moved in with her adult son, Kash Wolff (Kash). She testified that because she had lost her job and lost her car, she "needed to rely on him for a while." Kash had a job and usually paid their rent and all of their monthly household expenses. Mary admitted that Kash had anger control issues and caused physical damage to their residence and to property within the residence, but Mary fixed what she could and did not believe Kasey noticed the damage. Mary described Kash as an alcoholic, admitted he used drugs, and testified that he frequently allowed his friends to live with them for weeks at a time. Mary admitted that some of Kash's friends were not a good influence on Kasey and that she asked them to leave, but she testified that it was "hard" since Kash was "trying to be nice and give them a place to stay."

Mary described one time when she discovered Kash's friend was storing stolen property, including a shotgun, in their garage. She called the police and reported the stolen property, and shortly thereafter, a bullet was shot into their residence and lodged in Mary's headboard. Initially, Mary testified that Kash's friend "shot at me because I turned him in," but later, she testified that "[i]t could have been somebody shooting a BB — or a gun back there at animals."

Mary lived with Kash for nearly 2 years, but about 2 months before the modification trial, they were evicted for nonpayment of rent. At the time of trial, Mary had moved back in with her adult daughter and her daughter's boyfriend and minor child. Mary described her daughter's home as a stable and structured environment, but admitted the living arrangement was temporary. It is undisputed that during Mary's parenting time, Kasey lived wherever, and with whomever, Mary was living.

At the time of the custody modification in 2011, Curtis was still living in the same residence where he and Mary had lived during their marriage. In 2014, Curtis remarried and built a

new home, where he currently lives with his wife, her two daughters, and Kasey.

(e) Child's Testimony

Kasey was 12 years old at the time of trial. He testified in chambers with his parents' counsel present. The district court assured Kasey that his testimony would not be shared with his parents, and the parents' attorneys were similarly admonished. We have considered Kasey's testimony as part of our de novo review, but we will not summarize it here other than to say it is clear that he loves both his parents and wants to spend time with both of them.

(f) Child's Health and Welfare

The evidence at trial was undisputed that Kasey is a healthy, well-adjusted teenager who is involved in appropriate activities, has meaningful friendships, and is doing well academically. He spends quality time with both his parents and has a strong and loving relationship with both. He also has a positive relationship with Curtis' new wife and her two daughters and with Mary's adult daughter and that daughter's child.

(g) Parental Communication

The evidence at trial showed that since their divorce, Mary and Curtis have generally been cordial with one another and able to communicate effectively about most parenting issues. Curtis testified they struggle with some joint decisions, and he recounted a time when Mary needed money and demanded that Curtis pay her nearly $1,000 before she would agree to have Kasey attend a different elementary school. Curtis also testified that he and Mary had difficulty agreeing on holiday parenting time, because it was not addressed in the 2011 parenting plan.

(h) Requested Relief

Curtis asked the court to award him primary legal and physical custody of Kasey, subject to Mary's parenting time on a "10/4" schedule during the school year and a week-on-week-off

schedule during the summer. Curtis believed Mary's housing situation had become chronically unstable and unsafe, and he felt it would be best if Kasey spent fewer overnights in that environment during the school year. Curtis asked that he be ordered to pay all of Kasey's expenses and that Mary not be required to pay any child support. Finally, Curtis asked that his existing child support obligation be terminated prospectively, but not retroactively.

Curtis submitted a proposed parenting plan reflecting this requested relief. His parenting plan also included a safety plan that prohibited Mary from consuming alcohol or narcotics during her parenting time, except as prescribed by a physician. The safety plan also provided that if Curtis believed Mary was under the influence of alcohol or drugs during her parenting time, he could "suspend or terminate" her parenting time until her sobriety could be confirmed.

Mary asked the court to continue the joint custody arrangement and the equal parenting time schedule. She also asked that Curtis' child support obligation be increased to $1,437 per month, based on his increased earnings since the last child support modification.

4. District Court Order

(a) Factual Findings

The district court made express factual findings about changes in Mary's housing, employment, and finances since the custody modification in 2011. We summarize those findings below.

(i) Housing

The court found that since 2011, Mary had experienced difficulty maintaining a stable residence in which to raise Kasey. It found she had moved five times, been evicted multiple times, and was generally dependent on others to pay her rent and living expenses. She had lived with 13 different people since 2011, some of whom were physically violent and many of whom were not a good influence on Kasey. The court was

particularly troubled with the environment in which Mary lived for most of the 2-year period leading up to the modification trial:

> It is clear to the Court that [Mary] recognized that while living with Kash, having his friends stay for a week or two at a time in and out of the house was not a good situation for [K]asey, but because she had no other place to go, no employment, no other source of income, she was reliant on her 24-year-old son to provide her and [K]asey a roof over their head. Her objections to the people living there apparently were unsuccessful as the parade of people continued until they were eventually evicted. During this period of time, [Mary] testified that Kash was making bad decisions, was an alcoholic, was hanging out with bad people, making poor choices of friends and these were the very people that were residing with her and [K]asey . . . .

(ii) Employment

The court found that after the modification in 2011, Mary had difficulty maintaining stable employment. She had seven different employers during that time period, and for several of those years—from the summer of 2014 through May 30, 2017—she was almost continuously unemployed.

(iii) Finances

The court found that since 2011, Mary had incurred significant debt and had been sued multiple times by collection agencies, landlords, and businesses. It also found that because of her financial struggles, she had "left the financial care of the minor child to [Curtis] since the entry of the modification in November of 2011." The court found that a partial itemization of such expenses totaled more than $5,000, but that Curtis "ha[d] taken no action against [Mary] in an attempt to get her to pay her share of those expenses because he recognize[d] the precarious financial position that [she] has been in for the last several years."

(b) Modification Order

The court modified the parties' joint physical custody and gave Curtis physical custody, subject to Mary's parenting time on a 10/4 schedule during the school year and a week-on-week-off schedule during summer break. The court also established a specific holiday parenting time schedule. The court found it was unnecessary to modify the parties' joint legal custody, but it did give Curtis final say in the event the parties reached an impasse and were unable to make a joint decision. Finally, the court terminated Curtis' child support obligation and ordered Mary to pay nominal child support of $10 per month.

The court attached, and incorporated into its modification order, the proposed parenting plan submitted by Curtis. It expressly found the modified parenting plan was in Kasey's best interests except for the proposed changes to legal custody. The modification order, which was prepared by counsel, did not include an express finding that a material change in circumstances justified modification of Kasey's physical custody.

5. Court of Appeals

Mary appealed. As relevant to the issues on further review, she assigned it was error for the district court to (1) modify physical custody, (2) modify joint legal custody by giving Curtis final say in the event of an impasse, (3) include a safety plan in the modified parenting plan, and (4) deny Mary's counterclaim seeking an increase in child support.

In its de novo review, the Court of Appeals examined the record for evidence of a material change in circumstances affecting the best interests of the child since the 2011 custody modification. It found insufficient evidence to warrant modifying physical custody, but sufficient evidence to modify legal custody.

The Court of Appeals thus reversed the district court's order to the extent it modified Kasey's physical custody, affirmed the order to the extent it modified joint legal custody to give

Curtis final decisionmaking authority, eliminated the safety plan, and remanded the cause for further consideration of Mary's counterclaim seeking to increase Curtis' child support obligation.

We granted Curtis' petition for further review.

II. ASSIGNMENT OF ERROR

On further review, Curtis assigns only that the Court of Appeals erred in finding there was insufficient evidence of a material change in circumstances to support modifying physical custody.

III. STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion by the trial court.[2]

[2] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[3]

IV. ANALYSIS

1. Custody Modification

[3,4] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action.[4] We have described this showing as a two-step process: First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and

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[2] *VanSkiver v. VanSkiver*, 303 Neb. 664, 930 N.W.2d 569 (2019).

[3] *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019).

[4] *Whilde v. Whilde*, 298 Neb. 473, 904 N.W.2d 695 (2017); *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016).

affecting the best interests of the child.[5] Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.[6]

Here, neither parent claimed the other was unfit. Consequently, we focus our review on whether Curtis has shown a material change in circumstances occurring after the 2011 modification and affecting Kasey's best interests, and whether Curtis proved that changing the custody arrangement was in Kasey's best interests.

(a) Material Change in Circumstances

[5,6] We have long described a material change in circumstances as the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.[7] We have also explained that if a change in custody is to be made, it should appear to the court that the material change in circumstances is more or less permanent or continuous and not merely transitory or temporary.[8]

[7] We begin by noting, as did the Court of Appeals, that the district court made express factual findings concerning changes in Mary's employment and housing since the 2011 custody modification, but its order made no express finding that those changes were material and affected Kasey's best interests. The absence of this express finding is not dispositive, however, because we have recognized that even when a finding of a material change in circumstances is not expressly made by the trial court, an appellate court, in its de

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[5] *Id.*

[6] *Id.*

[7] *VanSkiver, supra* note 2; *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015); *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015); *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004); *Swenson v. Swenson*, 254 Neb. 242, 575 N.W.2d 612 (1998).

[8] *Hoschar v. Hoschar*, 220 Neb. 913, 374 N.W.2d 64 (1985), *disapproved on other grounds, Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989).

novo review, may make such a finding if the evidence supports it.[9]

Having reviewed the record de novo, we find ample evidence that Mary's continuous unemployment and housing instability combined to present a material change in circumstances after the 2011 modification that affected Kasey's best interests.

(i) Continuous Unemployment

The Court of Appeals concluded that Mary's unemployment after the 2011 modification did not amount to a material change in circumstances, reasoning that she experienced periods of unemployment before the 2011 modification too. It is true that Mary experienced periods of unemployment before 2011, but the evidence generally showed those periods were sporadic and included several years when Mary intentionally left the workforce to further her education. When the stipulated modification was entered in 2011, Mary had completed her degree in paralegal studies and was gainfully employed as a paralegal. She changed employers several times thereafter, but generally held a steady job in the legal field until 2014, when her employment situation changed significantly.

[8] From 2014 until shortly before trial in 2017, Mary was almost continuously unemployed and her only source of income was child support. This lengthy period of unemployment differed from the past, in that Mary was not unemployed because she was changing jobs or furthering her education. Mary did start working shortly before trial in this case, but the jobs were part time and temporary and did not suggest a commitment to returning to stable employment. And as a general rule, when determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the complaint to modify is considered most significant.[10]

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[9] *Parker, supra* note 8.

[10] See *Heistand, supra* note 7.

Despite Mary's history of sporadic and temporary unemployment before the custody modification in 2011, we agree with the district court that the continuous unemployment she experienced after 2014 amounted to a material change in circumstances. And it was a change in circumstances that negatively impacted her ability to provide safe and stable housing for Kasey, a concern we discuss next.

(ii) Housing

The Court of Appeals expressed concern over Mary's housing instability and the questionable character of some of the individuals with whom she resided after the 2011 modification. But it ultimately concluded this evidence did not support a material change in circumstances, reasoning there was no evidence that the frequent moves or the presence of questionable individuals in the home "had any actual negative impact on Kasey."[11] Our de novo review leads us to a different conclusion.

We find it significant that at the time of the stipulated custody modification in 2011, Mary lived in her own residence and appeared to be providing a safe and stable living environment for Kasey. Someone from the Nebraska Department of Health and Human Services was living with her around the clock to make sure she "stayed on the straight and narrow," and there was no evidence of crime or violence in the home. Since that time, Mary's housing situation has changed significantly.

She has been evicted twice for nonpayment of rent. Her chronic unemployment left her unable to afford safe and stable housing, and she became dependent on the generosity of family and friends for a place to live. Mary moved residences four times in 2015 alone, and since 2011, she has lived with approximately 13 different people. Mary admits some of the people with whom she lived were not a good influence on Kasey, and the evidence bears that out.

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[11] *Jones, supra* note 1 at *7.

For several years after the 2011 custody modification, Mary lived with a man who used illegal substances and who was verbally, mentally, and physically abusive to her. And from 2015 until a few months before trial in 2017, Mary lived with her adult son, who had a violent temper, was an alcoholic, used illegal drugs, and allowed his friends to live with them for weeks at a time. At the time of trial, Mary was living with her adult daughter, and while the environment in that home was considerably safer than Mary's prior residence, she admitted the arrangement was temporary. Mary was hopeful her circumstances would improve in the future, but she described no concrete plans for more permanent housing.

Mary's post-2011 living conditions were unstable and regularly exposed Kasey to living alongside people who were verbally and physically abusive to Mary, used illegal drugs, engaged in criminal activity, and had violent tempers. Mary did not believe that Kasey was affected by living in this environment, because he was still doing well in school, had positive relationships with his parents and peers, and regularly attended church with her. But we have rejected the suggestion that a parent must show that actual harm has befallen a child in order to establish that a modification of custody due to a material change in circumstances would be in the child's best interests.[12] And there is little doubt that if this unsafe and unstable living environment had existed and been brought to the attention of the court at the time of the 2011 custody modification, it would have persuaded the court to decree differently.

On this record, we find that Curtis met his burden of proving that Mary's continuous unemployment and chronic housing instability after the 2011 modification was a material change in circumstances that affected Kasey's best interests. We next consider whether the modified custody arrangement ordered by the district court was in Kasey's best interests.[13]

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[12] See *Schrag, supra* note 7.

[13] See *Hopkins, supra* note 4.

(b) Best Interests of Child

[9] When determining the best interests of the child in the context of custody, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse.[14] Other relevant considerations include stability in the child's routine, minimalization of contact and conflict between the parents, and the general nature and health of the individual child.[15] No single factor is determinative, and different factors may weigh more heavily in the court's analysis, depending on the evidence presented in each case. The one constant is that the child's best interests are always the standard by which any custody or parenting time determination is made.[16]

Here, the district court found it was in Kasey's best interests for Curtis to have primary physical custody, subject to Mary's liberal parenting time on a 10/4 schedule during the school year and a week-on-week-off schedule during summer break. After our de novo review, we cannot find this was an abuse of discretion.

Since the 2011 modification, Curtis has had stable employment and a consistently safe and stable living environment for raising children; Mary has not. The district court left joint legal custody in place with additional provisions for resolving disputes, but placed primary physical custody with Curtis. It also changed the parenting time schedule to reduce the number of overnights with Mary during the school year, while still

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[14] *Jeffery T., supra* note 3. See, also, Neb. Rev. Stat. § 43-2923(6) (Reissue 2016).

[15] See *Jeffery T., supra* note 3.

[16] See *id.*

affording liberal parenting time and allowing Kasey to spend equal time with both his parents over the summer months. We agree such a custody and parenting time arrangement is in Kasey's best interests.

(c) Disposition

We thus reverse the Court of Appeals' finding that Curtis did not prove a material change in circumstances justifying modification of physical custody, and we remand the cause with directions to affirm the district court's modification of physical custody. We also direct the Court of Appeals to affirm the modified parenting plan approved by the district court, with two caveats.

First, for the sake of clarity, we direct the parenting plan be corrected to reflect that the parties maintain joint legal custody of Kasey, but that in the event they reach impasse and are unable to make a joint decision, Curtis shall have final say. Second, because we agree with the Court of Appeals that the record in this case does not support the need for a safety plan, we direct the safety plan provisions be stricken from the parenting plan.

2. Child Support Order

The district court terminated Curtis' monthly child support obligation and ordered Mary to pay nominal child support of $10 per month. No party takes issue with the amount of support ordered, but when the case was before the Court of Appeals, Mary assigned that it was error not to attach a child support worksheet to the order of modification showing how the support was calculated. Given the Court of Appeals' disposition, it did not reach this assignment of error. We exercise our discretion to consider it now, rather than directing consideration on remand.

[10,11] Neb. Ct. R. § 4-203(E) (rev. 2020) of the child support guidelines provides that "[a]ll orders for child support, including modifications, must include a basic income and support calculation worksheet 1, and if used, worksheet 2 or 3."

We have been clear that "[a]ll orders concerning child support, including modifications, should include the appropriate child support worksheets."[17] The appellate courts have repeatedly emphasized the importance of adhering to this requirement,[18] explaining that attaching the worksheet allows the trial court to show the parties, and the appellate courts, that it has "'done the math'" required by the child support guidelines.[19]

[12] In this case, the court ordered nominal support pursuant to the earlier version of Neb. Ct. R. § 4-209 (rev. 2020) of the child support guidelines, which provides that "[e]ven in very low income cases, except in cases of disability or incarceration where a lower amount may be justified, a minimum monthly support of $50, or 10 percent of the obligor's net income, whichever is greater, per month should be set." The purpose of setting nominal support is to maintain information on the obligor in the child support system and, "hopefully, encourage such person to understand the necessity, duty, and importance of supporting his or her children."[20]

We have not previously addressed whether a child support worksheet is required even when ordering nominal support under § 4-209, but we see no principled reason to depart from the settled rule, even in very low income cases. Admittedly, when nominal support is ordered in the recommended amount of $50, there is very little math to show. But in this case, it is not clear whether the $10 support figure was calculated based on a finding regarding Mary's net income or whether the court concluded that an amount lower than the recommended minimum was justified in this case. And of course, whenever there is a deviation from the child support guidelines, either the

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[17] *Rutherford v. Rutherford*, 277 Neb. 301, 305, 761 N.W.2d 922, 926 (2009).

[18] *Id.*

[19] See *Stewart v. Stewart*, 9 Neb. App. 431, 434, 613 N.W.2d 486, 489 (2000). See, also, *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018); *Molina v. Salgado-Bustamante*, 21 Neb. App. 75, 837 N.W.2d 553 (2013).

[20] § 4-209.

reason for the deviation must "be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the court file."[21]

[13] Because the absence of a child support worksheet requires the parties and appellate courts to speculate about the trial court's conclusions and calculations in awarding support, we hold that even in very low income cases, courts awarding nominal support under § 4-209 should attach a child support worksheet. And the reason for any deviation from the minimum support amounts required by § 4-209 should be contained either in the court's decree or order or on worksheet 5.

On remand, we direct the Court of Appeals to remand the matter to the district court with directions to prepare and attach an appropriate child support worksheet to the order of modification.

V. CONCLUSION

For the foregoing reasons, we reverse the Court of Appeals' decision in part and remand the cause with directions to affirm the district court's modification of physical custody, child support, and the parenting plan, subject to the caveats set out above. In all other respects, we affirm.

Affirmed in part, and in part reversed and remanded with directions.

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[21] § 4-203.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Application No. C-4973 of Keith Skrdlant. Windstream Communications, Inc., appellant, v. Nebraska Public Service Commission and Keith Skrdlant, appellees.

In re Application No. C-4960 of Jason Poppe et al. Windstream Communications, Inc., appellant, v. Nebraska Public Service Commission et al., appellees.

942 N.W.2d 196

Filed April 23, 2020. Nos. S-18-877, S-18-878.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is an appellate court's duty to determine whether it has jurisdiction to decide them.
3. **Public Service Commission: Time: Words and Phrases: Appeal and Error.** The words "file" and "filing" in Neb. Rev. Stat. § 75-134.02 (Reissue 2018) mean that a motion for reconsideration must be in the possession of the Public Service Commission within 10 days after the effective date of the order in order to suspend the time for filing a notice of intention to appeal.
4. **Administrative Law: Presumptions: Evidence.** The file stamp of an agency is afforded a presumption of regularity, and therefore, in the absence of evidence to the contrary, the date a document was received by and in the possession of the agency is the date shown by the file stamp.

Appeals from the Public Service Commission. Appeals dismissed.

Blake E. Johnson and Katherine J. Spohn, of Bruning Law Group, for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

Miller-Lerman, Cassel, Stacy, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

In these two appeals, Windstream Communications, Inc. (Windstream), attempts to appeal orders of the Nebraska Public Service Commission (PSC) which granted applications requesting changes to existing boundaries so that the applicants could receive advanced telecommunications services from another service provider in lieu of service from Windstream. As explained below, Windstream's motions for rehearing were not timely filed and did not suspend the time for appeal. Accordingly, Windstream's notices of intention to appeal were not timely filed with the PSC, and we lack jurisdiction. We dismiss these appeals.

STATEMENT OF FACTS

In both cases Nos. S-18-877 and S-18-878, applicants requested boundary changes so that they could receive advanced telecommunications service from Hamilton Telecommunications. In case No. S-18-877, Keith Skrdlant filed an application on March 1, 2018, and in case No. S-18-878, 10 applicants, including Jason Poppe, filed their applications on November 27, 2017. In each case, the PSC notified Hamilton Telecommunications and Windstream of the applications, and in each case, Hamilton Telecommunications responded that it would accept the request, but Windstream did not consent to the requested boundary changes.

After holding public hearings on the applications, the PSC entered orders in both cases on July 10, 2018. In case No.

S-18-877, the PSC found that Skrdlant's application should be granted, and it ordered that the requested revision to exchange boundaries be made. In case No. S-18-878, the PSC found that the applications of Poppe and of three other applicants, each of whom had either testified at the public hearing or submitted information after the hearing, should be granted, and it ordered that the requested revisions to exchange boundaries be made. However, the PSC denied the applications of the six remaining applicants because they failed to appear or to submit information upon the PSC's request. In each case, the PSC concluded its order by stating that the order was "ENTERED AND MADE EFFECTIVE . . . this 10th day of July, 2018."

Windstream thereafter submitted motions for rehearing requesting that the PSC reconsider its July 10, 2018, orders in these cases. A certificate of service attached to each motion asserted that the motion was served on the applicants via certified mail on July 20, but each motion was file stamped as having been received by the PSC on July 23. On July 31, the PSC entered orders scheduling oral arguments on Windstream's motions for rehearing. Oral arguments were held, and on August 21, the PSC entered orders denying the motions for rehearing.

On September 13, 2018, in each case, Windstream filed a notice of intention to appeal with the PSC. Thereafter, in each case, the Nebraska Court of Appeals filed an order to show cause why the appeal should not be dismissed for lack of jurisdiction. The Court of Appeals noted that the PSC's order provided that it was effective on July 10 and that Windstream's motion for rehearing was not filed within 10 days of the entry of the PSC order. The Court of Appeals reasoned that because the motion for rehearing, which was file stamped July 23, was not filed within 10 days, it could not be a terminating motion, and that because Windstream's notice of appeal was not filed within 30 days of the July 10 order, it was not timely.

Windstream responded to the order to show cause in each case. Windstream argued that it had filed its motion for rehearing within 10 days of the July 10, 2018, order because it "transmitted" the motion "both electronically and via U.S. Mail on July 20, 2018." Windstream filed the affidavit of one of its attorneys in each case. In the affidavits, the attorney stated that she transmitted to the PSC "an electronic communication dated July 20, 2018 . . . which enclosed [Windstream's] Motion for Rehearing in this matter" and that on that same day, she "transmitted a hard copy" of the motion for rehearing to the PSC "via U.S. Mail." The affidavit did not aver that the motion had been received by the PSC on July 20. No affidavit by PSC personnel was submitted which might have averred that the PSC received the motion on July 20. And, although the email attached to the attorney's showing states, "[a]ttached, please find motions for rehearing," the email submitted as proof bore no attachments, not even an unstamped motion for rehearing. Windstream contended that "service of the Motion was effective as of July 20, 2018" and cited Neb. Ct. R. Pldg. § 6-1105(b)(4) (rev. 2016). Windstream argued that it had 30 days after the PSC's August 21 rulings on its motions for rehearing to file its notices of intention to appeal and that it timely did so on September 13.

After Windstream filed its responses to the orders to show cause, the Court of Appeals entered orders stating that the cases would proceed but that it would reserve ruling on jurisdictional issues. We later moved these cases to our docket.

ASSIGNMENT OF ERROR

In each case, Windstream claims that the PSC erred when it determined that the applicants would not receive reasonable advance telecommunications capability service within a reasonable amount of time absent a change to the exchange boundary.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision. *Green v. Seiffert*, 304 Neb. 212, 933 N.W.2d 590 (2019).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction to decide them. *Id.* This is the case regardless of whether the issue is raised by the parties. *Id.*

The following statutes govern appeals from orders of the PSC and are relevant to the jurisdictional issue in this appeal: Neb. Rev. Stat. § 86-158(1) (Reissue 2014) provides, "Except as otherwise provided in section 86-123, any order of the [PSC] entered pursuant to authority granted in the Nebraska Telecommunications Regulation Act may be appealed by any interested party to the proceeding. The appeal shall be in accordance with section 75-136." Neb. Rev. Stat. § 75-136(2) (Reissue 2018) provides:

> Any appeal filed on or after October 1, 2013, shall be taken in the same manner and time as appeals from the district court, except that the appellate court shall conduct a review of the matter de novo on the record. Appeals shall be heard and disposed of in the appellate court in the manner provided by law. Appeal of a [PSC] order shall be perfected by filing a notice of intention to appeal with the executive director of the [PSC] within thirty days after the effective date of the order as determined under section 75-134.

Neb. Rev. Stat. § 75-134(2) (Reissue 2018) provides in part that "[e]very order of the [PSC] shall become effective ten days after the date of the mailing of a copy of the order to the parties of record except (a) when the [PSC] prescribes an alternate effective date . . . ." Neb. Rev. Stat. § 75-134.02 (Reissue 2018) provides in part:

> [A]ny party may file a motion for reconsideration with the [PSC] within ten days after the effective date of the order as determined under section 75-134. The filing of a

> motion for reconsideration shall suspend the time for filing a notice of intention to appeal pending resolution of the motion . . . ."

In the July 10, 2018, orders about which Windstream complains, the PSC declared that the orders were effective the day they were entered. Therefore, the effective date of the orders under § 75-134(2)(a) was July 10. Under § 75-136(2), appeals from the orders would be "perfected by filing a notice of intention to appeal with the executive director of the [PSC] within thirty days after" July 10. While under § 75-134.02 the "filing of a motion for reconsideration shall suspend the time for filing a notice of intention to appeal," § 75-134.02 requires such motion for reconsideration to be filed "within ten days after the effective date of the order." To determine compliance with these statutes, we must determine when the motions for rehearing were filed with the PSC. If the motions for rehearing were not timely, then the time for filing the notices of intention to appeal was not suspended and the notices of intention to appeal filed September 13 were not timely.

[3] The motions for rehearing filed by Windstream in these cases were file stamped by the PSC as being received on July 23, 2018, which was more than 10 days after the July 10 effective date of the orders. In a case interpreting a statute governing filing deadlines for appeals in the Tax Equalization and Review Commission (TERC), we held that "the word 'filed' means 'in the possession of' a particular person or agency, as the circumstance dictates, and that [the statute] makes it clear that the appeal must be in the possession of TERC in order to be considered filed." *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 920, 620 N.W.2d 90, 101 (2000). We similarly interpret "file" and "filing" in § 75-134.02 to mean that a motion for reconsideration must be in the possession of the PSC within 10 days after the effective date of the order in order to suspend the time for filing a notice of intention to appeal.

In the records of the proceedings in the PSC that were provided in these appeals, the only indication of when Windstream's motions for rehearing were in the possession of the PSC is the date of July 23, 2018, that was file stamped on each motion. In a case in which the date a notice of appeal was filed was at issue, we noted that "[i]t has long been held that in the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed." *State v. Hess*, 261 Neb. 368, 377, 622 N.W.2d 891, 900-01 (2001). We reasoned in *Hess* that the timely filing of documents is an official duty of the clerk of a district court and that "the timely filing of such documents is an official act to which the presumption of regularity attaches." 261 Neb. at 377, 622 N.W.2d at 901. We further reasoned in *Hess* that "[t]he entry of filing by the clerk is the best evidence of the date of filing and is presumed to be correct until the contrary is shown," and we therefore concluded that "we must presume, in the absence of affirmative evidence to the contrary, that the clerk performed his or her duty and endorsed the notice of appeal with the date it was in fact presented to him or her for filing." 261 Neb. at 377-78, 622 N.W.2d at 901.

[4] By reasoning similar to *Hess*, we determine that the file stamp of an agency such as the PSC is afforded a presumption of regularity and that therefore, in the absence of evidence to the contrary, the date the document was received by and in the possession of the agency for filing is the date shown by the file stamp. The file stamp is durable proof of filing unless overcome by meaningful evidence to the contrary. In response to the Court of Appeals' orders to show cause, Windstream attempted to overcome this presumption by asserting that on July 20, 2018, it transmitted the motions electronically as email attachments and via the U.S. mail. Windstream's evidence of such transmissions included affidavits of its attorney to which copies of the email were

attached, but the emails themselves bore no attached motions for rehearing.

With regard to mailing hard copies of the motions via U.S. mail on July 20, 2018, such mailing was not effective to establish that the motions were filed with the PSC on that date. As discussed above, the relevant statutes require filing within 10 days, which we interpret to mean that the motions must be in the possession of the PSC within that time. Mailing on a certain date does not establish possession by the recipient on that date. By contrast, we note that after the decision in *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm., supra*, discussed above, the Legislature amended relevant statutes related to appeals to TERC to adopt a "mailbox rule" to the effect that an appeal is timely filed if placed in the U.S. mail on or before the specified date. See *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013). However, the statutes quoted above regarding filing of motions with the PSC do not contain a "mailbox rule" nor do the rules, effective April 19, 2019, to which we refer below, contain a "mailbox rule." In sum, Windstream does not direct us to authority to the effect that a motion is timely filed with the PSC if placed in the mail on or before the specified date. Windstream cites only Neb. Ct. R. Pldg. § 6-1105(b)(4); however, that rule relates to *service* of pleadings, not to *filing* of pleadings.

In regard to service, at oral argument the attorney for the PSC stated that the motion "had been received electronically" and, when asked to clarify, answered "it was emailed to counsel, so counsel had it." Regarding filing, the attorney continued, "[w]hether they're the appropriate . . . I mean, I'm not sure how filing is accomplished, even if it[']s hand-delivered. I suspect it comes in, *somebody stamps it* . . . ." (Emphasis supplied.) Given the foregoing and the substance of the emails, it is not clear that Windstream even considered the email sent by its counsel to constitute a "filing." We do not believe the PSC has established filing or admitted to a fact establishing filing on July 20, 2018, and to the contrary, we

understand the dialogue quoted above to mean that although there may have been service on opposing counsel on July 20, the filing of the motions is evidenced by a file stamp which in this case was July 23.

Windstream's evidence that it submitted the motions electronically does not overcome the presumption that the motions for rehearing were filed as stamped on July 23, 2018. A proper efiling system provides verification of receipt. No such verification has been submitted in this case. The Windstream affidavit in response to the show cause order did not aver or identify that a recipient of the email was a PSC individual authorized to receive and administer the filing. And although the email heading shows that the email was sent to various "nebraska.gov" addresses, the record does not show that any certain address is that of the proper person with whom a pleading to the PSC must be filed; during the pendency of the appeal, the PSC did not assert that a proper person received the document on July 20. It is not the duty of a court to scour the record in search of facts that might support a claim. See *State v. Dill*, 300 Neb. 344, 913 N.W.2d 470 (2018) (declining to scour record in search of facts that might support claim). Finally, even if we were to adopt a presumption that the email sent by Windstream on July 20 bore attached motions for rehearing and further presume that it was received by a proper recipient on that same date, Windstream has not directed us to any rule or regulation of the PSC or other authority indicating that an email attachment is an acceptable method for filing a motion with the PSC. Compare *Strode v. Saunders Cty. Bd. of Equal.*, 283 Neb. 802, 815 N.W.2d 856 (2012) (filing of motion for rehearing by facsimile acceptable because rule adopted by TERC provides for filing by facsimile if original is mailed or delivered within 24 hours).

For completeness, we note that effective April 21, 2019, the PSC amended its general rules of practice and procedure. Those rules now define a pleading to include a motion, 291 Neb. Admin. Code, ch. 1, § 001.25 (2019); require that

all pleadings must be on white letter-sized paper, 291 Neb. Admin. Code, ch.1, § 002.05A (2019); and require that all pleadings must be "filed with the [PSC] at its official office," 291 Neb. Admin. Code, ch. 1, § 002.05B (2019). They further provide that "[f]iling may be accomplished by personal delivery or mail and will be received during regular office hours of the [PSC]." *Id.* See, also, 291 Neb. Admin. Code, ch.1, § 002.01 (2019) ("office hours are 8:00 a.m. to 5:00 p.m., Monday through Friday"). These rules appear to end any uncertainty over whether filings with the PSC can be accomplished via email.

CONCLUSION

Based on the file stamps, the motions for rehearing are presumed to have been filed with the PSC on July 23, 2018, and Windstream has not overcome that presumption. The motions therefore were not filed within 10 days of the effective date of the respective orders, and under § 75-134.02, they did not suspend the time for filing a notice of intention to appeal. Windstream's notices of intention to appeal were filed with the PSC on September 13, which was beyond the 30-day time limit allowed under § 75-136(2) to perfect appeals from the July 10 orders. We therefore lack jurisdiction and accordingly dismiss these appeals.

Appeals dismissed.

Heavican, C.J., participating on briefs.
Funke, J., not participating.

Papik, J., concurring.

Windstream's appeals were timely filed only if its motions for reconsideration were filed by July 20, 2018. I agree with the majority opinion that, given the July 23 file stamp appearing on Windstream's motions, it is appropriate to presume that the motions were not filed until then, in the absence of evidence to the contrary. I also agree that Windstream has not supplied us with evidence sufficient to rebut the presumption.

I write separately to make some observations about difficulties that can arise when, as here, the governmental entity with whom a motion is to be filed has no rules or regulations setting forth the method by which the motion is to be filed or the person or persons within the entity with whom it is to be filed.

If, at the time Windstream filed its motions, the Public Service Commission (PSC) had rules or regulations informing litigants as to how they were to file a document, the tasks of filing a motion and determining whether one was timely filed would both be relatively easy. In that scenario, a motion would be effectively filed as soon as the person at the PSC identified by rule actually received the motion by the prescribed method. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 920, 620 N.W.2d 90, 101 (2000) (interpreting "filed" to mean "'in the possession of' a particular person or agency, as the circumstance dictates").

Here, however, the PSC had no rules or regulations setting forth how filing was to be accomplished. For this reason, it is not entirely clear to me how we can determine whether and when the right person received the motion by the appropriate method. Indeed, at oral argument, counsel for the PSC acknowledged that he did not know to whom at the PSC a filing must be delivered. This situation, it seems to me, places litigants in a very difficult position, particularly where, as here, appellate jurisdiction depends upon the timely filing of motions.

So what counts as a "filing" of a document with a governmental body if no direction is provided as to how that is to be accomplished? An Ohio appellate court wrestled with that question in *Hanson v. Shaker Hts.*, 152 Ohio App. 3d 1, 786 N.E.2d 487 (2003). It concluded that if no direction is provided in statute or regulation as to the method of filing, a party can use any method of delivery to effectively file a document so long as it is actually received. It also concluded that in the absence of specific direction as to the person within the governmental body with whom a document is to be filed, filing is

accomplished by actual delivery to personnel within the governmental body if delivery to that person or persons is "reasonably calculated to notify" the appropriate official or officials of the filing. *Id.* at 7, 152 Ohio App. 3d at 491.

As the majority notes, we have previously interpreted the word "filed" to mean "'in the possession of' a particular person or agency, as the circumstance dictates." *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. at 920, 620 N.W.2d at 101. I am open to the possibility that the *Hanson* court's approach is consistent with our interpretation of the word "filed," but would also prevent parties from being penalized for not being informed how or with whom a document is to be filed.

Here, however, I do not believe Windstream has shown that its motions for reconsideration were timely received by persons who were reasonably likely to notify the relevant officials at the PSC that a motion had been filed. There is no indication the hard copies Windstream mailed to the PSC were received by July 20, 2018. This leaves only the July 20 email sent by Windstream's counsel. The sole affidavit Windstream offered in response to the jurisdictional order to show cause attached that email and asserted that the motions were attached thereto and that the email was sent to "the Nebraska Public Service Commission and its legal counsel." No additional details were provided either in the affidavit or in the response to the order to show cause about the specific identity of the recipients, why the motions were emailed to them, or how sending the motions to the recipients was reasonably calculated to result in the appropriate officials at the PSC receiving notification of the filing. Nor did the record as a whole provide evidence sufficient to answer these questions without conjecture.

In fact, as the majority observes, it is not even clear that Windstream considered the email sent by its counsel to constitute a "filing." The email was sent to counsel for the PSC and did not specifically request that the motions be filed. Instead, it stated, in relevant part, "Attached, please find motions for

rehearing filed on behalf of Windstream . . . . A hard copy of each motion has also been mailed to the [PSC].” This language and the fact it was sent to counsel suggests to me that Windstream intended for the mailed hard copy to be filed, and was merely *serving* opposing counsel via email. Windstream did nothing to counter that appearance on appeal. To the contrary, it seemed to confirm that reading, by arguing, with citation to a civil pleading rule regarding service of motions, that *service* of the motions was effective on July 20, 2018.

In the absence of evidence that the July 20, 2018, email attaching the motion for reconsideration was received by PSC personnel who were reasonably likely to notify the appropriate officials of the filing, Windstream could not overcome the presumption of regularity even if we were to adopt the *Hanson* court’s approach to determining whether a motion was effectively filed.

Fortunately, as the majority notes, it does not appear this issue is likely to recur in the PSC context now that the PSC has amended its rules and regulations to clarify how filing is to take place. However, in the event that a question should arise in the future as to whether a party properly filed a document with another governmental entity with no rules or regulations setting forth how filing is accomplished, I would be open to considering whether a party may show that it effectively filed a document by making the showings discussed in the *Hanson* case summarized above.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Herchel H. Huff, appellee, v. Doug Brown, sheriff of Furnas County, appellant.

941 N.W.2d 515

Filed April 23, 2020. No. S-19-271.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and an appellate court will not disturb those findings unless they are clearly erroneous.
2. **Mandamus.** Whether to grant a writ of mandamus is within the trial court's discretion.
3. **Public Officers and Employees: Records.** The duty, if any, to provide public records stays with the office of the records' custodian and is transferred to a new holder of the office.
4. **Mandamus: Proof.** A party seeking a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Cum. Supp. 2018) has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by Neb. Rev. Stat. § 84-712.01 (Reissue 2014), and (3) the requesting party has been denied access to the public record as guaranteed by Neb. Rev. Stat. § 84-712 (Reissue 2014).
5. ____: ____. If the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2018) or Neb. Rev. Stat. § 84-712.08 (Reissue 2014).
6. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding

clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary court of law.

7. **Mandamus: Proof.** Under Neb. Rev. Stat. § 84-712.03(1)(a) (Cum. Supp. 2018), the requesting party's initial responsibility includes demonstrating that the requested record is a public record that he or she has a clear right to access under the public records statutes and that the public body or custodian against whom mandamus is sought has a clear duty to provide such public records.

Appeal from the District Court for Furnas County: James E. Doyle IV, Judge. Affirmed in part, and in part reversed and remanded.

Melodie T. Bellamy, Special Counsel for Furnas County, and Morgan R. Farquhar, Furnas County Attorney, for appellant.

Herchel H. Huff, pro se.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Miller-Lerman, J.

NATURE OF CASE

Doug Brown, the sheriff of Furnas County, appeals the order of the district court for Furnas County, Nebraska, which granted in part a writ of mandamus requiring him to provide records to Herchel H. Huff pursuant to the public records statutes. Brown argues, inter alia, that the court erred when it substituted him as a party for the prior sheriff, when it granted the writ based solely on Huff's affidavit, when it granted the writ despite Huff's failure to respond to the prior sheriff's response which required Huff to deposit fees before certain records would be produced, and when it waived fees that were authorized by statute.

We conclude that although the district court did not err when it substituted Brown's name for that of the former sheriff, the court erred when it determined that Huff had shown that Brown had a clear duty to provide the records requested. We

therefore affirm in part the order to the extent it denied Huff's petition but reverse in part the order to the extent it granted the writ of mandamus.

STATEMENT OF FACTS

On September 23, 2018, Huff sent to then Furnas County sheriff Kurt Kapperman a 4-page letter which included 15 numbered paragraphs of requests for public records. Huff is an inmate serving sentences for convictions including motor vehicle homicide. The documents requested by Huff included, inter alia, records relating to the investigation of charges against him, criminal history records of jurors who had convicted him, criminal history records of and fees and expenses paid to witnesses and prosecuting attorneys in his trial, information regarding the salaries paid to the sheriff, and records relating to the impoundment of his vehicle.

Kapperman responded in writing to Huff's requests on October 2, 2018. Kapperman stated that "no responsive records exist[ed]" as to 14 of the 15 paragraphs of requests. The remaining paragraph, denominated as "request 3," included requests for jail records, including medical records, maintained pursuant to Neb. Rev. Stat. § 47-204 (Reissue 2010). In request 3, Huff requested his own jail records as well as records for certain jurors from his trial that he asserted had been "convicted [of] or cited for DWI." In his response, Kapperman stated with respect to the request for jail records relating to jurors that "no responsive records exist, and the request seeks protected medical information." With respect to the request for Huff's jail records, Kapperman estimated that "the inspection and copying of records would cost approximately $750.00" and stated that he therefore required "a deposit of $750.00 before fulfilling such a request." Kapperman cited Neb. Rev. Stat. § 84-712(3)(f) (Reissue 2014) as authority for requiring the deposit.

On October 15, 2018, Huff filed a petition for writ of mandamus under Neb. Rev. Stat. § 25-2156 (Reissue 2016) and

the public records statutes, Neb. Rev. Stat. § 84-712 et seq. (Reissue 2014 & Cum. Supp. 2018). Huff named "Sheriff Kurt Kapperman" as the defendant in the petition. Huff sought an "order compelling . . . Kapperman to release all requested documents per the [public records] statutes." Kapperman filed an answer on January 21, 2019, in which he generally denied the allegations in Huff's petition. Kapperman also asserted that Huff had failed to state a claim against him upon which relief could be granted, because Brown had been sworn into office on January 3 and Kapperman was no longer sheriff.

On January 30, 2019, the court held a telephonic hearing. The court first took up and overruled Huff's motion to disqualify the judge. The court then turned to the petition for a writ of mandamus. The court referred to an affidavit of Huff dated November 13, 2018, which had been offered into evidence by Huff and marked as exhibit 3. It generally asserted that Huff had requested documents from Kapperman, that the documents were public records subject to disclosure, and that Kapperman had failed to comply with Huff's request and was refusing to release records, in violation of the public records statutes. Kapperman objected to exhibit 3 "on the basis that [he had not] had an opportunity to cross-examine" Huff regarding statements in the affidavit. The court overruled Kapperman's objection and admitted exhibit 3 into evidence.

Neither Huff nor Kapperman offered additional evidence, and the court heard argument by both parties. In addition to arguing that he could not comply with Huff's request because he was no longer the sheriff of Furnas County, Kapperman argued that Huff was barred from proceeding with his claim because Huff had failed to timely respond to Kapperman's response of October 2, 2018, in violation of § 84-712(4), which requires a deposit before Kapperman would provide the requested records that were in his possession.

On February 14, 2019, the district court filed an order in which it granted in part and denied in part Huff's petition for a writ of mandamus. The court addressed Kapperman's argument

that Huff failed to state a claim against Kapperman because he was no longer the Furnas County sheriff. The court stated that the fact that Kapperman was no longer the sheriff was "of no consequence" because the petition was directed at the office of the sheriff, not at the specific individual occupying the office at any given time. Accordingly, the court permitted Huff "to substitute . . . Brown, the current Furnas County Sheriff[,] in the caption of the case in place of Kapperman."

Turning to the merits of Huff's request, the court stated that the sheriff's response that he had "no responsive records" to most of Huff's requests was "not sufficient." The court cited Nebraska precedent which it read to provide that the reference in § 84-712.01(1) to public records "of or belonging to" a public custodian "should be construed liberally to include documents or records that a public body is entitled to possess, regardless of whether the public body actually has possession of the documents." Based on that reading of precedent, the court reviewed Huff's specific requests and categorized them into three general groups: (1) records the sheriff was not required to produce, (2) records the sheriff appeared to be entitled to possess, and (3) records the sheriff appeared not to be entitled to possess.

The court included in the first category—records the sheriff was not required to produce—medical records related to persons other than Huff and a report of the names of all county officials. In his request 3, Huff requested, inter alia, jail records, including medical records, for certain jurors in his trial. The court determined that medical records relating to persons other than Huff were exempt from production under § 84-712.05(2). In another request, Huff requested records maintained pursuant to Neb. Rev. Stat. § 23-1306 (Reissue 2012) regarding "all the county officers with their official signatures and seals of their respective offices." The court noted that § 23-1306 gave the county clerk the duty to maintain such records regarding county officers. The court determined that the sheriff might be entitled to possess such

records with regard to his own office, and it therefore included records regarding the office of sheriff in the second category, discussed below. However, the court concluded that with regard to records regarding other county officials, the sheriff did not have a duty to respond. The court therefore denied in part Huff's petition for mandamus, because it pertained to the requests for medical records of others and information regarding other county officers.

The court generally granted mandamus as to Huff's remaining requests and set forth different requirements as to each request depending on how certain the court was that the sheriff was entitled to possess the requested record. The requests were generally denominated as records the court presumed the sheriff was entitled to possess or records the court thought the sheriff might not be entitled to possess. This categorization was consistent with the second and third categories identified above.

Regarding records it presumed the sheriff was entitled to possess, the court ordered the sheriff to conduct a due and diligent investigation to determine whether such records existed and, if so, to provide them to Huff. If after a due and diligent investigation the sheriff determined he was not entitled to possess the records, the sheriff would be granted the opportunity to rebut the presumption by affidavit evidence. Such affidavit would need to include the facts necessary to support the sheriff's determination, as well as the identity and location of any other custodian of records that the sheriff believed was entitled to possess the records.

Regarding records the court thought the sheriff might not be entitled to possess, the court ordered the sheriff to conduct a due and diligent investigation to determine whether such records existed and, if so, to provide them to Huff. If the records were no longer available, the sheriff would be required to explain in writing why such records were no longer available. If the sheriff determined his office was not entitled to possess the records, the sheriff needed to report

facts supporting such determination and identify any other public custodian the sheriff believed was entitled to possess the records.

In its order, the court also addressed the requirement that Huff deposit a fee before the sheriff would provide Huff's jail records, which the sheriff had determined he could provide. The court stated that § 84-712(3)(b) and (f) authorizes a public records custodian to charge a fee that "'shall not exceed the actual added cost of making the copies available'" and to require a deposit if the cost is estimated to exceed $50. The court concluded that "[t]his provision authorized the deposit requested by the sheriff." The court noted, however, that Huff was indigent and had been permitted to proceed in forma pauperis in this action.

The court acknowledged that neither the public records statutes nor the in forma pauperis statutes explicitly supported a waiver of the fees chargeable under § 84-712. Nevertheless, the court determined that in enacting the public records statutes, "the [L]egislature intended to make all public records readily available to the public," and the court "infer[red that] the [L]egislature intended to avoid the imposition of copying expenses as [a] means to avoid the obligation to produce public records."

The court noted that as an inmate, Huff did not have the ability to examine public records in situ, and that therefore, his only access to records would be by obtaining copies; the court further noted that as a prisoner, Huff had little financial resources to pay the costs. Therefore, in order to fulfill what it determined to be the Legislature's intent and the court's authority under § 84-712.03(2) "to grant such other equitable relief as may be proper," the court determined that fees were subject to waiver in an appropriate circumstance. The court determined that Huff's requests were not frivolous, and it therefore concluded that the fees associated with his requests were subject to waiver and should in fact be waived. The court applied this holding to both the $750 deposit that the sheriff had required

and any fees that might be chargeable in connection with the additional production of records ordered by the court.

In conclusion, the court ordered that the sheriff would have 30 days from the date of the order

> to conduct the investigations and inquiries required, to deliver to Huff the records required by this order or state under oath he is not entitled to possess such records and the identity and location of any custodian of the public body he believes is entitled to possess such records and to contemporaneously file with the court a report of his responses to the requests and his responses to this writ.

Brown appeals the order of the district court.

ASSIGNMENTS OF ERROR

Brown claims, renumbered and restated, that the court erred when it (1) substituted Brown for Kapperman as the defendant; (2) found that the sheriff had a duty to provide certain records even after Huff failed to pay a fee or timely respond as required under § 84-712(4); (3) received exhibit 3 into evidence and ordered a writ of mandamus without admitting any other evidence; (4) ordered the sheriff (a) to provide records without the payment of an authorized fee, (b) to provide records that were not in his possession, and (c) to conduct an investigation and to report on other requested records by identifying and locating the custodian of such records; and (5) waived fees and costs authorized under § 84-712 and ordered the sheriff to produce records without the payment of such fees and costs.

STANDARDS OF REVIEW

[1,2] Mandamus is a law action, and it is an extraordinary remedy, not a writ of right. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and we will not disturb those findings unless they are clearly erroneous. *Id*. Whether to grant a writ of mandamus is within the trial court's discretion. *Id*.

ANALYSIS

Petition for Writ of Mandamus and Request for Public Records Were Directed at Person Holding Office of Sheriff, and Therefore, Court Did Not Err When It Allowed Substitution of Brown's Name for Kapperman's.

Brown first claims that the district court erred when it substituted his name as sheriff for that of Kapperman as the defendant in this action. We determine that the district court fairly interpreted Huff's records request and petition for a writ of mandamus as being directed at the office of the Furnas County sheriff as the custodian of public records and that therefore, the court did not err when it allowed the caption for this action to be updated to reflect the name of the current holder of that office.

The district court noted that "Huff's request for the production of public records was directed to the office of the sheriff of Furnas County . . . not to the individual who occupied the office at the time of the delivery of the request." We agree with the district court's interpretation of the request and of Huff's petition for a writ of mandamus as seeking compliance with that request by the sheriff. A request under the public records statutes is directed to the custodian of the records being sought, and although a request is made to the specific person holding the position of custodian, in substance it is inherently directed at the holder of the office that acts as the custodian of the records.

[3] We note that Neb. Rev. Stat. § 23-1709 (Reissue 2012) provides in relevant part that "[w]hen a sheriff goes out of office he or she shall deliver to his or her successor all books and papers pertaining to the office . . . ." We read the requirement under § 23-1709 that a sheriff leaving office deliver "all books and papers" to his or her successor to include public records for which the sheriff is custodian. We further note that with regard to the naming of parties to an action, Neb. Rev. Stat. § 25-322 (Reissue 2016) provides in relevant part:

> An action does not abate by . . . the transfer of any interest therein during its pendency, if the cause of action survives or continues. . . . In case of [a] transfer of interest, the action may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action.

Reading these statutes together, we determine that Huff's action for mandamus to enforce his public records request directed to the holder of the office of sheriff did not abate as a result of the transfer of public records of the sheriff's office from Kapperman as custodian to Brown as custodian. The duty, if any, to provide public records stays with the office of the records' custodian and is transferred to the new holder of the office. We therefore conclude that the district court did not err when it allowed the substitution of Brown's name for Kapperman's name as custodian of the public records at issue in this action.

In Order for Court to Issue Mandamus, Huff Needed to Show That Sheriff Had Clear Duty to Provide Requested Records.

The remaining issues on appeal deal with Huff's requests for public records and whether he was entitled to a writ of mandamus requiring the sheriff to provide the requested records. We therefore review standards relating to mandamus in the context of a public records request.

[4,5] A person denied access to a public record may file for speedy relief by a writ of mandamus under § 84-712.03. *Aksamit Resource Mgmt. v. Neb. Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018). We have stated that a party seeking a writ of mandamus under § 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by § 84-712.01, and (3) the requesting party has been denied access to the public record as guaranteed by § 84-712.

Aksamit Resource Mgmt., supra. Where a suit is filed under § 84-712.03, the Legislature has imposed upon the public body the burden to "'sustain its action.'" *Aksamit Resource Mgmt.*, 299 Neb. at 123, 907 N.W.2d at 308. If the public body holding the record wishes to oppose the issuance of a writ of mandamus, the public body must show, by clear and conclusive evidence, that the public record at issue is exempt from the disclosure requirement under one of the exceptions provided by § 84-712.05 or § 84-712.08. See *Aksamit Resource Mgmt., supra*.

In the present case, the only documents that the sheriff asserted were exempt from disclosure under a statutory exception were medical records that the sheriff asserted to be exempt under § 84-712.05(2). The court agreed that such records were exempt from disclosure, and it therefore denied mandamus as to those records. Huff did not appeal or cross-appeal to assign error to the court's denial of mandamus regarding these records; therefore, the court's denial of mandamus as to those records is affirmed and whether the records are exempt from disclosure is not at issue in this appeal.

The issues on appeal involve records for which the court granted a writ of mandamus. In his response to Huff's request, Kapperman did not assert, and Brown does not argue on appeal, that these records were exempt from disclosure pursuant to a statutory exception. Instead, in his response to Huff's request, Kapperman either (1) asserted that no responsive records existed or (2) acknowledged that the records existed but required the deposit of a fee before the records would be provided. The standard set forth above placing a burden on the public body to show by clear and convincing evidence that a record is exempt does not apply when the public body's reason for denying a records request is not that the record is exempt from disclosure under a statutory exception. Instead, we have acknowledged:

> Requiring the public body to demonstrate that an exception applies to the disclosure of a particular public

> record does not, however, change the fact that it is the initial responsibility of the relator to demonstrate that the record in question is a public record within the meaning of § 84-712.01. Under § 84-712.03, a writ may be sought by "[a]ny person denied any rights granted by sections 84-712 to 84-712.03 . . . ." In order to establish standing and jurisdiction, therefore, it must be shown that the party seeking mandamus has been denied rights under § 84-712. A necessary component of this showing is that the party was seeking a record that is a "public record" within the meaning of § 84-712.01.

State ex rel. Neb. Health Care Assn. v. Dept. of Health, 255 Neb. 784, 789-90, 587 N.W.2d 100, 105 (1998).

[6,7] The requesting party's initial responsibility to demonstrate a prima facie claim for a writ of mandamus requiring release of public records must be understood in the context of general requirements for mandamus. Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary court of law. *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 917 N.W.2d 903 (2018). Therefore, under § 84-712.03(1)(a), the requesting party's initial responsibility includes demonstrating that the requested record is a public record that he or she has a clear right to access under the public records statutes and that the public body or custodian against whom mandamus is sought has a clear duty to provide such public records.

As noted above, the district court denied mandamus with regard to medical records the sheriff asserted were exempt from disclosure. The court also denied mandamus with regard to records regarding county officials other than the county

sheriff. Because Huff does not appeal or cross-appeal that ruling, the denial of mandamus as to those records is affirmed.

With Regard to Records for Which Sheriff Required a Deposit of Fees, Huff Failed to Show He Timely Responded to the Request and Therefore Failed to Show the Sheriff Had a Clear Duty to Provide Such Records.

As we have indicated above, the remaining issues on appeal relate to records with respect to which the court granted mandamus and that the sheriff asserts he has no duty to provide either because no such record existed or because the records existed but Huff did not timely respond to the sheriff's request for a deposit of fees before the records would be provided.

We first address the records that in his response Kapperman acknowledged were in his possession but for which he required a deposit of fees before the request could be fulfilled. We determine that because Huff did not timely respond as required under § 84-712(4), the sheriff did not have a clear duty to provide the records and the court erred when it granted mandamus as to these records.

In his response to Huff's request, Kapperman asserted that most of the requested records did not exist but he acknowledged that jail records relating to Huff as sought in request 3 existed and were public records that could be provided to Huff. However, Kapperman estimated that "the inspection and copying of records would cost approximately $750.00," and he therefore required from Huff "a deposit of $750.00 before fulfilling such a request." We note that § 84-712(3)(b) provides in part that "the custodian of a public record may charge a fee for providing copies of such public record . . . , which fee shall not exceed the actual added cost of making the copies available." Also, § 84-712(3)(f), which was cited by Kapperman in his response, provides that "[i]f copies requested in accordance with . . . this section are estimated by the custodian of such public records to cost more than fifty dollars, the custodian

may require the requester to furnish a deposit prior to fulfilling such request."

Brown claims on appeal that the district court erred when it found that the sheriff had a duty to provide these records even after Huff failed to respond to Kapperman's request for a deposit before providing the records. Brown cites § 84-712(4), which provides in relevant part that after the custodian has provided to the requester an estimate of the expected cost of the copies:

> The requester shall have ten business days to review the estimated costs, including any special service charge, and request the custodian to fulfill the original request, negotiate with the custodian to narrow or simplify the request, or withdraw the request. If the requester does not respond to the custodian within ten business days, the custodian shall not proceed to fulfill the request.

Kapperman's response to Huff's request was dated October 2, 2018. Huff does not assert, and there is nothing in the record that indicates, that within 10 business days thereafter, Huff either requested Kapperman to fulfill the original request, attempted to negotiate with Kapperman to narrow or simplify the request, or withdrew his request. Instead, on October 15, Huff filed a petition for a writ of mandamus in the district court. Brown argues that because Huff did not respond within 10 business days in one of the ways set forth in § 84-712(4), and because the statute provides that in such circumstance, "the custodian shall not proceed to fulfill the request," the sheriff no longer had a duty to fulfill the request. We agree with the sheriff.

Huff attached to his petition copies of his request and Kapperman's response. Huff did not assert in his petition that he had responded within 10 business days to Kapperman's request for a deposit of fees; nor did he attach a copy of any such response. The only additional evidence Huff offered at the hearing was his affidavit, in which he made no assertion that he had timely responded. Without a response, under

§ 84-712(4), Kapperman was no longer under a duty to fulfill the request for jail records. Therefore, we determine that with respect to these records, Huff failed his initial responsibility to demonstrate that he had been denied access to the public record as guaranteed by § 84-712, because he failed to demonstrate that the sheriff had a clear duty under § 84-712 to fulfill the request. See *Russell v. Clarke*, 15 Neb. App. 221, 724 N.W.2d 840 (2006) (affirming denial of petition for writ of mandamus where evidence established that there were no public records maintained by custodian other than those of which copies were provided or of which custodian offered to provide copies upon payment of reasonable expense of copying, and requester failed to adduce evidence to contrary).

We note in connection with this request that in his petition, Huff asserted that Kapperman was "charging [an] amount more than what it would cost to copy these records." However, Huff did not assert a factual basis to support his claim of unreasonableness; nor did he present evidence to show that the $750 requested by Kapperman exceeded the reasonable expense of copying. There was no showing indicating the volume of documents requested and therefore no way to determine whether $750 was a reasonable cost, and in addition, the district court made no finding that the requested fee was excessive or unreasonable. Instead, in its order, the court stated that § 84-712(3)(f) "authorized the deposit requested by the sheriff." Although the court thereafter determined that the fee should be waived, such determination was based on Huff's inability to pay rather than the reasonableness of the fee. Because the sheriff has been relieved of his duty, if any, to provide records encompassed by request 3, we do not comment on the court's ruling that the fees provided for in § 84-712(3)(f) can be waived. Compare 5 U.S.C. § 552(a)(4)(A) (2018) (providing for statutory waiver of fee).

On the record before the district court, Huff did not show a clear duty on the part of the sheriff as custodian of the jail records to provide the records which the sheriff offered to

provide upon a deposit of fees. We therefore conclude that the court abused its discretion when it granted mandamus as to those records.

Huff Failed to Demonstrate That Sheriff Had a Clear Duty to Provide Records That Sheriff Asserted Did Not Exist.

Regarding the majority of the records requested by Huff, the sheriff responded that no responsive records existed. The district court granted mandamus with regard to those requests encompassed by this response under the reasoning that such records were records "'of or belonging to'" the sheriff because the sheriff was "'entitled to possess'" the records. We determine that the court misapplied this court's precedent in reaching that conclusion, and we conclude that Huff failed to establish as a prima facie case that the requested records were records that the sheriff had a clear duty to provide.

The record from the district court does not contain evidence to support a finding that the sheriff was the custodian of the requested records. As noted above, Huff attached to his petition Kapperman's response in which Kapperman asserted that as to most of Huff's requests, "no responsive records exist." In his pleadings and in his affidavit, Huff made generalized allegations that Kapperman was withholding records and not fulfilling his duty. But there was no other evidence to establish that the sheriff was the custodian of the requested records. In its order, the court does not explicitly find that the sheriff was being untruthful and that the requested records were actually in his possession. Instead, the court reasoned that the sheriff was required to provide the records to Huff because the sheriff was "'entitled to possess'" the records.

For purposes of the public records statutes, § 84-712.01(1) defines "public records" to "include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board,

bureau, commission, council, subunit, or committee of any of the foregoing." In its order in this case, the district court cited *Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009), in which we stated that this definition "does not require a citizen to show that a public body has actual possession of a requested record" and we liberally construed the "'of or belonging to'" language of § 84-712.01(1) to include "any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession." We stated that "[t]he public's right of access should not depend on where the requested records are physically located." *Id.* The district court in its order interpreted *Evertson* "to require the custodian who receives a public records request to examine each of the requests to determine whether, as a custodian in the public body to which the request is directed, he or she is 'entitled to possess the document' requested." The court then categorized the records requested by Huff as those that the sheriff "presumptively appears to be entitled to possess" and those "which it appears the sheriff may not be entitled to possess." As to each category, the court required the sheriff to investigate whether he was entitled to possess the requested documents and either provide the documents, explain why he could not possess them, or identify any other custodian the sheriff believed to be entitled to possess the records.

We determine that the district court read *Evertson* too broadly. In *Evertson*, the city's mayor had commissioned an investigation by a private entity and two citizens requested from the city a written report that was in the possession of the private entity. Although we ultimately concluded that the record was exempt from production based on a statutory exception, as a preliminary step we determined that the report was a "public record" under § 84-712.01 even though the city had declined to take possession. In reaching that conclusion, we set forth the language relied on by the district court to the effect that public records include documents the public body is entitled to possess.

However, *Evertson* must be understood in the context of a request for documents in the possession of a private entity. In *Evertson*, we set forth tests for determining whether records in the possession of a private party are public records subject to disclosure, and such tests generally focused on the public body's delegation to a private entity of its authority to perform a government function and the preparation of the records as part of such delegation of authority. Thus, it was in the context involving the public body's access to documents in the possession of a private entity that the "entitled to possess" language in *Evertson*, 278 Neb. at 9, 767 N.W.2d at 759, emerged.

In the present case, Huff did not assert, and there is no indication from the record, that any of the documents requested by Huff were in the possession of a private entity to whom the sheriff had delegated authority to perform a function of the sheriff's office. The court made general findings that the requested records were records that the sheriff appeared to be entitled to possess; however, the court made no indication whether it thought that, contrary to the response that no responsive records existed, the records were actually in the sheriff's possession or whether it thought the sheriff could obtain the records from some other unspecified custodian pursuant to some unspecified authority. Huff presented no evidence to contradict the sheriff's response or to establish that the sheriff was the custodian of the requested records.

The sheriff argued at the hearing that the records at issue were "not items that are kept by the sheriff's department" and that instead, the custodians of certain requested records may have been other county officers such as the county attorney or the county clerk. Therefore, it is possible the court may have determined that the sheriff was "entitled to possess" such records in the performance of his duties because the sheriff could request the other county officers to provide the records. See *Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009). But we do not think that *Evertson* should

be extended to apply to records normally in the possession of other governmental custodians. Although the sheriff may be able to request records from another county office, it does not mean they are records "of or belonging to" the sheriff; instead, they are records "of or belonging to" the other county office. See § 84-712.01.

The public records statutes are directed to "the custodian" of a requested public record, see § 84-712, and the duties imposed thereunder on a specific custodian relate only to the public records of which that specific office or person is the custodian. A specific custodian only has a clear duty under the public records statutes to provide the public records of which he or she is custodian. It is the obligation of the person requesting a record to determine the proper custodian and to make a request of that person or office.

The record of proceedings in this case is that in his response, the sheriff asserted that as to most of Huff's requests, no responsive records existed. The only evidence presented by Huff was his affidavit in which he made general allegations that the sheriff failed to comply with his requests. But there is no evidence to support a showing that the sheriff was in fact custodian of any of the records at issue, and therefore, Huff failed to make a prima facie showing that the sheriff had a clear duty under the public records statutes to provide the records. Although other county officers may have been custodians of the requested records, the public records statutes did not impose a duty on the sheriff to obtain those records on Huff's behalf.

For completeness, we note that in another request subsequent to request 3, Huff sought the criminal history records of various individuals such as jurors and attorneys. Neb. Rev. Stat. § 29-3520 (Reissue 2016) provides in part that "[c]omplete criminal history record information maintained by a criminal justice agency shall be a public record open to inspection and copying by any person during normal business hours and at such other times as may be established by

the agency maintaining the record." Further, Neb. Rev. Stat. § 29-3522 (Reissue 2016) states that if the requested criminal justice history record is not in the custody or control of the person to whom the request is made, such person shall notify the requester and state the agency, if known, which has custody or control of the record in question. In this case, the sheriff responded to this request by asserting "no responsive records exist." With respect to Huff's request for criminal histories, we read this response as being both that the sheriff did not have custody of such records and that the sheriff was not aware of any requested criminal histories that were in the custody and control of another agency. Although on this record as a whole, the sheriff has broadly addressed the concerns reflected in §§ 29-3520 and 29-3522, the better practice going forward when responding to a request for criminal history record information is an initial twofold response containing both an answer to whether the responder has custody and control of the information sought and, if not, which agency, if known, has custody or control of the record in question or an explicit statement that the responder is not aware of any criminal history in the custody of another agency.

We further note, with respect to Huff's requests for documents other than criminal histories, that the public records statutes do not include a requirement similar to that in § 29-3522 for a custodian to inform the requester of another agency that has custody or control of the record requested. Therefore, to the extent the district court's mandamus ordered the sheriff to provide such information with regard to records other than criminal histories, the sheriff had no clear duty to do so.

We conclude that the district court abused its discretion when it granted the writ of mandamus as to the records for which the sheriff has responded that no responsive records exist. Because we conclude that Huff did not establish a prima facie case that he was denied public records that the sheriff had a clear duty to provide, we reverse the portions of the

order granting mandamus. We therefore need not consider Brown's remaining assignments of error.

CONCLUSION

We conclude that the district court did not err when it allowed Brown's name to be substituted for Kapperman's, because the present action was directed to the office of the sheriff of Furnas County. With regard to the merits of Huff's petition for a writ of mandamus, to the extent the district court denied Huff's petition in part, we affirm such denial. To the extent the district court granted the remainder of Huff's petition and issued mandamus, we conclude that Huff failed to demonstrate a prima facie case that he had been denied a request for public records that the sheriff had a clear duty to provide under § 84-712. We therefore reverse the order to the extent the court granted mandamus, and we remand the matter with directions to the district court to deny Huff's petition for a writ of mandamus in its entirety.

Affirmed in part, and in part
reversed and remanded.

Freudenberg, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Schaefer Shapiro LLP, a Nebraska limited liability partnership, appellant, v. Rodien Ball, appellee.

941 N.W.2d 755

Filed April 23, 2020. No. S-19-547.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Courts: Appeal and Error.** The district court and higher appellate courts 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, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Garnishment: Social Security.** As a general rule, Social Security payments to a recipient on deposit with a bank are exempt from garnishment under both federal and state law.
5. ____: ____. Exempt funds such as Social Security payments remain exempt from garnishment, even when commingled with nonexempt funds, so long as the source of the exempt funds is reasonably traceable.
6. **Garnishment: Attachments: Proof.** One who seeks exemption from attachment and garnishment should prove entitlement to the exemption.
7. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the District Court for Douglas County, Leigh Ann Retelsdorf, Judge, on appeal thereto from the County

Court for Douglas County, Lawrence E. Barrett, Judge. Judgment of District Court affirmed.

James E. Riha and Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

A judgment creditor sought to garnish the judgment debtor's bank account, which at one time contained funds both exempt and nonexempt from garnishment. We hold that funds exempt from garnishment remain exempt, even when commingled with nonexempt funds, so long as the source of exempt funds is reasonably traceable. Because competent evidence supported the county court's finding that the bank account consisted solely of exempt funds, we affirm.

BACKGROUND

Schaefer Shapiro LLP (Schaefer) obtained a judgment against Rodien Ball. On December 26, 2018, Schaefer filed an affidavit and praecipe for summons in garnishment, asserting that the judgment against Ball totaled $1,994.99 and that a bank held assets of Ball.

The bank answered garnishment interrogatories indicating that Ball's account contained funds other than wages in excess of $1,994.99. Upon Schaefer's application to deliver nonexempt funds, the court ordered that "the non-exempt earnings, property, credits, or money withheld by the garnishee in the amount of $1,994.99 be transferred to the Court."

Ball requested a hearing, claiming that the funds were exempt from garnishment. At the January 2019 hearing, Ball testified that he received $1,790 in Social Security every month and that the only funds in his garnished account were Social

Security payments. He estimated that the total balance in the garnished bank account was "[$]30,000, probably." In October 2017, Ball sold real estate and received "[p]robably about a hundred thousand." Although Ball deposited those proceeds into the same bank account as his Social Security payments, he testified: "[I]t's all gone. Been spent, and I owed bills." Ball iterated that he spent the sale proceeds but did not spend Social Security funds. The county court ruled from the bench: "Show that the testimony's been given that the funds are exempt. They are ruled exempt."

Upon Schaefer's appeal, the district court affirmed the county court's judgment. The district court highlighted the absence of evidence regarding how much money was in the bank account in October 2017, or anytime thereafter, aside from Ball's estimation. And there was no evidence as to how much money was in the account before any commingling occurred or at the time the interrogatories were completed. The district court observed that the county court apparently found Ball to be credible, and the district court found no error by the county court appearing on the record.

Schaefer appealed, and we moved the case to our docket.[1]

ASSIGNMENT OF ERROR

Schaefer assigns that the lower courts erred because the act of depositing and commingling otherwise exempt Social Security funds into the same bank account as nonexempt proceeds from the sale of real estate removes the exempt status, thereby allowing garnishment of the Social Security funds unless the garnishee proves the exempt status of the funds.

STANDARD OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.[2]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[2] *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[2,3] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.[3] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

ANALYSIS

[4] As a general rule, Social Security payments to a recipient on deposit with a bank are exempt from garnishment under both federal and state law.[5] In an earlier case decided by this court,[6] there was no dispute that the bank account consisted solely of checks directly deposited by the Social Security Administration. This appeal presents a twist: What is the effect, if any, on exempt funds when commingled with nonexempt funds?

[5] The majority of federal[7] and state[8] courts have determined that Social Security benefits maintain their exempt status, even if commingled with nonexempt funds. A Virginia court took the contrary view,[9] but the continued validity of that

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[3] *Houser v. American Paving Asphalt*, 299 Neb. 1, 907 N.W.2d 16 (2018); *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419, 889 N.W.2d 596 (2016).

[4] *Id.*

[5] See, *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973) (implementing 42 U.S.C. § 407(a) (2018)); *Havelock Bank v. Hog Confinement Systems*, 214 Neb. 783, 335 N.W.2d 765 (1983).

[6] *Havelock Bank v. Hog Confinement Systems, supra* note 5.

[7] See, *S & S Diversified Services, L.L.C. v. Taylor*, 897 F. Supp. 549 (D. Wyo. 1995); *NCNB Financial Services, Inc. v. Shumate*, 829 F. Supp. 178 (W.D. Va. 1993); *In re Lichtenberger*, 337 B.R. 322 (C.D. Ill. 2006); *In re Moore*, 214 B.R. 628 (D. Kan. 1997).

[8] See, *In re Estate of Merritt*, 272 Ill. App. 3d 1017, 651 N.E.2d 680, 209 Ill. Dec. 502 (1995); *Dean v. Fred's Towing*, 245 Mont. 366, 801 P.2d 579 (1990); *General Motors Acceptance Corp. v. Deskins*, 16 Ohio App. 3d 132, 474 N.E.2d 1207 (1984).

[9] *Bernardini v. Central Nat. Bank, Etc.*, 223 Va. 519, 290 S.E.2d 863 (1982).

decision has been questioned due to later legislation.[10] Most courts, however, require that the exempt source of the funds be traceable.[11] We now hold that exempt funds such as Social Security payments remain exempt from garnishment, even when commingled with nonexempt funds, so long as the source of the exempt funds is reasonably traceable.

[6] When there is a dispute about whether funds are exempt, which party carries the burden of proof becomes key. One who seeks exemption from attachment and garnishment should prove entitlement to the exemption.[12] This is in accord with the general rule that the burden of proving an exemption rests on the party claiming it.[13] It is also in line with the teaching of a treatise concerning Social Security: "[O]nce it is determined that an account contains commingled funds, the burden shifts to the claimant to prove that the remaining funds constitute exempt social security funds."[14] Ball, as the party claiming that the funds were exempt, had the burden to prove that they were exempt.

[7] In considering whether Ball met his burden, we are constrained by our standard of review. The county court determined that all of the funds in the bank account were exempt. And the findings of the county court have the effect of findings

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[10] See, *In re Delima*, 561 B.R. 647 (E.D. Va. 2016); *In re Meyer*, 211 B.R. 203 (E.D. Va. 1997).

[11] See, *In re Lichtenberger, supra* note 7; *In re Moore, supra* note 7; *In re Estate of Merritt, supra* note 8; *Dean v. Fred's Towing, supra* note 8; *General Motors Acceptance Corp. v. Deskins, supra* note 8.

[12] See *Novak v. Novak*, 2 Neb. App. 21, 508 N.W.2d 283 (1993), *affirmed in part and in part reversed and remanded* 245 Neb. 366, 513 N.W.2d 303 (1994). See, also, *Scottsbluff Nat. Bank v. Pfeifer*, 126 Neb. 852, 254 N.W. 494 (1934); *Stull v. Miller*, 55 Neb. 30, 75 N.W. 239 (1898).

[13] See, *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015) (exemption to criminal nonsupport); *Hamilton Cty. EMS Assoc. v. Hamilton Cty.*, 291 Neb. 495, 866 N.W.2d 523 (2015) (Industrial Relations Act exemption); *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009) (tax exemption).

[14] 2A Social Security Law and Practice § 34:8 (2019).

by a jury—they will not be set aside unless clearly wrong.[15] With respect to a jury verdict, we have stated that it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.[16] And in determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.[17]

Viewing the evidence most favorably to Ball and giving him the benefit of every reasonably inference, we cannot say that the county court's finding was clearly wrong. Ball testified that the bank account contained only his Social Security payments and that he spent all of the nonexempt money that had been deposited in the account. The county court accepted this testimony.

Schaefer argues that it is "mathematically impossible" for the $30,000 balance in the account to consist solely of exempt Social Security funds.[18] According to Schaefer, it would take at least 17 months for the account balance to go from $0 to $30,000 at $1,790 per month, but that only 14 months passed from the commingling of the funds in October 2017 to the filing of the garnishment in December 2018. Presumably, then, it would be mathematically possible for Ball's account to contain $25,060 as of December 2018 (time of service of garnishee summons) or $26,850 as of January 2019 (time of hearing).

The county court was not bound to accept Ball's estimation of the account balance. The question posed at the hearing was, "And how much is in the account?" The question inquired about the present balance of the account rather than the balance at the time of the garnishment filing, although that

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[15] See *ML Manager v. Jensen, supra* note 2.

[16] See *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[17] *Id.*

[18] Brief for appellant at 5.

hearing occurred approximately 3 weeks later. Ball answered, "I don't know. Thirty — 30,000, probably." The county court may have believed that the account contained an amount lesser than $30,000.

Schaefer further argues that federal law should govern a bank's review of an account to determine whether an exempt benefit was paid during the 2-month lookback period.[19] Under federal regulations, a financial institution must issue a notice to the account holder named in the garnishment order where (1) a benefit agency deposited a benefit payment into an account during the lookback period, (2) the balance in the account on the date of the account review was above $0 and the financial institution established a protected amount, and (3) there are funds in the account in excess of the protected amount.[20] Schaefer asserts that applying the 2-month lookback period to Ball's Social Security benefits would leave any amount in the bank account over $3,580 ($1,790 per month × 2 months) subject to being garnished.

It is not clear from the record whether the federal regulations apply here. The federal regulations were added "to implement statutory provisions that protect Federal benefits from garnishment by establishing procedures that a financial institution must follow when served a garnishment order against an account holder *into whose account a Federal benefit payment has been directly deposited*."[21] The regulations specify:

> Benefit payment means a Federal benefit payment referred to in § 212.2(b) *paid by direct deposit* to an account with the character "XX" encoded in positions 54 and 55 of the Company Entry Description field and the number "2" encoded in the Originator Status Code field of the Batch Header Record of the direct deposit entry.[22]

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[19] See 31 C.F.R. § 212.3 (2018).

[20] 31 C.F.R. § 212.7(a) (2018).

[21] 31 C.F.R. § 212.1 (2018) (emphasis supplied).

[22] 31 C.F.R. § 212.3 (emphasis omitted) (emphasis supplied).

Because our record contains no evidence that Ball's Social Security payments were directly deposited into his account, we cannot speak to whether the federal regulations apply. But even if they did apply, exempt funds remain exempt,[23] and Ball testified that his account contained only Social Security funds.

The parties presented scant evidence to the county court. But Ball's testimony that the account contained only exempt funds, if believed, provided a basis for the county court to rule accordingly. We cannot say that the county court's finding was clearly wrong. Like the district court, we see no error appearing on the record.

CONCLUSION

Because the county court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm the decision of the district court affirming the judgment of the county court.

Affirmed.

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[23] See, 42 U.S.C. § 407(a); *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004) (federal regulation cannot empower action prohibited by federal statute).

Nebraska Supreme Court
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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Kenneth A. Nnaka, respondent.

941 N.W.2d 760

Filed April 23, 2020. No. S-20-073.

Original action. Judgment of public reprimand.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

The State Bar of Texas entered an "Agreed Judgment of Public Reprimand" of the respondent, Kenneth A. Nnaka, on October 16, 2019. The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed a motion for reciprocal discipline against the respondent. We grant the motion for reciprocal discipline and impose a public reprimand.

FACTS

The respondent was admitted to the practice of law in the State of Nebraska on May 8, 2014. He has also been admitted to the practice of law in Texas.

On October 16, 2019, the State Bar of Texas and the respondent signed an "Agreed Judgment of Public Reprimand." The respondent admitted to a violation of "Rule 1.04(a)" of the Texas disciplinary rules, stating that a lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee.

On January 31, 2020, the relator filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. On February 10, this court filed an order to show cause as to why it should not impose reciprocal discipline. On February 21, the relator filed a response requesting that this court impose a public reprimand. On February 28, the respondent filed a response in which he requested that this court grant him a private reprimand or, alternatively, take no disciplinary action, because he self-reported this matter to the relator.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline

> of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Murphy, supra*.

Upon due consideration of the record, and the facts as determined by the State Bar of Texas, we determine that public reprimand is appropriate.

CONCLUSION

The respondent is publicly reprimanded. The respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

Nebraska Supreme Court
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State of Nebraska, appellee, v. David E. Degarmo, appellant.

942 N.W.2d 217

Filed May 1, 2020. No. S-19-015.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Appeal and Error.** When reviewing whether a consent to search was voluntary, as to the historical facts or circumstances leading up to a consent to search, an appellate court reviews the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which an appellate court reviews independently of the trial court. And where the facts are largely undisputed, the ultimate question is an issue of law.
3. **Constitutional Law: Search and Seizure: Blood, Breath, and Urine Tests.** The Fourth Amendment prohibits unreasonable searches and seizures, and it is well established that the taking of a blood, breath, or urine sample is a search.
4. **Search and Seizure: Warrantless Searches.** Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.
5. **Warrantless Searches.** The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.

6. **Constitutional Law: Search and Seizure: Duress.** Generally, to be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne.
7. **Warrantless Searches: Duress.** Consent for a warrantless search must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological.
8. **Constitutional Law: Search and Seizure.** The determination of whether the facts and circumstances constitute a voluntary consent to a search, satisfying the Fourth Amendment, is a question of law.
9. **Search and Seizure.** Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.
10. **Police Officers and Sheriffs: Warrantless Searches.** While there is no requirement that police must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search, knowledge of the right to refuse is a factor to be considered in the voluntariness analysis.
11. **Police Officers and Sheriffs: Search Warrants.** A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion.

Appeal from the District Court for Lancaster County, Andrew R. Jacobsen, Judge, on appeal thereto from the County Court for Lancaster County, Thomas E. Zimmerman, Judge. Judgment of District Court affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, Nathan A. Liss, and Mariah J. Nickel for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

David E. Degarmo was convicted of driving under the influence based largely on the testimony of a certified drug recognition expert who concluded Degarmo was under the influence of marijuana. A subsequent chemical test of Degarmo's urine confirmed the presence of marijuana. Degarmo challenges the admission at trial of the results of the warrantless urine test,

relying on the U.S. Supreme Court's opinion in *Birchfield v. North Dakota*.[1] Because we conclude Degarmo consented to the urine test and the results were thus admissible, we do not address the *Birchfield* issue.

I. FACTS

1. Traffic Stop

On the morning of December 26, 2016, Degarmo was driving on a highway in Lancaster County, Nebraska, when he was stopped by Lancaster County Deputy Sheriff Jeremy Schwarz for an expired registration. Degarmo was the only occupant of the vehicle. Schwarz noticed the odor of burnt marijuana coming from inside Degarmo's vehicle, and he asked Degarmo to accompany him back to his cruiser.

Schwarz patted Degarmo down before placing him in the cruiser and found a baggie containing a small amount of marijuana in Degarmo's front pocket. While seated inside the cruiser with Degarmo, Schwarz again smelled marijuana and noticed Degarmo had slow speech and bloodshot eyes. Degarmo admitted that, within the prior 20 minutes, he had smoked a "pinch" of marijuana in his vehicle before he began driving. Schwarz subsequently searched Degarmo's vehicle and found a marijuana pipe in the center console. The pipe contained both burnt and unburnt marijuana. Schwarz noticed Degarmo had a distinct green hue on his tongue with heat-raised taste buds, which Schwarz testified are indicators of recent marijuana inhalation. Schwarz also observed Degarmo to be relaxed and calm and to have fluttering eyelids, and he testified those were also signs of marijuana ingestion.

2. Field Sobriety Tests

Based on his observations, Schwarz decided to administer field sobriety tests. He conducted a horizontal gaze nystagmus test, a vertical gaze nystagmus test, an eye convergence test,

[1] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

a "modified Romberg test," a walk-and-turn test, and a one-legged stand test. Degarmo did not show any signs of impairment on the nystagmus tests, but Schwarz testified that is not unusual when the suspected impairment is due to marijuana. Degarmo showed signs of impairment on all of the remaining tests.

After conducting the field sobriety tests, Schwarz had Degarmo return to the cruiser and took his pulse, which measured at 140 beats per minute. Schwarz testified an average normal pulse is 60 to 90 beats per minute. Schwarz arrested Degarmo for driving under the influence and took him to a detoxification center in Lincoln, Nebraska, for a drug recognition evaluation (DRE). A DRE is a nationally standardized protocol for identifying drug intoxication.[2]

3. Drug Recognition Evaluation

Schwarz, who is a certified DRE expert, conducted the DRE. It was performed in a testing room with only Schwarz and Degarmo present. Most of the DRE was video recorded, and Degarmo waived his *Miranda* rights prior to the examination.

(a) Breath Test

At the beginning of the DRE, Schwarz requested a breath sample from Degarmo. In doing so, he read part A of a standardized postarrest chemical test advisement to Degarmo. This form provided:

> You are under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs. Pursuant to law, I am requiring you to submit to a chemical test or tests of your breath or urine to determine the concentration of alcohol or drugs in your breath or urine.
>
> Refusal to submit to such test or tests is a separate crime for which you may be charged.

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[2] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

> **I have the authority to direct whether the test or tests shall be of your breath or urine and may direct that more than one test be given.**
>
> **A. Request for test:** I hereby direct a test of your ✓ breath ___ urine to determine the ✓ alcohol ___ drug content.

Schwarz checked the blank space in front of "breath" and "alcohol" on the advisement, and both Schwarz and Degarmo signed the advisement form at 11:08 a.m. Schwarz testified that when he went through the form, he explained to Degarmo that it pertained only to testing for alcohol ingestion. Degarmo's breath test was completed at 11:27 a.m. and showed no alcohol in his system.

(b) Opinion of Impairment

After taking the breath test, Schwarz conducted the remainder of the DRE according to the standardized protocol.[3] Schwarz testified, summarized, that Degarmo showed impairment consistent with use of marijuana on most of the DRE tests he administered. Schwarz further testified that the tests on which Degarmo showed no impairment were tests on which marijuana use would not be expected to result in impairment. Schwarz formed the opinion that Degarmo was under the influence of marijuana and was unable to safely operate a motor vehicle. After forming this opinion, Schwarz asked Degarmo to consent to a urine test.

(c) Urine Test

In connection with requesting consent for a urine test, Schwarz read Degarmo another standardized form. This form was entitled "Consent to Search for Blood/Urine Alcohol or Drug Evidence," and it provided:

> I, David E. Degarmo, located at 721 K St., Lancaster County, Nebraska, have been informed of my constitutional right not to have a search made of my blood or

[3] See *id.*

> urine, which is under my control, without a search warrant. I also have been informed of and understand my right to refuse to consent to such search. I understand that if I refuse to give consent to search my blood or urine, a search warrant for my blood or urine will be sought. With this understanding, I hereby authorize [Deputy] Schwarz, who had identified himself/herself as a law enforcement officer in the State of Nebraska, to conduct a search of my body for blood or urine for alcohol and/or drugs. I understand that such a search may include the drawing of my blood and/or the collection of my urine. I understand that this may be used as evidence against me in criminal proceedings.
>
> I have read and/or have been read this form; I understand it; and I give the officer permission to search my blood or urine. This permission is being given voluntarily and without threats or promises of any kind.

After this consent to search form was read to him, Degarmo signed and dated the form at 12:04 p.m., and he provided the requested urine sample. The signed consent to search form was received into evidence at trial without objection.

Degarmo's urine sample was sent to the Nebraska State Patrol Crime Laboratory for testing. The test results confirmed the presence of the metabolite for tetrahydrocannabinol (the active drug in marijuana) in Degarmo's urine.

4. Motion to Suppress

Degarmo was charged in the county court for Lancaster County with driving under the influence (one prior conviction), possession of 1 ounce or less of marijuana, and possession of drug paraphernalia. He moved to suppress the results of the urine test, arguing that he did not voluntarily consent to the test and that the urine sample was obtained without a warrant in violation of *Birchfield*,[4] his rights under the 4th and 14th Amendments to the U.S. Constitution, and article I, § 7, of the

[4] See *Birchfield, supra* note 1.

Nebraska Constitution. The county court denied the motion to suppress, reasoning in part that Degarmo "freely, voluntarily, knowingly and intelligently" gave consent for the urine test by signing the consent to search form. The matter proceeded to trial.

5. Trial

During the jury trial, Schwarz generally testified to the events as set out above. He also testified that after conducting all but the final step of the DRE (the urine test), it was his opinion that Degarmo was under the influence of marijuana and was not able to safely operate a motor vehicle. He testified that he formed his opinion on the cause and extent of Degarmo's impairment prior to conducting the urine test, and he described the urine test in this case as "confirmation" or "corroborat[ion]" of his opinion on Degarmo's impairment.

The toxicologist who tested Degarmo's urine sample also testified at trial. She explained the urine testing process and testified that she performed the test in accordance with "Title 177." Over Degarmo's objection, the toxicologist testified that her testing showed the active drug metabolite for marijuana was present in Degarmo's urine. Her report to that effect was received into evidence, also over Degarmo's objection. The toxicologist admitted that it was not scientifically possible to determine impairment based only on the presence of drug metabolites in urine, and she explained that the purpose of urine testing was simply to "corroborate the drug recognition evaluator's opinion" as to the substance contributing to any impairment.

Degarmo testified in his own defense. As relevant to the issues on appeal, he admitted that on the morning he was stopped by Schwarz, he had smoked a small amount of marijuana inside his vehicle before driving.

6. Verdicts and Sentences

The jury found Degarmo guilty on all three charges. On the conviction for driving under the influence, Degarmo was

sentenced to 45 days in jail, fined $500, and his license was revoked for 18 months. On the conviction for possession of marijuana, Degarmo was fined $300. And on the conviction for possession of drug paraphernalia, Degarmo was fined $25.

7. Appeal to District Court

Degarmo filed a timely appeal through new court-appointed counsel. He assigned error to the admission of the warrantless urine test result. The district court, sitting as an intermediate court of appeals, affirmed.[5] In doing so, it examined the totality of the circumstances and found that Degarmo voluntarily consented to the urine test. Degarmo appealed again, and we granted his petition to bypass the Court of Appeals.

II. ASSIGNMENT OF ERROR

Degarmo assigns that the district court erred in affirming the county court's order overruling his motion to suppress the results of the urine test.

III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[6] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[7]

[2] Likewise, we apply the same two-part analysis when reviewing whether a consent to search was voluntary.[8] As to the historical facts or circumstances leading up to a consent

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[5] See *State v. Hatfield*, 304 Neb. 66, 933 N.W.2d 78 (2019).

[6] *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

[7] *Id.*

[8] *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

to search, we review the trial court's findings for clear error.[9] However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court.[10] And where the facts are largely undisputed, the ultimate question is an issue of law.[11]

IV. ANALYSIS

[3-5] The Fourth Amendment prohibits unreasonable searches and seizures, and it is well established that the taking of a blood, breath, or urine sample is a search.[12] Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.[13] The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.[14]

Both the county court and the district court devoted considerable analysis to whether the search incident to arrest exception can apply to a urine test after the U.S. Supreme Court's decision in *Birchfield*.[15] This case does not require us to answer that question. As explained below, we conclude that Degarmo voluntarily consented to the search of his urine and that his motion to suppress was properly overruled. As such, we do not address the applicability of any other recognized exception to the warrant requirement.

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[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] See, *Birchfield, supra* note 1; *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

[13] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[14] *Id*.

[15] See *Birchfield, supra* note 1.

1. Legal Standard and Historical Facts

As a threshold matter, we emphasize that our analysis in this case is focused exclusively on whether Degarmo voluntarily gave consent for the search of his urine.[16] We thus do not address whether, in the wake of the U.S. Supreme Court's holding in *Birchfield*, Degarmo can also be deemed to have impliedly consented to the urine test pursuant to Nebraska's implied consent laws.[17]

[6-9] Generally, to be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne.[18] Consent must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological.[19] The determination of whether the facts and circumstances constitute a voluntary consent to a search, satisfying the Fourth Amendment, is a question of law.[20] Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.[21]

Here, the county court made several findings of historical fact related to its determination that Degarmo voluntarily consented to the urine test. It found that Degarmo was in custody at the time, having been arrested on suspicion of driving under the influence of drugs and transported to a detoxification center for purposes of a DRE. It found that as part of the DRE, Schwarz read Degarmo part A of the postarrest chemical test

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[16] See *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017) (concluding *Birchfield* did not categorically invalidate warrantless blood draw based on actual consent when driver was incorrectly advised he was required to consent or face criminal penalties and finding totality of circumstances test proper).

[17] See Neb. Rev. Stat. § 60-6,197(1) and (3) (Cum. Supp. 2018).

[18] *Schriner, supra* note 8.

[19] *Id*.

[20] *Id*.

[21] *Id*. See, also, *Hoerle, supra* note 16.

advisement form and directed a test of his breath, and that Degarmo signed part A of that form at 11:08 a.m. It found that about an hour later, Schwarz read Degarmo the consent to search form asking for permission to search his urine, and that Degarmo signed that form at 12:04 p.m. It noted Degarmo's testimony that he signed the forms because he understood that he was going to be "guilty no matter what." It also noted Degarmo's testimony that he felt "belittled" during the entire course of the DRE.

Degarmo does not challenge any of these findings of historical fact, and we agree they are supported by the record and not clearly erroneous. After considering the totality of the circumstances, both the county court and the district court concluded that Degarmo voluntarily consented to the search of his urine. Because this determination presents a question of law, we consider it independently.[22]

2. Totality of Circumstances

As stated, whether consent to a warrantless search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent. On appeal, Degarmo advances two reasons why his written consent to the urine test was not voluntary. First, he argues his consent was "coerced out of him by a claim of lawful authority."[23] Next, he argues his consent was not voluntary because he was "in a police-dominated atmosphere."[24] We address each argument in turn.

In arguing that his consent was coerced by a claim of lawful authority, Degarmo claims that after he read and signed the postarrest chemical test advisement form (which directed him to submit to a breath test), he was left with the "'impression'" that if he did not also sign the consent to search form and agree to a search of his urine, that he "'was going to be guilty no

[22] *Schriner, supra* note 8.

[23] Brief for appellant at 20.

[24] *Id*.

matter what.'"[25] We find this argument unavailing in light of the plain language of the consent to search form.

[10] The consent to search form expressly advised Degarmo that he had a constitutional right *not* to have a search made of his blood or urine without a search warrant, and the form unequivocally stated that Degarmo had a right to refuse to consent to such a search. While there is no requirement that police must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search, knowledge of the right to refuse is a factor to be considered in the voluntariness analysis.[26] Here, the fact that Degarmo was told he had a constitutional right to refuse a warrantless search of his urine is a factor that weighs heavily in favor of finding his consent to such a search was voluntary.

[11] The consent to search form also told Degarmo that if he refused to give consent to search his blood or urine, then officers would seek a search warrant. In his reply brief, Degarmo suggests that the threat of being "detained even further for the possible issuance of a search warrant"[27] was itself coercive, but we disagree. As we explained in *State v. Tucker*,[28] "A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion."

Having considered the language of the postarrest chemical test advisement form in conjunction with the plain language of the consent to search form, we reject Degarmo's suggestion that an objectively reasonable person would be left with the impression he or she had to consent.

Nor are we persuaded by Degarmo's claim that his consent was coerced simply by being "in a police-dominated atmosphere."[29] Degarmo suggests his consent to the urine

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[25] *Id.*

[26] See *United States v. Drayton*, 536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002).

[27] Reply brief for appellant at 3.

[28] *State v. Tucker*, 262 Neb. 940, 948, 636 N.W.2d 853, 860 (2001).

[29] Brief for appellant at 20.

search was not voluntary because he "had been arrested, placed in handcuffs, put into a police cruiser, driven to detox, [and] subjected to various tests."[30] All these are factors to consider in a totality of the circumstances analysis, but having done so, we do not agree with Degarmo that any of these factors vitiate the voluntariness of his written consent.

The U.S. Supreme Court has held the "fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search."[31] And this court has similarly recognized that "[t]he mere fact that the individual is in police custody, standing alone, does not invalidate the consent if, in fact, it was voluntarily given."[32] Here, the record shows Degarmo's arrest and transport to a detox center were part of a routine DRE investigation, which was video recorded. There is no evidence that police conducted either the arrest or the DRE in a threatening or coercive manner.[33]

Having considered the totality of the circumstances, we determine Degarmo's written consent to the warrantless search of his urine was voluntary and not coerced. The motion to suppress was properly denied by the county court, and that denial was properly affirmed by the district court.

V. CONCLUSION

Because Degarmo voluntarily consented to the warrantless search of his urine, the search fell within a recognized exception to the warrant requirement. Finding no error in the district court's decision to affirm the county court's overruling of Degarmo's motion to suppress, we affirm.

Affirmed.

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[30] Brief for appellant at 20-21.

[31] *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

[32] *State v. Christianson*, 217 Neb. 445, 449, 348 N.W.2d 895, 898 (1984).

[33] See *Schriner, supra* note 8 (finding consent for warrantless search was voluntary when there was no evidence of police pressure and police body camera recorded interaction).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Thomas Yeransian, in his capacity as the representative of certain contingent value rights under the Contingent Value Rights Agreement dated October 15, 2010, appellant, v. Willkie Farr & Gallagher LLP, appellee.

942 N.W.2d 226

Filed May 1, 2020. No. S-19-320.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Jurisdiction: Pleadings: Appeal and Error.** An appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
4. **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 evidence.
5. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
6. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
7. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any

contact with or maintaining any relation to this state as far as the U.S. Constitution permits.

8. **Jurisdiction: States: Legislature: Intent.** It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute.
9. **Due Process: Jurisdiction: States.** When a state construes its long-arm statute to confer jurisdiction to the fullest extent constitutionally permitted, the inquiry collapses into the single question of whether jurisdiction comports with due process.
10. **Jurisdiction: States.** To constitute sufficient minimum contacts, a defendant's conduct and connection with the forum state must be such that he or she should reasonably anticipate being haled into court there.
11. **Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities and determines whether the nonresident defendant's actions create substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.
12. **Jurisdiction: States.** A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.
13. **Jurisdiction.** General personal jurisdiction arises where a defendant's affiliations with a state are so continuous and systematic as to render the defendant essentially at home in the forum state.
14. **Jurisdiction: Words and Phrases.** Specific personal jurisdiction requires that a claim arise out of or relate to the defendant's contacts with the forum.
15. **Jurisdiction.** A defendant need not be at home in the forum state to be subject to specific personal jurisdiction, but, rather, there must be an affiliation between the forum and the underlying controversy.
16. **Jurisdiction: Words and Phrases.** Specific personal jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.
17. **Jurisdiction: Time.** Specific personal jurisdiction is determined at the time a suit is commenced, and minimum contacts must exist either at the time the cause of action arose, at the time the suit was filed, or within a reasonable period of time immediately prior to the filing of the lawsuit.
18. **Jurisdiction: Words and Phrases.** For specific personal jurisdiction, there must be a substantial connection between the defendant's contacts with the forum state and the operative facts of the litigation.
19. **Jurisdiction: States: Contracts.** While contractual agreements may be relevant to consideration of minimum contacts that support jurisdiction,

the existence of a contract with a party in a forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction.

20. ____: ____: ____. To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing.

21. ____: ____: ____. To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court looks to whether the contracting party has created continuing relationships and obligations with citizens of another state.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

James D. Sherrets, Diana J. Vogt, and James L. Schneider, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Steven D. Davidson, of Baird Holm, L.L.P., for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Thomas Yeransian appeals the district court's order dismissing his complaint against the law firm of Willkie Farr & Gallagher LLP (Willkie). Willkie had represented Aspen Holdings, Inc. (Aspen), in 2009 and 2010, when Aspen merged with and was acquired by Markel Corporation (Markel). Yeransian, as a representative of Aspen's former shareholders, brought suit against Willkie to obtain the Aspen attorney-client file for the former shareholders' dispute with Markel over payments from the merger. The district court found Willkie did not have the requisite minimal contacts with Nebraska for the court to have personal jurisdiction over it. Alternatively, the court found that Yeransian failed to present a claim upon which relief can be granted because Willkie had represented Aspen, and not its shareholders, and that Markel, as the surviving entity, was entitled to control of the file. Yeransian challenges both grounds. For the reasons set forth herein, we affirm.

BACKGROUND

Willkie is an international law firm with its principal place of business in New York, New York. Willkie does not have a Nebraska office.

In 2009 and 2010, Willkie represented Aspen, a Delaware corporation with its principal place of doing business in Nebraska, in Aspen's merger with Markel, a Virginia corporation. At the time of the merger and now, some of Aspen's shareholders reside in Nebraska. For the purpose of this representation, Willkie and Aspen entered into an engagement letter whereby Willkie stated that the client would be "Aspen Holdings, Inc.," and explained that "[t]his engagement does not create an attorney-client relationship with any related persons or entities, such as parents, subsidiaries, affiliates, employees, officers, directors, shareholders or partners."

In July 2010, Aspen and Markel agreed to the terms of the merger and executed an "Agreement and Plan of Merger" (Merger Agreement). In October 2010, Aspen and Markel also executed a "Contingent Value Rights Agreement" (CVR Agreement). Pursuant to the Merger Agreement, the merger transaction closed later in 2010. Under both the CVR Agreement and the Merger Agreement, the parties elected to have Delaware law govern.

Under the CVR Agreement, each share of Aspen's common stock and option was converted into the right to receive, among other compensation, certain contingent payments. This right had an initial principle value which was to be subjected to adjustment depending on factors set out by the CVR Agreement. Markel was periodically required to provide the holders of certain CVR rights (CVR Holders) certain information relevant to this changing value. The CVR Agreement designated a representative to act on behalf of the CVR Holders (Holder Representative), including granting this representative the authority to enforce any claim against Markel arising under the CVR Agreement. When Markel was required to provide any notice under the CVR Agreement to the CVR

Holders, the agreement specified that such notice be sent to the Holder Representative "with a copy (which shall not constitute notice)" sent to Willkie.

Yeransian alleges he is the current Holder Representative. In September 2016, on behalf of the CVR Holders, Yeransian filed suit against Markel in the U.S. District Court for the District of Delaware. In the suit, Yeransian alleged that Markel violated its obligations under the CVR Agreement and sought payment of the unpaid benefits. Yeransian claimed that there were ambiguities in the CVR Agreement and requested Willkie's attorney-client file with Aspen to aid in resolution of the ambiguities. Upon request, however, Willkie refused to provide the file, citing attorney-client privilege.

In July 2018, Yeransian initiated the instant action in the district court for Douglas County, Nebraska, by filing a complaint against Willkie to acquire its Aspen file. The complaint's claims included the following: (1) Willkie breached its contract for representation of Aspen, (2) Willkie breached its fiduciary duty to the CVR Holders under the CVR Agreement, and (3) restitution should be ordered for costs associated with the return of the file. Yeransian alleged that the Nebraska district court is a proper venue for these claims because Aspen's principal place of business was in Omaha, Nebraska; Willkie represented Aspen in 2009 and 2010 during the merger and in connection with the CVR Agreement; Willkie maintained regular contact with Aspen officers and employees in Douglas County in furtherance of this representation; and a substantial number of the CVR Holders continue to reside in Nebraska.

Willkie filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, for failure to state a claim for which relief can be granted. Willkie claimed Markel is the rightful possessor of this file, because Willkie represented Aspen, not its shareholders, and Markel absorbed Aspen in the 2010 merger. Willkie asserted Markel acquired all property, rights, privileges, powers, and franchises of Aspen, including Willkie's Aspen file on the merger. Accordingly,

Willkie argued Yeransian should submit its request for the file to Markel.

The district court granted Willkie's motion and dismissed Yeransian's claims. First, the court found Yeransian's complaint failed to allege Willkie had the requisite minimum contacts with the State of Nebraska and that, as such, the court did not have personal jurisdiction over Willkie. The court disagreed that Willkie's representation of Aspen could be used as a basis for personal jurisdiction, explaining that any contacts which may have arisen in 2009 and 2010 have long ceased before any cause of action arose based on Willkie's declining to provide Yeransian the file. Additionally, the court held that those potential contacts with the State existed between Willkie and Aspen as a corporate entity and not Aspen's individual shareholders. Even if there was personal jurisdiction, the court found Yeransian's complaint also failed to state a claim upon which relief could be granted because Willkie's client was Aspen and not Aspen's shareholders, which meant Markel, as the surviving entity, was the rightful owner of the file.

ASSIGNMENTS OF ERROR

Yeransian assigns, restated, that the district court erred in (1) finding the court lacked personal jurisdiction over Willkie, (2) denying an initial discovery request on the issue of personal jurisdiction, (3) implying that Yeransian lacked standing, and (4) finding Yeransian failed to state a claim upon which relief can be granted.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1] Similarly, an appellate court examines the question of whether the nonmoving party

[1] *Patterson v. Metropolitan Util. Dist.*, 302 Neb. 442, 923 N.W.2d 717 (2019).

has established a prima facie case of personal jurisdiction de novo.[2]

[3,4] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[3] 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 evidence.[4]

ANALYSIS

Personal Jurisdiction

[5,6] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[5] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[6]

[7-9] Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[7] It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute.[8] When, as here, a state construes its long-arm statute to confer jurisdiction to the fullest extent constitutionally permitted, the inquiry collapses into the single

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[2] *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018).

[3] *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

[4] *Id*.

[5] *Nimmer, supra* note 2.

[6] *Id*.

[7] Neb. Rev. Stat. § 25-536 (Reissue 2016).

[8] *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013).

question of whether jurisdiction comports with due process.[9] Therefore, the issue is whether Willkie had sufficient minimum contacts with Nebraska so that the exercise of personal jurisdiction would not offend the traditional notions of fair play and substantial justice.[10]

[10,11] To constitute sufficient minimum contacts, a defendant's conduct and connection with the forum state must be such that he or she should reasonably anticipate being haled into court there.[11] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities and determine whether the nonresident defendant's actions create substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.[12]

[12-14] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.[13] General personal jurisdiction arises where a defendant's affiliations with a state are so continuous and systematic as to render the defendant essentially at home in the forum state.[14] Specific personal jurisdiction, in turn, requires that a claim arise out of or relate to the defendant's contacts with the forum.[15]

Yeransian's arguments are solely based upon Willkie's presence within Nebraska during the Aspen and Markel merger. It is undisputed that Willkie's principal place of business is in New York and that it does not have a Nebraska office. Further,

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[9] See *id*.

[10] See *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse*, 298 Neb. 705, 905 N.W.2d 644 (2018).

[11] *Id*.

[12] See *Nimmer, supra* note 2.

[13] *Id*.

[14] See *Hand Cut Steaks Acquisitions, supra* note 10.

[15] See *id*.

there are no allegations that Willkie has had a Nebraska presence outside of its work surrounding the merger. Accordingly, there is an insufficient basis to establish general personal jurisdiction and the issue before us is whether the district court had specific personal jurisdiction over Willkie.

[15-18] A defendant need not be at home in the forum state to be subject to specific personal jurisdiction, but, rather, there must be an affiliation between the forum and the underlying controversy.[16] Specific personal jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.[17] This inquiry is determined at the time a suit is commenced, and minimum contacts must exist either at the time the cause of action arose, at the time the suit was filed, or within a reasonable period of time immediately prior to the filing of the lawsuit.[18] Thus, there must be a substantial connection between the defendant's contacts and the operative facts of the litigation.[19]

Yeransian alleges Willkie created a substantial connection with Nebraska in the current subject matter through its work surrounding the 2010 merger and its drafting of the CVR Agreement. Yeransian's argument centers on the allegation that by drafting the CVR Agreement, Willkie entered into a contractual relationship that envisioned continuing contacts in Nebraska due to Aspen's previous presence and the CVR Holders' continued residency in the forum state.

[19-21] However, the CVR Agreement does not supply the contacts necessary to establish a continuing substantial connection. While contractual agreements may be relevant to consideration of minimum contacts that support jurisdiction, the existence of a contract with a party in a forum state does not, in and of itself, provide the necessary contacts for personal

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[16] *Id.*

[17] *Id.*

[18] See *Nimmer, supra* note 2.

[19] *Hand Cut Steaks Acquisitions, supra* note 10.

jurisdiction.[20] To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing.[21] A court looks to whether the contracting party has created continuing relationships and obligations with citizens of another state.[22]

We begin by noting that Willkie was not a party to the CVR Agreement. Willkie participated in the process as a representative of Aspen. Willkie has no continuing obligations under the terms of the CVR Agreement. Any continuing relationship from the agreement would have extended to Aspen, which ceased to be an entity due to its merger with Markel in 2010.

Additionally, Willkie has no obligations to the CVR Holders extending from Willkie's agreement to represent Aspen in the merger process. Willkie's representation was limited to Aspen as the corporate entity and explicitly did not extend to Aspen's shareholders. This representation is detailed in the engagement letter, signed by an Aspen representative, stating that Willkie's client would be "Aspen Holdings, Inc.," and stipulating that "[t]his engagement does not create an attorney-client relationship with any related persons or entities, such as . . . shareholders . . . ."

Contrary to the clear language of the engagement letter, Yeransian alleges that Willkie represented Aspen's shareholders during the merger and has continued to represent them as the CVR Holders. To support this claim, Yeransian points to the provision of the CVR Agreement which directs Markel to send any required notices to the Holder Representative "with a

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[20] See, *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014); *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

[21] *Hand Cut Steaks Acquisitions, supra* note 10; *Nimmer, supra* note 2.

[22] See *Kugler Co., supra* note 20. See, also, *Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

copy (which shall not constitute notice)" sent to Willkie. Citing this provision, Luke Yeransian, a former founder and chief executive officer of Aspen, stated in an affidavit that it was his understanding that "Willkie Farr remained as counsel for the [CVR] Holders following the conclusion of the merger."

The CVR Agreement's notice provision instructing Markel to send a copy of notices under the agreement to Willkie is insufficient to indicate Willkie had any sort of attorney-client relationship with Aspen's previous shareholders or that its representation of Aspen would continue until the expiration of the CVR Agreement. The notice provision does not label Willkie as the CVR Holders' representative nor does it indicate that such copy is due to an existing or impending attorney-client relationship with the CVR Holders. While the notice provision directed that a copy of notices sent to the Holder Representative also be sent to Willkie, it specified that such copy would not constitute notice. The mere proximity of the requirement of notice to the Holder Representative and Willkie does not, without more, establish an attorney-client relationship to the CVR Holders or evidence an existing one.

Similarly, citing only the notice provision, Luke Yeransian contended that the provision created an attorney-client relationship with the CVR Holders. However, no evidence was offered that either party acted upon this alleged relationship such as the CVR Holders' paying Willkie any fees or retainers for services, communications about the alleged representation between Willkie and any CVR Holders, or correspondence from any CVR Holder to Willkie about initiating the pending suit against Markel. Yeransian makes no allegations outlining Willkie's authority to act on the CVR Holders' behalf or the parameters of any sort of advisory role Willkie might have had with the CVR Holders. While Yeransian asks for discovery to obtain Willkie's documents concerning Willkie's representation of Aspen, the motion did not seek to uncover evidence of an agreement between Willkie and the CVR Holders. Instead,

the discovery only sought evidence of Willkie's exposure to Nebraska during its representation of Aspen. Even if Yeransian was seeking discovery to uncover evidence of the alleged representation arrangement between Willkie and the CVR Holders, it is unclear why the Holder Representative and the CVR Holders would not have additional evidence beyond the notice provision of the CVR Agreement of such an arrangement. Accordingly, Luke Yeransian's reading of the CVR Agreement's notice provision is also insufficient to establish Willkie had an attorney-client relationship with the CVR Holders.

As explained, Willkie was not a party to the CVR Agreement or the merger. The notice provision of the CVR Agreement was insufficient to demonstrate or create an attorney-client relationship between Willkie and the CVR Holders. Willkie's engagement letter, signed by a representative of Aspen, explained Willkie and Aspen's attorney-client relationship and specified that Willkie represented Aspen as a corporate entity and did not represent Aspen's shareholders. Willkie's relationship with Nebraska was through its representation of Aspen, which did have a presence in Nebraska but which is no longer an entity. Now, neither Willkie nor Aspen have any continuing obligations under the CVR Agreement. Instead, the CVR Agreement requires Markel to pay the CVR Holders according to existing valuations of certain Markel activities. As the district court correctly found, Willkie's representation of Aspen in the 2010 merger did not extend to the CVR Holders and is insufficient to establish a continuing substantial connection between Willkie and Nebraska under the operative facts of the current litigation.

Yeransian also takes issue with the lower court's consideration of the time difference between Willkie's representation of Aspen during the 2010 merger and Yeransian's seeking the attorney-client file in 2016, asserting the court created an "expiration date [for] specific jurisdiction analysis."[23]

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[23] Brief for appellant at 14.

Yeransian misconstrues the court's analysis. Instead of applying an expiration date, the court was addressing Yeransian's argument that the CVR Agreement created a substantial connection between Willkie and Nebraska under the operative facts of the litigation. The court correctly considered that Willkie did not represent the shareholders. The court also correctly considered that even though Willkie represented Aspen in the 2010 merger that produced the CVR Agreement, that any relationship this representation may have had on the CVR Holders' rights under the agreement was too attenuated from Willkie due to a lack of privity of contract and the length of time since Willkie's participation.

Further, despite Willkie's having no attorney-client relationship with the CVR Holders and no continuing obligations under the CVR Agreement, Yeransian claims Willkie has a continuing substantial connection with Nebraska because the CVR Holders are the current, rightful owners of Willkie's attorney-client file as the previous shareholders to Aspen and they continue to reside within the state.

This argument incorrectly presumes the CVR Holders are the current, rightful owners of the 2010 merger file. Aspen was incorporated under the laws of Delaware, and in the merger documents, the parties elected to have Delaware law apply. Under Delaware "General Corporation Law," upon consummation of a merger, "all property, rights, privileges, powers, and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation."[24] "[A]ll . . . privileges" necessarily encompasses an attorney-client privilege and "all property" necessarily encompasses documentation of all premerger communications pursuant to an attorney-client privilege, including those communications relating to the negotiation of the merger itself.[25]

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[24] Del. Code tit. 8, § 259 (2020).

[25] See *Great Hill Equity v. SIG Growth Equity Fund*, 80 A.3d 155 (Del. Ch. 2013).

As such, Markel, as the surviving corporation, is the current, rightful owner of Willkie's attorney-client file on Aspen's 2010 merger. Yeransian's argument that Willkie has a continuing presence in Nebraska because the CVR Holders reside in Nebraska and are the current, rightful owners of Willkie's attorney-client file with Aspen is, therefore, without merit.

In consideration of all of the above, Yeransian failed to establish a continuing substantial connection under the operative facts of the litigation to establish Willkie has sufficient minimum contacts with Nebraska for the exercise of specific personal jurisdiction.

Jurisdictional Discovery

Yeransian also assigns the district court erred in denying his motion regarding jurisdictional discovery. He argues that if discovery had been granted, he could have obtained further evidence of Willkie's representation of Aspen and Willkie's presence in Nebraska through that representation.

Yeransian does not contend that such discovery would produce evidence of an agreement for representation between Willkie and the CVR Holders or evidence of additional continuing obligations to show Willkie had a continuing substantial presence in Nebraska. Even if Yeransian did seek evidence of an alleged arrangement where Willkie also represented the CVR Holders, he fails to allege why the CVR Holders would not already have such evidence. Instead, the evidence Yeransian sought concerned only Willkie's representation of Aspen at the time of the merger, which representation and its presence in Nebraska is uncontested by Willkie. Accordingly, the district court did not abuse its discretion in denying Yeransian's motion to conduct discovery in order to prove these unchallenged allegations.[26]

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[26] See, *Lombardo, supra* note 3; *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

CONCLUSION

The district court did not err in denying Yeransian's motion for discovery and granting Willkie's motion to dismiss Yeransian's complaint for lack of personal jurisdiction. Because the district court correctly determined it lacked jurisdiction, we need not address Yeransian's remaining assignments.

Affirmed.

Miller-Lerman, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

FTR Farms, Inc., a Nebraska corporation, appellee, v. Rist Farm, Inc., a Nebraska corporation, appellant, and Eugene Wesley Dowell and Mary L. Dowell, husband and wife, et al., appellees.

942 N.W.2d 204

Filed May 1, 2020. No. S-19-438.

1. **Partition: Equity: Appeal and Error.** A partition action is an action in equity and is reviewable by an appellate court de novo on the record.
2. **Partition.** The purpose of a partition action is to divide a jointly owned interest in real property so that each owner may enjoy and possess in severalty.
3. ____. One of several tenants in common has an absolute right to a partition of their real estate, in the absence of an agreement to, or other impediments to, the contrary.
4. ____. As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.
5. ____. A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted.
6. ____. The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole.
7. ____. Owelty addresses a disparity in the value of partitioned parcels and is the payment of money required when property is not susceptible of division into exactly equal shares to make the portions of property respectively assigned to the cotenants of equal value.

8. **Partition: Jurisdiction.** A court acquiring jurisdiction of property for partition acquires complete jurisdiction of the property and affords complete justice to all parties in that action with respect to the subject matter.
9. **Partition: Equity.** In a partition in equity, the court does not act in a merely ministerial character, in obedience to the call of some or all of the parties, but administers relief in such manner as to do equal and exact justice as far as possible.
10. **Partition.** In a partition in kind, where the premises are incapable of a fair division, the court has power to award a pecuniary compensation or charge upon the land.
11. ____. Owelty is predicated upon a division. There can be no owelty in the absence of a division of property.
12. **Partition: Equity.** Owelty should be rarely utilized and only when it is equitably necessary.
13. **Equity: Evidence: Appeal and Error.** In an appeal of an equity action, where credible evidence is in conflict on a material question of fact, an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and their manner of testifying, and accepted one version of the facts rather than another.
14. **Partition: Presumptions.** While it is generally true that there is a presumption in favor of partition in kind, it is likewise true that the character and location of the property, or the amount of the interest sought to be assigned, or both, may be such that it will be presumed that partition in kind cannot be made.

Appeal from the District Court for Richardson County: Julie D. Smith, Judge. Affirmed and remanded for further proceedings.

John Hahn, of Wolfe, Snowden, Hurd, Ahl, Sitzmann, Tannehill & Hahn, L.L.P., for appellant.

Michael R. Dunn, of Halbert, Dunn & Halbert, L.L.C., for appellees Eugene Wesley Dowell et al.

Jeffery W. Davis, of Smith, Schafer, Davis & Gaertig, L.L.C., for appellee FTR Farms, Inc.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

In this appeal from proceedings to partition real estate, the principal issue is whether partition in kind can be decreed using "owelty"—that is, a monetary payment to equalize values. Because the law has long favored partition in kind, it empowers a court of equity to use that device to accomplish full and complete justice. But the power should be invoked sparingly. Here, we are not persuaded that owelty would enable division in kind without great prejudice to the owners. We affirm the judgment and remand the cause for further proceedings.

BACKGROUND

Property and Owners

FTR Farms, Inc., and Rist Farm, Inc., each own an undivided one-half interest in a 311-acre tract of farmland in Richardson County, Nebraska. A winding river—which the record identifies variously as the Nemaha River, Little Nemaha River, or Big Nemaha River—creates a natural divide through roughly the middle of the property.

The river separates the property into two tracts: north and south. The north tract of the property is approximately 135 acres. The south tract is approximately 176 acres. Both tracts have high quality soil, but the north tract's soil is marginally better. A bridge connects both tracts of the property.

In June 2011, FTR Farms and Rist Farm purchased the property from Eugene Wesley Dowell and Mary L. Dowell for $1,750,000. The buyers executed a promissory note to the Dowells for $1,312,500. The difference was paid at or before closing. The Dowells have a purchase money security interest secured by a deed of trust. Prior to the partition action, FTR Farms and Rist Farm each paid half of the annual payment on the promissory note.

Partition Ownership

In March 2017, FTR Farms filed a complaint for partition of the property, seeking partition by sale. It alleged that the

property could not be partitioned in kind according to their respective interests without prejudice to their rights. In Rist Farm's answer, it alleged that the property could be physically partitioned without great prejudice to the parties. The answer also asserted that partition by sale would be harmful to the parties' farming operations.

On FTR Farms' motion for summary judgment regarding ownership, the district court determined that FTR Farms and Rist Farm were joint owners of the property as tenants in common. The court ordered that partition be made and appointed a referee to recommend whether the property could be partitioned in kind without great prejudice to the owners.

Partition in Kind

The referee inspected the property. He opined that

> physical division of the [property] into two separate, equal tracts would not be possible and would be impractical and detrimental to the value of [the property], and actual partition and division of [the property] between the two owners cannot be made, without great prejudice to the owners or one of them.

He stated that the property should be sold, so that the sale may then be evenly divided between the parties.

FTR Farms and the referee moved to confirm the referee's report and requested sale of the property. At the hearing, FTR Farms and Rist Farm submitted appraisals of the property. FTR Farms' expert appraised the property as irrigated, and Rist Farm's expert appraised the property as nonirrigated. This table summarizes the respective appraisals:

Tract	**FTR Farms**	**Rist Farm**
North	$1,084,668	$860,000
South	$1,292,925	$1,075,000
Combined	$2,367,020	$1,935,000
South − North =	$208,257	$215,000
Combined − (North + South) =	($10,573)	0

At the hearing, the referee testified that he recommended partition by sale because the north and south tracts were not

equal in size, the south tract was valued $200,000 more than the north side, and he could not find any other feasible way to divide the property into equal tracts. He explained that "[his] report [was] strictly limited to the notion that if the acres are not exactly the same, it cannot be partitioned."

FTR Farms' president testified that the property was purchased as a whole and should be sold as a whole. He stated he was going through a bankruptcy proceeding and wanted to sell the property to pay off his debts. He believed that he would receive more equity from the sale of the whole property, rather than a sale of half.

At the hearing, Rist Farm argued that the property should be partitioned in kind. It argued that Rist Farm should receive the south tract and that FTR Farms should receive the north tract. Rist Farm indicated that it would be willing "to make up a difference or a boot to equalize the valuation of the properties." Rist Farm's appraiser testified that if the property were sold as a whole versus as a separate parcel, it would have a negative impact. She stated that in her experience, there are fewer bidders for larger parcels because of financing and cost restrictions, whereas the smaller parcels bring more bidders. She recommended that the land be sold as two parcels to get the best price.

Rist Farm's president testified that Rist Farm farmed the south tract and that FTR Farms farmed the north tract. Each party kept their own profits, and each paid half of the yearly payment on the promissory note. He explained that if the property were sold, he would lose his equity in the land, pay capital gains tax, lose his pride because he farmed that land since 1980, and lose a portion of his farming operation, as well as the profits from it. He stated that if partitioned in kind, Rist Farm would prefer the south tract and be willing to pay $215,000 to FTR Farms to equalize the value of the property.

At the hearing, the Dowells stipulated that if the property were divided and money were to change hands as part of the division, the funds paid would be given to the Dowells to

reduce the debt on the less valuable property and new promissory notes would be put in place to protect the Dowells' first lien position. Alternatively, if the property were sold by the referee, the Dowells would be paid in full from the proceeds.

In the district court's order on the motion to confirm the referee's report, it explained that if it were to divide the property in kind, there would be a significant difference in size and value between the parcels. It reasoned that the north tract would be materially less than the money equivalent that could be obtained for FTR Farms' share of the whole. It concluded that "[d]ividing the property in kind would greatly prejudice [FTR Farms.]" It declined to adopt Rist Farm's proposal to award owelty to equalize the difference in value, because "there is a lack of established authority in Nebraska to do so in a situation like this, both in terms of statutes and case law."

The district court found that physical division "cannot be made without greatly prejudicing its owners and that this real estate should be sold at public auction as provided by law." It authorized the referee to sell the property "as one tract, as two separate tracts, or in any manner which might be desirable to prospective buyers."

Partition Sale and Confirmation

A public auction followed. The referee first solicited bids for the north and south tracts separately. Although the precise high bids for the separate tracts are not in our record, testimony at the confirmation hearing disclosed that the total of the highest bids for the individual tracts was $1.6 million and that the high bid for the south side was either $920,000 or $940,000. The referee then offered the whole property, which was bid in for $1.62 million.

The referee moved to confirm the sale. A hearing was held, and the parties adduced evidence. Both FTR Farms and Rist Farm objected to the confirmation of the sale. They argued that the sale price was unreasonable and grossly inadequate. Nonetheless, the district court confirmed the sale.

At the confirmation hearing, the Dowells presented evidence showing that a notice of default had been given to FTR Farms and Rist Farm on November 15, 2018, regarding the debt owed to the Dowells, because FTR Farms had failed to pay its half of the payment due on November 1.

Appeals

Both FTR Farms and Rist Farm purported to appeal. The Nebraska Court of Appeals dismissed the appeal for lack of a final order. The district court then held a hearing to determine the remaining issues, namely referee's fees and expenses, attorney fees, supersedeas bond, and oil and gas lease payments. The district court determined the fees and resolved the remaining issues.

From this judgment, Rist Farm then filed a timely appeal. We moved the appeal to our docket.[1]

ASSIGNMENTS OF ERROR

Rist Farm assigns that the district court erred (1) in determining that it did not have authority to award owelty to make partition in kind equitable, (2) in ordering partition by sale without finding that partition in kind would greatly prejudice both owners, and (3) by failing to consider options for partition in kind other than what was proposed by Rist Farm.

STANDARD OF REVIEW

[1] A partition action is an action in equity and is reviewable by an appellate court de novo on the record.[2]

ANALYSIS

We begin with basic, longstanding concepts governing partition actions in Nebraska. Our partition statutes have existed from statehood.[3]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[2] *Zornes v. Zornes*, 292 Neb. 271, 872 N.W.2d 571 (2015).

[3] See Rev. Stat. §§ 802 to 844 (1867).

[2] Recently, we have explained: The purpose of a partition action is to divide a jointly owned interest in real property so that each owner may enjoy and possess in severalty.[4] This articulation differs little from its ancient precedent: The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as joint tenants, or tenants in common, to them in severalty.[5]

[3] One of several tenants in common has an absolute right to a partition of their real estate, in the absence of an agreement to, or other impediments to, the contrary.[6] This also is not a new concept.[7] Here, the parties agree on the necessity of partition. They dispute between partition in kind and partition by sale.

[4] One method is favored over the other. As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.[8] We have often stated this principle or its equivalent.[9] But we have also acknowledged that the preference can be overcome.[10]

[5,6] Finally, we have said that a sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain

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[4] *Zornes v. Zornes, supra* note 2.

[5] *Phillips v. Dorris*, 56 Neb. 293, 76 N.W. 555 (1898).

[6] *Malcom v. White*, 210 Neb. 724, 316 N.W.2d 752 (1982).

[7] See *Windle v. Kelly*, 135 Neb. 143, 280 N.W. 445 (1938).

[8] *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[9] See, *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005); *Phillips v. Phillips*, 170 Neb. 733, 104 N.W.2d 52 (1960); *Cary v. Armbrust*, 160 Neb. 392, 70 N.W.2d 427 (1955); *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950).

[10] See *Nordhausen v. Christner*, 215 Neb. 367, 338 N.W.2d 754 (1983).

that the interests of all will be promoted.[11] Our statute requires a court to determine whether "partition cannot be made without great prejudice to the owners."[12] The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole.[13] With these principles in mind, we turn to the specific arguments here.

Owelty Permissible

Rist Farm's first assignment of error attacks the district court's legal conclusion that "there is a lack of established authority in Nebraska to [order an award of owelty to offset the difference in value] in a situation like this, both in terms of statutes and case law." Rist Farm argues that the district court "clearly did have authority to award owelty,"[14] while FTR Farms characterizes this as an "attempt[] to read into our statutes and case law a concept that simply does not exist."[15]

Here, it is not clear whether the district court determined that owelty is never permitted, as FTR Farms argues, or whether owelty was unsuited to the circumstances here. While the court spoke of a "lack of established authority," it also referred to "a situation like this." We reject the notion that owelty has no place in our partition jurisprudence.

[7] Although the term "owelty" appears only once in our reported decisions,[16] it has ancient roots. Under Roman law, property owners used full partitioning remedies, including payments between cotenants to equalize unequal divisions (owelty) and removing and vesting a cotenant's interest in

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[11] *In re Estate of McKillip, supra* note 8.

[12] Neb. Rev. Stat. § 25-2181 (Reissue 2016).

[13] *In re Estate of McKillip, supra* note 8; *Trowbridge v. Donner, supra* note 9.

[14] Brief for appellant at 15.

[15] Brief for appellee FTR Farms at 7.

[16] See *Staats v. Wilson*, 76 Neb. 204, 107 N.W. 230 (1906).

the property from a cotenancy (allotment).[17] "Owelty thus addresses a disparity in the value of partitioned parcels and is the payment of money required when property is not susceptible of division into exactly equal shares to make the portions of property respectively assigned to the cotenants of equal value."[18] The modern definition of "owelty" is "[e]quality as achieved by a compensatory sum of money given after an exchange of parcels of land having different values or after an unequal partition of real property" or "[t]he sum of money so paid."[19]

Most states have recognized or, at one time, employed an owelty award.[20] States that employ an owelty award authorize its use either by common law[21] or statute.[22] Several states have reasoned that the use of an owelty award should be rarely used and only in cases when it is equitably necessary.[23] Only

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[17] See John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. Rev. 755 (1986).

[18] 59A Am. Jur. 2d *Partition* § 154 (2015).

[19] Black's Law Dictionary 1279 (10th ed. 2014).

[20] See, generally, 59A Am. Jur. 2d, *supra* note 18 (examining cases across several jurisdictions utilizing owelty award in partition action).

[21] See, e.g., *Sawin v. Osborn*, 87 Kan. 828, 126 P. 1074 (1912); *Waller v. George*, 322 Mo. 573, 16 S.W.2d 63 (1929); *Chesmore v. Chesmore*, 484 P.2d 516 (Okla. 1971); *Updike v. Adams*, 24 R.I. 220, 52 A. 991 (1902).

[22] See, e.g., Ala. Code § 35-6-25 (2014); Cal. Civ. Proc. Code § 873-250 (2015); Idaho Code Ann. § 6-541 (2010); 735 Ill. Comp. Stat. 5/17-105 (2018); Me. Rev. Stat. Ann. tit. 14, § 6515 (2020); Mass. Gen. Laws ch. 241, § 14 (2004); Mich. Comp. Laws § 600.3336 (2013); Minn. Stat. § 558.12 (2018); Miss. Code Ann. § 11-21-33 (2019); Mont. Code Ann. § 70-29-209 (2019); Nev. Rev. Stat. § 39.440 (2019); N.H. Rev. Stat. Ann. § 547-C:22 (2019); N.Y. Real Prop. Acts. Law § 943 (2009); Or. Rev. Stat. § 105.250 (2019); 42 Pa. Stat. and Cons. Stat. Ann. § 1562 (West 2014); Tenn. Code Ann. § 29-27-117 (Supp. 2018); Va. Code Ann. § 8.01-83 (2015); Wash. Rev. Code § 7.52.440 (2017).

[23] See, *Harris v. Johnson*, 42 Ill. App. 3d 751, 356 N.E.2d 1107, 1 Ill. Dec. 825 (1976); *Burns v. Ambler*, 302 Mich. 526, 5 N.W.2d 451 (1942); *Bagg v. Osborn*, 169 Minn. 126, 210 N.W. 862 (1926); *Waller v. George, supra* note 21.

Kentucky has expressly held that an owelty award is in opposition to its partition statutes and, therefore, is not recognized.[24]

[8] Rist Farm concedes that a Nebraska court's authority to award owelty "comes not from statute, as in some jurisdictions, but rather is inherent in its broad equitable powers."[25] In Nebraska, a court acquiring jurisdiction of property for partition acquires complete jurisdiction of the property and affords complete justice to all parties in that action with respect to the subject matter.[26]

A brief digression is necessary. For most of Nebraska's history, its probate courts lacked jurisdiction of partition actions, even where the real estate was the property of a decedent's estate.[27] For that reason, all of Nebraska's partition litigation originated in a district court until relatively recently.[28]

We have used the term "owelty" only one time—in *Staats v. Wilson*.[29] There, we rejected a collateral attack upon a prior partition judgment, stating that "[t]he conduct of the widow and the heirs regarding the homestead amounted to a partial parol partition of the land with *owelty*."[30] Thus, we used the term consistently with the definition, but as a description and not as a form of relief.

But without using the term "owelty," we have implemented equalization payments in two cases involving partition of real estate. One case is ancient; the other quite recent.

In *Lynch v. Lynch*,[31] the heirs of a 66-foot-wide platted lot in Omaha, Nebraska, sought partition of three undivided interests: one-sixth, one-third, and one-half. The property was

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[24] *Wrenn v. Gibson*, 90 Ky. 189, 13 S.W. 766 (1890).

[25] Brief for appellant at 16.

[26] See *Fairley v. Kemper*, 174 Neb. 565, 118 N.W.2d 754 (1962).

[27] See *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

[28] See *id*.

[29] *Staats v. Wilson, supra* note 16.

[30] *Id*. at 210, 107 N.W. at 232 (emphasis supplied).

[31] *Lynch v. Lynch*, 18 Neb. 586, 26 N.W. 390 (1886).

partitioned in kind: The one-half interest heir received the east 44 feet of the property and the one-third interest heir received the west 22 feet. The value of the one-sixth interest and one-half of the property's rents were charged as a lien upon the east 44 feet. The sole question on appeal was whether the district court had the power to render the monetary judgment to equalize the division in kind.

[9,10] In holding that it did, we articulated two principles. First, in a partition in equity, "the court does not act in a merely ministerial character, in obedience to the call of some or all of the parties, but administers relief in such manner as to do equal and exact justice as far as possible."[32] Second, in a partition in kind, "where [the] premises are incapable of a fair division[,] the court has power to award a pecuniary compensation or charge upon the land."[33] Thus, without using the term, we recognized the concept of owelty.

Much more recently, in *In re Estate of McKillip*,[34] we implemented an owelty award without using the term. Three heirs inherited four tracts of land and cash. Only two of the four tracts were contiguous. After a partition by sale, an appeal was taken. We reversed, holding that the property should be partitioned in kind by one heir receiving the two contiguous tracts and each of the other heirs receiving one of the remaining tracts. We granted complete relief by fashioning a remedy for the unequal division of land using cash from the remaining estate to equalize the value in the division. This met the definition of owelty: a pecuniary sum given to a party receiving a smaller valuation of land to equalize the distribution.

For the sake of completeness, we note that we have implemented a partition in kind of promissory notes.[35] In that case, we directed the district court upon remand to implement an equalization payment as necessary.

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[32] *Id.* at 592, 26 N.W. at 393.

[33] *Id.*

[34] *In re Estate of McKillip, supra* note 8.

[35] See *Zornes v. Zornes, supra* note 2.

[11,12] These cases teach that owelty is permitted in partition cases. But it has been used sparingly and only in particular circumstances. With respect to real estate, we have employed the concept only twice in a century and a half. We agree with a Minnesota court that "[o]welty is predicated upon a division. There can be no owelty in the absence of a division of property."[36] And we agree with the many states stating that owelty should be rarely utilized and only when it is equitably necessary.[37] That owelty is permitted does not answer the question whether it was appropriate here. We now turn to that question.

Partition in Kind or by Sale

Rist Farm next assigns that the district court erred in ordering partition by sale without finding that partition in kind would greatly prejudice both owners. In making this argument, Rist Farm relies upon the use of owelty to equalize the difference in value between the tracts on each side of the river.

[13] In our de novo review of this question, we accord some deference to the district court. In an appeal of an equity action, where credible evidence is in conflict on a material question of fact, an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and their manner of testifying, and accepted one version of the facts rather than another.[38]

We also note that we have the advantage of hindsight in that our record includes the actual sale price and some information regarding the bidding at the partition sale. In *Trowbridge v. Donner*,[39] where we reversed a partition by sale and mandated partition in kind, we considered the sale results in assessing whether partition in kind would greatly prejudice the

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[36] *Bagg v. Osborn, supra* note 23, 169 Minn. at 129, 210 N.W. at 863.

[37] See, *Harris v. Johnson, supra* note 23; *Burns v. Ambler, supra* note 23; *Bagg v. Osborn, supra* note 23; *Waller v. George, supra* note 21.

[38] *Siedlik v. Nissen*, 303 Neb. 784, 931 N.W.2d 439 (2019).

[39] *Trowbridge v. Donner, supra* note 9.

owners. We follow that precedent and take the sale results into consideration.

[14] We have already set forth the governing principles favoring partition in kind and prohibiting partition by sale to advance the interests of one owner, and articulating the test for determining whether a partition in kind would result in great prejudice to the owners. We do not repeat them here. But we also recognize that while it is generally true that there is a presumption in favor of partition in kind, it is likewise true that the character and location of the property, or the amount of the interest sought to be assigned, or both, may be such that it will be presumed that partition in kind cannot be made.[40]

Whether partition in kind will result in great prejudice to the parties requires comparing two amounts.[41] The first is the amount an owner would receive if the property were divided in kind and the owner then sold his portion of the property.[42] The second is the amount each owner would receive if the entire property were sold and the proceeds were divided among the owners.[43] If the first amount is materially less than the second amount, great prejudice has been shown.[44]

FTR Farms' president testified that the sale of the whole would bring a greater price than the sum of the sales of the separate tracts. Rist Farm's appraiser, on the other hand, opined that sales of the separate tracts would bring more bidders and "would be the best at trying to get the most for the two pieces." We give weight to the district court's observation of the witnesses and its implicit credibility assessment in favor of FTR Farms. Moreover, the sale results support FTR Farms' president's opinion. The highest bids for the individual tracts totaled $1.6 million, but the entire tract sold for $1.62 million. We cannot characterize this difference as immaterial.

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[40] *Nordhausen v. Christner, supra* note 10.

[41] *In re Estate of McKillip, supra* note 8.

[42] *Id.*

[43] *Id.*

[44] *Id.*

Owelty cannot solve the problem resulting from the whole property selling for a greater price than the high bids for the individual tracts. Bearing in mind the *In re Estate of McKillip* explanation of the calculations regarding the test to determine great prejudice, we illustrate the problem.[45] To determine the first number of the great prejudice test—the amount the owner of each tract would receive if divided in kind and then sold—we use the high bids for the individual tracts, which the record shows totaled $1.6 million. We use the higher number related by Rist Farm's president: $940,000 for the south and, by calculating the corresponding amount, $660,000 for the north. To determine the second number—the amount each would receive from the sale of the whole and the division of proceeds—we divide the sale price of $1.62 million equally, which is $810,000 apiece. Thus, Rist Farm would receive $130,000 more by selling the south tract than its share from the sale of the total property. FTR Farms, on the other hand would receive $150,000 less from the sale of the north tract than its share of the sale of the total. In other words, owelty of $130,000 (Rist Farm's "excess" from sale of the south tract) would greatly prejudice FTR Farms by $20,000—the amount by which the sale of the whole exceeded the sale of the tracts. Owelty of $140,000 would prejudice both parties equally, by $10,000. The great prejudice to FTR Farms can be eliminated, but only if the owelty is $150,000. This, however, would greatly prejudice Rist Farm by $20,000—again, the amount by which the sale of the whole exceeded the sale of the tracts. This table shows the calculations:

	Whole	**South**	**North**
Individual tract high bids	$1,600,000	$940,000	$660,000
Equal division of whole	$1,620,000	$810,000	$810,000
Excess or shortage	---	$130,000	($150,000)
Owelty of $130,000	$1,600,000	$810,000	$790,000
Owelty of $140,000	$1,600,000	$800,000	$800,000
Owelty of $150,000	$1,600,000	$790,000	$810,000

[45] See *id.*

If we use Rist Farm's president's alternative amount of $920,000, the prejudice remains with slightly different numbers. This table shows those calculations:

	Whole	South	North
Individual tract high bids	$1,600,000	$920,000	$680,000
Equal division of whole	$1,620,000	$810,000	$810,000
Excess or shortage	---	$110,000	($130,000)
Owelty of $110,000	$1,600,000	$810,000	$790,000
Owelty of $120,000	$1,600,000	$800,000	$800,000
Owelty of $130,000	$1,600,000	$790,000	$810,000

No matter what owelty payment is used, great prejudice results to either one or both of the parties.

And we cannot disregard the effect of the default by FTR Farms and Rist Farm regarding the 2018 payment due to the Dowells. The default apparently places both tracts at risk of a trustee's sale, making it quite difficult to retroactively mandate a partition in kind. The bankruptcy proceeding, which, in some way not clear from the record, relates to FTR Farms, introduces more uncertainty into the partition action.

Ultimately, we are not persuaded that this is a rare circumstance where owelty should be utilized and is equitably required. It differs from the situation in *In re Estate of McKillip* in important ways.[46] In that case, "[t]here was no dispute as to the value of the real estate, and there was no claim that the value of the real estate as one parcel was greater than the value of the sum of the individual tracts."[47] Here, the values were disputed and there was a claim that the value of the whole exceeded the sum of the parts. There, the tracts were not all contiguous. Here, both were. Here, the disparity in the sizes of the tracts made conflict over the amount of owelty inevitable. There, the differences in undisputed values could be equalized from the balance of the inherited estate. Here, owelty would require a payment from one owner to the

[46] See *id.*

[47] *Id.* at 376, 820 N.W.2d at 877.

other, placing them in irreconcilably conflicting positions, particularly where one owner was somehow involved with a bankruptcy.

In the district court, Rist Farm did not contend that an equal division without owelty was possible. And the record makes it clear that even with owelty, partition in kind could not be made without great prejudice to one or both of the owners.

Upon our de novo review, we conclude that FTR Farms sustained its burden to establish that partition in kind could not be had without great prejudice. It follows that a partition in kind was not feasible and that the district court did not err in accepting the referee's report and ordering partition by sale.

Partition in Kind Alternatives

Rist Farm argues that the district court erred by failing to consider all reasonable options for partition in kind before partition by sale. It contends that the district court only considered the options it proposed to the court and did not consider alternative options to partition that property into equal tracts.

Rist Farm relies upon *In re Estate of McKillip* for the proposition that the court must consider all alternative methods to partition in kind before partition by sale can be ordered.[48] This argument is flawed. In *In re Estate of McKillip*, we reversed the district court's order to partition by sale, because the party seeking the sale did not prove that partition in kind would greatly prejudice the owners. Here, FTR Farms satisfied its burden of proof.

Moreover, neither party presented evidence regarding a division other than one based on the Nemaha River. At this point, an argument for an alternative division in kind rests upon pure speculation. This assignment also lacks merit.

CONCLUSION

The district court did not err in rejecting the owelty award and finding that partition in kind would cause great prejudice

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[48] See *In re Estate of McKillip, supra* note 8.

to the owners. Accordingly, we affirm the district court's order imposing partition by sale. We recognize that the default of the 2018 payment to the Dowells and the effect of other payments or defaults regarding that indebtedness not shown in our record may affect the ultimate distributions to the parties. Upon remand, the district court may make the adjustments necessary to achieve complete justice to the parties.

Affirmed and remanded for
further proceedings.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jessica Jo Lang, appellant.

942 N.W.2d 388

Filed May 8, 2020. No. S-19-275.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Mental Competency: Appeal and Error.** A trial court's determination of competency will not be disturbed on appeal unless there is insufficient evidence to support the finding. But a trial court's decision not to order a competency evaluation or hold a competency hearing is reviewed for an abuse of discretion.
3. **Effectiveness of Counsel: Appeal and Error.** In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
4. **Investigative Stops: Motor Vehicles: Time.** A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop.
5. ____: ____: ____. When the mission of an investigative stop is addressing a suspected traffic violation, the stop may last no longer than is necessary to effectuate that purpose, and authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed.
6. **Controlled Substances: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Because of marijuana's legal status as

contraband, a trained officer who detects the odor of marijuana emanating from a vehicle in Nebraska has firsthand information that provides an objectively reasonable basis to suspect contraband will be found in the vehicle.

7. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
8. **Warrantless Searches: Motor Vehicles.** Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Among the established exceptions to the warrant requirement is the automobile exception.
9. **Search and Seizure: Warrantless Searches: Probable Cause: Motor Vehicles.** The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.
10. **Search and Seizure: Probable Cause: Words and Phrases.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
11. **Controlled Substances: Search and Seizure: Warrantless Searches: Motor Vehicles: Probable Cause.** Assuming a vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement.
12. **Search and Seizure: Motor Vehicles: Probable Cause.** If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This includes all containers within the vehicle.
13. **Courts: Trial: Mental Competency.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court may cause such medical, psychiatric, or psychological examination of the accused to be made as it deems necessary.
14. **Mental Competency.** An explicit competency determination is necessary only when the court has reason to doubt the defendant's competence, and if proceedings do not provide the court with reason to doubt a defendant's competence, it does not err by not conducting a competency hearing.
15. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.

16. **Mental Competency.** There are no fixed or immutable signs of incompetence, and a defendant can meet the modest aim of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies.
17. **Effectiveness of Counsel: Proof: Words and Phrases.** Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
18. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.
19. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.
20. **Mental Competency: Final Orders.** A trial court's decision to overrule a motion for a competency evaluation is not a final, appealable order.
21. **Trial: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess trial counsel's reasonable strategic tactics when reviewing claims of ineffective assistance of counsel.

Appeal from the District Court for Hall County: Mark J. Young, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

After a stipulated bench trial, Jessica Jo Lang was convicted of possessing methamphetamine and marijuana. In this direct appeal, she argues the district court erred in overruling her motion to suppress and her motions seeking a competency evaluation. Lang, who is represented by new appellate counsel, also claims her trial counsel provided ineffective assistance. Finding no error, we affirm.

I. BACKGROUND

1. Traffic Stop

On August 16, 2017, Officer Bret Renz of the Grand Island Police Department was on patrol. At approximately 10:45 p.m., his radar detected a vehicle traveling more than 10 miles per hour over the posted speed limit and he activated his patrol car's overhead emergency lights and initiated a traffic stop. The driver of the vehicle was Omega Fristoe, and the sole passenger was Lang.

Renz gathered Fristoe's information and returned to his patrol car to run a record check and complete a traffic citation. As he did this, Officer Chris Marcello of the Grand Island Police Department arrived on the scene to assist.

After Renz completed the citation form, both officers approached Fristoe's vehicle. Renz approached on the driver's side, and Marcello approached on the passenger's side. The front passenger window was rolled down 4 to 6 inches, and as Marcello approached, he detected an odor of marijuana coming from the passenger window. He saw Lang look up at him and then reach into her purse. He watched Lang get a cigarette from her purse and light it, after which Lang blew smoke around the cabin of the vehicle and then continued to "go through her purse."

Marcello got Renz' attention, and the officers met at the back of the vehicle to speak privately. At that point, Renz had not issued the citation to Fristoe. Marcello told Renz he smelled marijuana coming from the passenger window, and

the officers decided to expand their investigation. Renz placed his ticket book, with the citation still attached, on the trunk of Fristoe's vehicle, and then the officers reapproached the vehicle and asked the occupants to step out. Both Fristoe and Lang complied.

When Lang stepped out of the vehicle, she brought her purse with her. She was directed to place the purse on the hood of Fristoe's vehicle, which she did. The officers told Fristoe and Lang that the odor of marijuana had been detected coming from inside their vehicle. During the course of the investigation, Marcello searched Lang's purse and discovered a green leafy substance in a baggie that field-tested positive for marijuana, a white crystalline substance in a baggie that field-tested positive for methamphetamine, some nonnarcotic pills, and drug-related paraphernalia.

2. Motion to Suppress

Lang was charged with (1) possession of a controlled substance, methamphetamine (a Class IV felony); (2) possession of marijuana, less than an ounce (an infraction); and (3) possession of drug paraphernalia (an infraction). She pled not guilty.

Lang filed a motion to suppress the evidence found in her purse, arguing it was obtained as the result of an unconstitutional search. At the suppression hearing, both Renz and Marcello testified to the events as summarized above. In addition, Renz testified that before Marcello alerted him to the odor of marijuana coming from the passenger window, he had not smelled marijuana either time he approached the driver's side of the vehicle.

At the conclusion of the evidence, the district court overruled Lang's motion to suppress. It found there was probable cause for the traffic stop because the vehicle was observed speeding. It reasoned the smell of marijuana coming from inside the vehicle gave the officers probable cause for a warrantless search of the vehicle and containers in the vehicle, including Lang's purse. The court found Marcello's testimony

about smelling marijuana coming from the passenger window was credible, and it rejected Lang's argument to the contrary. Lang's case was set for trial.

3. Trial

(a) First Request for Competency Evaluation

On the morning of September 24, 2018, Lang appeared in court with her attorney for jury selection. Outside the presence of the prospective jurors, Lang's counsel told the court he was concerned that Lang's emotional state may interfere with jury selection and trial. The court construed this as an oral motion for a competency evaluation, and it took the matter up on the record.

No evidence was offered, but Lang's attorney informed the court that Lang suffered from post-traumatic stress disorder as a result of a prior work-related assault and that she had been unable to afford her anxiety medication for more than a year. Counsel explained that Lang had been frightened during all of her court appearances, but that her emotional state that day was "extreme." Counsel told the court that Lang "does understand what is going on and understands what we are saying," but that he was concerned about her sobbing in court, explaining:

> I am having trouble getting communication back from her that I understand or that the jury will understand in part due to her inability to control her depression.
>
> She also has informed me that for the past couple three weeks, she has seriously considered issues of suicide and self-harm because of this situation and her lack of medication. She has not known how to resolve it.
>
> She states to me that she has in fact sought help from governmental entities in regards to her mental health, but because she is pending a worker's compensation claim against the State of Nebraska, those entities have said that the State should be responsible for paying that and they

> have not provided treatment. Her worker's comp trial is not scheduled for another couple of months.
>
> . . . .
>
> . . . Your Honor, I think if we were to go to jury selection and trial today, I don't believe the jury would be able to get past the emotional condition that my client is in for purposes of actually addressing and listening to the facts that may be presented at the time of trial or that they would be able to even understand Ms. Lang should she elect to testify, if she was able to testify at all.

The State took no position on the issue other than advising it was ready for trial. The district court, with counsel's permission, spoke with Lang directly:

> THE COURT: Ms. Lang, we're here today to select a jury that will ultimately decide whether or not you are guilty or not guilty of the charges that have been filed against you. Do you understand that Ms. Lang?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Ms. Lang, it's important that the jury reach a decision based upon the facts of the case and not their impressions, positive or negative, about you or anyone else. Do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Ms. Lang, will you control yourself during the courtroom proceedings?
>
> THE DEFENDANT: I can try my best. I apologize.
>
> THE COURT: Ms. Lang, are there any accommodations that the Court can provide that would allow you to calm yourself?
>
> THE DEFENDANT: No.
>
> . . . .
>
> THE COURT: At this point, it appears that Ms. Lang understands the nature of these proceedings and that Ms. Lang suffers, by her statements and by counsel's statements, from some traumatic issues that don't involve this case.

> I find Ms. Lang is competent to proceed to trial. We will attempt at least to begin voir dire today as the second case to be chosen. We'll see how things go.
>
> I'll be willing to listen to any comments by either counsel.

Our record does not include jury selection, but it does show that the next day, the district court commented favorably on Lang's composure during jury selection.

(b) Second Request for Competency Evaluation

On the first day of trial, outside the presence of the jury, the State requested a reciprocal order of witness sequestration, which the court granted. Fristoe, who was present in the courtroom and a possible witness for the defense, was told he would have to step out once the trial began. At that point, Lang covered her face and began sobbing. Lang's counsel told the court that Fristoe was a strong emotional support for Lang, who was still having anxiety issues.

The court spoke again with Lang about the importance of a fair trial and controlling her emotions and behavior during trial. Lang replied to the court, "I cannot control my mental illness. I am sorry." The court replied:

> I don't mean to belittle your emotional situation, but I have not received any evidence that would support a claim that you cannot carry on appropriately or behave yourself.
>
> I would note you did a great job at jury selection yesterday. I would note that no tears appear to be falling off when you are making the sobbing noises.

Lang's counsel then offered exhibit 8, a psychological evaluation from December 2014 conducted as part of Lang's workers' compensation case. The exhibit was received without objection. The State again advised the court it was ready to try the case and opposed additional delays.

The court asked Lang's counsel to clarify whether he was seeking a continuance or seeking a competency evaluation. Counsel replied:

> [R]ight now, I do not know — well, how can I put this — if Ms. Lang can understand what's going on.
>
> I believe that her emotional condition, her anxiety reaction, and her depression have made it such that she cannot control her physical condition. As she has presented in the courtroom, it's making it difficult to verbally communicate and appropriately provide an appearance to the jury which may jeopardize their ability to render an impartial decision. That's my concern.

The court asked again, "[A]re you asking for a competency evaluation, [counsel]?" to which counsel replied, "I will ask for a competency evaluation to see if she's capable of participating in her current psychological condition." The court took a recess to review exhibit 8 and then went back on the record and made the following ruling outside the presence of the jury:

> Based upon review of Exhibit 8 and the Court's observations from yesterday and today, I am overruling the motion for a competency evaluation. There's nothing in the record indicating Ms. Lang is incapable of understanding the proceedings or communicating with counsel.
>
> I will, however, in an attempt to accommodate Ms. Lang, continue this matter until one p.m. so that Ms. Lang may have a chance to get some fresh air and to come back and hopefully be ready to participate or be ready to be attentive during the trial of this case.
>
> . . . .
>
> Ms. Lang, this is an unusual step, but I am giving you a chance to take a little more time to compose yourself. In reviewing Exhibit 8, the mental health reports from three and four years ago, it appears that you have had some coping skills you need to be utilizing.

(c) Change of Plea

When the parties returned at 1 p.m. to begin trial, Lang's counsel advised that his client wanted to enter a no contest plea to the charges in the information. Lang confirmed that was her desire.

The court went through the standard plea colloquy with Lang, and Lang consistently indicated that she understood her rights and the consequences of her pleas. After the State recited the factual basis, the court asked Lang whether she understood that if the court accepted her pleas, she would be giving up her right to appeal the overruling of her motion to suppress. Lang indicated she was not aware of that fact and told the court it may affect her decision. A recess was taken so Lang could talk with her attorney.

After the recess, Lang's counsel advised the court that in order to preserve her right to appeal the suppression ruling, Lang now wanted to withdraw her no contest pleas, enter not guilty pleas, waive a jury, and have the matter tried to the bench on "the facts as submitted to the Court in the hearing on the motion to suppress." Lang confirmed that was how she wanted to proceed.

The court allowed Lang to withdraw her no contest pleas and enter not guilty pleas and then discussed the waiver of a jury trial with Lang. Lang stated she had discussed the matter with her attorney and wanted to waive a jury trial. She told the court that no one had made any threats, used any force, or made any promises to get her to waive a jury. The court accepted Lang's jury waiver, expressly finding it was made freely, voluntarily, knowingly, and intelligently. The jury was dismissed, and the matter proceeded immediately to a bench trial.

(d) Stipulated Bench Trial

The parties stipulated that the court should take judicial notice of the evidence presented at the motion to suppress hearing and that the court should consider it as evidence in the bench trial. Lang's counsel renewed his objection to the evidence seized from Lang's purse on the ground it was obtained

through an unconstitutional search, and the objection was overruled. The State then offered, without objection, a copy of the laboratory report containing test results for the substances found in Lang's purse, and the parties stipulated that one of the items described in the laboratory report was the white crystalline substance found in Lang's purse, which tested positive for methamphetamine, weighing 3.5 grams.

After the presentation of evidence, the district court found the State had met its burden of proof as to counts I and II of the information and found Lang guilty. The court found the State had failed to prove count III, possession of drug paraphernalia, and dismissed that count. The court ordered a presentence investigation and asked the parties whether they wanted to request "any other . . . evaluations." The State and Lang both declined. Lang was ordered to appear at sentencing on February 5, 2019.

(e) Sentencing and Third Request for Competency Evaluation

Lang did not appear for sentencing on February 5, 2019, but new defense counsel appeared on her behalf and requested a continuance. Sentencing was continued to February 14.

At the sentencing hearing, Lang's new counsel moved for a competency evaluation, arguing he did not think Lang had been able to effectively assist her prior counsel. The State argued that a competency evaluation was unnecessary and opposed a continuance for that purpose.

In support of the request for a competency evaluation, defense counsel asked the court to take judicial notice of the presentence investigation report and offered exhibits 10 and 11, both of which had been prepared in connection with Lang's workers' compensation case. Exhibit 10 was a medical report dated October 20, 2018, which summarized Lang's diagnoses of generalized anxiety disorder, post-traumatic stress disorder, and major depressive disorder. Exhibit 11 was a report of psychological testing performed on September 18, 2018, which generally agreed with the diagnoses set forth in exhibit 10 and

added diagnoses of panic disorder without agoraphobia and of avoidant personality disorder. Exhibits 10 and 11 were received without objection.

After reviewing the exhibits, the district court denied Lang's third motion for a competency evaluation. The court acknowledged evidence of Lang's traumatic work-related injury and her mental health diagnoses. But it also observed that throughout the criminal proceedings, Lang had been able to confer with counsel and make decisions regarding her defense, including the decision to withdraw her pleas of no contest and proceed with a stipulated bench trial to preserve her right to appeal the suppression ruling and her decision to hire new counsel for the sentencing phase. The court concluded that Lang understood the nature of the proceedings and her rights within those proceedings and that a formal competency evaluation was not necessary.

After an opportunity for allocution, Lang was sentenced to 12 months' probation on count I and was fined $300 on count II. She timely appealed, and we moved the appeal to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Lang assigns that the district court erred in (1) overruling her motion to suppress and (2) overruling her motions to determine competency. Lang also assigns that her trial counsel provided ineffective assistance in several respects.

III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[1] When a motion to suppress is denied

[1] *State v. Hartzell*, 304 Neb. 82, 933 N.W.2d 441 (2019).

pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[2]

[2] A trial court's determination of competency will not be disturbed on appeal unless there is insufficient evidence to support the finding.[3] A trial court's decision not to order a competency evaluation or hold a competency hearing is reviewed for an abuse of discretion.[4]

[3] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[5]

IV. ANALYSIS

1. Motion to Suppress

In seeking to suppress evidence obtained from the search of her purse, Lang argues (1) the search was unlawful because it occurred after the purpose of the traffic stop had been completed and (2) the search of her purse was not justified by the automobile exception to the warrant requirement. We address each argument in turn and reject both.

(a) Traffic Stop Not Impermissibly Extended

[4,5] A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete

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[2] *Id.*

[3] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[4] See *State v. Cortez*, 191 Neb. 800, 218 N.W.2d 217 (1974) (failure to hold hearing on defendant's mental capacity to stand trial not abuse of discretion). See, also, *U.S. v. Turner*, 644 F.3d 713 (8th Cir. 2011) (district court's decision not to order competency evaluation or hold competency hearing reviewed for abuse of discretion).

[5] *State v. Lee*, 304 Neb. 252, 934 N.W.2d 145 (2019).

the mission of the stop.[6] When the mission of an investigative stop is addressing a suspected traffic violation, the U.S. Supreme Court has instructed that the stop may last no longer than is necessary to effectuate that purpose, and authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed.[7]

Here, Fristoe was stopped for exceeding the speed limit. Lang does not challenge the stop itself, but she argues that by the time the odor of marijuana was detected, the traffic stop was already complete.[8] We disagree.

The record shows that near the end of the traffic stop, while one officer was in the process of explaining the speeding citation to the driver but before the citation had been issued, the other officer smelled marijuana coming from the passenger window. The district court made an express factual finding that the odor of marijuana was detected before the traffic citation had been issued to the driver. This factual finding is supported by the record and is not clearly erroneous.

There is no evidence that officers took any longer than necessary to investigate the speeding violation or to prepare the resulting citation. And because the citation had not yet been issued to Fristoe, the purpose of the traffic stop had not yet been effectuated when the smell of marijuana was detected coming from the vehicle.

[6] Because of marijuana's legal status as contraband, a trained officer who detects the odor of marijuana emanating from a vehicle in Nebraska has firsthand information that provides an objectively reasonable basis to suspect contraband will be found in the vehicle.[9] The smell of marijuana provided officers with reasonable suspicion to expand the traffic stop

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[6] *State v. Barbeau*, 301 Neb. 293, 917 N.W.2d 913 (2018).

[7] *Rodriguez v. U.S.*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

[8] See *id.*

[9] *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018).

to include investigation of possible criminal activity involving controlled substances.[10] Moreover, because the vehicle was readily mobile, the odor of marijuana alone provided officers with probable cause to search the vehicle under the automobile exception to the warrant requirement.[11] We discuss that exception next.

(b) Automobile Exception

[7,8] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[12] Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.[13] Among the established exceptions to the warrant requirement is the automobile exception.[14]

[9-11] This exception applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.[15] Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[16] Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement.[17]

Lang does not contest that Fristoe's vehicle was readily mobile, and she generally concedes the officers had probable cause to search the vehicle after smelling marijuana. But Lang argues the automobile exception did not justify the warrantless

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[10] See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[11] *Seckinger, supra* note 9.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

search of her purse, because when the purse was searched, it was no longer inside the vehicle. On this record, we are not persuaded that makes a difference.

[12] The U.S. Supreme Court has held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[18] This includes all containers within the vehicle.[19]

The district court made a factual finding that Lang was seated inside the vehicle with the purse on her lap when the officer detected the smell of marijuana. Lang was seated in the passenger seat, and the smell of marijuana was coming from the passenger window. After noticing the smell, the officer observed Lang repeatedly "go through her purse," and when Lang was asked to step out of the vehicle, she brought the purse with her.

Officers instructed her to set the purse on the hood of the vehicle, and she complied. On this record, the location of the purse at the time it was searched does not change its character as a container that was inside the vehicle when officers developed probable cause to search the vehicle.[20] The district court properly overruled Lang's motion to suppress.

2. Competency Rulings

Lang's trial counsel moved for a competency evaluation three times during the course of this case—before jury selection, before the presentation of evidence, and before sentencing. She argues the court erred in overruling those motions.

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[18] *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

[19] *Id*.

[20] See, e.g., *State v. Furrillo*, 274 Or. App. 612, 362 P.3d 273 (2015) (passenger's backpack properly searched after he removed it from vehicle upon exiting after drug dog alerted to vehicle); *State v. Smith*, 152 Idaho 115, 266 P.3d 1220 (Idaho App. 2011) (backpack in vehicle at time officer observed marijuana pipe in vehicle properly searched even though driver removed it from vehicle upon exiting).

[13,14] The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court.[21] The trial court may cause such medical, psychiatric, or psychological examination of the accused to be made as it deems necessary.[22] But an explicit competency determination is necessary only when the court has reason to doubt the defendant's competence, and if proceedings do not provide the court with reason to doubt a defendant's competence, it does not err by not conducting a competency hearing.[23]

[15,16] A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[24] We have recognized there are no fixed or immutable signs of incompetence, and a defendant can meet the modest aim of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies.[25]

We find no abuse of discretion in the trial court's decision to overrule Lang's motions for a competency evaluation. On appeal, Lang does not contend she was unable to understand or comprehend the proceedings against her. She argues only that "[h]er mental illness before jury selection and presentation of evidence prevented [her] from presenting a rational defense."[26] She does not explain why this is so, and we see nothing in the record to support this argument.

Despite Lang's mental health diagnoses and her occasional emotional responses in the courtroom, the record contains

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[21] *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

[22] See, *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016); *Cortez, supra* note 4. See, also, Neb. Rev. Stat. § 29-1823 (Cum. Supp. 2018).

[23] See *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[24] *Grant, supra* note 22.

[25] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[26] Brief for appellant at 15.

nothing that would provide the court with a reason to doubt her competence.

The trial court had the opportunity to observe and interact with Lang during jury selection, during the plea hearing, during the bench trial, and during sentencing. During those interactions, Lang consistently demonstrated an understanding of the criminal proceedings and her rights in relation to those proceedings, as well as the ability to assist in her own defense. On this record, there was no abuse of discretion in overruling Lang's motions for a competency evaluation.

3. Ineffective Assistance of Counsel

[17] Lang assigns that her trial counsel, who was different from her appellate counsel, provided ineffective assistance. Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[27] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[28]

[18] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.[29]

[19] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal.[30] The determining factor is whether the record is sufficient to adequately review the

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[27] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[28] *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019).

[29] *Id.*

[30] *Id.*

question.[31] We have said the record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.[32]

Lang's brief argues that her trial counsel was deficient in three respects: (a) failing to preserve appellate review of the court's rulings on the competency motions, (b) failing to move for a continuance, and (c) stipulating that evidence received at the suppression hearing could be considered by the court during the bench trial. We conclude the record is sufficient to resolve all of Lang's claims, and we find them all to be meritless.

(a) Preserving Appellate Review

Lang argues that to preserve appellate review of the court's rulings on her motions for a competency evaluation, trial counsel should have taken an immediate interlocutory appeal from the court's rulings. Lang is mistaken, as is perhaps best illustrated by the fact that we reviewed those rulings in this direct appeal.

[20] It is true that a proceeding to determine competency to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2016) and that an order finding an accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken.[33] But no such order was entered here, because competency proceedings were deemed unnecessary by the court. The trial court's decisions overruling Lang's motions for a competency evaluation were not final, appealable orders,[34] and Lang's trial counsel was

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[31] *Id*.

[32] *Id*.

[33] See *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000).

[34] See *id.*

not deficient in waiting until direct appeal of the judgment to assign error to those interlocutory rulings.

(b) Failing to Move for Continuance

Lang argues her trial counsel performed deficiently when he moved for competency evaluations prior to jury selection and prior to trial, rather than moving to continue trial. She argues that as between the two motions, "the correct motion was to continue the trial, as it would be easier to prove."[35] To prevail on such a claim, Lang would need to show both that counsel's decision to move for a competency evaluation rather than a continuance fell below an objective standard of reasonableness and that if a motion to continue had been made, a reasonable probability exists that the result of the trial would have been different.[36] She can show neither.

[21] Trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess trial counsel's reasonable strategic tactics when reviewing claims of ineffective assistance of counsel.[37] As such, counsel does not render deficient performance merely by failing to present the motion that is "easier to prove." Moreover, Lang does not argue, and we see nothing in the record, suggesting that if a motion to continue had been made and sustained, the result of trial in this case would have been any different. This claim has no merit.

(c) Stipulating to Evidence

Lang argues her trial counsel was ineffective for stipulating, during the bench trial, that the court could consider evidence received at the suppression hearing. The record affirmatively refutes her claim that trial counsel performed deficiently in this regard.

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[35] Brief for appellant at 16.

[36] See *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018).

[37] *State v. Manijikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

At the plea hearing, Lang told the court that in order to preserve her right to appeal the suppression ruling, she wanted to waive a jury and have a stipulated bench trial. At the time, Lang's counsel explained that Lang was asking to "try this matter based upon the facts as submitted to the Court in the hearing on the motion to suppress." The court accepted Lang's jury waiver and proceeded directly to the stipulated bench trial. As is typical in such a proceeding, trial counsel stipulated to the admission of certain evidence while preserving the arguments raised in the motion to suppress, then the district court determined whether that evidence was sufficient to convict Lang of the crime charged.[38]

The record shows that Lang agreed to a stipulated bench trial to preserve her right to appeal the suppression ruling and that she did so after discussing this strategy with trial counsel and with the understanding that counsel would stipulate to the admission of the evidence received during the suppression hearing. On these facts, Lang cannot show trial counsel performed deficiently in stipulating to that evidence during the bench trial.

V. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

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[38] See, e.g., *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016); *Howard, supra* note 10.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Richard K. Bonness, appellant, v. Joel D. Armitage, M.D., appellee.

942 N.W.2d 238

Filed May 8, 2020. No. S-19-393.

1. **Rules of the Supreme Court: Pleadings: Waiver: Appeal and Error.** When a question concerning the waiver of an affirmative defense involves the interpretation of rules of pleading, it is a question of law reviewed de novo.
2. **Limitations of Actions: Pleadings.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted.
3. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
4. **Appeal and Error.** As a general rule, a Nebraska appellate court does not consider an argument or theory raised for the first time on appeal.
5. **Waiver: Estoppel.** Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
6. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed.
7. **Limitations of Actions: Malpractice: Words and Phrases.** In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.

8. **Malpractice: Damages: Words and Phrases.** In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss. Legal injury is not damage; damage is the loss resulting from the misconduct.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed.

Patrick J. Cullan and Joseph P. Cullan, of Cullan & Cullan, L.L.C., for appellant.

David A. Blagg, Brien M. Welch, and Kathryn J. Cheatle, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Richard K. Bonness appeals the district court's dismissal of his medical malpractice action against Joel D. Armitage, M.D., on statute of limitations grounds. Bonness contends that Armitage waived the statute of limitations defense and that even if he did not, his complaint should not have been dismissed. We disagree and affirm the decision of the district court.

BACKGROUND

Commencement of Action and Initial Procedural History.

This case began on June 20, 2017, when Bonness filed his initial complaint against Armitage. The initial complaint generally alleged that Armitage had failed to timely diagnose Bonness with prostate cancer.

The attorney who filed the initial complaint on behalf of Bonness later moved to withdraw, and new counsel entered an appearance. The district court subsequently granted Bonness leave to file an amended complaint. Bonness did so in January 2018. The amended complaint contained additional factual

allegations, but also generally alleged that Armitage had failed to timely diagnose Bonness with prostate cancer. Armitage filed an answer later that month in which he denied negligence and also asserted that the claims alleged were barred by the professional negligence statute of limitations.

After the filing of the first amended complaint, the parties engaged in discovery for some time. In November 2018, Bonness filed a motion for leave to file a second amended complaint. In the motion, he asserted that the proposed second amended complaint would reflect new information learned during discovery. Armitage did not object to the motion for leave to file a second amended complaint. The district court granted the motion, and Bonness filed the second amended complaint. Because the second amended complaint is the operative complaint for purposes of this appeal, we summarize its allegations in greater detail below.

Second Amended Complaint.

In the second amended complaint, Bonness alleged that he had a family history of prostate cancer and that his father had died of prostate cancer at the age of 68. Following his father's death in 1995 until 2010, Bonness underwent "Prostate-Specific Antigen" (PSA) tests several times while he was seen by physicians other than Armitage. According to the second amended complaint, a PSA test measures the level of PSA in the bloodstream and can serve as an early indicator of prostate cancer, because the level of PSA in the blood is often elevated in men with prostate cancer. In 2007, one of those other physicians referred Bonness to a urologist because of an elevated PSA test and a hardened area on his prostate. The urologist determined that there was no cancer.

In late 2010, Armitage became Bonness' physician. The second amended complaint alleged that "based on . . . Bonness' desire to do everything necessary to screen for prostate cancer," Bonness and Armitage "agreed to a health plan that entailed utilizing the most effective preventative cancer care for the early detection of prostate cancer." Armitage allegedly

told Bonness that he would implement the plan in accordance with protocols in place at a university medical center.

Bonness alleged that during his initial visit with Armitage, Bonness informed Armitage that Bonness had a family history of prostate cancer, that he had been taking the medication commonly known as Avodart for many years, that he had undergone PSA testing earlier in the year, and that his PSA at that time was 3.0 ng/mL. Armitage noted in his records that he would perform PSA testing on Bonness on a yearly basis, but would not perform the testing that day, because Bonness had already been tested that year. Armitage also continued to prescribe Avodart for Bonness.

Bonness alleged that at the time of his first appointment with Armitage, the federal Food and Drug Administration was warning physicians that if taken for more than 6 months, Avodart decreases an individual's PSA level by about 50 percent. According to the second amended complaint, Avodart's effect on PSA levels requires physicians to double the value of PSA levels for purposes of testing for the presence of prostate cancer. Accordingly, Bonness alleged that his PSA test of 3.0 ng/mL in 2010 should have been interpreted as 6.0 ng/mL. Bonness also alleged that a patient with an adjusted PSA value of 6.0 ng/mL should be referred to a urologist, presumably for further testing.

Bonness alleged that he relied on Armitage's representation that there was no need to perform additional PSA testing in 2010. Bonness further alleged that Armitage affirmatively represented to him in 2011 that PSA testing was not immediately necessary and that he relied on that representation. Bonness also alleged that in 2013, Armitage affirmatively represented to him that PSA testing was "deemed unreliable" and that it was not necessary to perform the test and that Bonness relied on those representations as well. Bonness alleged that he specifically inquired of Armitage whether PSA testing should be performed in 2010, 2011, and 2013.

Armitage later claimed that Bonness refused to undergo PSA testing in 2010, 2011, and 2013, but Bonness denied refusing and also alleged that Armitage should have known that he desired testing. He asserted that Armitage should have known he wished to be tested based on Bonness' family history of prostate cancer, the death of his father from prostate cancer, Bonness' concerns regarding friends who had been diagnosed with prostate cancer, his "repeated, express concerns about the risk to himself of having prostate cancer," and his "expressed willingness to do, or have done, whatever was necessary" to detect and treat prostate cancer.

Bonness alleged that in 2014, Armitage reversed course and affirmatively represented to him that PSA testing was now warranted. Bonness then underwent PSA testing. His PSA level was over 5.0 ng/mL, a level the second amended complaint characterized as "elevated." In 2015, Bonness underwent additional PSA testing and his PSA level was more than 6.0 ng/mL, a level the second amended complaint also characterized as "elevated." Bonness alleged that as a result of his elevated PSA levels, he underwent a prostate biopsy on January 9, 2015, which revealed the presence of cancer. In March 2015, Bonness then underwent a radical prostatectomy. Bonness alleged that after this procedure, he was told he was cancer free.

Bonness had additional PSA testing performed in April, May, and June 2016. Based on PSA testing performed in June 2016, Bonness was informed that his prostate cancer had recurred.

Based on these facts, Bonness alleged that Armitage was liable for negligence and for failure to obtain his informed consent to the treatment provided. With respect to his claim of negligence, Bonness alleged that the most effective preventative cancer care for prostate cancer would have included PSA testing in 2010, 2011, and 2013. He also alleged that because he was taking Avodart, his PSA test results in 2010 should have been doubled. He contended that given his PSA test results in 2010 and Bonness' family history of prostate cancer,

Armitage should have immediately referred him to a urologist. With respect to his claim of failure to obtain informed consent, he also alleged that Armitage should have provided him with information regarding the risks to Bonness of not having regular PSA tests in light of his family history of prostate cancer and the effect of Avodart on PSA test results.

Bonness alleged that it was only after the recurrence of his prostate cancer that he learned of facts that led to the discovery of his claims against Armitage.

Dismissal by District Court.

Armitage moved to dismiss the second amended complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). The motion to dismiss asserted that the second amended complaint failed to allege facts indicating that it was timely filed.

Following a hearing, the district court entered a written order granting the motion to dismiss. The district court found that Bonness' claims were barred by the 2-year professional negligence statute of limitations set forth in Neb. Rev. Stat. § 25-222 (Reissue 2016). The district court concluded that Armitage's allegedly deficient treatment would have been known to Bonness by January 2015, when his prostate cancer requiring surgical intervention was first discovered. The district court wrote that by that date, Bonness would have known that Armitage had been unable to prevent Bonness from getting prostate cancer. Based on its determination that Bonness discovered his claims in January 2015, the district court found that he did not timely file his action.

Bonness timely appealed.

ASSIGNMENTS OF ERROR

Bonness assigns two errors on appeal, both concerning the district court's dismissal of his suit on statute of limitations grounds. According to Bonness, the district court erred by dismissing the suit, (1) because Armitage waived the statute of limitations defense and (2) because Bonness did not discover his claims until his cancer recurred in June 2016.

STANDARD OF REVIEW

[1] When a question concerning the waiver of an affirmative defense involves the interpretation of rules of pleading, it is a question of law reviewed de novo. See *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb. 698, 851 N.W.2d 82 (2014).

[2,3] A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Rutledge v. City of Kimball*, 304 Neb. 593, 935 N.W.2d 746 (2019).

ANALYSIS

Did Armitage Waive Statute of Limitations Defense?

[4] We begin our analysis by considering Bonness' argument that Armitage waived the statute of limitations defense. Initially, we note that nothing in our record indicates that Bonness raised this argument in the trial court, and it is thus not clear that it is properly preserved for appellate review. See, e.g., *State v. Kruse*, 303 Neb. 799, 808, 931 N.W.2d 148, 155 (2019) ("[a]s a general rule, an appellate court will not consider an argument or theory that is raised for the first time on appeal"). But even assuming the argument is properly before us, we find that it lacks merit for reasons we will explain.

A party can waive a statute of limitations defense. See, e.g., *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015). For example, a party waives a statute of limitations defense if it fails to plead it. See *id.* In this case, however, Bonness concedes that Armitage did not fail to plead a statute of limitations defense. Armitage asserted in his answer to the first amended complaint that Bonness' claims were barred by the statute of limitations. And although Armitage did not file an

answer to the second amended complaint, he filed a motion to dismiss on statute of limitations grounds.

Unable to liken this case to those in which a party fails to plead a statute of limitations defense and thereby waives it, Bonness argues that Armitage waived the statute of limitations defense by not immediately moving to dismiss the first amended complaint. According to Bonness, as soon as the first amended complaint was filed, Armitage had all of the information necessary to file a motion to dismiss on statute of limitations grounds but instead engaged in discovery for several months. This, Bonness contends, led him to believe that Armitage was defending the case solely on its merits and thus amounts to a waiver of the defense.

[5] Bonness acknowledges that he is unable to direct us to any cases in which we or another court has held that a party waived a statute of limitations defense by not immediately filing a motion to dismiss on statute of limitations grounds. Instead, Bonness relies on cases in which we have discussed waiver in a general sense and said that "[o]rdinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part." See, e.g., *Eagle Partners v. Rook*, 301 Neb. 947, 959, 921 N.W.2d 98, 108 (2018). Bonness asserts that Armitage's engaging in discovery after the first amended complaint was filed qualifies as a waiver under that standard.

We find Bonness' contention that Armitage waived the statute of limitations defense unsound. As we noted in recounting the standards of review applicable to this appeal, a challenge to a pleading on statute of limitations grounds is a challenge that the complaint fails to state a claim upon which relief can be granted. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). This is relevant because our rules of pleading in Nebraska state that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under § 6-1107(a), or by motion

for judgment on the pleadings, or at the trial on the merits." § 6-1112(h)(2). Our rules of pleading thus make clear that a party does not waive the right to contend that a complaint fails to state a claim upon which relief can be granted by not filing a motion under § 6-1112(b)(6). Rather, the defense is preserved *through trial*. Accordingly, Armitage's decision not to file a motion to dismiss the first amended complaint could not have amounted to an act showing an intention to waive the statute of limitations defense.

Neither could it amount to an estoppel. Bonness' estoppel theory is that he was led to believe that Armitage would not seek to dismiss on statute of limitations grounds when he did not immediately move to dismiss. For reasons we have explained, however, Bonness could not reasonably conclude from Armitage's choice to engage in discovery that Armitage would not later seek to contend that the pleading failed to show it was filed in accordance with the statute of limitations. We see no basis to find that Armitage waived the statute of limitations defense.

Was Dismissal on Statute of Limitations Grounds Proper?

Having found that Armitage did not waive the statute of limitations defense, we turn to Bonness' contention that the district court erred by dismissing the case on statute of limitations grounds. As we have discussed, a defendant may, as Armitage did here, raise the statute of limitations as part of a motion to dismiss for failure to state a claim upon which relief can be granted. If such a motion is made but the complaint does not disclose on its face that it is barred by the statute of limitations, dismissal is improper. See *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013). However, if the face of the complaint does show that the cause of action is time barred and the plaintiff does not allege facts to avoid the bar of the statute of limitations, dismissal is proper. See *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018). The

task before us is thus to review the second amended complaint and determine whether, accepting the factual allegations therein as true, it shows that the cause of action is barred by the applicable statute of limitations. For the reasons discussed below, we conclude that it does.

There appears to be some disagreement between the parties as to whether the applicable statute of limitations is the professional negligence statute of limitations set forth in § 25-222 or the statute of limitations in the Nebraska Hospital-Medical Liability Act set forth in Neb. Rev. Stat. § 44-2828 (Reissue 2010). The parties agree, however, that those statutes of limitations are identical as they relate to this case. Accordingly, we will consider the case under § 25-222, which provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Under the statute, an action must be commenced within 2 years of the date the limitations period began to run unless the action was not or could not reasonably be discovered within that 2-year period, in which case, it must be commenced within 1 year after it is discovered or should be discovered.

See *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013). As we will explain, the parties disagree in this case, both as to when the statute of limitations began to run and when Bonness discovered or reasonably could have discovered his claims against Armitage.

Bonness argues that Armitage committed several isolated acts of negligence and that a separate statute of limitations period began to run upon each such act. Specifically, Bonness contends that Armitage was negligent in 2010, 2011, and 2013, when he saw Bonness, but did not perform PSA testing, did not properly interpret Bonness' earlier PSA test results, and did not refer him to a urologist. Bonness acknowledges that under his theory, the 2-year statute of limitations would have expired as to his claims unless § 25-222's discovery exception applies. But Bonness argues the discovery exception does apply. He contends that he did not discover and could not reasonably have discovered his claims until he learned his prostate cancer had recurred on June 24, 2016. He thus argues that he timely filed this action by filing it within 1 year of that date.

Armitage disagrees with Bonness, as to both when the statute of limitations began to run and when he could have reasonably discovered his claims. Armitage argues that under the continuing treatment doctrine, see, e.g., *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006), the statute of limitations did not begin to run on Bonness' claims until January 2015, when the professional relationship between Bonness and Armitage concluded. Based on his contention that the statute of limitations began to run in January 2015, Armitage asserts that even if Bonness is correct that he could not reasonably have discovered his claims until June 2016, his claims are nonetheless barred, because the 1-year discovery extension does not apply if a plaintiff discovered or reasonably could have discovered his or her claims prior to the expiration of the 2-year statute of limitations. See, e.g., *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002). Alternatively, Armitage argues that the district

court was correct to conclude that based on the facts alleged in the operative complaint, Bonness discovered or reasonably could have discovered his claims in January 2015, and that thus, his claims are barred even if the statute of limitations began to run as early as Bonness contends.

[6-8] We will begin our analysis by considering whether the district court was correct to conclude that under the facts alleged in the operative complaint, Bonness discovered or reasonably could have discovered his claims in January 2015, when he first learned of the presence of prostate cancer. Several principles govern when a party discovers a claim for statute of limitations purposes. "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. *Guinn v. Murray, supra*. It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed. *Id.* In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Id.* In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss. *Id.* Legal injury is not damage; damage is the loss resulting from the misconduct. *Id.*

Given these governing principles, we must consider what Bonness knew in January 2015 and whether a reasonable person in his position with that knowledge would have pursued an inquiry that would have led to knowledge of facts constituting the basis of his claims. The first and most obvious fact that Bonness knew at that time was that he had been diagnosed with prostate cancer. The district court seemed to conclude that Bonness had discovery of his claims based on his diagnosis alone. It reasoned that as soon as Bonness knew that he had prostate cancer, he would have known that "the treatment

provided by [Armitage] had not been effective in precluding [Bonness'] development of prostate cancer."

Although this statement of the district court is unquestionably true, we find it does not shed much light on the question at hand. Bonness does not allege that Armitage was negligent because he failed to prevent prostate cancer; he alleges that Armitage was negligent because he should have detected prostate cancer earlier. It is not so clear to us that based on a diagnosis of a condition alone, a patient is on inquiry notice of a claim that his or her physician should have diagnosed the condition earlier. We need not, however, decide whether Bonness discovered his claims against Armitage based on a diagnosis alone. As we will discuss below, the second amended complaint disclosed that at the time of his diagnosis, Bonness was aware of other information relevant to the discovery of his claims.

At the time he was diagnosed with cancer in January 2015, Bonness not only knew that he had been diagnosed, he also knew what Armitage had done and not done with respect to testing for prostate cancer before that diagnosis. As noted above, Bonness alleged that before Armitage became his doctor in 2010, he had undergone PSA testing for several years at the direction of other physicians and, on one occasion, was referred to a urologist for an elevated PSA result. Bonness alleged Armitage did not direct PSA testing for several years and represented to him in those years that PSA testing was not immediately necessary and that it was "deemed unreliable." Bonness also alleged, however, that elevated results on PSA testing ordered by Armitage in 2014 and 2015 led to the referral of Bonness to a urologist in early 2015 and his prostate cancer diagnosis. By the time of his diagnosis, then, Bonness would have known his diagnosis occurred as a result of elevated levels on a test that he had previously received regularly at the direction of other physicians, but that Armitage had declined to perform for several years and had claimed was unreliable.

We also note that the second amended complaint contains several other allegations regarding Bonness that suggest a person in his position would have questioned Armitage's detection efforts as soon as a diagnosis was made. As noted above, Bonness alleged that because members of his family and friends had been diagnosed with prostate cancer, Bonness repeatedly expressed concerns to Armitage about prostate cancer and made it clear that he wanted to do whatever was necessary to detect it. In addition, in the years in which Armitage did not order PSA testing, Bonness inquired about whether testing should be performed. In our view, once Bonness was diagnosed with cancer, a reasonable person in his position would have known of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.

We are not persuaded by Bonness' argument that the fact that he was told he was cancer free following surgery in March 2015 is relevant to the discovery analysis. The fact that Bonness was told the cancer had been removed following surgery may have affected the extent of damages available for Armitage's alleged negligence in failing to detect prostate cancer. The focus, however, in deciding when a plaintiff discovered a cause of action for statute of limitations purposes is when the plaintiff knows of the existence of an injury. See *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013). Injury, for these purposes, is the wrongful act or omission which causes the loss, not damage. See *id.* One need not know the extent of his or her damages to have discovery. See *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000).

Because we find that the face of the second amended complaint shows that Bonness discovered his claims against Armitage upon learning of his prostate cancer diagnosis in January 2015, it is not necessary for us to pinpoint exactly when the statute of limitations period began to run. Whether the statute of limitations began running in January 2015, as

Armitage contends, or earlier, as Bonness claims, the action was not commenced within 2 years of accrual or within 1 year of discovery.

CONCLUSION

Because the face of the complaint shows that the action is barred by the statute of limitations, the district court did not err in granting Armitage's motion to dismiss.

Affirmed.

Miller-Lerman, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Benjamin L. Ferrin, appellant.

942 N.W.2d 404

Filed May 8, 2020. No. S-19-594.

1. **Criminal Law: Courts: Judgments: 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. Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. 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.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court, and evidence which is not made a part of the bill of exceptions may not be considered.
4. **Records: Appeal and Error.** As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
5. **Trial: Pretrial Procedure: Pleadings: Evidence: Juries: Appeal and Error.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court.
6. **Pretrial Procedure: Pleadings: Appeal and Error.** An appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.

7. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
8. **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. An appellate court does not resolve conflicts in the evidence, pass on credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
9. **Criminal Law: Statutes.** To determine the elements of a crime, courts look to the text of the statute.
10. ____: ____. Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
11. ____: ____. Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
12. **Statutes.** In the absence of anything indicating otherwise, statutory language is to be given its plain and ordinary meaning.
13. **Criminal Law: Police Officers and Sheriffs: Judges: Proof: Intent.** To show a violation of Neb. Rev. Stat. § 28-906(1) (Reissue 2016), the State must prove that (1) the defendant intentionally obstructed, impaired, or hindered either a peace officer, a judge, or a police animal assisting a peace officer; (2) at the time the defendant did so, the peace officer or judge was acting under color of his or her official authority to enforce the penal law or preserve the peace; and (3) the defendant did so by using or threatening to use either violence, force, physical interference, or obstacle.
14. **Criminal Law: Police Officers and Sheriffs: Intent.** Neb. Rev. Stat. § 28-906(1) (Reissue 2016) does not proscribe all conduct that intentionally obstructs, impairs, or hinders officers who are acting under color of their authority to either enforce the penal law or preserve the peace. Instead, it proscribes only conduct that involves using or threatening to use "violence, force, physical interference, or obstacle."

15. **Police Officers and Sheriffs: Convictions: Evidence.** Evidence showing a defendant resisted handcuffing, struggled with an officer, and continued to resist restraint is alone sufficient to sustain a conviction for obstructing a peace officer under Neb. Rev. Stat. § 28-906(1) (Reissue 2016).
16. **Criminal Law: Police Officers and Sheriffs.** The act of running away from police interposes a physical obstacle that can obstruct, impair, or hinder an officer's efforts to preserve the peace under Neb. Rev. Stat. § 28-906(1) (Reissue 2016).
17. **Criminal Law: Police Officers and Sheriffs: Judges: Intent.** The proper inquiry under Neb. Rev. Stat. § 28-906(1) (Reissue 2016) is not whether a defendant has engaged in "some sort of physical act," but, rather, whether a defendant's conduct, however expressed, used or threatened to use either violence, force, physical interference, or obstacle to intentionally obstruct, impair, or hinder a peace officer or judge who was acting to either enforce the penal law or preserve the peace under color of his or her official authority.
18. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** Officers making a traffic stop may order the driver and passengers to get out of the vehicle pending completion of the stop.
19. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles: Evidence.** Evidence that a defendant repeatedly refused to comply with police orders to exit a vehicle during a traffic stop is sufficient to show the use of either "physical interference" or "obstacle" under Neb. Rev. Stat. § 28-906(1) (Reissue 2016).

Appeal from the District Court for Sarpy County, George A. Thompson, Judge, on appeal thereto from the County Court for Sarpy County, Robert C. Wester, Judge. Judgment of District Court affirmed.

John H. Sohl for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

The district court for Sarpy County affirmed Benjamin L. Ferrin's conviction and sentence for the misdemeanor offense

of obstructing a peace officer under Neb. Rev. Stat. § 28-906 (Reissue 2016), which provides in relevant part:

> A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he or she intentionally obstructs, impairs, or hinders (a) the enforcement of the penal law or the preservation of the peace by a peace officer or judge acting under color of his or her official authority or (b) a police animal assisting a peace officer acting pursuant to the peace officer's official authority.

The primary question on appeal is whether the evidence in this case was sufficient to support Ferrin's conviction. Finding it was, we affirm.

I. BACKGROUND

On February 11, 2018, at 1:54 p.m., two Bellevue, Nebraska, police officers were dispatched to a domestic disturbance call. When they arrived, they spoke with M.H., who had called police for assistance. M.H. told police she and her husband, Ferrin, were having marital difficulties, and she reported he had locked her out of their residence. M.H. spoke with police outside the residence, and the conversation was video recorded.

M.H. told police she had spoken with Ferrin by telephone earlier that day and was concerned about his state of mind, explaining "he just appeared to have snapped." M.H. reported that Ferrin had been verbally and physically abusive in the past, and she told the officers Ferrin had sexually assaulted her about 3 weeks earlier. M.H. told the officers that Ferrin owned several guns and that he had been suicidal months before. She warned officers that Ferrin may be uncooperative if they tried to talk with him.

1. Traffic Stop

While police were interviewing M.H. outside her residence, Ferrin drove past in his pickup truck. One of the officers got

into his cruiser and followed Ferrin's truck, activating his overhead lights. The officer testified that the purpose of the traffic stop was twofold: to investigate a possible crime against M.H. and to check on Ferrin's well-being.

Ferrin pulled his truck to the side of the road and stopped. The first officer parked his cruiser behind Ferrin's truck and waited for the second officer to arrive and provide backup. According to the first officer, he did not want to contact Ferrin without backup, because he was concerned about Ferrin's state of mind and the possibility there were guns in his truck.

The second officer arrived at the traffic stop shortly thereafter, and the officers positioned themselves near the first officer's cruiser and directed Ferrin to exit his pickup truck and walk back to them. Ferrin, whose window was rolled down, replied that he could not hear the officers. Using the public address system in one of the cruisers, the officers again asked Ferrin to open his pickup door, exit the pickup, and walk back to where the officers were positioned. Ferrin responded, "'No, thank you.'"

At that point, the officers considered it a "high-risk" traffic stop and drew their firearms. They again asked Ferrin to step out of his truck and walk back to them. Ferrin responded that he did not want to leave his truck, because he had a dog inside. The officers suggested Ferrin roll up the window so that the dog could not get out, and they again directed him to exit the truck and walk back to them. Again Ferrin refused to comply. The officers informed Ferrin that if he did not comply with their request to get out of his truck, he could be charged with a crime. Ferrin asked why he had been stopped, and the officers told him they were "investigating a domestic incident." Ferrin replied that the officers had no reason to stop him, and he remained inside the truck. The officers again instructed Ferrin to get out of the truck and walk back to them so that they could talk with him. Ferrin remained in the truck. The video shows that the officers made approximately eight requests for Ferrin to step out of the truck and that he complied with none.

After approximately 3 to 5 minutes of this back-and-forth communication, the officers advised Ferrin he was under arrest for obstructing a peace officer. Ferrin responded, "'Fuck off.'" He remained in his truck for a few more seconds, then opened the door and got out. When the officers instructed Ferrin where to put his hands, he again responded, "'Fuck off.'" The officers then instructed Ferrin to lift his shirt so that they could see his waistband and to walk toward them until he was told to stop. Ferrin complied with these requests. The officers then directed Ferrin to get down on his knees. Ferrin initially refused that request, but complied after further direction. At that point, Ferrin was handcuffed, searched, and placed in the cruiser. The entire stop and arrest was video recorded.

2. Criminal Proceedings

On March 7, 2018, the State filed a criminal complaint in Sarpy County Court charging Ferrin with obstructing a peace officer, in violation of § 28-906. Ferrin entered a plea of not guilty.

(a) Motion to Suppress

Ferrin filed a motion to suppress, contending the traffic stop and subsequent arrest were not supported by probable cause. A suppression hearing was held, but that hearing was not included in the record on appeal. In a written order, the county court overruled the suppression motion in all respects. The matter was set for a jury trial.

(b) Motion in Limine

Before trial, Ferrin filed a motion in limine seeking to preclude the State from referring to, or offering evidence of, M.H.'s statements to police before the traffic stop. Ferrin argued that M.H.'s statements had no relevance to the charged offense and would serve only to prejudice the jury. The State responded that M.H.'s statements, which included allegations of criminal conduct by Ferrin, formed the basis for the traffic stop and were inextricably intertwined with evidence of the

obstruction crime with which Ferrin had been charged. The court denied Ferrin's motion in limine, but indicated it would give a limiting instruction to the jury regarding the proper use of M.H.'s statements.

(c) Jury Trial

At trial, both officers testified to the facts summarized above. A video recording of the traffic stop, including M.H.'s statements to the officers prior to the stop, was offered and received over Ferrin's relevancy and hearsay objections. The court gave the jury a limiting instruction essentially admonishing them to consider M.H.'s statements only for the purpose of determining whether police were conducting a criminal investigation or preserving the peace. Similar admonishments were repeated several times during the trial and were included in the written jury instructions.

At the close of the State's case in chief, Ferrin moved for directed verdict, arguing the State had failed to prove the material elements of the charged offense. Summarized, Ferrin argued the evidence was insufficient as a matter of law to prove a violation of § 28-906(1), because it showed merely that he refused to cooperate with police. The court overruled Ferrin's motion, after which he testified in his own defense.

At the close of all the evidence, Ferrin renewed his motion for a directed verdict without additional argument. The court summarily overruled the motion and submitted the case to the jury. The jury returned a guilty verdict, and the court sentenced Ferrin to 7 days in the county jail, 1 month of probation, and a $50 fine. Ferrin timely appealed his conviction and sentence to the district court, sitting as an appellate court.

3. Appeal to District Court

Ferrin assigned four errors before the district court: (1) There was insufficient evidence to convict him, (2) the county court erred by overruling his motion to suppress, (3) the county court erred by admitting evidence that had a prejudicial impact on the jury, and (4) the sentence imposed was excessive.

The district court rejected all four assignments of error and affirmed the trial court's judgment. Ferrin timely appealed, and we moved the case to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

On appeal to this court, Ferrin assigns, restated and reordered, that the district court erred in affirming the judgment of the county court, because the county court erred in (1) overruling his motion to suppress, (2) overruling his motion in limine, and (3) overruling his motions for directed verdict, because there was insufficient evidence to prove the material elements of the crime.

III. STANDARD OF REVIEW

[1] 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.[1] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[2] Statutory interpretation presents a question of law.[4]

IV. ANALYSIS

1. Motion to Suppress

Ferrin's first assignment of error challenges the overruling of his motion to suppress, but the bill of exceptions in this case does not contain the suppression hearing.

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[1] *State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (2019).

[2] *Id.*

[3] *Id.*

[4] *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

[3,4] A bill of exceptions is the only vehicle for bringing evidence before an appellate court, and evidence which is not made a part of the bill of exceptions may not be considered.[5] As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[6] Because our record does not include the suppression hearing, we do not consider Ferrin's assignment of error regarding the ruling on his motion to suppress.

2. Motion in Limine

[5] Ferrin's second assignment of error challenges the overruling of his motion in limine, which sought to preclude admission of M.H.'s video-recorded statements to police. We have repeatedly held that a motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.[7] It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.[8] Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court.[9]

Ferrin's brief notes that he objected at trial when the video recording of M.H.'s statements was offered, but he has not assigned error to the ruling during trial. To be considered by an appellate court, an alleged error must be both specifically

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[5] *Bohling v. Bohling*, 304 Neb. 968, 937 N.W.2d 855 (2020).

[6] *D.I. v. Gibson*, 295 Neb. 903, 890 N.W.2d 506 (2017).

[7] *Pantano v. American Blue Ribbon Holdings*, 303 Neb. 156, 927 N.W.2d 357 (2019); *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[8] *Pantano, supra* note 7.

[9] *Id.*

assigned and specifically argued in the brief of the party asserting the error.[10]

[6] An appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.[11] Because Ferrin's second assignment of error challenges only the ruling on the motion in limine, it presents nothing for appellate review.

3. Motions for Directed Verdict/ Sufficiency of Evidence

Ferrin's third assignment of error challenges the overruling of his motions for directed verdict made at the close of the State's case and renewed at the conclusion of all the evidence. Both motions asserted the evidence was insufficient to prove the material elements of the charged offense.

[7] A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.[12] We therefore consider Ferrin's third assignment of error as one challenging the sufficiency of the evidence to prove the offense of obstructing a peace officer.

[8] 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

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[10] *State v. Dady*, 304 Neb. 649, 936 N.W.2d 486 (2019).

[11] See *Pantano, supra* note 7.

[12] *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

a reasonable doubt.[13] An appellate court does not resolve conflicts in the evidence, pass on credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[14]

(a) Obstructing Peace Officer

[9-12] We begin by identifying the material elements the State must prove to show a violation of § 28-906(1). To determine the elements of a crime, we look to the text of the statute.[15] And when analyzing the text of a criminal statute, we follow settled principles of statutory construction. Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[16] Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.[17] And in the absence of anything indicating otherwise, statutory language is to be given its plain and ordinary meaning.[18]

[13] Under the plain language of the statute, to show a violation of § 28-906(1), the State must prove that (1) the defendant intentionally obstructed, impaired, or hindered either a peace officer, a judge, or a police animal assisting a peace officer; (2) at the time the defendant did so, the peace officer or judge was acting under color of his or her official authority to enforce the penal law or preserve the peace; and (3) the defendant did so by using or threatening to use either violence, force, physical interference, or obstacle.

On appeal, Ferrin does not argue there was insufficient evidence to establish the first two of these elements. Rather,

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[13] *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

[14] *Id.*

[15] *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019).

[16] *Id.*

[17] *Id.*

[18] *State v. Stanko*, 304 Neb. 675, 936 N.W.2d 353 (2019).

his insufficiency argument is focused on the third element, which addresses the proscribed conduct. We limit our analysis accordingly.

(i) Proscribed Conduct

[14] Section 28-906(1) does not proscribe all conduct that intentionally obstructs, impairs, or hinders officers who are acting under color of their authority to either enforce the penal law or preserve the peace. Instead, it proscribes only conduct that involves using or threatening to use "violence, force, physical interference, or obstacle." We have rejected the suggestion that these statutory terms are unconstitutionally vague, finding instead that they are commonly used words and are understandable by those of ordinary intelligence.[19]

[15] We have consistently recognized that evidence showing a defendant resisted handcuffing, struggled with an officer, and continued to resist restraint is alone sufficient to sustain a conviction for obstructing a peace officer.[20] But here, the State generally concedes that Ferrin's conduct during the traffic stop did not involve using or threatening to use either violence or force. We agree, and we confine our analysis to whether the record contains sufficient evidence that Ferrin used or threatened to use either "physical interference" or "obstacle" within the meaning of § 28-906(1). Nebraska's appellate courts have considered these terms in several cases.

This court first considered the meaning of the phrase "physical interference, or obstacle" as used in § 28-906(1) in the 1987 case *In re Interest of Richter*.[21] In that case, two uniformed officers responded to a domestic disturbance call requesting police assistance in removing a disruptive youth from a home. When officers arrived, the youth was

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[19] *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

[20] *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001); *Lynch, supra* note 19.

[21] *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987).

arguing, cursing, and yelling, and officers told him he would be taken to a youth shelter for the evening. While officers were escorting the youth for transport, he ran away. They pursued him on foot and eventually located him an hour later, at which point he tried to run from the officers a second time. Based on these events, the State alleged the youth was within the jurisdiction of the juvenile court because he committed an act which would constitute a violation of § 28-906(1).[22] In response, the youth argued that to prove a violation of § 28-906(1), the State had to show he used or threatened to use "some physical means to thwart the officers"[23] that involved more than simply running away from police. We disagreed.

[16] We gave § 28-906(1) its plain and ordinary meaning, and reasoned that even if the word "physical" modified both "interference" and "obstacle," the act of running away from police interposed a physical obstacle that obstructed, impaired, or hindered the officers' efforts to preserve the peace.[24]

Ten years later, we decided *State v. Yeutter*.[25] In that case, city police discovered Edwin Yeutter's dog running at large in violation of a city ordinance, and an officer went to Yeutter's home to issue a citation. Yeutter refused to provide his identifying information, and the officer could not complete the citation. When Yeutter was told that if he did not cooperate, he would be arrested for obstructing an officer, he held out his arms and said, "'[G]o ahead and take me.'"[26] The officer

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[22] See, generally, Neb. Rev. Stat. § 43-247(1) (Reissue 2016).

[23] *In re Interest of Richter, supra* note 21, 226 Neb. at 876, 415 N.W.2d at 478.

[24] *In re Interest of Richter, supra* note 21. Accord *U.S. v. Sledge*, 460 F.3d 963 (8th Cir. 2006) (under Nebraska law, mere act of running away from law enforcement officers constitutes physical interference or obstacle within meaning of § 28-906(1)).

[25] *State v. Yeutter*, 252 Neb. 857, 566 N.W.2d 387 (1997).

[26] *Id.* at 859, 566 N.W.2d at 390.

instructed him to put his hands on a nearby car, Yeutter refused, and a physical struggle ensued. During the struggle, Yeutter grabbed the officer's baton, grabbed the officer's handcuffs, bit the officer's finger, and generally resisted being taken into custody and placed in the police cruiser.

Yeutter was convicted for assaulting an officer, resisting arrest, and obstructing a peace officer. The Nebraska Court of Appeals, in a memorandum opinion filed on December 18, 1996, in case No. A-96-255, reversed the conviction for obstructing a peace officer and otherwise affirmed. We granted Yeutter's petition for further review to determine just one question: whether he was entitled to a jury instruction on self-defense.

But before we addressed that question, we described Yeutter's arrest for obstructing a peace officer as "an illegal arrest,"[27] noting that at the time the officer attempted to place him under arrest for obstruction, Yeutter had not "used or threatened to use violence or force or physically interfered with the officer."[28] We then went on to state that "the mere verbal refusal to provide information to an officer does not constitute an obstacle to the enforcement of the penal laws as contemplated by § 28-906. There must be some sort of physical act in order for a violation of this statute to occur."[29] These propositions of law, while dicta, have been cited by both the Nebraska Court of Appeals and the U.S. District Court for the District of Nebraska.[30] We therefore conclude it is necessary to revisit our statements in *Yeutter* to ensure they comport with the statutory language of § 28-906(1).

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[27] *Id.* at 861, 566 N.W.2d at 391.

[28] *Id.*

[29] *Id.* at 862, 566 N.W.2d at 391.

[30] See, *Deezia v. City of Lincoln*, 350 F. Supp. 3d 868 (D. Neb. 2018); *State v. Ellingson*, 13 Neb. App. 931, 703 N.W.2d 273 (2005); *State v. Owen*, 7 Neb. App. 153, 580 N.W.2d 566 (1998).

The plain language of § 28-906(1) makes it a crime not just to *use* violence, force, physical interference, or obstacle, but also to *threaten* to do so. Consequently, while *Yeutter* correctly observed that "the mere verbal refusal to provide information to an officer does not constitute an obstacle to the enforcement of the penal laws as contemplated by § 28-906,"[31] our opinion was imprecise when it went on to state that "some sort of physical act"[32] is always required. Because threats can be expressed verbally as well as through gestures and physical acts,[33] our language in *Yeutter* was too restrictive, and it failed to give effect to all of the statutory language the Legislature included in § 28-906(1).

[17] We now clarify that the proper inquiry under § 28-906(1) is not whether a defendant has engaged in "some sort of physical act," but, rather, whether a defendant's conduct, however expressed, used or threatened to use either violence, force, physical interference, or obstacle to intentionally obstruct, impair, or hinder a peace officer or judge who was acting to either enforce the penal law or preserve the peace under color of his or her official authority.

(ii) Sufficient Evidence of Proscribed Conduct

Ferrin argues the evidence at trial was insufficient to show he used or threatened to use physical interference or obstruction. He describes his conduct as "merely refus[ing] to come back and talk to the officers"[34] when requested to do so, and he equates such conduct with "the mere verbal refusal to provide information to an officer," which we stated

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[31] *Yeutter, supra* note 25, 252 Neb. at 862, 566 N.W.2d at 391.

[32] *Id*.

[33] See *Owen, supra* note 30 (holding no clear error in jury instruction stating "obstacle" under § 28-906(1) could be either verbal or physical).

[34] Brief for appellant at 19.

in *Yeutter* was insufficient to constitute an "obstacle" under § 28-906.

The State argues *Yeutter* is inapplicable because Ferrin's conduct involved more than just a mere verbal refusal to provide information. The State generally describes Ferrin's conduct as a series of defiant refusals to exit his vehicle that presented an obstacle to the officers' investigation under § 28-906(1).

[18,19] It is well settled that officers making a traffic stop may order the driver and passengers to get out of the vehicle pending completion of the stop.[35] Here, when officers ordered Ferrin to get out of the truck, he repeatedly refused to comply and instead defiantly remained inside the truck. This conduct did not involve using violence or force. However, a reasonable jury could find that evidence that a defendant repeatedly refused to comply with police orders to exit a vehicle during a traffic stop is sufficient to show the use of either "physical interference" or "obstacle" under § 28-906(1).

The terms "interference" and "obstacle" have similar meanings. Used in its common and ordinary sense, the word "interference" means "[t]he action or fact of interfering or intermeddling (*with* a person, etc., or *in* some action)."[36] Similarly, "obstacle" means "[s]omething that stands in the way or that obstructs progress (*literal* and *figurative*); a hindrance, impediment, or obstruction."[37] Given the commonly understood meaning of these terms, a reasonable fact finder could conclude that Ferrin's conduct in repeatedly refusing to comply with police orders to exit his truck during a traffic stop

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[35] See *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997).

[36] "Interference," Oxford English Dictionary Online, http://www.oed.com/view/Entry/97762 (last visited Apr. 30, 2020).

[37] "Obstacle," Oxford English Dictionary Online, http://www.oed.com/view/Entry/129940 (last visited Apr. 30, 2020).

amounted to using either "physical interference, or obstacle" under § 28-906(1). And although we are mindful that cases from other jurisdictions apply different statutory language, this holding is in accord with decisions from other state and federal courts which hold that refusal to comply with an officer's requests to exit the vehicle during a traffic stop can support an arrest or conviction for obstruction.[38]

Here, the evidence showed the traffic stop was part of an active police investigation of a reported domestic dispute involving possible domestic violence and sexual assault crimes. As part of that investigation, Ferrin was repeatedly asked to step out of his truck so officers could question him, and he repeatedly refused to comply with those requests, even after being told the nature of the investigation and being advised that he could be charged with a crime if he did not comply. Viewed in the light most favorable to the prosecution, this evidence was sufficient for a rational trier of fact to find that Ferrin used "physical interference, or obstacle" to intentionally obstruct, impair, or hinder the officers in their investigation.

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[38] See, e.g., *Skube v. Koester*, 120 F. Supp. 3d 825 (C.D. Ill. 2015) (prolonged refusal to comply with police orders to exit vehicle can constitute crime of obstruction); *Taylor v. State*, 326 Ga. App. 27, 755 S.E.2d 839 (2014) (evidence sufficient to prove obstruction when, among other things, defendant refused police orders to exit truck during investigation and instead locked door); *State v. Orr*, 157 Idaho 206, 335 P.3d 51 (Idaho App. 2014) (evidence sufficient to support conviction for obstruction where suspect refused police requests to exit vehicle); *People v. Synnott*, 349 Ill. App. 3d 223, 811 N.E.2d 236, 284 Ill. Dec. 941 (2004) (defendant knowingly obstructed police investigation by repeatedly refusing orders to exit vehicle); *Wilson v. Village of Los Lunas*, 572 F. Appx. 635 (10th Cir. 2014) (refusing officer's requests to exit vehicle during traffic stop provided probable cause to arrest for obstructing officer); *United States v. Thomas*, No. 97-4827, 1998 WL 852951 (4th Cir. Dec. 10, 1998) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 166 F.3d 336 (4th Cir. 1998)) (refusing orders to exit vehicle constituted resisting, delaying, or obstructing officer).

Finding sufficient evidence to support the jury's verdict, we reject Ferrin's third assignment of error.

V. CONCLUSION

For the foregoing reasons, the district court correctly affirmed the judgment of the county court, and we likewise affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. BH Media Group, Inc., doing business as Omaha World-Herald, appellee and cross-appellant, v. Scott Frakes, in his official capacity as director of the Nebraska Department of Correctional Services, appellant and cross-appellee.

State of Nebraska ex rel. Lee Enterprises, Inc., doing business as Lincoln Journal Star, appellee and cross-appellant, v. Scott Frakes, in his official capacity as director of the Nebraska Department of Correctional Services, appellant and cross-appellee.

State of Nebraska ex rel. Amy A. Miller and ACLU of Nebraska Foundation, appellees and cross-appellants, v. Scott Frakes, in his official capacity as director of the Nebraska Department of Correctional Services, appellant and cross-appellee.

943 N.W.2d 231

Filed May 15, 2020. Nos. S-18-604 through S-18-606, S-19-027 through S-19-029.

1. **Mandamus: Words and Phrases.** Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and an appellate court will not disturb those findings unless they are clearly erroneous.
3. **Mandamus.** Whether to grant a writ of mandamus is within the trial court's discretion.

4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
5. **Legislature: Statutes: Intent: Records.** In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government.
6. **Legislature: Statutes: Intent: Records: Public Policy.** Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.
7. **Mandamus: Proof.** A party seeking a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Reissue 2014) has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by Neb. Rev. Stat. § 84-712.01 (Reissue 2014), and (3) the requesting party has been denied access to the public record as guaranteed by Neb. Rev. Stat. § 84-712 (Reissue 2014).
8. **Records: Proof.** If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and conclusive evidence that Neb. Rev. Stat. § 84-712.05 (Reissue 2014) or Neb. Rev. Stat. § 84-712.08 (Reissue 2014) exempts the records from disclosure.
9. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
10. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
11. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
12. **Records: Words and Phrases.** Disclosure, within the meaning of the public records statutes, refers to the exposure of documents to public view.
13. **Pleadings: Time: Appeal and Error.** When any terminating motion such as a motion to alter or amend is timely filed, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion.

14. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
15. **Administrative Law: Records.** The withholding of an entire document by an agency is not justifiable simply because some of the material therein is subject to an exemption.

Appeals from the District Court for Lancaster County: Jodi L. Nelson, Judge. Appeals in Nos. S-18-604 through S-18-606 dismissed. Judgments in Nos. S-19-027 through S-19-029 affirmed in part, and in part reversed and remanded with directions.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellant.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees BH Media Group, Inc., and Lee Enterprises, Inc.

Christopher Eickholt, of Eickholt Law, L.L.C., for appellees Amy A. Miller and ACLU of Nebraska Foundation.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Freudenberg, JJ., and Moore, Chief Judge.

Funke, J.

Scott Frakes, director of the Nebraska Department of Correctional Services (DCS), appeals from writs of mandamus ordering the disclosure, pursuant to the Nebraska public records statutes, see Neb. Rev. Stat. §§ 84-712 through 84-712.09 (Reissue 2014, Cum. Supp. 2018 & Supp. 2019), of records related to DCS' efforts to acquire lethal injection drugs. Frakes contends that the records are not subject to the public records statutes and that the district court erred in determining that he failed to prove that the records should not be disclosed. Because Frakes' contentions contradict the text of Nebraska's public records statutes and are adverse to this court's public records precedent, we find that his appeal is without merit.

Relators have cross-appealed, arguing that the court erred in not ordering the redaction of confidential portions of otherwise public records and compelling the release of the redacted documents. As a matter of first impression, we agree with relators.

We therefore affirm in part, and in part reverse and remand with directions in cases Nos. S-19-027 through S-19-029. We dismiss the appeals in cases Nos. S-18-604 through S-18-606.

BACKGROUND

This matter concerns three cases consolidated for purposes of trial and appeal. The relators are BH Media Group, Inc., doing business as Omaha World-Herald (OWH); Lee Enterprises, Inc., doing business as Lincoln Journal Star (LJS); and Amy A. Miller and ACLU of Nebraska Foundation. In October and November 2017, each relator submitted public records requests pursuant to the public records statutes, seeking information related to DCS' purchase of pharmaceuticals for use in the lethal injection execution protocol. DCS provided responsive documents to each request, and it informed relators that it had additional responsive documents in its possession that would be withheld from disclosure. DCS stated that the withheld records consist of (1) communications between a DCS execution team member and a lethal injection drug supplier, (2) Drug Enforcement Agency (DEA) forms, (3) inventory logs, (4) chemical analysis reports, (5) photographs of packaging, (6) invoices, and (7) purchase orders. DCS responded that these documents would not be disclosed, because they are confidential and exempt from disclosure under Neb. Rev. Stat. § 83-967(2) (Reissue 2014) and because they are not public records as defined under § 84-712.01(1).

Each relator petitioned the district court for Lancaster County for a writ of mandamus to compel Frakes, in his official capacity as director of DCS, to produce the withheld records. In each case, the court entered a show cause order and Frakes filed an answer and response. Frakes argued that nondisclosure is justified under § 83-967(2), which makes the identity of all

members of the execution team confidential and exempt from disclosure under the public records statutes.

The matter proceeded to trial. The court heard testimony from Miller, a citizen of Nebraska and an attorney for the ACLU of Nebraska Foundation; JoAnne Young, a reporter for LJS; and Joe Duggan, a reporter for OWH. A previous public records request by Miller and response by DCS from August 16, 2016, was offered into evidence as exhibit 10. Exhibit 10 contains correspondence between Frakes and a drug supplier concerning DCS' payment for lethal injection drugs, an offer to sell and purchase order, invoices, DEA forms, and photocopies of packaging showing the expiration dates of lethal injection drugs.

Young testified about her reporting on state government and death penalty issues for the LJS since 2007. She admitted she may attempt to interview DCS' lethal injection drug supplier if she learned its identity. Duggan testified that if he received information about the supplier, he would attempt to interview the supplier and would ask who else might have information about its transaction with DCS.

The relators called Frakes as a witness. Under DCS' execution protocol,[1] which was received into evidence, the DCS director, the Nebraska State Penitentiary warden, and the Nebraska State Penitentiary public information officer are designated as members of the execution team. In his testimony, Frakes admitted without objection that he is a member of the execution team. In addition, he confirmed the publicly known identities of the warden and public information officer. Frakes did not contend that the lethal injection drug supplier is a member of the execution team.

Frakes testified that he would not publicly identify other members of the execution team, because there is the potential for threats or harassment. He testified that the purchase orders and chemical analysis reports were withheld, because they identify a member of the execution team "on their face." He

[1] 69 Neb. Admin. Code ch. 11, § 003 (2017).

testified that the communication with a supplier, DEA forms, photographs, and invoices were withheld, because they identify the supplier and, if contacted, the supplier could share the identity of a team member. He stated that "since the supplier has direct knowledge of team members, or at least one team member . . . I can . . . draw the connection that [it] would be able to identify a member of the team." Frakes testified that inventory logs were withheld, because they "contain information that ultimately could lead to identifying the supplier." He admitted that he had the ability to redact identifying information contained in the records and that he could ask the supplier not to identify any team members. He did not know whether DCS' contract with the supplier contains a confidentiality or nondisclosure provision. He asserted that the photographs of packaging are attorney work product.

In closing arguments, the relators argued that the purchase orders and chemical analysis reports should undergo a redaction process and be disclosed. Regarding the remaining records, they argued that there is no provision under Nebraska law which makes the identity of a lethal injection drug supplier confidential. Frakes argued that because the withheld records name the supplier and the supplier knows the identity of a team member, the withheld records are reasonably calculated to lead to the identity of a team member.

On June 18, 2018, the district court entered orders in each case partially granting and partially denying the requests for writs of mandamus. The court found that pursuant to § 84-712.01(3), it was required to liberally construe public records laws in favor of disclosure. The court found the relators met their burden to show a prima facie claim that they were denied access to public records as guaranteed by public records laws. The court interpreted § 83-967(2) as an exemption from disclosure under the public records statutes and found that the burden therefore shifted to Frakes to prove by clear and convincing evidence that the documents sought were exempt from disclosure. The court found that the purchase orders and chemical analysis reports identified execution team

members on their face and therefore were exempt from disclosure under § 83-967(2). As to the remaining documents, the court found that Frakes failed to meet his burden to show that an exemption applies. The court stated that "[t]he evidence is speculative at best" that disclosure of these documents would lead to the identification of an execution team member. The court found that Frakes had not proved that the photographs of packaging are attorney work product. The court ordered Frakes to disclose within 7 days the communications with the supplier, DEA records, invoices, inventory logs, and photographs of packaging.

On June 19, 2018, Frakes filed a notice of appeal. On June 27, relators filed motions to alter or amend the judgments to include an award of attorney fees and costs. The court determined that, despite Frakes' notice of appeal, it had jurisdiction over the motions to alter or amend. The court found the motions to alter or amend were proper, because relators had requested attorney fees in their petitions. Following a hearing, the court granted relators' motions for an award of attorney fees and costs. Frakes appealed, and relators cross-appealed. We moved the appeals to our docket and consolidated them.

ASSIGNMENTS OF ERROR

Frakes assigns, restated, that the district court erred in (1) finding relators had established standing and jurisdiction, (2) finding relators had met their burden to show the documents sought are public records as defined by § 84-712.01, (3) finding § 83-967(2) is an exemption from disclosure that the public body must prove applies by clear and convincing evidence, (4) finding Frakes failed to establish by clear and convincing evidence that the withheld documents are reasonably calculated to lead to the identity of an execution team member, (5) finding Young's public records request was properly submitted, (6) finding the court had jurisdiction to rule on the motions to alter or amend, and (7) finding relators were entitled to attorney fees and costs.

Relators assign on cross-appeal that the district court erred in not requiring disclosure of the purchase orders and chemical analysis reports with the redactions of confidential information, in accordance with § 84-712.06.

STANDARD OF REVIEW

[1-3] Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and we will not disturb those findings unless they are clearly erroneous.[3] Whether to grant a writ of mandamus is within the trial court's discretion.[4]

[4] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[5]

ANALYSIS

[5] In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government.[6] Section 84-712.01(1) defines public records in Nebraska: "[P]ublic records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing."

[6] The Legislature intended that courts liberally construe §§ 84-712 to 84-712.03 for disclosure "whenever any state . . . record of receipt [or] voucher, invoice, purchase order . . . or

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[2] *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 894 N.W.2d 788 (2017).

[3] *Id*.

[4] *Id*.

[5] *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018).

[6] *Id.*

expenditure involving public funds is involved."[7] And it did so "in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of . . . the public bodies and entities created to serve them."[8] Because the Legislature has expressed a strong public policy for disclosure, an appellate court must narrowly construe statutory exemptions shielding public records from disclosure.[9]

[7,8] A person denied access to a public record may file for speedy relief by a writ of mandamus under § 84-712.03.[10] A party seeking a writ of mandamus under § 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by § 84-712.01, and (3) the requesting party has been denied access to the public record as guaranteed by § 84-712.[11] If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and conclusive evidence that § 84-712.05 or § 84-712.08 exempts the records from disclosure.[12]

Jurisdiction

We have two sets of appeals: those taken following the June 18, 2018, orders and those taken after the district court awarded attorney fees to the relators. The first appeals were

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[7] § 84-712.01(3).

[8] *Id.*

[9] *Aksamit Resource Mgmt., supra* note 5.

[10] *Id*.

[11] *Id*. See *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998).

[12] See *Aksamit Resource Mgmt., supra* note 5; *State ex rel. Neb. Health Care Assn., supra* note 11. Cf. *State ex rel. Veskrna, supra* note 2 (using clear and convincing burden of proof); *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

premature.[13] We dismiss those appeals for lack of jurisdiction. We have jurisdiction over the second set of appeals.

Standing

Frakes argues that the relators lack standing to bring this mandamus action, because they failed to prove, as a threshold matter, that the documents they seek are "public records" as defined by § 84-712.01. In framing this as a standing argument, rather than a burden of proof argument, Frakes relies on language from *State ex rel. Neb. Health Care Assn. v. Dept. of Health*.[14] In that case, as referenced above, we set out the respective burdens of proof that applied to those seeking to use mandamus to compel access to public records and those seeking to withhold such records. Frakes is correct that, in dicta, we described the relator's burden of proof as something that was necessary "[i]n order to establish standing and jurisdiction"[15] to bring a mandamus action under § 84-712.03. But our language regarding standing and jurisdiction was imprecise, and has caused unnecessary confusion.

In the context of a public records denial, a district court's jurisdiction over a writ of mandamus is governed by § 84-712.03, and such jurisdiction does not turn on whether the claim advanced by the relator has merit. The concept of standing relates to a court's power to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.[16] The focus of the standing inquiry is on whether the plaintiff is the proper party to assert the claim.[17] Indeed, in considering standing, the legal and factual validity of the claim presented must be

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[13] See *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

[14] *State ex rel. Neb. Health Care Assn., supra* note 11.

[15] *Id.*, 255 Neb. at 789, 587 N.W.2d at 105.

[16] *Griffith v. Nebraska Dept. of Corr. Servs.*, 304 Neb. 287, 934 N.W.2d 169 (2019).

[17] *Id.*

assumed.[18] To the extent *State ex rel. Neb. Health Care Assn.* framed the relator's showing in a mandamus action seeking public records as a matter of standing and jurisdiction rather than a threshold burden of proof, we disapprove of that language.

A party denied access to records need only establish a prima facie claim that the requested record is a public record.[19] A party has established a prima facie claim if it has produced enough evidence to demonstrate that it is entitled to judgment if the evidence were uncontroverted.[20] The inquiry of whether a requested record is a public record focuses on the information or record sought.[21]

The categories of records at issue in Frakes' appeal are the records that the district court found did not on their face identify an execution team member, which are (1) communications between a DCS execution team member and a supplier, (2) DEA forms, (3) inventory logs, (4) photographs of packaging, and (5) invoices. Relators have not sought the identity of any execution team member and have requested that any confidential information within the records be redacted prior to their disclosure.

Here, after correctly setting out the parties' respective burdens of proof, the district court made factual findings that relators met their burden to prove they were citizens of Nebraska or other persons interested in the examination of the public records, that the documents sought were public records as defined by § 84-712.01, and that Frakes had denied them access to the records. Because we do not find

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[18] *Id.*

[19] See, *City of Kimball, supra* note 12; *State ex rel. Neb. Health Care Assn., supra* note 11.

[20] See *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

[21] See, *State ex rel. Adams Cty. Historical Soc. v. Kinyoun*, 277 Neb. 749, 765 N.W.2d 212 (2009); *City of Kimball, supra* note 12; *State ex rel. Neb. Health Care Assn., supra* note 11.

any of these findings to be clearly erroneous, we will not disturb them.

Frakes' position is distinguishable from our decision in *State ex rel. Unger v. State*.[22] In *State ex rel. Unger*, the relator sought the disclosure of a portion of a presentence report consisting of a victim's questionnaire, which raised the issue of whether a presentence report is within the definition of "public records" under § 84-712.01. We found that under Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2014), a presentence report is privileged and wholly exempt from disclosure unless otherwise provided by statute, and that as a result, presentence report materials are not considered public records under § 84-712.01(1). Even recognizing that *State ex rel. Unger* upheld a public body's decision to withhold information, that case does not support the overbroad theory that Frakes asserts here. If Frakes were correct on his standing and jurisdiction theory, we would have dismissed the appeal in *State ex rel. Unger* for lack of jurisdiction, but we did not do so. We affirmed the district court's decision that the relator failed to establish a prima facie claim, because, in that case, the Legislature expressly made privileged a particular type of record, a presentence report. Consequently, the relator failed to set forth a prima facie claim, because even if his claim were uncontroverted, the information sought was privileged. Here, accepting their claims as uncontroverted for purposes of establishing a prima facie claim, relators have not sought privileged information, including the identity of any execution team member, nor any information reasonably calculated to lead to the identity of an execution team member. Section 83-967(2) does not impede relators' ability to establish a prima facie claim.

Frakes separately argues that Young and Duggan did not submit records requests on behalf of LJS and OWH respectively. However, the record is clear that Young and Duggan submitted the requests as journalists for their respective news

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[22] *State ex rel. Unger v. State*, 293 Neb. 549, 878 N.W.2d 540 (2016).

organizations. The record is also clear that DCS was responding to Young and Duggan as representatives of their respective news organizations. Frakes further argues that Young's request was in the form of questions and not requests. Assuming without deciding that Young's records request was not submitted in the proper form, we find that Frakes has waived this argument pursuant to §§ 84-712(4) and 84-712.04. However, DCS did not deny Young's request on this basis and simply responded in the same manner as it did to the other requesting parties. Therefore, Young did not have an opportunity to modify her request as provided under § 84-712(4).

The relators have standing, and the district court had jurisdiction under § 84-712.03.

Documents Subject to Public Records Statutes

Frakes next argues that the requested documents are not subject to the public records statutes based on § 83-967(2). Frakes contends that the disclosure of the documents will lead to the identity of the execution team members. Frakes relies upon the first clause of § 83-967(2), which provides: "The identity of all members of the execution team, and any information reasonably calculated to lead to the identity of such members, shall be confidential and exempt from disclosure pursuant to sections 84-712 to 84-712.09 . . . ."

It is well-understood that the public records statutes place the burden of proof upon the public body to justify nondisclosure.[23] In order for Frakes to withhold records responsive to relators' public information requests based upon § 83-967(2), he has to show that the information identifies a member of the execution team or is reasonably calculated to lead to the identity of such a member.

[9-11] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to

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[23] See, § 84-712.03(2); *City of Kimball, supra* note 12; *State ex rel. Neb. Health Care Assn., supra* note 11.

interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[24] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[25] It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[26]

We first analyze Frakes' argument that as a matter of statutory interpretation, § 83-967(2) provides a complete exception to Nebraska's public records laws pursuant to the "other statute" exception found in § 84-712(1). Section 84-712(1) states: "*Except as otherwise expressly provided by statute*, all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized to (a) examine such records, and . . . obtain copies of public records . . . ." (Emphasis supplied.)

Frakes argues that § 83-967(2) is an "other statute" and that when §§ 83-967(2) and 84-712(1) are read together, they combine to create an "exception from the entirety of the [public records statutes],"[27] and that therefore, the documents requested by relators are "not subject to the statute authorizing records requests."[28]

The public records statutes encourage open and transparent government. Even so, the Legislature has made certain records exempt from disclosure under §§ 84-712.05 and 84-712.08. Section 84-712.05 provides that 23 separate categories of records "may be withheld from the public," so long as those

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[24] *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

[25] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[26] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[27] Reply brief for appellant in cases Nos. S-18-604 through S-18-606 at 9.

[28] Brief for appellant in cases Nos. S-18-604 through S-18-606 at 20.

records have not been "publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties." Section 84-712.05 permits the withholding of a variety of categories of sensitive information, such as medical records and Social Security numbers. Several of these types of records are identified as "confidential."[29] Section 84-712.08 suspends §§ 84-712, 84-712.01, and 84-712.03 through 84-712.09, as well as Neb. Rev. Stat. § 84-1413 (Cum. Supp. 2016), when the application of those provisions would result in the loss of federal funds, services, or essential information which would otherwise be available to a state agency.

A statute qualifies as an "other statute" under § 84-712(1) when the plain language of a statute makes it clear that a record, or portions thereof, is exempt from disclosure in response to a public records request.[30] An "other statute" exemption does not allow a court to imply an exemption but only allows a specific exemption to stand.[31]

Section 83-967(2) provides that the identity of execution team members, and any information reasonably calculated to lead to the identity of such members, "shall be confidential and exempt from disclosure pursuant to sections 84-712 to 84-712.09." The plain and unambiguous language of § 83-967(2) contains an identifiable legislative intent to prevent the disclosure of the identities of execution team members. Section 83-967(2) thus qualifies as an "other statute" under § 84-712(1).

Although we agree that § 83-967(2) qualifies as an "other statute" under § 84-712(1), we disagree with Frakes about the impact of this conclusion. The plain and ordinary language of § 83-967(2) does not provide a complete exception

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[29] See § 84-712.05(4), (13), and (16)(b).

[30] See *Doe ex rel. Roe v. Washington State Patrol*, 185 Wash. 2d 363, 374 P.3d 63 (2016).

[31] *Id*.

to the public records statutes. Rather, § 83-967(2) makes records "exempt from disclosure pursuant to sections 84-712 to 84-712.09." Frakes is attempting to imply an exception using § 84-712(1) without regard to the language found within § 83-967(2).

[12] An exemption from disclosure should not be misunderstood as an exception to the laws of the public records statutes. Disclosure, within the meaning of the public records statutes, refers to the exposure of documents to public view.[32] In arguing that § 83-967(2) creates an exception to the entirety of the public records statutes, Frakes presumes that the sole obligation imposed by the public records statutes is the exposure of documents to public view. Contrary to Frakes' presumption, however, the public records statutes impose other additional obligations upon governmental bodies. An example of such an additional obligation occurs when a public body denies a public records request and § 84-712.04(1) requires the public body to provide to the requesting party in writing a description of the withheld records and the reasons for denial, including citations to any particular supporting legal authority. The writing must name the public official responsible for denying the request and provide notice of the requester's right to administrative or judicial review of the public body's decision. Section 84-712.04(2) requires each public body to maintain a file of all denial letters and to make the file available to any person upon request.

The language of § 83-967(2) states only that certain records are "confidential and exempt from disclosure," which is similar to language the Legislature has used in exempting other confidential records from disclosure under § 84-712.05, like § 84-712.05(4), (13), and (16)(b). There is no language within § 83-967(2) that would relieve DCS of its obligations under the public records statutes to respond to and document public information requests even where documents are not exposed to

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[32] *State ex rel. Neb. Health Care Assn., supra* note 11.

public view. Were we to accept Frakes' view that § 83-967(2) operates as a complete exception to the public records statutes, he would have no obligation to respond to a records request that he deems to implicate § 83-967(2), confirm the existence of records sought, explain why records may be withheld, provide notice of a right to judicial or administrative review of his decision, or keep these requests on file or make such file available upon request.

Under this court's precedent, we have consistently respected the venerable policies of the public records statutes when adjudicating the applicability of exemptions from disclosure.[33] In *State ex rel. Sileven v. Spire*,[34] the relator filed a public records request for documents relevant to investigations of him by law enforcement. The trial court found that the documents fell within the plain and ordinary meaning of an exemption under § 84-712.05(5), because the records were developed or received by law enforcement agencies as part of an investigation. The relator claimed that he had a heightened interest in obtaining the records, because he was entitled to review information regarding his criminal history record as provided by Neb. Rev. Stat. § 29-3525 (Reissue 1989). This court cited to Neb. Rev. Stat. § 29-3506 (Reissue 1989), which provides that "[c]riminal history record information shall not include intelligence or investigative information." In considering the impact of § 29-3506 on the relator's argument, we cited to the "other statute" exception found within § 84-712. We concluded that "[t]he information requested by the relator consists of records concerning an investigation of him and is specifically excluded from review under § 29-3506 as well as § 84-712.05(5)."[35] Thus, we understood in that context that both an "other statute" exception under § 84-712

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[33] See, *State ex rel. Unger, supra* note 22; *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993).

[34] *State ex rel. Sileven, supra* note 33.

[35] *Id.*, 243 Neb. at 457, 500 N.W.2d at 183.

and an exemption within § 84-712.05 applied, that both statutes protected the information sought from disclosure, and that applying either statute led to the same result. The fact that § 29-3506 qualified as an "other statute" did not render the public records statutes inapplicable nor preclude judicial review of the government's decision to withhold information, as Frakes argues § 83-967(2) does here.

State courts in other jurisdictions have held that all public records exceptions, including "other statute" exceptions, are construed narrowly.[36] The "narrow construction" rule means that if there is a plausible construction of a statute favoring disclosure of public records that construction will prevail.[37]

Reference to federal laws confirms the rule that an "other statute" exception is to be narrowly construed. "Nebraska, like the federal government and many other states, has broad public records laws that generally provide open access to governmental records."[38] We have previously analogized decisions under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2018), to construe Nebraska's public records statutes.[39] As an analogy to § 84-712, the third exemption under the FOIA, 5 U.S.C. § 552(b)(3), provides that disclosure requirements do not apply to matters "specifically exempted from disclosure by statute." Exemptions under the FOIA "must be narrowly construed."[40]

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[36] *Fisher Broadcasting v. City of Seattle*, 180 Wash. 2d 515, 326 P.3d 688 (2014). See, *American Civil Liberties Union of Northern California v. Superior Court*, 202 Cal. App. 4th 55, 134 Cal. Rptr. 3d 472 (2011); *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 89 Cal. Rptr. 3d 374 (2009); *Colby v. Gunson*, 224 Or. App. 666, 199 P.3d 350 (2008).

[37] *Colby, supra* note 36.

[38] *Kinyoun, supra* note 21, 277 Neb. at 754, 765 N.W.2d at 217.

[39] *City of Kimball, supra* note 12; *State ex rel. Neb. Health Care Assn., supra* note 11.

[40] *Dept. of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976).

With these principles in mind, we agree with the district court's interpretation that § 83-967(2) is reasonably and ordinarily understood as an exemption like those under § 84-712.05. In the context presented here, we must interpret § 83-967(2) together with provisions under the public records statutes and narrowly construe § 83-967(2) in favor of disclosure, particularly due to the fact that this case concerns the expenditure of public funds.

Frakes relies on language from *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*[41] In that case, the power district relied on an exemption under § 84-712.05(3) to withhold its competitive information; the power district did not rely on an "other statute." We narrowly construed § 84-712.05(3) in favor of disclosure and held that the power district was required to disclose its records. We concluded our opinion by stating that had the Legislature passed a hypothetical "other statute" protecting the power district's competitive information, "we would not hesitate to apply the 'other statute' exception of the public records law and the general principle favoring a specific over a general statutes."[42]

Within 2 months of our decision, the Legislature passed superseding legislation in Neb. Rev. Stat. § 70-673 (Reissue 2018), which provides:

> (1) Notwithstanding any other provision of law, the public power industry . . . and the Nebraska Power Review Board may withhold competitive or proprietary information which would give an advantage to business competitors. . . .
>
> (2) Any request for records described in this section shall be subject to the procedures for public record requests provided in sections 84-712 to 84-712.09.

The language of § 70-673 demonstrates the shortcomings of Frakes' theory regarding § 83-967(2). First, by using the phrase

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[41] *Aksamit Resource Mgmt., supra* note 5.

[42] *Id.*, 299 Neb. at 127, 907 N.W.2d at 310.

"[n]otwithstanding any other provision of law," the Legislature demonstrated with clear intention that § 70-673(1) should prevail when it conflicts with another statute. By contrast, § 83-967(2) does not state that information is exempt from disclosure "notwithstanding [the public records statutes]." Rather, § 83-967(2) states that information is exempt from disclosure "pursuant to [the public records statutes]." Under an appropriately narrow construction, § 83-967(2) can be harmonized with the public records statutes and interpreted as an exemption. Second, § 70-673(2) recognizes that, as described above, the public records statutes impose requirements to respond to and document public records requests. Under Frakes' reading of § 83-967(2), he is not subject to those statutory requirements even though § 83-967(2) is silent on the matter. Frakes' atextual interpretation must be rejected.

The lessons of *Aksamit Resource Mgmt.* counsel against Frakes' interpretation. In *Aksamit Resource Mgmt.*, we overruled a district court's determination that an exemption under § 84-712.05 applied and found that under an appropriately narrow construction of the exemption, the records at issue were required to be disclosed. We apply precisely the same rationale here. Guided by the Legislature's requirement under § 84-712.01(3) that we liberally construe public records statutes in favor of disclosure in cases which concern the expenditure of public funds, we conclude that the district court correctly interpreted § 83-967(2) as an exemption under the public records statutes. This assignment of error is without merit.

Failure of Proof Exemption Applies

The next issue for consideration is whether Frakes met his burden of proving an exemption applies which justifies nondisclosure. The district court's findings in favor of relators have the effect of a jury verdict and will not be disturbed unless they are clearly erroneous.[43]

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[43] See *State ex rel. Veskrna, supra* note 2.

Frakes argues on appeal that the documents ordered to be disclosed contain information "reasonably calculated to lead to the identity" of a team member as pronounced in § 83-967(2). However, the phrase "reasonably calculated" is undefined by statute and has not previously been interpreted by this court in the context of § 83-967(2). We need not do so here. But our analysis should not be read to disregard this phrase or to suggest that it could never lead to withholding records which would otherwise be subject to disclosure under the public records statutes.

Even accepting, only for purposes of argument, Frakes' proposed definition, the evidence did not rise to that level. He defines "reasonably calculated" as that which is "moderately likely."[44] Thus, he argues, § 83-967(2) protects "information [moderately likely] to lead to the identity" of an execution team member. Frakes testified that he understood identifying information of an execution team member to include that person's name, official title, personal or work email address, or office address. Apart from the purchase orders and chemical analysis reports, which identify a team member on their face, Frakes has not elicited any proof that the remaining records contain any identifying information with regard to an execution team member. Nor did he present *evidence* of a chain of discovery moderately likely to result in the discovery of the identity of an execution team member.

We digress to reject two arguments advanced by the parties. First, the relators disputed whether unidentified execution team members truly are at risk of threats or harassment if identified. But regardless of the factual record on this issue, the Legislature has protected against the disclosure of the identities of execution team members under § 83-967(2). Second, there is no merit to Frakes' argument that the occupations of Miller, Young, and Duggan make it more likely that disclosure of the records will lead to the identity of a team member. Frakes' duty to disclose public records does not depend on who makes the

[44] Brief for appellant in cases Nos. S-18-604 through S-18-606 at 25.

request. The public records statutes apply "equally to all persons without regard to the purpose for which the information is sought."[45] As a general rule, citizens are not required to explain why they seek public information.[46] "The information belongs to citizens to do with as they choose."[47] The withholding of information under public records laws cannot be predicated on the identity of the requester.[48]

Upon review of the sworn testimony, exhibits, the district court's order, and the parties' arguments on appeal, we conclude that Frakes failed to prove by clear and conclusive evidence that any of the requested records are reasonably calculated to lead to the identity of an execution team member. The evidence on this issue was slight on both sides, with the burden of proof on Frakes.

While objections were sustained to numerous questions which may have been aimed at meeting this burden, Frakes made no offers of proof[49] nor does he assign any error on appeal to these evidentiary rulings.[50]

In his presentation to the trial court, Frakes focused on arguing that the public records statutes are inapplicable and that relators carry the burden of proof. Frakes conceded that these records do not identify execution team members on their

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[45] *State ex rel. Sileven, supra* note 33, 243 Neb. at 457, 500 N.W.2d at 183.

[46] *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004).

[47] *Id*., 541 U.S. at 172.

[48] See *id*. See, also, *U. S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975); *North v. Walsh*, 881 F.2d 1088 (D.C. Cir. 1989).

[49] See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008) (to predicate error upon ruling to permit witness to answer specific question, record must show offer to prove facts sought to be elicited).

[50] See *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015) (for appellate court to consider alleged error, party must specifically assign and argue it).

face, and he did not argue that the five categories of withheld records at issue contained any identifying information with regard to an execution team member. Frakes testified that the records identify a lethal injection drug supplier, which if contacted could disclose the identity of an execution team member. But he provided no evidence that such disclosure was likely. We agree with the district court that Frakes' attenuated reasoning about whether an unidentified third party may or may not divulge confidential information is unpersuasive.

Relators had little difficulty undermining Frakes' position on cross-examination. Frakes admitted that he could ask the supplier not to identify any execution team members, but did not know if this had been done. He also did not know if the contract with the supplier contains any confidentiality or nondisclosure provisions. In addition, Frakes acknowledged that the inventory logs do not identify a supplier, but, rather, they "contain information that ultimately could lead to identifying the supplier."

Frakes failed to prove that the records contain any information which if disclosed would reasonably lead to the identity of a team member. Frakes faced a weighty burden to prove by clear and conclusive evidence that an exemption applies. Frakes' conclusory allegations that records here come within an exemption are insufficient. The district court was well within its discretion to issue a partial writ to compel Frakes to produce these records. The court did not err in concluding that Frakes failed to prove by clear and conclusive evidence that an exemption applies.

Attorney Fees

Frakes argues the district court lacked jurisdiction to award relators attorney fees and costs, because he had already filed a notice of appeal and paid the docket fee. In addition, Frakes argues that the award of attorney fees was improper, because there is evidence that the relators' expenses will be reimbursed by a third party. We find no merit to these assignments of error.

The district court issued orders on June 18, 2018, compelling Frakes to disclose the records which did not identify an execution team member on their face within 7 days. Frakes appealed the next day. Relators timely filed motions to alter or amend the judgments on June 27. Those motions asked the district court to alter or amend the judgments to award attorney fees and litigation costs to them pursuant to § 84-712.07, as requested in their petitions. The court's June 18 order was silent on the issue of attorney fees and therefore implicitly denied relators' request.[51] As to the relators' motions to alter or amend, the district court found that it had jurisdiction over the motions and awarded the relators reasonable attorney fees and costs.

Where a request for attorney fees is made pursuant to state law, attorney fees are generally treated as an element of court costs, and an award of costs in a judgment is considered a part of the judgment.[52] A party seeking statutorily authorized fees must make a request for such fees prior to a judgment in the cause.[53] If a postjudgment motion seeks a substantive alteration of the judgment, a court may treat the motion as one to alter or amend the judgment.[54] A motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Reissue 2016) must be filed no later than 10 days after the entry of judgment.

[13] A motion to alter or amend a judgment is a "terminating motion" under Neb. Rev. Stat. § 25-1912(3) (Supp. 2017). Pursuant to § 25-1912(3), when any terminating motion such as a motion to alter or amend is timely filed, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before

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[51] See *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

[52] *Webb v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 810, 920 N.W.2d 268 (2018).

[53] *Id.*

[54] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

or after the timely filing of the terminating motion. That section further states that a new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion.[55]

Frakes admits that a timely filed motion to alter or amend would have nullified his notice of appeal filed on June 19, 2018, but argues that relators' motions were not motions to alter or amend. To make this argument, Frakes mistakenly claims that relators never made a request for attorney fees prior to judgment. However, the record is clear that the relators requested attorney fees in their pleadings. A request for attorney fees in a pleading is sufficient to comply with the requirement that a party must request such fees prior to judgment.[56] Relators' motions to include an award for attorney fees and costs sought substantive alteration of the judgments. Additionally, relators' motions were filed within 10 days of the entry of the judgment. As a result, under § 25-912(3), the motions to alter or amend caused Frakes' notice of appeal to have no effect. The district court had jurisdiction to award relators attorney fees and costs.

Frakes further argues that the court erred in awarding fees because they were not "reasonably incurred by the complainant."[57] Section 84-712.07 provides that in any case in which the complainant seeking access to public records has substantially prevailed, the court may assess against the public body which had denied access to their records reasonable attorney fees and other litigation costs reasonably incurred by the complainant. The record indicates that both OWH and LJS offered affidavits setting forth their fee arrangement with their counsel. The affidavits stated that OWH and LJS and their counsel agreed that "Media of Nebraska, Inc. would pay the

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[55] See, *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

[56] See, *Webb, supra* note 52; *Murray, supra* note 51; *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

[57] § 84-712.07.

legal fees for the litigation." Frakes therefore contends that the relators "failed to offer any evidence they incurred any fees at all. Instead, they established the fees were incurred by a third party . . . ."[58] We disagree.

[14] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[59] Black's Law Dictionary defines "'incur'" as a verb meaning "'[t]o suffer or bring on oneself (a liability or expense).'"[60] Here, the district court found that relators had incurred a fair and reasonable amount of attorney fees. Frakes does not contest the reasonableness of the amount of fees awarded, but merely argues that relators did not incur the fees because another entity has agreed to pay those fees. We find no error in the court's decision. Billing records in evidence show that relators did incur attorney fees. Section 84-712.07 requires only that the fees be "reasonably incurred." There is no requirement under § 84-712.07 that the fees be "'actually incurred'"[61] by the prevailing party. Relators incurred fees even if those fees were later reimbursed by a third party. This assignment of error is without merit.

Cross-Appeals

On cross-appeal, relators argue that the district court erred in not ordering Frakes to redact confidential information contained in the purchase orders and chemical analysis reports and disclose the balance of such records in accordance with § 84-712.06. Relators' cross-appeals raise an issue of first impression under Nebraska law.

[15] Section 84-712.06 of the public records statutes requires that "[a]ny reasonably segregable portion of a record shall be

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[58] Brief for appellant in cases Nos. S-19-027 through S-19-029 at 39.

[59] *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

[60] *Id.*, 299 Neb. at 285, 908 N.W.2d at 67, quoting Black's Law Dictionary 885 (10th ed. 2014).

[61] See *id.* (interpreting Neb. Rev. Stat. § 76-726 (Reissue 2018)).

provided to the public as a public record upon request after deletion of the portions which may be withheld." The FOIA contains an analogous provision under 5 U.S.C. § 552(b). In interpreting the FOIA, the Eighth Circuit has recognized that agencies are required to disclose nonexempt portions of a document, unless those nonexempt portions are inextricably intertwined with exempt portions.[62] Effectively, each document consists of "'discrete units of information,'" all of which must fall within a statutory exemption in order for the entire document to be withheld.[63] The withholding of an entire document by an agency is not justifiable simply because some of the material therein is subject to an exemption.[64]

The agency has the burden to show that the exempt portions of the documents are not segregable from the nonexempt material.[65] The agency's justification must be relatively detailed, correlating specific parts of the requested documents with the basis for the applicable exemption.[66] An agency need not commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.[67] Ultimately, to carry its burden before the district court, the agency must provide a reasonably detailed justification rather than conclusory statements to support its claim that the nonexempt material in a document is not reasonably segregable.[68] When agencies demonstrate that the withheld records are exempt in their entireties, courts have upheld the

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[62] *Mo. Coalition for Environment v. U.S. Army Corps*, 542 F.3d 1204 (8th Cir. 2008).

[63] *Id.* at 1212.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242 (D.C. Cir. 1977).

[68] See, *id.*; *Schoenman v. F.B.I.*, 841 F. Supp. 2d 69 (D.D.C. 2012).

determination that no segregation is possible.[69] The declarations must provide the relator a "'"meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding."'"[70]

Frakes did not argue that confidential portions of the withheld documents are not segregable from nonexempt portions. Frakes instead made the argument, rejected above, that the documents were by definition wholly exempt from disclosure. Although relators properly raised the issue, the district court made no findings on the issue of segregability. Rather, the district court conducted a different analysis by distinguishing the withheld records between those which identified a team member on their face and those which did not. This left unaddressed the argument raised by relators that under the public records statutes nonexempt portions of the purchase orders and chemical analysis reports should be disclosed.

Appellate courts may address the issue of segregability on their own or may remand the matter to the district court to make findings on the issue.[71] Here, it is clear that Frakes has proved that an exemption applies to the names of execution team members as well as any of their identifying information, such as that person's official title or contact information. However, we find nothing in our record on appeal which suggests that an exemption applies to the portions of the purchase orders and chemical analysis reports which do not identify an execution team member, and there is no evidence that the exempt portions of the records are inextricably intertwined with nonexempt portions. Nonexempt portions of those records are not entitled to protection under § 83-967(2) and must be disclosed pursuant to § 84-712.06.

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[69] See *Jarvik v. C.I.A.*, 741 F. Supp. 2d 106 (D.D.C. 2010).

[70] *American Civil Liberties Union of Northern California, supra* note 36, 202 Cal. App. 4th at 85, 134 Cal. Rptr. 3d at 495, quoting *Wilderness Soc. v. U.S. Dept. of Interior*, 344 F. Supp. 2d 1 (D.D.C. 2004).

[71] See *Juarez v. Dept. of Justice*, 518 F.3d 54 (D.C. Cir. 2008).

On remand, the district court must order Frakes to produce nonexempt portions of the purchase orders and chemical analysis reports after portions that may be withheld have been redacted, such as an execution team member's name, title, home or work address, telephone number, or email address.

CONCLUSION

In cases Nos. S-18-604 through S-18-606, we dismiss the appeals for lack of jurisdiction. In cases Nos. S-19-027 through S-19-029, we affirm in part, and in part reverse and remand with directions to issue appropriate writs in conformity with this opinion.

Appeals in Nos. S-18-604 through S-18-606 dismissed.

Judgments in Nos. S-19-027 through S-19-029 affirmed in part, and in part reversed and remanded with directions.

Papik, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Leandre R. Jennings III, appellant.

942 N.W.2d 753

Filed May 15, 2020. No. S-18-1186.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Motions to Suppress: Pretrial Procedure: Trial: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
3. **Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
4. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.
5. ____: ____: ____: ____. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
6. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.

7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.
8. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
9. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
10. **Constitutional Law: Search and Seizure: Search Warrants: Probable Cause.** The particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described.
11. **Search Warrants: Search and Seizure.** A warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching.
12. **Search Warrants: Police Officers and Sheriffs.** A search warrant must be sufficiently particular to prevent an officer from having unlimited or unreasonably broad discretion in determining what items to seize.
13. **Search Warrants: Evidence: Police Officers and Sheriffs.** Absent a showing of pretext or bad faith on the part of the police or the prosecution, valid portions of a warrant are severable from portions failing to meet the particularity requirements.
14. **Criminal Law: Appeal and Error.** Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
15. **Convictions: Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
16. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.
17. **Verdicts: Evidence: Appeal and Error.** Overwhelming evidence of guilt can be considered in determining whether the verdict rendered was surely unattributable to the error, but overwhelming evidence of guilt is not alone sufficient to find the erroneous admission of evidence harmless.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. NATURE OF CASE

Leandre R. Jennings III was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The district court sentenced Jennings to consecutive terms of imprisonment for life, 30 to 40 years, and 40 to 45 years, respectively. Before trial, Jennings made two motions to suppress evidence obtained from searches of cell phone records and his residence. The first motion to suppress was based on cell phone records obtained pursuant to a provision within the federal Stored Communications Act, which has since been ruled unconstitutional. In the second motion to suppress, Jennings challenges the language of several paragraphs in the warrant as violating the particularity requirements of the Fourth Amendment. The district court denied these motions, and Jennings renewed the objections at trial. He now appeals.

II. BACKGROUND

Michael Brinkman was fatally shot during a home invasion in Omaha, Nebraska. Michael's wife, Kimberly Milius (Kimberly), and their son, Seth Brinkman, were home during the invasion. After the investigation led law enforcement to suspect Jennings, he was arrested. The State charged Jennings with first degree murder under Neb. Rev. Stat. § 28-303 (Reissue 2016), a Class IA felony; use of a deadly weapon

(firearm) to commit a felony under Neb. Rev. Stat. § 28-1205 (Reissue 2016), a Class IC felony; and possession of a deadly weapon (firearm) by a prohibited person under Neb. Rev. Stat. § 28-1206 (Reissue 2016), a Class ID felony. Jennings was found guilty in a trial by jury.

At trial, Kimberly and Seth testified to what they witnessed during the home invasion that lead to Michael's death. Kimberly testified that during the early evening of December 23, 2016, Michael, Kimberly, and Seth were at home getting ready to go out to dinner. Both Michael and Seth were showering in their respective bathrooms. As Michael was getting out of the shower, he asked Kimberly to answer the front door. Kimberly looked out a window and did not see anyone, though she did see a white sport utility vehicle parked in their driveway.

Kimberly opened the front door, and two men with guns, wearing masks and what appeared to be surgical gloves, forced their way into the home at gunpoint. One of the men was wearing a "[S]anta" hat. Kimberly asked the men what they wanted, and they answered, "Money." Kimberly offered to get her purse, but one of the men put a gun to her head and backed her into a corner of the living room. The other man, who was wearing the Santa hat, went down the hallway toward Michael's room. Kimberly heard a gunshot, then scuffling sounds and another gunshot. After the gunshots, the first assailant ordered Kimberly into the master bedroom. As she entered the room, she saw Seth strike the second assailant with a shower rod. Kimberly testified that the second assailant was the same size as Jennings.

Seth's testimony described the intruders in a similar fashion. He testified that he was in the shower when he heard his mother scream. He turned off the shower after he heard "rustling" sounds in the hallway. Seth peeked out of the shower and then heard a gunshot from the master bedroom. At that point, Seth grabbed the shower rod off the wall and went into the master bedroom, where he encountered and attacked the

second assailant. During the scuffle, the Santa hat fell off the second assailant's head. When the first assailant subsequently entered the room with Kimberly, he punched Seth and wrestled the shower rod away from him. The first assailant ordered Kimberly and Seth "to get down and to shut up." The second assailant left the room and returned a short time later with what appeared to be a white "money bag." Seth testified that the second assailant said something to the first and that they then left, taking Kimberly's cell phone with them.

After they left, Kimberly ran to lock the front door and Seth went to look for Michael. Seth first went to the bathroom where he had showered, in order to put on his clothes. When doing so, he noticed that his shorts had some sort of sauce on them and that there were fast food items on the floor. The items included a partially eaten piece of "Texas toast," some "fries," and a container of sauce from a Raising Cane's restaurant. Seth testified that none of those items were present before the intruders arrived.

Seth then went to an upstairs bedroom and found the door was difficult to open. Seth forced the door open and discovered the door had been blocked by Michael, who was lying on the floor. Seth called for Kimberly, and she used Seth's cell phone to call the 911 emergency dispatch service while Seth tried to aid Michael.

The first officer on the scene entered the home and found Michael with Seth, and the officer then requested medical assistance. An ambulance rushed Michael to the hospital, but he did not survive. Michael's autopsy established that the cause of death was a gunshot wound to the chest.

Kimberly and Seth provided descriptions of the intruders to law enforcement. During a canvassing of the neighborhood, law enforcement obtained surveillance video from a neighbor which showed a white sport utility vehicle driving by the Brinkman residence several times around the time of the attack. The lead detective viewed the videos and recognized the vehicle as a Dodge Durango. Police also released a

photograph and description of the vehicle to the media seeking the public's help in locating the vehicle or suspects.

Members of the forensics team came and collected evidence, including DNA swabs from the Texas toast, the Raising Cane's sauce container, the shower rod, and the Santa hat. Police also collected three spent shell casings from the residence, later determined to be .380 caliber.

On January 2, 2017, law enforcement received an anonymous telephone call indicating the caller had seen the Durango in the lot of an apartment complex several days before the murder. The caller claimed to have observed two black males exit the vehicle and go to an apartment on the third floor of an adjoining building. The caller provided the license plate number on the vehicle.

Police determined that the vehicle belonged to a car rental company. The records provided by the rental company showed that from December 13 through 27, 2016, the vehicle was rented to Carnell Watt. The owner of the rental company office told police that Watt regularly rents vehicles from that location and that she frequently came in with Jennings, whom she would introduce as her husband.

Police recovered the vehicle from a car rental office in Detroit, Michigan, and conducted a digital forensics examination. The Durango was equipped to keep a time-stamped list of all cell phones which have previously had a Bluetooth connection to the vehicle. Cell phones associated with Watt, her sister, and Jennings were connected to the Durango during the dates Watt rented the vehicle. During an interview with Omaha police, Watt indicated that she lent the Durango to Jennings during the rental period.

On February 13, 2017, law enforcement personnel received a response from the Federal Bureau of Investigation's national DNA database commonly referred to as "CODIS" informing them that the DNA swab of the Texas toast included Jennings as a probable match. Law enforcement then sought permission from the court to obtain Jennings' cell site

location information (CSLI) pursuant to a provision within the Stored Communications Act. Law enforcement sought records from cell service companies for Jennings. Only the records obtained from one such company are challenged on appeal. That company provided Jennings' cell phone records and CSLI in response to a court order which showed that Jennings' cell phone was in the area of the crime around the relevant times.

Police also obtained Watt's cell phone records, which showed that on the day of the homicide, her cell phone was located in the area of her place of employment, which is not close to the location of the homicide. However, the records also showed that at around 3 p.m. on December 23, 2016, Watt's cell phone was briefly in the area of a Raising Cane's restaurant located in Council Bluffs, Iowa.

On February 16, 2017, law enforcement viewed the surveillance video for December 23, 2016, from the Council Bluffs Raising Cane's restaurant in question and observed a white sport utility vehicle in the drive-through lane of the restaurant between 3:17 and 3:23 p.m. The video displayed two unidentifiable occupants and a particular item of clothing worn by the driver. The item worn by the driver was described as a dark shirt with light stripes.

Using all of the aforementioned information, a detective applied for a search warrant for a specific address on North 60th Street. The affidavit detailed the description of the intruders as wearing gloves and masks, noted the various clothing items described during the intrusion and seen on the Raising Cane's surveillance video, indicated that the CSLI data placed Jennings' phone near the Brinkman residence before and after the time of the murder, and specified that the Nebraska State Patrol had notified Omaha police of a possible CODIS match to Jennings from one of the items recovered at the scene. The affidavit also noted that the address Jennings had provided to his probation officer was on Sprague Street, but that Jennings also had a vehicle registered in Nebraska

with a North 60th Street address and that a utilities district's records showed Watt and Jennings listed as residents there. The court reviewed all of the information provided by the detective and issued a search warrant for the North 60th Street address.

The detective testified to how the search warrant was executed at the North 60th Street residence. The Omaha "crime lab" accompanied him and several officers to the address. After entry was made, the crime lab took pictures of everything in the residence before anything was disturbed.

The search warrant contained numbered paragraphs specifying the parameters of the search. The warrant read as follows:

> 1) Venue Items identifying those parties who either own or who are in control of the residence [on] **North 60th Street,** Omaha, Douglas County, Nebraska;
>
> 2) The ability to seize and process item(s) of evidentiary value, to include: cellular phone(s), computer(s) recording device(s) including audio and video, companion equipment, records, whether stored on paper, magnetic media such as tape, cassette, disk, diskettes, or on memory storage devices such as optical disks, programmable instruments such as telephones, "electronic address books", or any other storage media, together with indicia of use, ownership, possession or control of the aforementioned residence;
>
> 3) Any make and model firearm(s) which fires a 380 caliber cartridge . . . ;
>
> 4) Unknown brand/size/construction mask which could be used to conceal the wearers face;
>
> 5) Clothing items to include but not limited to grey hooded sweatshirt, navy blue hooded sweatshirt, blue athletic style warm-up pants with white stripes;
>
> 6) Blue or Black in color latex or similar construction gloves[.]

The evidence recovered from the search of the North 60th Street residence included photographs of the condition of the

residence before it was searched; various documents establishing residency for Watt and Jennings; photographs of clothing items, some of which items were seized; and photographs of cell phones along with their retail boxes.

After he was arrested, a buccal swab was taken from Jennings and compared to the DNA evidence recovered at the scene. Comparison of the swab taken from the Texas toast to a buccal swab taken from Jennings after he was arrested found that Jennings was the probable major contributor to the DNA detected. A forensic DNA analyst from the University of Nebraska Medical Center testified that the probability of a random individual's matching a DNA profile found within the major component of the mixture given that Jennings expresses such a profile is approximately 1 in 123 octillion.

Before trial, Jennings moved to suppress (1) his cell phone records and (2) evidence obtained from the search of his residence. Jennings argued that his cell phone records, which included CSLI, should be suppressed because they were obtained through a court order under a provision within the Stored Communications Act, instead of through search warrants, and because there was insufficient probable cause to support a warrant.

Jennings argued that the evidence obtained from the search of his residence should be suppressed because the search warrant was not sufficiently particular and because there was not probable cause to support it. Specifically, Jennings argued that the CSLI information and the DNA information provided in the affidavit should be excluded from the probable cause analysis. The affidavit in support of the warrant contained information summarizing the investigation details recounted above and also reported the call record and CSLI obtained from Jennings' cell phone. The affidavit explained that the University of Nerbaska Medical Center's human DNA laboratory built a "mainly single source male" DNA profile from the piece of Texas toast and that profile was a probable match in the CODIS system for Jennings.

At the request of the parties, the district court postponed ruling on Jennings' motions to suppress until after the U.S. Supreme Court issued its ruling in *Carpenter v. United States*,[1] which involved whether a search warrant was required to obtain CSLI. While *Carpenter* was pending, law enforcement obtained search warrants for Jennings' cell phone records.

On June 22, 2018, the U.S. Supreme Court issued its opinion in *Carpenter* and held therein that a search warrant was required to obtain a person's CSLI. Thereafter, the district court held additional hearings on Jennings' motions to suppress. In a subsequent written order, the district court denied Jennings' motions to suppress. The district court denied Jennings' motion to suppress his cell phone records because although law enforcement's initial orders were insufficient under *Carpenter*, the later search warrants cured that defect. The district court denied Jennings' motion to suppress the evidence obtained from the search of his residence because the search warrant was sufficiently particular and supported by probable cause. Jennings renewed his objections at trial, and they were overruled. Several items and photographs obtained during the search were admitted into evidence over a continuing objection from Jennings.

III. ASSIGNMENTS OF ERROR

Jennings assigns that the district court erred in denying his two motions to suppress, in violation of his constitutional rights. First, Jennings assigns that obtaining the cell phone records and CSLI from the court order pursuant to a provision within the Stored Communications Act was held to be unconstitutional by *Carpenter* and that the district court erred by concluding that the subsequent warrant cured the constitutional violation. Second, Jennings assigns that the denial of the motion to suppress the evidence obtained from the search of his residence was error because the affidavit to support the

[1] *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

warrant was insufficient and the warrant itself lacked the particularity required by the U.S. Constitution.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[2] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[3]

[2] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[4]

[3] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[5]

[4-6] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.[6] The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[7] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[8]

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[2] *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

[3] *Id.*

[4] *State v. Baker*, 298 Neb. 216, 903 N.W.2d 469 (2017).

[5] *Id.*

[6] *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019).

[7] *Id.*

[8] *Id.*

[7] Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[9]

V. ANALYSIS

Jennings correctly asserts that seizure of his cell phone records and CSLI under a provision within the Stored Communications Act was a violation of his Fourth Amendment rights. However, the fact that the relevant provision of the Stored Communications Act was not determined to be unconstitutional until 18 months after the order in this case leads us to conclude that the exclusion of the evidence is subject to the good faith exception established in *Illinois v. Krull*.[10] Thus, the district court correctly denied Jennings' motion to suppress related to the cell phone records and CSLI. Jennings' assertion that the information obtained from the seizure of the cell phone records and CSLI should be excluded from a probable cause analysis concerning the residential search warrant fails for the same reasons. We find that the record supports the district court's determination that the warrant was supported by probable cause. We also find that a majority of the provisions in the residential search warrant met the particularity requirements of the Fourth Amendment and that the masks, gloves, cell phones, and documents showing Jennings' occupancy were seized in accordance with these requirements. Assuming without deciding that the photographs taken by law enforcement of the interior of the residence, including photographs of items not specified in the warrant, were seized pursuant to invalid portions of the warrant, their admission was harmless error.

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[9] *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018).

[10] See *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).

1. Motion to Suppress Cell Phone Records and CSLI

Under *Carpenter*, the State conducted a search in violation of the Fourth Amendment when it used a court order pursuant to a provision within the federal Stored Communications Act, rather than a warrant, to acquire Jennings' cell phone records and CSLI.[11] However, the fact that Jennings' Fourth Amendment rights were violated does not mean the district court erred in denying the motion to suppress.[12] In addressing a nearly identical scenario, we recently observed that "the exclusionary rule is to be a 'last resort' and not a 'first impulse.'"[13] We find that exclusion of the CSLI evidence is not the appropriate remedy for the violation of Jennings' Fourth Amendment rights.

The exclusion of evidence obtained in violation of the Fourth Amendment is not itself a constitutional right.[14] Rather, it is a remedy designed to deter constitutional violations by law enforcement.[15] Thus, in situations where the exclusion as a remedy would not deter law enforcement, several exceptions to the exclusionary rule have been recognized.[16] One of those exceptions to the exclusionary rule applies to evidence

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[11] See *Carpenter v. United States, supra* note 1.

[12] See, *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) (explaining that application of exclusionary rule is not "a necessary consequence of a Fourth Amendment violation"); *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019), *cert. denied* ___ U.S. ___, 139 S. Ct. 2680, 204 L. Ed. 2d 1080.

[13] *State v. Brown, supra* note 12, 302 Neb. at 60, 921 N.W.2d at 811 (citing *Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)).

[14] *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (citing *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976)).

[15] See *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017).

[16] See, *Davis v. United States, supra* note 14; *Illinois v. Krull, supra* note 10; *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Hoerle, supra* note 15.

obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional.[17]

When the police applied for the court order on February 14, 2017, for Jennings' cell phone records and CSLI from the cell service companies, they were making a request pursuant to a federal statute that had not yet been ruled unconstitutional. Law enforcement obtained the CSLI without first securing a warrant supported by probable cause, but did so as authorized by 18 U.S.C. § 2703(d) (Supp. V 2017) of the Stored Communications Act. It cannot be said that by doing so, law enforcement relied on a statute that was clearly unconstitutional. As we noted recently in *State v. Brown*,[18] many courts have held, as we did in *State v. Jenkins*,[19] that the Stored Communications Act did not violate the Fourth Amendment. *Carpenter* was decided nearly 18 months after the application for the records in this case.[20]

[8] We find that law enforcement made the request in objectively reasonable reliance on the Stored Communications Act and did not have reason to believe that the relevant provision of the act was unconstitutional. On these facts, exclusion of the cell phone records and the CSLI obtained under the court order would not serve as a deterrent to future Fourth Amendment violations by law enforcement, and its application is unwarranted. Thus, we conclude, albeit for reasons different from those articulated by the district court, that it did not err by denying Jennings' motion to suppress the cell phone records and CSLI. A proper result will not be reversed merely because it was reached for the wrong reason.[21] We need not address the validity of the subsequent warrants that Jennings asserts failed to cure the Fourth Amendment violation.

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[17] *State v. Brown, supra* note 12.

[18] *Id.*

[19] *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

[20] *Carpenter v. United States, supra* note 1.

[21] *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013).

2. Motion to Suppress Evidence Recovered From Search of Residence

Jennings argues that the evidence recovered from the search of the North 60th Street residence should have been suppressed because the warrant lacked probable cause and, in the alternative, the warrant violated the particularity requirements of the Nebraska and U.S. Constitutions. The Fourth Amendment provides that warrants may not be granted "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Nebraska Constitution, under article I, § 7, similarly provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

(a) Probable Cause

In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.[22] The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[23] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[24]

[9] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[25]

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[22] *State v. Goynes, supra* note 6.

[23] *Id.*

[24] *Id.*

[25] *Id.*

Because Jennings' CSLI had been obtained pursuant to a federal statute that a reasonable law enforcement officer would believe to be constitutional, we disagree with Jennings' argument that the statements in the affidavit supporting the residential search warrant, which referred to the cell phone records and CSLI obtained from the cell service company, should not be considered in a probable cause determination because they were fruit of the poisonous tree. Law enforcement officers were including in the affidavit in support of the residential search warrant all the information available to them and had no reason to believe that any of the information had been obtained in violation of Jennings' Fourth Amendment rights. Moreover, it was objectively reasonable for a law enforcement officer to believe that the cell phone information obtained from the court order was relevant and usable in future affidavits pertaining to the same investigation. Because a good faith exception applies to the initial court order, the same exception applies to the use of the cell phone records and the CSLI in the subsequent affidavit.[26]

We also disagree with Jennings' contention that the statement in the supporting affidavit about the possible DNA match to Jennings in the CODIS system was too vague to be properly relied upon to support a finding of probable cause. The portion of the affidavit concerning the DNA match reads as follows:

> On January 23rd 2017 Investigators were notified of a mainly single source male DNA profile [which] was located from testing of EV#20.
>
> On January 27th 2017 the UNMC Human DNA Laboratory submitted their findings to the Nebraska State Patrol for CODIS entry and search.
>
> On February 13, 2017 Investigators were notified of a possible CODIS identification to the submitted sample [which] was that belonging to [Jennings].

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[26] See, *United States v. Leon, supra* note 16; *State v. Brown, supra* note 12.

Jennings asserts that in order to include these statements in the probable cause analysis, we must make the impermissible assumption that the magistrate was familiar with CODIS and its limitations. Moreover, Jennings points out that the language of "possible CODIS identification" does not give details of the probability supporting the match.

But this is not how appellate courts review findings of probable cause in a warrant. We have long applied the same standard set forth by the U.S. Supreme Court in *Illinois v. Gates*.[27] When the Court adopted the totality of the circumstances test, it also explained that "'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.'"[28] We examine the affidavit using a commonsense approach to determine whether the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing; the Fourth Amendment requires no more.[29]

We will not assume that a magistrate judge is unaware of the meaning of acronyms and abbreviations. We decline to assume that the magistrate judge did not know what the CODIS system is and then relied on information that he or she did not understand. The statements in the affidavit did not have the scientific detail provided by an expert witness at trial, but the Fourth Amendment does not require such a technical level of detail. The statements provided a link between the Texas toast found at the crime scene and a DNA sample from Jennings on file in the CODIS database. Using a commonsense approach, we find that the statements about the DNA evidence were clear enough to be properly considered in the probable cause analysis.

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[27] *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). See, also, *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

[28] *Illinois v. Gates, supra* note 27, 462 U.S. at 236 (quoting *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

[29] See *State v. Detweiler, supra* note 27.

Moreover, in addition to the CSLI and DNA information discussed above, the affidavit in support of the search warrant recounted several important details from the investigation. Law enforcement recounted the eyewitness statements about the clothing worn by the assailants, the presence of the food left at the scene, the description of the white sport utility vehicle in the driveway, the video obtained from the neighbor's house depicting a white Durango driving by multiple times, and the information obtained from the anonymous tip which led the authorities to question the car rental company and trace the vehicle to Watt. The affidavit further recounted that Watt had stated in an interview with the Omaha police that she allowed Jennings to use the Durango rented in her name. Police also described the surveillance video acquired from the Raising Cane's restaurant in Council Bluffs showing a white Durango go through the drive-through lane during the time that Watt's and Jennings' cell phones show them to be in the area. The CSLI recovered from the court order indicated that Jennings' cell phone was in an area near the Brinkman residence before and after the murder. We find, under the totality of the circumstances, that there was sufficient information contained within the affidavit to support the court's finding of probable cause to issue the warrant for the search of the North 60th Street residence.

(b) Particularity Requirement

Jennings alternatively argues that all evidence from the residential search should have been suppressed because the language contained in paragraphs 1, 2, and 5 of the warrant violated the particularity requirement of the U.S. and Nebraska Constitutions. The evidence recovered from the search of the North 60th Street residence includes various documents establishing residency for Watt and Jennings, clothing items, various types of gloves, and two cell phones. Photographs of the two cell phones along with their retail boxes were also taken and admitted into evidence. Law enforcement also took photographs of the condition of the residence before it was searched, which were entered into evidence.

[10,11] In addition to the requirement of probable cause, the Fourth Amendment contains a particularity requirement.[30] The particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described.[31] A warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching.[32]

[12] We have held that "a warrant must be sufficiently particular to prevent the officer from having unlimited or unreasonably broad discretion in determining what items to seize."[33] In determining whether a warrant is sufficiently particular, we find the factors listed by this court in *State v. Baker*[34] to be applicable. Those are (1) whether the warrant communicates objective standards for an officer to identify which items may be seized, (2) whether there is probable cause to support the seizure of the items listed, (3) whether the items in the warrant could be more particularly described based on the information available at the time the warrant was issued, and (4) the nature of the activity under investigation.[35] The majority of jurisdictions utilize the same or similar factors.[36]

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[30] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014); *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[31] *State v. Henderson, supra* note 30 (citing *U.S v. Clark*, 754 F.3d 401 (7th Cir. 2014)).

[32] *Id*.

[33] *State v. Baker, supra* note 4, 298 Neb. at 228-29, 903 N.W.2d at 478.

[34] *State v. Baker, supra* note 4.

[35] See, *id.*; *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015). See, also, *U.S. v. Sigillito*, 759 F.3d 913 (8th Cir. 2014); *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986).

[36] See, *U.S. v. Sanjar*, 876 F.3d 725 (5th Cir. 2017); *U.S. v. Sigillito, supra* note 35; *U.S. v. Kuc*, 737 F.3d 129 (1st Cir. 2013); *U.S. v. Rosa*, 626 F.3d 56 (2d Cir. 2010); *U.S. v. Sells*, 463 F.3d 1148 (10th Cir. 2006); *U.S. v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991); *United States v. Spilotro, supra* note 35. See, also, *State v. Hughes*, 433 So. 2d 88 (La. 1983); *State v. Jackson*, 150 Wash. 2d 251, 76 P.3d 217 (2003).

As these factors make apparent, the level of particularity that is required depends on the nature of the items under investigation. Further, whether a warrant violates the particularity clause must be determined in light of the language as a whole.[37]

In two cases, we found clauses under the circumstances that deemed authorizing the search of "any and all firearms" to be sufficiently particular. In *Baker*, we held that such a clause was sufficiently particular to enable the searching officers to identify the property authorized to be seized.[38] We upheld a similar challenge in *State v. Tyler*[39] to the seizure of a gunlock found during a residential search where the warrant read in part: "'1) Any and all firearms, and companion equipment to include but not limited to ammunition, holsters, spent projectiles, spent casings, cleaning kits/cases and boxes, paperwork, and the like.'" Prior to seeking the warrant, the police had determined that there were approximately 20 different firearms capable of using the type of cartridge recovered from the scene of a shooting.[40] We determined that this paragraph was sufficiently particular because the scope of the search was not left to the discretion of the officers. We also explained that the nature of the activity under investigation justifies its scope. When police are investigating a murder that occurred with a gun and there is a range of firearms fitting the known characteristics of the murder weapon, it is sufficient to describe the items to be searched for as "'[a]ny and all firearms . . . .'"[41]

In contrast, in *State v. Henderson*,[42] we found that the clause of a warrant authorizing the search for "'[a]ny and all information'" contained in a cell phone was unconstitutional

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[37] See *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

[38] *State v. Baker, supra* note 4.

[39] *State v. Tyler, supra* note 35, 291 Neb. at 934, 870 N.W.2d at 130.

[40] *State v. Tyler, supra* note 35.

[41] See *id.* at 934, 870 N.W.2d at 130.

[42] *State v. Henderson, supra* note 30, 289 Neb. at 276-77, 854 N.W.2d at 625.

because the warrant did not identify a particular crime or relevant evidence intended to be recovered from the cell phone. We held that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search. We also held that the catchall provision of the warrant authorizing the search of "'any other information that can be gained from the internal components and/or memory Cards'" was insufficiently particular to satisfy the Fourth Amendment even when it was preceded by a particular list of electronics.[43]

In other cases, we have found to be insufficiently particular language in a warrant permitting the search for "'additional stolen property.'"[44] We have also found insufficiently particular language permitting the personal search of any "'John and/or Jane DOE'"[45] present during a residential search.

(i) Paragraph 1: Venue Items

We disagree with Jennings' argument that the warrant provision allowing for the search and seizure of "[v]enue items identifying those parties who either own or who are in control of the residence" is too broad to satisfy the particularity requirements set forth above. The facts of the case demonstrate that there was a need for law enforcement to be able to establish a link between items found at the address and Jennings. Similarly to our finding in *Tyler*, we find that the venue items provision is sufficiently particular in light of the nature of the activity under investigation.[46]

Although "[v]enue items" in the warrant at issue described a category of items, rather than a specific item to be seized, that does not mean paragraph 1 violates the particularity

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[43] *Id.* at 277, 854 N.W.2d at 625.

[44] *State v. LeBron*, 217 Neb. 452, 457, 349 N.W.2d 918, 922 (1984).

[45] Compare *State v. Pecha*, 225 Neb. 673, 676, 407 N.W.2d 760, 763 (1987), with *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993).

[46] *State v. Tyler, supra* note 35.

requirements of the Fourth Amendment. The description sets forth objective standards by which executing officers can differentiate items subject to seizure from those that are not. It is the nature of venue items that they cannot be predicted with specificity. Law enforcement understands that items containing an address linked with the suspect's name are indicative of venue. The items that can be seized pursuant to such a venue items clause are clearly only those items which on their face establish ownership, occupancy, or control of the location being searched.

Photographs of the items admitted under paragraph 1 included a cell phone replacement claim, an energy bill, a Social Security card, a credit card billing envelope, and a tax form. Each item had the common trait of containing a shipping label demonstrating that Watt or Jennings received mail and used the North 60th Street address as their residence. The warrant was not constitutionally deficient based on paragraph 1, and the denial of Jennings' motion to suppress as it relates to exhibits 390 through 398 seized and admitted as venue items was properly denied.

(ii) Paragraph 2: Cell Phones

Paragraph 2, in contrast, has multiple deficiencies under the particularity provision of the Fourth Amendment. It states:

> The ability to seize and process item(s) of evidentiary value, to include: cellular phone(s), computer(s) recording device(s) including audio and video, companion equipment, records, whether stored on paper, magnetic media such as tape, cassette, disk, diskettes, or on memory storage devices such as optical disks, programmable instruments such as telephones, "electronic address books", or any other storage media, together with indicia of use, ownership, possession or control of the aforementioned residence[.]

First, the entire paragraph is grammatically vague. It is unclear how the first clause relates to the second clause listing electronic items. It is equally unclear why the paragraph ends with

a clause discussing "indicia of use, ownership, possession or control." Second, the warrant provides no indication of what it means to "seize and process item(s) of evidentiary value." It is unclear if that statement is limited to the list of specific electronic media that follows or leaves the search and seizure of items to the discretion of the executing officers. For these reasons, we find the statement, "[t]he ability to seize and process item(s) of evidentiary value, to include: . . ." to be unconstitutionally vague.

[13] However, this does not end our inquiry, insofar as the paragraph also listed particular items to be seized. Absent a showing of pretext or bad faith on the part of the police or the prosecution, valid portions of a warrant are severable from portions failing to meet the particularity requirements.[47]

Paragraph 2 contained a sufficiently particular list of specific electronic media items that included cell phones. This list is severable from the insufficiently particular language contained in the first clause of the paragraph. The probable cause provided by the affidavit supported looking for electronic records that could contain information that establishes ownership, occupancy, or control over the residence being searched. The search for and seizure of the specifically listed electronic items did not violate Jennings' Fourth Amendment rights. Thus, the two cell phones were properly seized and the picture of a specific cell phone was properly admitted into evidence as exhibit 406.

(iii) Paragraphs 4 and 6: Masks and Gloves

Paragraphs 4 and 6 specified certain clothing items to be searched for and seized. The detail provided in the warrant was based on the descriptions of the intruders provided by victims Kimberly and Seth. Photographs were taken of latex gloves and gardening gloves pursuant to paragraph 6. In addition, a box of latex gloves was physically seized pursuant to

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[47] See *State v. LeBron, supra* note 44. See, also, *U.S. v. Sigillito, supra* note 35.

paragraph 6. These photographs and the box of gloves were admitted into evidence as exhibits 352 through 356 and 528. Photographs of masks found in the residence were taken under paragraph 4 and entered into evidence as exhibits 361 through 365. Jennings does not claim on appeal that either of these paragraphs violated the particularity requirements of the U.S. and Nebraska Constitutions. As such, the motion to suppress was correctly denied as to exhibits 352 through 356, 361 through 365, and 528.

(iv) Paragraph 5: Clothing Items

Paragraph 5 provided for a categorical search for clothing followed by a list of the specific items described in the affidavit. Photographs of several clothing items were taken under this paragraph and admitted into evidence as exhibits 376 through 386. Exhibits 376 through 379, 385, and 386 were properly admitted as items specifically described in paragraph 5. Thus, we find that the motion to suppress was correctly denied as to exhibits 376 through 379, 385, and 386.

Not including the photographs of the items particularly listed in the warrant as discussed above, 56 additional photographs of the interior of the residence were admitted into evidence. These photographs depicted the general condition of the residence prior to the search. Included in the set of photographs were pictures of the retail boxes for two cell phones and two shirts that were hanging on a laundry rack in a utility room.

Jennings argues that these items were seized pursuant to the insufficiently particular clause "[c]lothing items," which is similar to the clause authorizing seizure of "'footwear [and] clothing" which the 10th Circuit has held violates the particularity requirements of the Fourth Amendment.[48] Assuming without deciding that the admission of these photographs violates the particularity clause, we find their admission to be harmless error.

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[48] See *U.S. v. Sells, supra* note 36, 463 F.3d at 1152.

[14-17] Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.[49] It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.[50] When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.[51] In other words, harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[52] Overwhelming evidence of guilt can be considered in determining whether the verdict rendered was surely unattributable to the error, but overwhelming evidence of guilt is not alone sufficient to find the erroneous admission of evidence harmless.[53]

The photographs of the shirts appear to be relevant in that the shirts are similar to clothing worn by the individual in the Raising Cane's restaurant surveillance video. The pictures of the cell phone boxes showing serial numbers were never linked to any element of the crime and appear to have no evidentiary value; thus, no prejudice resulted from their admission. And, given the body of overwhelming evidence of guilt properly admitted, the jury's verdict was surely unattributable to the two shirts.

Excluding these 56 photographs, the jury was presented with a large body of evidence upon which it could base the verdicts. DNA evidence on the Texas toast showed a major

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[49] *State v. Thompson, supra* note 9.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

contributor profile that matched Jennings' DNA information saved within the CODIS system. Subsequent comparison of the swab taken from the Texas toast to a buccal swab taken from Jennings after he was arrested indicated that Jennings was the probable major contributor of the DNA found at the Brinkman residence. The probability of a random individual's matching a DNA profile found within the major component of the mixture given that Jennings expresses such a profile is approximately 1 in 123 octillion. Jennings' CSLI data placed his cell phone near the area of the crime both before and after the time of the murder. The white Durango was traced to Watt, and Watt subsequently gave a statement to Omaha police indicating that she lent the vehicle to Jennings. Moreover, the Bluetooth records from the Durango showed Jennings' cell phone was connected to the Durango several times throughout the rental period. Further, the CSLI for Watt and Jennings placed both of their cell phones in the area of the Raising Cane's restaurant in Council Bluffs during the same timeframe the surveillance video shows a white Durango go through the drive-through lane.

The jury's verdicts were surely unattributable to the admission of the photographs taken of the Jennings' residence before the search. Accordingly, the admission of such evidence was harmless error.

VI. CONCLUSION

We find that the district court correctly denied both motions to suppress. The cell phone records and CSLI were properly admitted as a part of the good faith exception to the exclusionary rule. The affidavit provided probable cause for the issuance of a warrant to search the North 60th Street residence. The material evidence found from the search of the residence was properly admitted under sections of the warrant that were constitutionally valid. The balance of the evidence admitted was harmless error even if it were determined to be inadmissible. We affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. David L. Archie, appellant.

943 N.W.2d 252

Filed May 15, 2020. No. S-19-930.

1. **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.
2. **Sentences.** When imposing a sentence, the sentencing court is to 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. The sentencing court is not limited to any mathematically applied set of factors.
3. ____. 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.
4. **Effectiveness of Counsel: Appeal and Error.** Assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity.
5. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Mark D. Carraher for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

David L. Archie appeals his conviction and sentence following his no contest plea to a charge of attempted first degree sexual assault. He contends that his sentence was excessive and that he received ineffective assistance of counsel in the district court proceedings. We conclude that the district court did not abuse its discretion in sentencing Archie. And because Archie did not specifically allege deficient performance of counsel as required by *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019), we do not consider his claim that he received ineffective assistance of counsel.

BACKGROUND

Archie's Plea and Conviction.

Archie was initially charged in this case with first degree sexual assault. The information filed by the State alleged that between March 12, 1996, and April 6, 2004, he subjected T.A. to sexual penetration. According to the information, Archie was over 19 years of age and T.A. was under 16 years of age during this timeframe.

Archie and the State later reached a plea agreement. As part of the plea agreement, the State filed an amended information charging Archie with attempted first degree sexual assault. The amended information alleged that during the same time period referenced in the initial information, Archie attempted to subject T.A. to sexual penetration. Archie pleaded no contest to the amended information.

When asked by the court to provide a factual basis for the plea, the prosecutor described an investigation that began in February 2019 when T.A. filed a report with law enforcement alleging that Archie had sexually assaulted her when she was

a child. T.A. reported that Archie subjected her to sexual penetration in various forms and in various locations in Lincoln, Nebraska, beginning when she was 7 years old and continuing until she was 15 years old. In addition, after T.A. reported the assaults to law enforcement, she recorded a telephone conversation with Archie in which Archie admitted to having sexual intercourse with her when she was between 10 and 15 years old.

The district court accepted Archie's no contest plea, found him guilty of attempted first degree sexual assault, and scheduled a sentencing hearing.

Sentencing.

At the sentencing hearing, Archie's counsel argued for a lenient sentence. He emphasized that Archie's conviction was for conduct that occurred more than 15 years prior and argued that Archie "is a different person than he was 15 years ago." He contended that Archie no longer had a drinking problem. He also directed the district court's attention to a letter he submitted to the district court and which was included in the presentence investigation report. Aside from a few months in which Archie was released on parole, he was incarcerated for another conviction between 2004 and 2019. The letter referenced various programs Archie had completed while incarcerated, including recovery programs for sex offenders and substance abusers.

Before pronouncing Archie's sentence, the district court stated on the record that it had considered the presentence investigation report and all of the factors that trial courts are to consider in choosing an appropriate sentence. The district court then specifically addressed Archie's argument that he had been rehabilitiated while incarcerated for another conviction:

> I understand it is your position that this happened many years ago, before you were incarcerated, and that you have been rehabilitated while you are — while you have

> been in prison. You have produced some certificates and indicated you have taken a number of classes. I think that in some respects you have probably benefited from the incarceration and grown from that.
>
> However, sir, I read the transcript of the phone conversations you had with [the] victim. And those, quite frankly, tell a very different story. Sir, in the transcripts, based upon your statements and your reaction to the discussions you were having, you showed a complete lack of insight or understanding of the depravity of your conduct toward the victim. You talked about sexually assaulting a child as young as seven years old like you were reminiscing about good times. And more than once you told her that she had seduced you and you proudly recalled specifics about having sex with a pre-adolescent child. You talked about the things you had taught her. All of those things, sir, your words and your reaction to that discussion tell me very clearly you have not been rehabilitated when it comes to you being a sexual predator of children. I think if you are not incarcerated you absolutely will continue to be a danger to the community and children that you are exposed to.

The district court thereafter sentenced Archie to 18 to 20 years' imprisonment. Archie appealed.

ASSIGNMENTS OF ERROR

Archie assigns two errors on appeal. He claims (1) that the district court abused its discretion by imposing an excessive sentence and (2) that he was denied effective assistance of counsel.

STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

ANALYSIS

Excessive Sentence.

We begin our analysis with Archie's contention that he was given an excessive sentence. Archie does not and cannot dispute that his 18-to-20-year sentence was within the statutory limits; at the time of Archie's offense, attempted first degree sexual assault was a Class III felony punishable by up to 20 years' imprisonment. See Neb. Rev. Stat. §§ 28-105 (Reissue 1995 & Cum. Supp. 2002), 28-201(4)(b) (Reissue 1995 & Cum. Supp. 1998), and 28-319(1)(c) and (2) (Reissue 1995). He claims instead that the district court abused its discretion by failing "to account for" Archie's "rehabilitative progress" when sentencing him. Brief for appellant at 11. More specifically, Archie argues that the district court's imposition of a near-maximum sentence demonstrates that it did not consider his engagement in rehabilitative programs while incarcerated in the years between the offense and sentencing and letters from various individuals noting positive changes in Archie's life during that same time period.

[2,3] When imposing a sentence, the sentencing court is to 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. *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019). However, the sentencing court is not limited to any mathematically applied set of factors. *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.*

Given the foregoing standards, we do not disagree that, in fashioning a sentence, it would be appropriate for the district court to consider, along with other factors, whether and to what extent Archie had demonstrated rehabilitiation in the

years following the offense at issue. We do disagree, however, with Archie's argument that the district court did not consider them. To the contrary, at the sentencing hearing, the district court directly addressed Archie's claim that he should receive a lenient sentence because of his efforts at rehabilitation. As quoted at length above, the district court rejected the argument, finding that any notion that Archie had been rehabilitated was undercut by the recorded telephone conversation between Archie and T.A. in which Archie, among other things, "proudly recalled specifics about having sex with a pre-adolescent child."

A transcript of the recorded telephone conversation the district court alluded to is included within the presentence investigation report. Having reviewed the transcript, we do not disagree with the district court's characterization of the call and certainly see no basis to say that the district court abused its discretion by assigning little to no weight to Archie's rehabilitation argument in light of it.

Neither do we see any other basis to say that the district court erred in sentencing Archie to 18 to 20 years' imprisonment. The district court expressly stated that it considered the relevant sentencing factors, and we see no indication in the record that it considered improper factors. Among those relevant sentencing factors was Archie's criminal history. Archie's previous incarceration was due to convictions for first degree sexual assault of a child and incest. He had also previously been convicted of assault, attempted robbery, and other crimes. The district court did not abuse its discretion in sentencing Archie.

Ineffective Assistance of Counsel.

[4] Archie's second assignment of error alleges that he "was denied effective assistance of counsel in violation of his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 11 of the Nebraska Constitution." This general assignment of

ineffective assistance of counsel does not comply with our declaration last year in *State v. Mrza*, 302 Neb. 931, 935, 926 N.W.2d 79, 86 (2019), that "assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity."

After the State's brief on appeal urged us not to consider Archie's ineffective assistance claim because of his failure to comply with *Mrza*, Archie filed a reply brief. The reply brief includes a section titled "Restatement of Assignments of Error." Reply brief for appellant at 1. In that section, Archie has reframed his ineffective assistance of counsel assignment of error to include several specific alleged instances of deficient performance by trial counsel. He argues that he has thereby "cured" any failure to comply with *Mrza* and that therefore, his ineffective assistance assignment of error should be considered. Reply brief for appellant at 2. He also contends that it should be considered because, even if his initial brief did not comply with *Mrza*, the specific instances of deficient performance he wished to assert could be discerned from the argument section of the brief. We are unpersuaded by Archie's arguments for reasons we will explain.

[5] First, an appellant cannot cure a failure to adequately assign error via a reply brief. We have often stated that the purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief and that errors may not be asserted for the first time in a reply brief. See, e.g., *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). The ineffective assistance assignment of error in Archie's initial brief did not comply with *Mrza*. Allowing Archie to raise a *Mrza*-compliant ineffective assistance assignment of error in his reply brief would not be meaningfully different than allowing him to assert a brand new assignment of error in a reply brief. We also disagree with Archie's assertion that the

only rationale for the *Mrza* requirement is to relieve appellate courts from having to scour the argument section of a brief to identify the specific allegations of deficient performance and that his "[r]estatement" of his assignments of error eliminates that concern. Another obvious benefit of the *Mrza* requirement is that, if followed, the specifically alleged deficient performance will be clearly identified so that the appellee can respond in its brief on appeal. A late attempt to comply with *Mrza* does not afford the appellee the same opportunity.

We also decline Archie's invitation to attempt to discern the specific alleged instances of deficient performance from the argument section of his initial brief. We did "synthesize a specific assignment from the argument section" in *Mrza*, 302 Neb. at 935, 926 N.W.2d at 86, but we also made clear we would not do so in subsequent cases. On that basis, we recently refused to consider a claim of ineffective assistance of counsel that was assigned generally in a brief filed 3 months after our opinion in *Mrza* was released. See *State v. Guzman, ante* p. 376, 940 N.W.2d 552 (2020). Archie's initial brief was filed nearly 8 months after *Mrza*, and thus we will not consider his assignment of error alleging ineffective assistance of counsel.

CONCLUSION

We find no error in Archie's conviction and sentence, and we do not consider his ineffective assistance of counsel claim. Therefore, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Louis R. Grutell, appellant.

943 N.W.2d 258

Filed May 22, 2020. No. S-18-352.

1. **Appeal and Error.** An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Criminal Law: Statutes.** To determine the elements of a crime, courts look to the text of the enacting statute.
4. **Drunk Driving: Proof.** Under Neb. Rev. Stat. § 60-6,196 (Reissue 2010), a driving under the influence violation is a single offense that can be proved in more than one way.
5. **Drunk Driving: Evidence: Proof.** To prove a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010), the essential elements the State must prove beyond a reasonable doubt are (1) that the defendant was operating or was in actual physical control of a motor vehicle and (2) that at the time the defendant did so, he or she was either (a) under the influence of alcoholic liquor or of any drug, or (b) had a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or (c) had a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath.
6. **Drunk Driving: Proof.** When the State has charged an aggravated offense of driving under the influence, alleging as part of the offense that the defendant also had a breath alcohol concentration of .15 or more, that allegation is considered an essential element the State must prove beyond a reasonable doubt.
7. **Drunk Driving.** The plain language of Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010) shows the driving under the influence statutes apply not

just on Nebraska's highways as that term is defined, but everywhere in Nebraska except private property not open to public access. Stated differently, the only place in Nebraska where the driving under the influence statutes do not apply to the operation or control of a motor vehicle is on private property which is not open to public access.

8. **Indictments and Informations: Complaints.** In Nebraska, a criminal complaint or information does not need to affirmatively negate any statutory exceptions which are not descriptive of the offense.
9. **Indictments and Informations: Statutes.** It is well established that an information is sufficient if it alleges the crime in the language of the enacting statute.
10. **Drunk Driving.** The exception in Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010) for private property not open to public access is not a material element of the offense of driving under the influence. Instead, the exception in § 60-6,108(1) creates an affirmative defense to the crime of driving under the influence.
11. **Criminal Law: Trial: Evidence: Proof.** In the absence of a statute placing the burden of proving an affirmative defense on the defendant in a criminal case, the nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense, and once the defendant has produced sufficient evidence to raise the defense, the issue becomes one which the State must disprove.
12. ____: ____: ____: ____. In a criminal case, the evidence necessary to raise an affirmative defense may be adduced either by the defendant's witnesses or in the State's case in chief without the necessity of the defendant's presenting evidence. A defendant need only adduce a slight amount of evidence to satisfy this initial burden of raising an affirmative defense.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann and Bishop, Judges, on appeal thereto from the District Court for Stanton County, Mark A. Johnson, Judge. Judgment of Court of Appeals affirmed.

Nathan S. Lab and James K. McGough, of McGough Law, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, Nathan A. Liss, and, on brief, Joe Meyer, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Papik, and Freudenberg, JJ.

Stacy, J.

Following a jury trial in district court, Louis R. Grutell was convicted and sentenced for driving under the influence of alcohol (DUI), fourth offense, with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath.[1] He appealed his conviction, assigning plain error to the district court's failure to address the provisions of Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010). Section 60-6,108(1) provides, in relevant part, that Nebraska's DUI statutes "shall apply upon highways and anywhere throughout the state except private property which is not open to public access." Grutell had not requested any rulings or instructions based on § 60-6,108(1), but on direct appeal, he argued it was plain error for the district court not to address the statute.

In a memorandum opinion, the Nebraska Court of Appeals found no plain error and affirmed.[2] We granted Grutell's petition for further review. For the reasons set out below, we affirm.

BACKGROUND

In May 2017, the State filed an information in the district court for Stanton County charging Grutell with DUI, fourth offense, with a concentration of more than .15 of 1 gram of alcohol per 2l0 liters of breath, a Class IIA felony.[3] The information did not reference § 60-6,108 and did not affirmatively allege that Grutell was operating a motor vehicle on a highway or on private property open to public access. Grutell pled not guilty, and a jury trial was held.

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[1] See Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.02 and 60-6,197.03(8) (Cum. Supp. 2018).

[2] *State v. Grutell*, No. A-18-352, 2019 WL 3425909 (Neb. App. July 30, 2019) (selected for posting to court website).

[3] See §§ 60-6,196, 60-6,197.02(1)(a)(i)(A), and 60-6,197.03(8).

TRIAL

Opening Statements

During opening statements, Grutell's counsel suggested the evidence would show that Grutell did not consume alcohol until after his vehicle got stuck in a roadside ditch. Counsel remarked this would present a "problem" for the State because the State would not be able to show that Grutell "actually operated that motor vehicle on a public road or highway while under the influence." The State objected to these remarks, arguing it did not have to show Grutell was operating a vehicle on a public road or highway. The district court initially overruled the State's objection, but a few hours later it reversed its ruling. Outside the presence of the jury, the court explained that after conducting some research, it concluded the State was not required to prove the offense of DUI occurred on a public street or highway. The court went on to add that "if the defendant argues that this [DUI] was required to be on a street or highway, then upon objection, the Court will instruct the jury that it is not required."

Deputy's Testimony

The arresting deputy sheriff testified that at approximately 8 p.m. on February 17, 2017, he was patrolling Highway 24 when he observed a vehicle stranded in the ditch alongside a gravel road that intersected the highway. The vehicle's headlights were on, and the vehicle appeared to be rocking back and forth in the ditch. The deputy saw tire tracks on the traveled surface of the gravel road that led directly to the vehicle in the ditch.

The vehicle was registered to Grutell, who was the only occupant. The deputy found Grutell in the driver's seat of the vehicle with the engine running. When Grutell was asked to step out of the vehicle, he staggered and swayed as he walked. Grutell smelled strongly of alcohol, had slurred speech, and had glassy, bloodshot eyes. Grutell told the deputy he had come from a bar and restaurant in Norfolk, Nebraska, and was

on his way to visit his ex-wife at a different bar, where she worked as a bartender. The deputy asked Grutell whether he had consumed any alcohol that day, and Grutell said he "had a few at home" and then had "a couple more" at the bar in Norfolk. Grutell later told the officer that if he was charged with DUI, he would say he had not been driving the vehicle at all and was just "check[ing] on the vehicle in the ditch."

The deputy administered field sobriety tests. Grutell was unable to complete one of the tests and showed signs of impairment on all the others. Grutell was arrested for DUI and was transported to the Norfolk police station where a breath test was conducted. Grutell had a breath alcohol concentration of .176. On appeal, he does not challenge either the breath testing process or the test result.

Motion for Directed Verdict

At the close of the State's case, Grutell moved for a directed verdict arguing the State had failed to prove he was in "actual physical control" of a motor vehicle while intoxicated. As best we can determine from the record, Grutell's theory was that even if he was intoxicated while sitting behind the wheel of a running vehicle, the vehicle was stuck in the ditch at the time so he could not have exercised actual physical control over anything that would have caused the vehicle to move. The district court overruled the motion, reasoning that there was evidence the vehicle was rocking in the ditch when it was first observed by the deputy and that there was also evidence Grutell had operated the vehicle on the gravel roadway immediately before getting stuck in the ditch.

Grutell's Testimony and Closing Arguments

Grutell testified in his own defense. He testified that he was driving to visit his ex-wife at the bar where she worked when he missed his turn. While attempting to make a two-point turn on the gravel road, his vehicle fell into the ditch and became stuck. Grutell testified he did not have a cell

phone with him and decided not to walk for help; instead, he remained inside the vehicle and began drinking a bottle of rum he had purchased earlier that afternoon. Grutell denied having consumed alcohol earlier in the day, and he denied having told the deputy any such thing. Grutell testified that by the time the deputy arrived on the scene a few hours later, he had consumed half the bottle of rum. He acknowledged that no bottle of rum was found during the inventory search of his vehicle, but testified that was because he had thrown it out of the vehicle. Grutell agreed that the deputy found him sitting behind the wheel of his vehicle with the engine running and the headlights on, but he said that he kept the headlights on so someone might see him and that he kept the engine running to stay warm while he waited.

At the close of all the evidence, Grutell renewed his motion for directed verdict without further argument. The State resisted the motion, and the district court overruled it.

In his closing argument, Grutell's counsel asked the jury to return a verdict of not guilty if it believed Grutell's testimony that he had not consumed any alcohol until after his vehicle became stuck in the ditch. Similar to the argument presented in support of the motion for directed verdict, defense counsel argued during closing:

> It's true that you can be in the ditch, you can be there with a vehicle, and you can be charged with a DUI and be guilty. But it's also true that you can be in the ditch, you can be under the influence of alcohol, and if you did it at the time when that car is not movable anymore, that is not a DUI.

The State did not object to this argument.

Jury Verdict, Enhancement, and Sentence

After deliberating for more than an hour, the jury returned a unanimous verdict finding Grutell guilty of DUI with an alcohol concentration greater than .15. A presentence investigation

was ordered, and the matter was set for an enhancement and sentencing hearing.

At that hearing, the court received evidence of Grutell's prior DUI convictions and found him guilty of DUI, fourth offense, with a breath alcohol concentration of more than .15. Grutell was sentenced to a term of imprisonment for a period of 18 to 36 months, and his operator's license was revoked for a period of 15 years. He filed a timely appeal, represented by new counsel.

COURT OF APPEALS

One of Grutell's assignments of error to the Court of Appeals focused on § 60-6,108(1). That statute provides in relevant part that Nebraska's DUI statutes "shall apply upon highways and anywhere throughout the state except private property which is not open to public access."[4] In describing the practical effect of § 60-6,108(1), we have said it means that "Nebraska's DUI statutes do not apply to operation or control of a vehicle on private property that is not open to public access."[5]

It is undisputed that while Grutell's case was before the district court, he did not reference § 60-6,108(1), did not file a motion or submit a proposed jury instruction premised on § 60-6,108(1), and did not at any point contend the ditch where he was arrested was private property not open to public access. But on appeal, he argued the district court committed plain error in not addressing § 60-6,108(1).

As relevant to the issue on further review, Grutell argued the trial court plainly erred by "fail[ing] to rule on the issue of § 60-6,108 and its application to the case at hand"[6] and by failing to dismiss the case "pursuant to §60-6,108"[7] in response to Grutell's motions for directed verdict. Grutell also

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[4] § 60-6,108(1).

[5] *State v. Matit*, 288 Neb. 163, 168, 846 N.W.2d 232, 237 (2014).

[6] Brief for appellant at 12.

[7] *Id*.

suggested that the reason his trial counsel did not expressly raise § 60-6,108(1) was because of the court's "admonition"[8] early in the trial that the State did not have to prove the DUI occurred on a public highway. Finally, Grutell argued the evidence at trial was insufficient to sustain his DUI conviction "because there was no evidence that [Grutell's] operation or actual physical control of the vehicle occurred on a public roadway or private property with public access, as required by . . . §60-6,108."[9]

The Court of Appeals considered each of these arguments and, in a memorandum opinion, found none had merit.[10] It reasoned that under § 60-6,108(1), Nebraska's DUI statutes do not apply just on highways, but instead apply everywhere in Nebraska except on private property not open to public access. It rejected Grutell's suggestion that the trial court had precluded him from raising § 60-6,108(1), and instead, it found that because Grutell had not offered evidence or argument that the DUI statutes did not apply to the ditch where he was found, there was no need for the district court to make a finding, or to instruct the jury, on the requirements of § 60-6,108(1). In its analysis, the Court of Appeals also remarked that the requirements of § 60-6,108(1) are "not an essential element of [DUI] under § 60-6,196(1)."[11]

Grutell petitioned this court for further review, arguing primarily that the Court of Appeals' analysis had the effect of improperly shifting the burden of proof on a material element of the crime of DUI from the State to the defendant. We granted further review to address Grutell's argument that the provisions of § 60-6,108(1) are a material element of the crime of DUI.

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[8] *Id*.

[9] Reply brief for appellant at 2.

[10] *Grutell, supra* note 2.

[11] *Id*. at *7, citing *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015) (holding when instructing jury it is proper for court to describe offense in language of statute).

ASSIGNMENTS OF ERROR

Grutell assigns, restated, that the Court of Appeals erred in its plain error review by (1) rejecting his claim that the district court precluded him from challenging the status of the ditch under § 60-6,108(1), (2) shifting the burden of proof to Grutell to show he was on private property that was not open to public access, and (3) failing to determine as a matter of law whether a ditch adjacent to a gravel road satisfies the requirements of § 60-6,108(1).

STANDARD OF REVIEW

[1] An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[12]

[2] Statutory interpretation presents a question of law.[13]

ANALYSIS

[3] All of Grutell's assignments of error turn on the central premise that the provisions of § 60-6,108(1) are an essential element of the crime of DUI which the State must, in every case, prove beyond a reasonable doubt. To determine the elements of a crime, we look to the text of the enacting statute.[14]

Material Elements of DUI

The crime of DUI is defined in § 60-6,196, one of many statutes in the Nebraska Rules of the Road. That statute provides:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
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> (a) While under the influence of alcoholic liquor or of any drug;

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[12] *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019).

[13] *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

[14] *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019).

> (b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.[15]

[4-6] We have explained that under § 60-6,196, a DUI violation is a single offense that can be proved in more than one way.[16] Based on the text of § 60-6,196, the essential elements the State must prove beyond a reasonable doubt are (1) that the defendant was operating or was in actual physical control of a motor vehicle and (2) that at the time the defendant did so, he or she was either (a) under the influence of alcoholic liquor or of any drug, or (b) had a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or (c) had a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath.[17] And where, as here, the State has charged an aggravated offense,[18] alleging as part of the DUI offense that the defendant also had a breath alcohol concentration of .15 or more, that allegation is also considered an essential element the State must prove beyond a reasonable doubt.[19] But none of the statutes defining the offense of DUI, or establishing the penalties for DUI, contain any geographic limitations or exceptions.

It is another statute contained within the Nebraska Rules of the Road, § 60-6,108(1), that limits the applicability of the DUI statutes by providing in relevant part:

> (1) The provisions of the Nebraska Rules of the Road relating to operation of vehicles refer exclusively to

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[15] § 60-6,196.

[16] *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[17] See *id.*

[18] See § 60-6,197.03.

[19] See *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

> operation of vehicles upon highways except where a different place is specifically referred to in a given section, *but sections 60-6,196* [*(defining crime of DUI)*], *60-6,197* [*(addressing chemical tests for DUI)*], [and] 60-6,197.04 [(addressing preliminary breath test for DUI)] *shall apply upon highways and anywhere throughout the state except private property which is not open to public access.*

(Emphasis supplied.)

[7] The plain language of § 60-6,108(1) shows the Legislature intends the DUI statutes to apply not just on Nebraska's highways as that term is defined,[20] but everywhere in Nebraska *except* private property not open to public access. Stated differently, the only place in Nebraska where the DUI statutes do not apply to the operation or control of a motor vehicle is on private property which is not open to public access.[21] As such, the provisions of § 60-6,108(1) are best understood as creating a geographical exception to the DUI statutes for private property not open to public access.

Is Exception in § 60-6,108(1) Material Element of DUI?

The central question presented in this appeal is whether the exception set out in § 60-6,108(1) is a material element of the crime of DUI, such that the State must always disprove the exception in order to prove the crime of DUI. It is significant to our analysis that the exception at issue does not appear in the statute defining the crime, but, rather, in a separate statute.

Sometimes, when enacting a separate statutory exception to a criminal offense, the Legislature has been clear that the State is not required to negate the exception to prove the offense and the burden of proving the exception is on the person claiming

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[20] See Neb. Rev. Stat. § 60-624 (Reissue 2010).

[21] *Matit, supra* note 5.

its benefit.[22] The exception found in § 60-6,108(1) contains no such language. But that does not mean the State is required, in every DUI case, to negate the exception in § 60-6,108(1).

As a general rule, most jurisdictions hold that when a statutory exception appears in the statute defining the crime, the prosecution is required to plead and prove the defendant does not fall within the exception, but when the exception appears in a separate statute, it is considered a matter of defense.[23] Cases in Nebraska have followed this general rule.[24]

[8] In Nebraska, a criminal complaint or information does not need to affirmatively negate any statutory exceptions which are not descriptive of the offense.[25] Thirty years ago, in *State v. Golgert*,[26] we applied this rule in DUI cases.

[9] In *Golgert*, we considered whether an earlier codification of § 60-6,108(1)[27] required the State to affirmatively allege in the complaint that the crime of DUI occurred on a "highway." At the time, the earlier codification of § 60-6,108(1) provided that the statutes related to the crimes of careless driving

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[22] See, e.g., Neb. Rev. Stat. § 8-1121 (Reissue 2012) ("[i]n any proceeding under the Securities Act of Nebraska, the burden of proving an exemption or an exception from a definition shall be upon the person claiming it"); Neb. Rev. Stat. § 28-432(1) (Reissue 2016) (State need not negate exemptions or exceptions set out in Uniform Controlled Substances Act; burden of proving exemption or exception shall be upon person claiming its benefit).

[23] See *Annot.*, 153 A.L.R. 1218 (1944) (cases cited therein).

[24] Compare, e.g., *Mann, supra* note 14 (exception appearing in statute defining offense is material element State must prove); *State v. Hind*, 143 Neb. 479, 10 N.W.2d 258 (1943) (State required to plead and prove exception contained within statute defining crime); *Roberts v. State*, 110 Neb. 759, 195 N.W. 114 (1923) (exception not contained in statute defining offense is matter of defense); *Holmes v. State*, 82 Neb. 406, 118 N.W. 99 (1908) (State required to plead and prove exception contained within statute defining crime).

[25] See *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951).

[26] *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986).

[27] See Neb. Rev. Stat. § 39-603(1) (Reissue 1984).

and reckless driving applied "upon highways and anywhere throughout the state," but that another series of statutes in the Nebraska Rules of the Road, including the DUI statutes, applied only on "highways" as that term was then defined.[28] *Golgert* noted the well-established rule that an information is sufficient if it alleges the crime in the language of the enacting statute, and it observed that the text of the statute defining DUI did not address highways. Because the DUI enacting statute did not include the limitation that the offense must occur on a highway, we held that being on a highway was "not an element of the crime which must be alleged in the complaint."[29]

We pause to acknowledge that even after *Golgert*, it is a relatively common practice for prosecutors, when charging DUI, to include allegations in the complaint or information that at the time the defendant was operating or in actual physical control of a motor vehicle, he or she was not on private property not open to public access. Similarly, the DUI records we see on appeal show it is a common practice, in DUI trials, for courts to routinely instruct the jury on the requirements of § 60-6,108(1), either through the elements instruction or through definitional instructions. While the better practice may be to routinely instruct the jury on the requirements of § 60-6,108(1), the question here is whether it was plain error for the trial court to not address the exception at all. Like the Court of Appeals, we can find no plain error in that regard.

[10] We agree with the Court of Appeals that the exception in § 60-6,108(1) is not a material element of the offense of DUI which the State must plead and prove in every case.[30]

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[28] See *id.*

[29] *Golgert, supra* note 26, 223 Neb. at 955, 395 N.W.2d at 523. Accord *State v. Wagner*, 295 Neb. 132, 888 N.W.2d 357 (2016) (information charging refusal of chemical test is sufficient if it alleges facts or elements necessary to constitute offense described in statute and intended to be punished).

[30] See *Golgert, supra* note 26.

Instead, the exception in § 60-6,108(1) creates an affirmative defense to the crime of DUI, and that important distinction impacts the burden of proof.

§ 60-6,108(1) and Burden of Proof

[11,12] In *State v. Edwards*,[31] we recognized that courts in some jurisdictions require criminal defendants to bear the burden of proving an affirmative defense. But in Nebraska, we have adopted the rule that in the absence of a statute placing the burden of proving an affirmative defense on the defendant in a criminal case,[32] the nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense, and once the defendant has produced sufficient evidence to raise the defense, the issue becomes one which the State must disprove.[33] The evidence necessary to raise an affirmative defense may be adduced either by the defendant's witnesses or in the State's case in chief without the necessity of the defendant's presenting evidence.[34] A defendant need only adduce a slight amount of evidence to satisfy this initial burden of raising an affirmative defense.[35]

As several of our prior cases addressing § 60-6,108(1) demonstrate, it is common for a defendant to raise the applicability of § 60-6,108(1) in pretrial motions and during trial.[36] When

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[31] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

[32] See, e.g., Neb. Rev. Stat. §§ 28-202 and 29-2203 (Reissue 2016).

[33] *Edwards, supra* note 31; *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997).

[34] See *Kinser, supra* note 33.

[35] *Id.*

[36] See, e.g., *State v. Pester*, 294 Neb. 995, 885 N.W.2d 713 (2016) (§ 60-6,108(1) raised in motion to quash, motion to suppress, and motion for directed verdict); *Matit, supra* note 5 (§ 60-6,108(1) raised in motion to suppress and at trial); *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011) (raising § 60-6,108(1) in motion to suppress, at trial, and at enhancement hearing); *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004) (raising § 60-6,108(1) at trial).

cases have presented a question whether a vehicle was on private property not open to public access, it has generally been treated as a fact question for the fact finder to determine.[37] And our prior cases show that when § 60-6,108(1) was raised in a case involving a jury, the jury was instructed in a way that required the State to disprove the applicability of the defense.[38] As such, while our prior cases did not expressly characterize the exception in § 60-6,108(1) as an affirmative defense, we have consistently treated it as such.

With this framework in mind, we address Grutell's assignments of error on further review.

No Plain Error

In his brief on further review, Grutell first argues that the Court of Appeals erred in rejecting his claim that the district court prevented him from raising § 60-6,108(1). This argument focuses on the trial court's remark, made outside the presence of the jury, that the State was not required to prove that the DUI offense occurred on a public highway. The trial court's remark was a correct statement of the law, and we agree with the Court of Appeals that this remark did not preclude Grutell from raising the defense that his vehicle was on private property not open to public access.

Next, Grutell argues the Court of Appeals erred when it found that his failure to invoke § 60-6,108(1) prevented a finding of plain error by the trial court in not addressing that statute. Grutell argues that the Court of Appeals' analysis improperly shifted the burden of proof on § 60-6,108(1) from the State to the defense. We disagree.

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[37] See, *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014); *Matit, supra* note 5; *Prater, supra* note 36. But see *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011) (whether residential driveway was private property not open to public access was question of statutory interpretation and thus matter of law, since Legislature defined "[p]rivate road or driveway" in Neb. Rev. Stat. § 60-649 (Reissue 2010)).

[38] See, e.g., *Pester, supra* note 36; *Matit, supra* note 5.

As we have already explained, the exception in § 60-6,108(1) is not a material element of DUI. Rather, it is a separate statutory exception to the criminal offense of DUI, and as such, it is a matter to be raised initially as an affirmative defense. The Court of Appeals correctly observed that in this court's prior opinions addressing § 60-6,108(1), the issue of whether the defendant was on private property not open to public access was raised by the defense through pretrial motions and through the introduction of evidence at trial.[39] Because Grutell never raised the affirmative defense of § 60-6,108(1), the Court of Appeals correctly rejected his claim that the trial court plainly erred in not addressing it.

Finally, Grutell argues the Court of Appeals erred in failing to address, as a matter of law, whether § 60-6,108(1) applies to a ditch next to a gravel road. Again we disagree.

As stated earlier, the issue of whether a vehicle was being operated or controlled on private property not open to public access is ordinarily a fact question to be determined by the fact finder, and not an issue to be determined as a matter of law. For the sake of completeness, we note that in *State v. Thelen*,[40] we recently held as a matter of statutory interpretation that the ditch area within the county's right-of-way is part of the "public road" for purposes of Neb. Rev. Stat. § 39-301 (Reissue 2016). We express no opinion regarding the applicability, if any, of the holding in *Thelen* to questions under § 60-6,108(1). Instead, we emphasize that, on this record, it was not necessary for either the trial court or the Court of Appeals to address whether § 60-6,108(1) applies to a roadside ditch, because Grutell did not raise that affirmative defense in the trial court.

Instead, Grutell pursued an entirely different defense theory. Based on his testimony that he had not become intoxicated until after his vehicle got stuck in the ditch, he argued

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[39] See, e.g., cases cited *supra* note 36.

[40] *State v. Thelen, ante* p. 334, 940 N.W.2d 259 (2020).

the State could not show he had actual physical control over a "movable" vehicle while intoxicated. The jury rejected this theory.

On this record, Grutell did nothing to invoke the provisions of § 60-6,108(1) and there was no evidence adduced at trial by either party to create a fact issue regarding the applicability of § 60-6,108(1). The Court of Appeals correctly rejected Grutell's claims of plain error.

CONCLUSION

Finding no plain error in how either the trial court or the Court of Appeals addressed § 60-6,108(1), we affirm.

Affirmed.

Funke, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Douglas S. Bierman and James A. Hoppenstedt, appellees and cross-appellants, v. Brenda L. Benjamin, personally and individually, et al., appellants and cross-appellees.

943 N.W.2d 269

Filed May 22, 2020. No. S-18-915.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Appeal and Error.** An appellate court may, at its option, notice plain error.
6. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

8. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
9. ____. The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
10. **Contracts: Evidence.** A contract found to be ambiguous presents a question of fact and permits the consideration of extrinsic evidence to determine the meaning of the contract.

Appeal from the District Court for Buffalo County: John H. Marsh, Judge. Reversed and remanded for further proceedings.

Bradley D. Holbrook and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellants.

William J. Lindsay, Jr., and John A. Svoboda, of Gross & Welch, P.C., L.L.O., Kenneth F. George, of Ken George Law Office, and Luke M. Simpson, of Bruner, Frank & Schumacher, L.L.C., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

Plaintiffs Douglas S. Bierman (Doug) and James A. Hoppenstedt (Jim) filed a complaint against Brenda L. Benjamin and BD Construction, Inc./Kearney (BD), alleging various causes of action: to require Brenda to sell shares of BD, to remove Brenda as an officer and director of BD, for an accounting, and for damages based upon breach of fiduciary duty. Following a grant of partial summary judgment in favor of Doug and Jim and a trial, the court set a value for BD, found that Brenda had breached her fiduciary duty to BD, removed Brenda as an officer and director of BD, and awarded Brenda $1,703,197.79. We reverse, and remand for further proceedings.

BACKGROUND

BD is a construction company operated out of Kearney, Nebraska. At all times relevant to this litigation, BD had three shareholders: Mark W. Benjamin, who was a director and president and owned 59 percent of the shares; Doug, a director who owned 25 percent of the shares; and Jim, also a director, who owned 16 percent of the shares. The three entered into a buy-sell agreement on September 29, 2009, which provided for the sale and purchase of BD shares in a variety of scenarios.

Mark died on April 14, 2015. On May 26, Brenda was appointed to serve as president of BD, but Doug ran the company on a day-to-day basis. On April 20, 2016, Brenda terminated the employment of Doug and Jim. On May 6, Doug and Jim filed this lawsuit against Brenda and BD, initially seeking specific performance of the buy-sell agreement, an accounting, and the appointment of new officers and directors. Doug and Jim also sought damages for wrongful termination and breach of fiduciary duty.

Prior to trial, Doug and Jim filed a motion for summary judgment seeking a finding that the buy-sell agreement was enforceable. The district court granted summary judgment to Doug and Jim on that issue. The court reserved for trial the issue of the value of BD. Following trial, the district court valued BD, as of the date of Mark's death, at $3.8 million, with Mark's 59-percent interest valued at $2.242 million. In addition, the district court found that Brenda breached her fiduciary duty to BD and its shareholders in various ways. In accordance with the preceding findings, the district court awarded Brenda $1,703,197.79 for Mark's interest in BD. Brenda appeals, and Doug and Jim cross-appeal.

ASSIGNMENTS OF ERROR

On appeal, Brenda alleges that the district court erred in (1) granting partial summary judgment finding the buy-sell agreement enforceable; (2) finding that she acted in bad faith,

finding that she breached her fiduciary duties, and in removing her as a director and officer of BD; (3) not admitting testimony from Brenda's advisors regarding the good faith and reasonableness of the process utilized to set bonuses and of Brenda's review of applicable industry standards; (4) setting the value of Mark's shares, both because April 14, 2015, the date of Mark's death, bore no relationship to the value of BD and because life insurance proceeds received by BD on Mark's life were excluded; and (5) allowing a certified public accountant to testify regarding bonuses and compensation, because he was not qualified as an expert.

On cross-appeal, Doug and Jim assign that the district court erred in (1) reducing their damage award by 59 percent as to the distribution of bonuses, (2) failing to reinstate the debt or receivables owed to BD by Brenda and the estate, and (3) not awarding them attorney fees.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.[3]

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[1] *Merrick v. Fischer, Rounds & Assocs., ante* p. 230, 939 N.W.2d 795 (2020).

[2] *Id.*

[3] *DH-1, LLC v. City of Falls City, ante* p. 23, 938 N.W.2d 319 (2020).

[4,5] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[4] An appellate court may, at its option, notice plain error.[5]

ANALYSIS

Brenda assigns that the district court erred when it granted partial summary judgment in favor of Doug and Jim on the issue of the enforceability of the buy-sell agreement.

As relevant to this issue, article III of the buy-sell agreement states that "in the event of the death of a Shareholder, and only in such event, the Corporation will be required and shall, to the fullest extent permitted by applicable law, purchase the shares of stock of the Deceased Shareholder from the legal representative of the Deceased Shareholder's estate."

Article V purports to deal with the determination of purchase price in the event of the sale of shares. Section 5.1 applies where the shares are for sale pursuant to an offer of the disposing shareholder. Section 5.2 purports to apply to "Other Operative Events" and provides:

> In the case of all other Operative Events *other than the Death of Shareholder*, the price per share of the shares of stock shall be paid by the Corporation and/or the Non-disposing Shareholders. The price per share shall be the price which is agreed to annually by the Shareholders and attached hereto as an Exhibit. In the event of the failure to agree for two (2) consecutive years, the parties agree that the Corporation will employ an independent third party to appraise the business and determine the price per

[4] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

[5] *Id.*

> share, with appraisal costs split between the Corporation and the Shareholders as a group.

(Emphasis supplied.)

The district court found that the agreement was unambiguous, reasoning that the exclusion for "the death of a shareholder" noted in the first sentence did not modify the pricing method set forth in the second sentence. For that reason, the court concluded that the pricing method set forth in the second sentence should be used to calculate the share price for all operative events.

[6-10] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[6] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[7] When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[8] The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[9] A contract found to be ambiguous presents a question of fact and permits the consideration of extrinsic evidence to determine the meaning of the contract.[10]

None of the parties have challenged the district court's underlying determination that the buy-sell agreement was unambiguous, though they disagree as to the meaning of the agreement. But an appellate court may, at its option, notice plain error.[11]

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[6] *Wintroub v. Nationstar Mortgage*, 303 Neb. 15, 927 N.W.2d 19 (2019).

[7] *Id.*

[8] *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015).

[9] *Id.*

[10] *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015).

[11] *Mays v. Midnite Dreams, supra* note 4.

We do so here because we find the buy-sell agreement to be clearly ambiguous on the question of what pricing mechanism, if any, is set forth by the document.

In this case, we find the buy-sell agreement to be susceptible to multiple meanings. Most notably, section 3.1 provides that in the event of the death of a shareholder, BD is required, "[s]ubject to the terms and conditions as set forth herein," to purchase those shares from the estate of the deceased shareholder. While the agreement provides for the procedure to be followed for such a purchase via section 6.3, it does not include any explicit provision with language setting forth the price to be paid in that event. Article V purports to deal with the "Determination of Purchase Price," but has language that could be read as excluding "the death of a shareholder" from that particular pricing mechanism.

While section 3.1 states that the agreement sets forth certain "terms and conditions" to follow to effectuate such a purchase, there is an interpretation of the agreement that would not provide all necessary "terms and conditions." In addition, we observe that language in the agreement allowing for the purchase of life insurance policies to facilitate the purchase of the shares as required by the agreement could arguably be read as providing a pricing mechanism for the purchase of shares in the event of the death of a shareholder.

In short, it is not possible to determine the meaning of the buy-sell agreement as applied to the death of a shareholder. We find plain error in the district court's determination that the buy-sell agreement was unambiguous. The interpretation of an ambiguous contract presents an issue of fact not appropriate for determination on summary judgment. The consideration of extrinsic evidence is necessary to determine the meaning of the buy-sell agreement.

Accordingly, we find merit to Brenda's assignment of error asserting that the grant of partial summary judgment was in error. We reverse the district court's grant of summary

judgment and remand the cause to the district court for further proceedings. Because we find that the grant of summary judgment was error, we decline to reach the remainder of Brenda's assignments of error or to reach Doug and Jim's cross-appeal.

CONCLUSION

The district court's grant of summary judgment is reversed and the cause remanded for further proceedings.

Reversed and remanded for
further proceedings.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

William Sellers, appellee, v. Reefer Systems, Inc., appellant.

943 N.W.2d 275

Filed May 22, 2020. No. S-19-082.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Judgments: Statutes: Rules of the Supreme Court: Appeal and Error.** Because Nebraska Supreme Court rules are construed in the same manner as statutes, an appellate court does so independently of the conclusion of the lower court.
3. **Attorney Fees: Appeal and Error.** A court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
4. **Attorney Fees: Statutes: Rules of the Supreme Court: Affidavits: Appeal and Error.** In order to recover statutory "reasonable" attorney fees under Neb. Rev. Stat. § 48-125(4)(b) (Cum. Supp. 2018), the details of the attorney-client agreement is not a necessary component of the affidavit submitted pursuant to Neb. Ct. R. App. P. § 2-109(F) (rev. 2014) for justification of appellate attorney fees.
5. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute, and courts are not permitted to read additional words into a clear and unambiguous statute.
6. **Workers' Compensation: Attorney Fees.** When Neb. Rev. Stat. § 48-125(4)(b) (Cum. Supp. 2018) of the Nebraska Workers' Compensation Act does not specify that reasonable attorney fees must have been "incurred," it is improper for a court to add it.
7. **Workers' Compensation.** The Nebraska Workers' Compensation Act should be construed liberally to carry out its spirit and beneficent purpose of providing compensation to employees injured on the job.

8. **Attorney Fees: Legislature: Public Policy.** The Legislature determined as a matter of public policy that the "reasonable attorney's fee" mandated by Neb. Rev. Stat. § 48-125(4)(b) (Cum. Supp. 2018) does not depend on the terms of any fee agreement.
9. **Attorney Fees.** Statutory "reasonable" attorney fees taxed as costs do not go directly to the attorney.
10. ____. In order to determine proper and reasonable attorney fees, a court considers several factors, including the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, the customary charges of the bar for similar services, and the general equities of the case.

Petition for further review from the Court of Appeals, Riedmann, Bishop, and Arterburn, Judges, on appeal thereto from the Workers' Compensation Court, J. Michael Fitzgerald, Judge. Judgment of Court of Appeals reversed and remanded with directions.

Tanya J. Hansen, of Smith, Johnson, Allen, Connick & Hansen, for appellant.

Joel D. Nelson, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

In an appeal of a workers' compensation case, wherein the award to the employee was affirmed, the Nebraska Court of Appeals denied the employee's motion for attorney fees for his counsel's appellate work, despite the statutory mandate under Neb. Rev. Stat. § 48-125(4)(b) (Cum. Supp. 2018) that reasonable attorney fees shall be allowed to the employee by the appellate court if the employer files an appeal from a workers' compensation award and fails to obtain any reduction in the

amount of such award. We hold that the affidavit submitted by the employee's attorney, which mentioned a contingency fee agreement, presented the total number of hours worked on the appeal with a couple of examples of tasks performed, set forth an hourly rate, averred that the total hours claimed were calculated from business records itemizing the same, and averred in the attorney's expert opinion that the hours and rate were reasonable, sufficiently justifies under Neb. Ct. R. App. P. § 2-109(F) (rev. 2014) reasonable attorney fees to which the employee has a statutory right. We reverse the judgment and remand the matter to the Court of Appeals to determine the amount of the fee.

BACKGROUND

William Sellers was injured while working for Reefer Systems, Inc., in 2007. In 2019, the Workers' Compensation Court awarded him permanent total disability benefits. Reefer Systems appealed the award to the Court of Appeals. The Court of Appeals affirmed the award in all respects in a memorandum opinion issued on October 8, 2019.[1]

Sellers timely filed a motion in the Court of Appeals for an award of reasonable attorney fees pursuant to § 48-125(4)(b) for the reason that the employer appealed the trial court decision and there was no reduction in the amount of the award on appeal.

Attached to the motion is the affidavit of Sellers' counsel who worked on the appeal. Counsel avers that he spent 37.8 hours in total on the appeal, beginning April 18, 2019, and ending May 7, and opines that was "a reasonable amount of time for the work involved." Counsel describes that he has been an attorney since 1997 and that since 1999, a substantial portion of his practice has been workers' compensation cases. He avers that his hourly rate ranges from $140 to $245 per hour, that he is generally familiar with hourly rates charged by other

[1] *Sellers v. Reefer Systems*, No. A-19-082, 2019 WL 4940200 (Neb. App. Oct. 8, 2019) (selected for posting to court website).

litigation attorneys in this geographic area, and that an hourly rate of $200 per hour for his work on Sellers' appeal would be reasonable and consistent with fees charged in this area for attorneys of similar background and skill.

Counsel avers, further, that he derived the number of hours spent on the appeal from an audit of records maintained by his law firm's staff and himself, consistent with their regular and established business practices. He notes that the audit revealed its first entry on April 18, 2019, as reviewing the bill of exceptions, and, as its last entry, revising Sellers' brief. The hours assigned to these particular tasks is not set forth. No other tasks are specifically delineated. The referenced records were not attached to the affidavit. Counsel notes in the affidavit that he represented Sellers "on a contingent fee." The details of that arrangement are not otherwise described.

The Court of Appeals denied the motion for attorney fees on the ground that counsel's affidavit did not provide sufficient information to justify the reasonableness of the attorney fees sought. The Court of Appeals issued the following minute entry:

> [Sellers'] motion for attorney fees denied. Affidavit fails to justify amount of attorney fees sought. See Neb. Ct. R. App. P. § 2-109(F). See also St. John v. Gering Public Schools, 302 Neb. 269, 923 N.W.2d 68 (2019) (in seeking attorney fee[s], lawyer has burden of proving not only extent and value of services provided, but also existence and terms of fee contract).

We granted Sellers' petition for further review of this order of the Court of Appeals which overruled his motion for attorney fees.

ASSIGNMENTS OF ERRORS

Sellers assigns that the Court of Appeals erred in (1) overruling Sellers' motion for statutory attorney fees and (2) imposing a burden of proof regarding attorney fees derived from fee disputes between attorneys or between an attorney and client.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

[2] Because Nebraska Supreme Court rules are construed in the same manner as statutes, an appellate court does so independently of the conclusion of the lower court.[3]

[3] A court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[4]

ANALYSIS

Section 48-125(4)(b) provides for mandatory attorney fees for appellate work in circumstances where the employer appeals and fails to obtain any reduction in the award:

> If the employer files an appeal from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the Court of Appeals or Supreme Court *shall allow the employee a reasonable* attorney's fee to be taxed as costs against the employer *for such appeal*.

(Emphasis supplied.)

Section 2-109(F) of the Supreme Court rules sets forth the general procedure by which an employee must request the attorney fees allowable under § 48-125(4),[5] inasmuch as it sets forth the procedure for any litigant seeking from our appellate courts attorney fees to which there is a right under law or custom. Section 2-109(F) provides in relevant part:

> Any person who claims the right *under the law* or a uniform course of practice to an attorney fee in a civil case appealed to the Supreme Court or the Court of Appeals

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[2] *Saylor v. State*, 304 Neb. 779, 936 N.W.2d 924 (2020).

[3] See *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018).

[4] See *State ex. Rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019).

[5] See *Escobar v. JBS USA*, 25 Neb. App. 527, 909 N.W.2d 373 (2018).

> *must* file a motion for the allowance of such a fee *supported by an affidavit which justifies the amount of the fee sought for services in the appellate court.*

(Emphasis supplied.) Sellers' motion for attorney fees pursuant to § 48-125(4)(b) was timely under § 2-109(F), but the parties dispute whether the supporting affidavit adequately justifies "reasonable" attorney fees.

In denying Sellers' motion, the Court of Appeals concluded that the affidavit submitted under § 2-109(F) was inadequate because it did not provide the details of the fee agreement between Sellers and his attorney. This was in error. We have never held that in order to recover statutory "reasonable" attorney fees, the attorney must submit the details of the attorney-client agreement. Neither is such evidence specified in § 2-109(F) as a necessary component to the justification of an appellate attorney fees.

We have affirmed allowances of statutory attorney fees for trial work despite a lack of proof as to any fee agreement. In *Dale Electronics, Inc. v. Federal Ins. Co.*,[6] we held under a statute setting forth the right to "reasonable" attorney fees that the attorney-fee allowance for the work of in-house counsel should be for the time actually engaged in the work to the same extent as outside counsel; evidence of counsel's annual salary was not required. And in *Black v. Brooks*,[7] we affirmed the lower court's award of statutory "reasonable attorney's fees"[8] to which the successful tenant was entitled under Nebraska's Uniform Residential Landlord and Tenant Act (URLTA),[9] even though the tenant was represented on a pro bono basis without any provision under the agreement for payment to the attorney in the event of an award of statutory fees.

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[6] See *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979).

[7] *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013).

[8] Neb. Rev. Stat. § 76-1425(2) (Reissue 2009).

[9] Neb. Rev. Stat. §§ 76-1401 to 76-1449 (Reissue 2009).

In *Black*, we indicated that the tenant "need only present some evidence to the trial court upon which the court can make a meaningful award."[10] We observed, "We have never said a fee agreement or any other agreement showing an obligation of the client to pay the attorney fees to the attorney is part of the proof that must be proffered in order to support an award of statutory attorney fees."[11]

We reasoned in *Black* that the amount of the statutory attorney fees under URLTA is not directly tied by the statute to the amount due under a fee agreement and that the public policy goals of encouraging compliance with laws serving the public interest and encouraging settlements are effectively furthered only when the statutory attorney fees under URLTA are awarded for fee-based and pro bono work alike. A landlord who violates URLTA should not "reap the benefits of free representation to the other party."[12] There was nothing in the statutory language of "reasonable attorney's fees" in URLTA that made the recovery of such fees dependent upon a billing obligation, and we held it would be improper to insert the additional term "incurred" into the statute.[13]

[4-6] We now hold that in order to recover statutory "reasonable" attorney fees under § 48-125(4)(b), the details of the attorney-client agreement is not a necessary component of the affidavit submitted pursuant to § 2-109(F) for justification of appellate attorney fees. The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute, and we are not permitted to read additional words into a clear and unambiguous statute.[14] Several attorney fee statutes, such as the one recently addressed

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[10] *Black, supra* note 7, 285 Neb. at 451, 827 N.W.2d at 264.

[11] *Id.*

[12] *Id.* at 454, 827 N.W.2d at 266.

[13] See *Black, supra* note 7.

[14] See *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

in *TransCanada Keystone Pipeline v. Nicholas Family*,[15] specify that to be recoverable, the reasonable attorney fees must have been "incurred."[16] When § 48-125(4)(b) of the Nebraska Workers' Compensation Act does not specify that reasonable attorney fees must have been "incurred," it is improper for us to add it.

[7,8] We have repeatedly said that the Nebraska Workers' Compensation Act should be construed liberally to carry out its spirit and beneficent purpose of providing compensation to employees injured on the job.[17] It is apparent that the Legislature determined as a matter of public policy that the "reasonable attorney's fee" mandated by § 48-125(4)(b) does not depend on the terms of any fee agreement. Thus, the affidavit submitted under § 2-109(F) in support of attorney fees pursuant to § 48-125(4)(b) does not need to set forth the existence and terms of a fee contract between the employee and the attorney in order to "justify" statutorily mandated "reasonable" attorney fees for the appeal.

The Court of Appeals' reliance on *St. John v. Gering Public Schools*[18] to conclude otherwise is misplaced. *St. John* did not involve attorney fees taxed as costs under a statute or custom. Instead, it involved the question of the attorneys' entitlement under their attorneys' liens for services rendered pursuant to their fee agreements. In an analysis centered around the professional responsibility rules, we held that "while a lawyer with a valid fee agreement is entitled to recover from a client what a

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[15] *TransCanada Keystone Pipeline v. Nicholas Family*, 299 Neb. 276, 908 N.W.2d 60 (2018).

[16] See, e.g., Neb. Rev. Stat. § 1-148 (Reissue 2012); Neb. Rev. Stat. § 21-281 (Cum. Supp. 2018); Neb. Rev. Stat. § 30-4020 (Supp. 2019); Neb. Rev. Stat. § 50-1515 (Cum. Supp. 2018); Neb. Rev. Stat. § 53-223 (Reissue 2010); Neb. Rev. Stat. § 76-726 (Reissue 2018); Neb. Rev. Stat. § 81-3537 (Reissue 2014); Neb. Rev. Stat. § 85-1510 (Reissue 2014).

[17] *Bortolotti v. Universal Terrazzo & Tile Co.*, 304 Neb. 219, 933 N.W.2d 851 (2019). See Neb. Rev. Stat. § 48-101 (Reissue 2010).

[18] *St. John v. Gering Public Schools*, 302 Neb. 269, 923 N.W.2d 68 (2019).

fee agreement allows to the extent that amount is reasonable, a lawyer is not entitled to recover from a client more than a fee agreement allows."[19] Neb. R. of Prof. Cond. § 3-501.5 provides in part that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

In so holding in *St. John*, we cited to *Hauptman, O'Brien v. Turco*[20] for the proposition which states:

> *In a suit to recover an unpaid fee*, "the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services."

Like *St. John*, *Hauptman, O'Brien* did not involve statutory "reasonable" attorney fees to be taxed as costs in favor of the litigant-client. It was an action to enforce an attorney lien in an amount computed in accordance with the contingent fee agreement. The client asserted that recovery under the contingent fee agreement was excessive for the amount of work actually done, and we held that because the law firm failed to present any evidence in support of its motion for summary judgment as to the "extent and value of the professional services which it performed" during the period of its representation, there was "no factual basis upon which to determine whether or not the claimed fee computed pursuant to the contingent fee agreement is reasonable."[21] This was because collection by the attorney of attorney fees computed pursuant to a contingent fee agreement is still subject to the ethical principle embodied in § 3-501.5 of the professional conduct rules that prohibits a

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[19] *Id.* at 277, 923 N.W.2d at 75.

[20] See *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 931, 735 N.W.2d 368, 374 (2007) (emphasis supplied), quoting Restatement (Third) of the Law Governing Lawyers § 42(2) (2000).

[21] *Hauptman, O'Brien, supra* note 20, 273 Neb. at 932, 735 N.W.2d at 374.

lawyer from making an agreement for, charging, or collecting an unreasonable fee.

[9] But, as we pointed out in *Black*, statutory "reasonable" attorney fees taxed as costs do not go directly to the attorney.[22] The award of fees for an unsuccessful appeal by an employer in a workers' compensation case is "for the benefit of the claimant employee."[23] Within constitutional limits, the Legislature is free to set statutory attorney fees under the Nebraska Workers' Compensation Act in any amount it deems fit to further the public policy of the act. Attorney fees under § 48-125(4)(b) shall be allowed in an amount that is reasonable. That determination depends on the extent and value of services provided and is not dependent upon a fee agreement.

[10] We find that the affidavit submitted on Sellers' behalf contains sufficient justification of the extent and value of the attorney services provided on appeal to make a meaningful determination of the amount of "reasonable" attorney fees to which Sellers is entitled. In order to determine proper and reasonable attorney fees, a court considers several factors, including the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, the customary charges of the bar for similar services, and the general equities of the case.[24]

Sellers' affidavit did not need to set forth a detailed log of all tasks and the amount of time spent on each task in order to be considered under § 2-109(F) in determining reasonable attorney fees. The affidavit by Sellers' attorney stated

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[22] See *Black, supra* note 7.

[23] *Neeman v. Otoe County*, 186 Neb. 370, 376, 183 N.W.2d 269, 273 (1971).

[24] See, *Pan v. IOC Realty Specialist*, 301 Neb. 256, 918 N.W.2d 273 (2018); *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015).

the total number of hours and the applicable rate, and it presented an expert opinion that both were reasonable. The attorney noted a couple of tasks performed and stated that the number of hours claimed had been carefully logged in his law firm's business records.

We also note that the evidence supporting a meaningful determination of reasonable attorney fees on appeal is not limited to the affidavit required under § 2-109(F). It also includes the court's general experience in matters of litigation and what has been produced by the attorney for the appellate court's direct consumption.[25]

The Court of Appeals abused its discretion in concluding that it could not meaningfully determine a "reasonable attorney's fee" pursuant to § 48-125(4)(b), because Sellers' affidavit failed to adequately "justify" one. We reverse the denial of Seller's motion for appellate attorney fees and remand the matter with directions for the Court of Appeals to determine the amount of reasonable attorney fees. Nothing in this opinion should be read as expressing an opinion as to what the amount of attorney fees should be.

CONCLUSION

For the foregoing reasons, we reverse the judgment and remand the matter to the Court of Appeals with directions.

Reversed and remanded with directions.

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[25] See, e.g., *Rinderknecht v. Rinderknecht*, 204 Neb. 648, 284 N.W.2d 569 (1979); *Lippincott v. Lippincott*, 152 Neb. 374, 41 N.W.2d 232 (1950); *Specht v. Specht*, 148 Neb. 325, 27 N.W.2d 390 (1947); *Yost v. Yost*, 143 Neb. 80, 8 N.W.2d 686 (1943).

Nebraska Supreme Court
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Brenda L. Benjamin, Personal Representative of the Estate of Mark W. Benjamin, deceased, appellant and cross-appellee, v. Douglas S. Bierman and Sixth Street Rentals, L.L.C., appellees and cross-appellants.

Brenda L. Benjamin, Personal Representative of the Estate of Mark W. Benjamin, deceased, appellant and cross-appellee, v. Douglas S. Bierman et al., appellees and cross-appellants.

943 N.W.2d 283

Filed May 22, 2020. Nos. S-19-328, S-19-329.

1. **Trial: Witnesses: Evidence: Appeal and Error.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony; an appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
2. **Trial: Equity: Appeal and Error.** On appeal from the bench trial of an equity action, the standard of review is de novo on the record and the court must resolve questions of law and fact independently of the trial court's determinations.
3. **Equity: Appeal and Error.** When the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.
5. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
6. ____. The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.

7. ____. The fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
8. ____. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
9. ____. Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous.
10. **Witnesses: Testimony.** The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.
11. **Trial: Expert Witnesses.** A trier of fact is not bound to accept expert opinion testimony.
12. **Expert Witnesses.** The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.

Appeals from the District Court for Buffalo County: John H. Marsh, Judge. Affirmed.

Bradley D. Holbrook and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellants.

William J. Lindsay, Jr., and John A. Svoboda, of Gross & Welch, P.C., L.L.O., Kenneth F. George, of Ken George Law Office, and Luke M. Simpson, of Bruner, Frank & Schumacher, L.L.C., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

I. INTRODUCTION

Brenda L. Benjamin, personal representative of the estate of Mark W. Benjamin, filed separate complaints against Douglas S. Bierman (Doug) and Sixth Street Rentals, L.L.C. (Rentals), and against Doug, Eugene J. Bierman, and Sixth Street Development, L.L.C. (Development) (collectively appellees). In her complaints, Brenda generally sought an accounting, to dissolve both Rentals and Development, and damages. The district court found that appellees breached the operating

agreements of Rentals and Development, ordered an accounting for each, declined to dissolve either, and awarded Brenda damages of $22,200 with respect to Rentals and $473,233 with respect to Development. We affirm.

II. BACKGROUND

This is a companion case to *Bierman v. Benjamin*.[1] Mark passed away on April 14, 2015, leaving his wife, Brenda, as his primary beneficiary and the personal representative of his estate. In addition to Mark's share of BD Construction, Inc./Kearney (BD), Mark owned a one-half share of Rentals (case No. S-19-328) with Doug and a one-third interest in Development along with Doug and Eugene (case No. S-19-329).

Development is in the business of renting storage units. Pursuant to an oral lease, Development also rents, for $8,000 per month, the office building and shop utilized by BD, and it owns another building near the BD building and shop, as well as some vacant lots held for sale. Rentals owns trailers used for construction offices and storage, and a utility vehicle, all of which are rented to BD for approximately $4,000 per month.

Mark was acting as manager for both Rentals and Development at the time of his death. After Mark's death, Doug took over the manager position for both and continues to serve in that capacity. The record shows no formal action was taken to appoint Doug as manager of Development; rather, Doug called Eugene (his father) to inform him that Doug was going to elect himself as manager. At a later date, Doug issued a formal notice and minutes reflecting that change. In the same way, Doug named himself manager of Rentals and communicated that change to Brenda. Brenda testified that with respect to Development, Doug informed her that he and Eugene were prepared to outvote her on anything she might

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[1] *Bierman v. Benjamin, ante* p. 860, 943 N.W.2d 269 (2020).

want to do. As for Rentals, Brenda was less concerned with Doug's naming himself manager, because all of Rentals' assets were in the control of, and maintained by, BD.

Counsel for Rentals and Development sent notices to Brenda, pursuant to the respective separate but identical operating agreements, stating that Rentals and Development wished to buy out Mark's shares.

Brenda testified she and Doug had generally reached an agreement that Doug would buy out Mark's interest in Rentals and that Doug and Eugene would buy out Mark's interest in Development. Brenda would then receive Development's interest in a storage facility jointly owned by Development, Mark's estate, and a third entity, as an offset against the purchase price for Mark's interest in Development.

In November 2015, Brenda and Doug agreed to have both Rentals and Development valued. As relevant to this appeal, the business appraisals were completed by Terry Galloway. Galloway testified that Brenda and Doug agreed that December 31, 2014, was a more reasonable cutoff as the valuation date, rather than Mark's date of death just 4 months later. Ultimately, Galloway valued Rentals at $144,400, with Mark's one-half interest valued at $72,200, and valued Development at $5,641,700, with Mark's one-third interest valued at $1,880,900. The value of Development included $1.75 million in life insurance proceeds on Mark's life. These valuations were completed in March 2016.

Brenda testified that by the end of March 2016, she became aware there was going to be a problem closing on all three entities (BD, Rentals, and Development) at the same time. Closing was set for April 15, 2016, but it never occurred. Brenda testified that Doug refused to close and that he informed her the negotiations into BD needed to be rethought in light of the values assigned to Rentals and Development. Doug testified that he was unsure whether he wanted to own Rentals if he did not also own BD and that he did not have the money to buy Rentals at the time he sent notice of his election to do so.

Doug never offered to close on Rentals. As for Development, Doug wanted a determination as to whether the life insurance proceeds were included in BD before he closed on Development.

Following the failure to close on Rentals and Development, Brenda filed lawsuits on June 1, 2016, seeking various forms of relief as to both entities. Following a bench trial, the district court found that appellees breached the operating agreements of Rentals and Development, ordered an accounting for each, declined to dissolve either, and awarded Brenda damages of $22,200 with respect to Rentals and $473,233 with respect to Development. These appeals followed.

III. ASSIGNMENTS OF ERROR

On appeal, Brenda assigns that the district court erred in not ordering both Rentals and Development dissolved.

On cross-appeal, appellees assign, restated, that the district court erred in (1) finding that the operating agreements set forth an unambiguous method for determining fair market value; (2) finding that Galloway's appraisal was fair market value for purposes of the operating agreements; (3) finding that Galloway was an independent appraiser; (4) finding that the proper date of valuation was December 31, 2014, and not April 14, 2015; (5) finding that Galloway's valuation was substantially complete as of November 30, 2015, for purposes of determining when the 120-day period in which appellees were obligated to purchase Mark's interest; (6) finding that fair market value was established by Galloway's opinion of value as of November 30, 2015; (7) entering judgment without determining the correct fair market value of Mark's interest; (8) finding that appellees refused to complete the purchase of Mark's interest, because no agreement had been reached on BD; (9) finding that appellees rejected Galloway's valuation only when the parties did not agree on the value of the BD stock; (10) finding that appellees failed to negotiate in good faith and breached the contract to purchase Mark's interest from Brenda under the

operating agreements and that such was a substantial failure of the exchange; (11) denying Development's counterclaim for specific performance; (12) not using the value determined by their appraiser; (13) finding the starting date for accrual of interest to be March 30, 2016; and (14) awarding $22,200 and $437,233, respectively, plus interest, to Brenda.

IV. STANDARD OF REVIEW

[1] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony;[2] an appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[3]

[2,3] On appeal from the bench trial of an equity action, the standard of review is de novo on the record and the court must resolve questions of law and fact independently of the trial court's determinations.[4] When the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[5]

[4] The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.[6]

V. ANALYSIS

1. Brenda's Appeal

On appeal, Brenda argues that the district court erred in not ordering Rentals and Development to be dissolved under

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[2] *U.S. Pipeline v. Northern Natural Gas Co.*, 303 Neb. 444, 930 N.W.2d 460 (2019).

[3] *Id.*

[4] See *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[5] See *O'Connor v. Kearny Junction,* 295 Neb. 981, 893 N.W.2d 684 (2017).

[6] *DH-1, LLC v. City of Falls City, ante* p. 23, 938 N.W.2d 319 (2020).

the authority of Neb. Rev. Stat. § 21-147(a)(4)(B) or (a)(5)(B) (Reissue 2012), which subsections provide:

> A limited liability company is dissolved, and its activities must be wound up, upon the occurrence of any of the following:
>
> . . . .
>
> (4) on application by a member, the entry by the district court of an order dissolving the company on the grounds that:
>
> . . . .
>
> (B) it is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement; or
>
> (5) on application by a member, the entry by the district court of an order dissolving the company on the grounds that the managers or those members in control of the company:
>
> . . . .
>
> (B) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.

As an initial matter, appellees argue that Brenda lacks standing to request dissolution. We agree.

Both Rentals and Development are limited liability corporations, governed by the Nebraska Uniform Limited Liability Company Act. Under that act, a member is defined as "a person that has become a member of a limited liability company under section 21-130 and has not dissociated under section 21-145."[7] Neb. Rev. Stat. § 21-145 (Reissue 2012) provides that a person is "dissociated as a member from a limited liability company" upon the death of that person. Thus, upon Mark's death, he was dissociated and was no longer a member per the definition of the term under the act.

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[7] Neb. Rev. Stat. § 21-102 (Reissue 2012).

Dissociated members' "right to participate as a member in the management and conduct of the company's activities terminates,"[8] and thereafter, a dissociated member has limited rights. In the instance presented here, the death of a member, "the deceased member's personal representative or other legal representative may exercise the rights of a transferee provided in subsection (c) of section 21-141 and, for the purposes of settling the estate, the rights of a current member under section 21-139."[9] These rights are limited and primarily consist of the right to have access to records or other information concerning the company's activities.

Brenda has alleged that dissolution is proper under § 21-147(a)(4)(B) and (a)(5)(B). Both of those subsections require an application to be made by a member, but Mark ceased to be a member upon his death. By virtue of this dissociation, Brenda is also not a member. As such, she cannot seek dissolution under the plain language of the act.

Nor are we persuaded by Brenda's contention that article IX, section 2, of the operating agreement granted Mark the power to transfer governance power, along with his economic interest, in Rentals and Development. That section provides:

> Any Member may transfer by gift or bequest all or any portion of his or her interest in the Company to a spouse or child of the transferring Member, or to a trust established for the benefit of such spouse or child, or to an existing Member of the Company upon written notice to the Company, of such gift or bequest.

We read the plain language of this section of the agreements as permitting the transfer of some or all of a member's or dissociated member's interest in a limited liability company by gift or bequest. Indeed, under Neb. Rev. Stat. §§ 21-140 and 21-141 (Reissue 2012) of the act, an interest in a limited liability company is personal property that is transferable.

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[8] Neb. Rev. Stat. § 21-146(1) (Reissue 2012).

[9] Neb. Rev. Stat. § 21-143 (Reissue 2012).

But any interest that is transferred is accompanied by limited rights, as discussed above.[10] We do not read the language of the operating agreements as broadening the rights accompanying the interest to include governance power or, indeed, any other power beyond that permitted by the act.

We agree with appellees that Brenda lacks standing to seek dissolution, and therefore, we find no merit to her assignment of error on appeal.

2. Appellees' Cross-Appeal

On cross-appeal, appellees assign 17 separate assignments of error. Generally, appellees take issue with the fair market value of Rentals and Development, and they assign error to the district court's interpretation of the operating agreements regarding the calculation of the value, as well as the district court's adoption of one expert's value over another expert's value. Appellees also argue that the court should have ordered specific performance of the contract for the purchase of Mark's shares and that the court erred in finding a breach of that contract and awarding Brenda damages for the breach.

(a) Assignments of Error Related to Fair Market Value

Appellees' primary arguments on appeal center on the fair market value of Rentals and Development. Appellees first assign that the district court erred in finding that the operating agreements set forth an unambiguous method for determining the fair market value of Rentals and Development. In contrast, Brenda argues that the operating agreements did set forth how fair market value was to be determined—either the parties were to agree to it or, in the absence of agreement, the parties were to appoint an independent, third-party appraiser to calculate that value.

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[10] See, § 21-141; Neb. Rev. Stat. § 21-143 (Reissue 2012).

[5-9] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[11] The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.[12] The fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[13] A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.[14] Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous.[15]

The agreements provide in relevant part:

> In the event that a Member dies . . . , the Company may at its option repurchase the deceased . . . Member's interest in the Company for an amount equal to the fair market value of such interest on the Member's date of death . . . . The fair market value of the Member's interest shall be as agreed in good faith by the Company and the personal representative(s) of the deceased Member's estate . . . ; provided that if no such agreement has been reached within ninety (90) days of the date of death . . . , then the fair market value shall be determined by an independent and duly qualified appraiser mutually agreeable to the Company and the estate of the deceased Member . . . which shall equally bear equally [sic] the cost of such appraisal. The fair market value of the deceased Member's interest . . . shall be payable by the Company to the deceased Member's estate . . . within one hundred

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[11] *DH-1, LLC v. City of Falls City, supra* note 6.

[12] *Ray Anderson, Inc. v. Buck's Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

[13] *Id.*

[14] *Id.*

[15] *Id.*

> twenty (120) days of the establishment of such fair market value on the same payment terms as set forth in Section 9.4 of this Agreement.

We disagree with appellees' assertion that "fair market value" is a term of art necessitating reliance on factors outside of the agreements, and instead agree with Brenda's reading of the language of the operating agreements. The plain language of the agreements clearly states that "the fair market value shall be determined by an independent and duly qualified appraiser mutually agreeable to the Company and the estate of the deceased Member." We need not rely on anything further to interpret the agreements' definition of "fair market value." We reject this assignment of error.

Appellees next assign that the district court erred in finding that Galloway's appraisal was the fair market value of Rentals and Development for purposes of the operating agreements, that he was independent at the time of his appraisal, that the appraisal should be dated as of the end of the calendar year preceding Mark's death, and that the appraisal was substantially completed as of November 30, 2015.

[10-12] The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.[16] A trier of fact is not bound to accept expert opinion testimony.[17] The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.[18] An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[19]

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[16] *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018).

[17] *Id.*

[18] *Id.*

[19] *O'Connor v. Kearny Junction, supra* note 5.

The district court did not err in making these challenged findings. First, the record shows that the parties agreed Galloway should conduct the appraisal pursuant to the operating agreements. The record also supports the district court's finding that the parties were in agreement that the appraisal should be done as of December 31, 2014.

In addition, evidence at trial showed that the appraisal was originally received by the parties on November 30, 2015, but that discussions were ongoing as to various issues related to the appraisal. There is evidence that certain revisions to the appraisal were made between November 30, 2015, and the end of March 2016. The record supports the district court's finding that the appraisal was substantially complete by November 30 and that November 30 was appropriate from which to calculate the 120-day period from which appellees had to comply with the terms of the operating agreements for buying out Mark's interest.

The record is undisputed that Galloway eventually represented Brenda's interests in various negotiations regarding Rentals, Development, and BD. The record also shows that at the time of the appraisal, Galloway was not representing Brenda, and as such, there was evidence to support the court's finding that Galloway was independent.

We review the factual findings of the district court for clear error. We find no such error in the district court's finding that Galloway's valuation was the fair market value for purposes of the operating agreements and in entering judgment accordingly. Appellees' assignments of error regarding fair market value are without merit.

(b) Assignments of Error Related to Breach of Contract and Specific Performance

Appellees next assign that the district court erred in finding that they failed to negotiate in good faith when they rejected Galloway's valuation and refused to close on the Rentals and

Development sales only after the parties failed to reach an agreement on BD. Appellees further argue that the court erred in finding that they breached the agreement to buy Mark's interest. Again, we review the district court's factual findings for clear error and find none.

At trial, Doug testified that he and Brenda had a meeting on November 11, 2015, concerning the value of BD at a time when they were also in negotiations over the value of Rentals and Development. Doug also testified that 5 minutes into the meeting, Brenda said she was "done" and walked out.

But Brenda testified that her son had open heart surgery in Omaha, Nebraska, on November 10, 2015, and that on November 11, she was with him as he recovered at the hospital and was not at any meeting. The district court specifically found Brenda more credible on this point. The court further noted that the evidence supported Brenda's claim that despite having agreed on the value of Rentals and Development, appellees rejected Galloway's valuation and failed to close on the purchase of Mark's interests in Rentals and Development only after the parties could not reach an agreement on the value of BD.

We find no error in the district court's conclusion that these failures amounted to a failure to negotiate in good faith and a breach of the contract to purchase Mark's interests in Rentals and Development.

Appellees also assign that the district court erred in not ordering specific performance of the contract for purchase of Mark's shares. A court cannot award specific performance to the breaching party unless the breach is minor or involves no substantial failure of the exchange.[20] In this case, the court specifically found that the breach was not minor and was a substantial failure of the exchange. As noted above, the breach involved failure to close on the sale after the terms of the

[20] See *Albers v. Koch*, 185 Neb. 25, 173 N.W.2d 293 (1969).

operating agreements regarding that sale were met. We agree that this was not minor and was a substantial failure of the exchange. This assignment of error is without merit.

(c) Remaining Assignments of Error

Appellees also contend that the district court erred in not adopting the values of its expert as the values for Rentals and Development.

Doug had an appraisal of Development performed for purposes of trial with a valuation date of April 14, 2015. The appraiser set an adjusted value of $860,000 for Mark's one-third interest in Development, with a total value of $4,019,019. The appraiser set an adjusted value of $50,000 for Mark's one-half interest in Rentals, with a total value of $133,129.

There was no error in this determination. As noted above, the record demonstrates that the parties agreed to be bound by the fair market value as determined by Galloway. There is no merit to this assignment of error.

Appellees next assign that the district court erred in ordering them to pay interest on the damages award as of March 30, 2016. Having concluded that Galloway's fair market value was binding; that his appraisal was substantially complete as of November 30, 2015; and that appellees breached the contract to purchase Mark's interests, the district court did not err in concluding that interest should accrue as of March 30, 2016, or 120 days after the determination of fair market value as required by the operating agreements. There is no merit to this assignment of error.

In their final assignment of error, appellees assign that the district court erred in awarding Brenda damages. The primary basis of this assignment of error is appellees' contention that the district court erred in its reliance on Galloway's appraisal. We have previously found no merit to that assertion.

We additionally observe that appellees suggest Galloway's inclusion of the life insurance proceeds on Mark's life was

incorrect and that this affected the valuation of Rentals and Development as discussed above, as well as Brenda's ultimate award of damages. But appellees did not assign as error anything related to the inclusion of the life insurance proceeds, perhaps because the district court agreed with that position and excluded the value of the life insurance when determining Brenda's damages award. Accordingly, we find no merit to this assertion or to appellees' final assignment of error.

VI. CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Terry L. Dondlinger and Valerie Dondlinger, appellants, v. Jayson D. Nelson, an individual, et al., appellees.

942 N.W.2d 772

Filed May 22, 2020. No. S-19-428.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled.
4. **Summary Judgment: Proof.** The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial.
5. ____: ____. If the party moving for summary judgment makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
6. **Limitations of Actions: Malpractice: Attorney and Client.** If a claim for professional negligence in the nature of legal malpractice is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 2016) or has been tolled pursuant to the continuous representation rule.

7. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress.
8. **Limitations of Actions: Malpractice.** Under Neb. Rev. Stat. § 25-222 (Reissue 2016), it is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed.
9. **Limitations of Actions: Malpractice: Words and Phrases.** In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.
10. **Malpractice: Attorney and Client: Damages: Words and Phrases.** In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss. Legal injury is not damage; damage is the loss resulting from the misconduct.
11. **Limitations of Actions: Malpractice.** The statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.
12. **Limitations of Actions: Malpractice: Attorney and Client.** In a claim of professional negligence, if a client discovers the act or omission prior to the termination of an attorney's representation, then the continuous representation exception does not apply to toll the statute of limitations.
13. **Summary Judgment: Affidavits.** Where the movant for summary judgment submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact.
14. **Summary Judgment.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

James R. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Mark C. Laughlin and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

NATURE OF CASE

This appeal involves a legal malpractice action brought by Terry L. Dondlinger and Valerie Dondlinger which the district court for Douglas County dismissed as time barred. The district court concluded that the continuing representation exception to the 2-year statute of limitations in Neb. Rev. Stat. § 25-222 (Reissue 2016) did not apply. Instead, because the Dondlingers discovered the allegedly negligent act prior to the termination of the attorney-client relationship, the 1-year discovery rule in § 25-222 did apply and the Dondlingers' action was time barred. The district court granted the defendants' motion for summary judgment and dismissed the Dondlingers' action with prejudice. The Dondlingers appeal.

STATEMENT OF FACTS

On May 18, 2018, the Dondlingers filed a complaint against defendants Jayson D. Nelson and Hunegs, LeNeave & Kvas, P.A. On June 12, the Dondlingers amended their complaint and added Katie D. Figgins as a defendant. The complaints against the three defendants (collectively the appellees) set forth claims of professional negligence relating to the appellees' legal representation of the Dondlingers in a personal injury action for an accident that occurred on April 6, 2012. This personal injury action forms the underlying case in the current legal malpractice appeal.

In their controlling complaint, the Dondlingers allege that in the underlying case, the appellees "negligently failed to properly file a Tort Claim pursuant to the Nebraska Political Subdivision Claims Act, Neb. Rev. Stat. § 13-901 *et seq.*" on Nickerson Township, Dodge County, Nebraska. In the underlying case, Nickerson Township was granted summary judgment and dismissed from the case. The appellees, representing the Dondlingers, filed a notice of appeal to the Nebraska Court

of Appeals in November 2015 in case No. A-15-1108. During the pendency of case No. A-15-1108, the appellees filed a response to an order to show cause and a motion for extension of time to file a brief on behalf of the Dondlingers. The appeal was ultimately dismissed in May 2016 for their failure to file a brief.

In Nelson's affidavit filed in the current legal malpractice case, he explained how he informed the Dondlingers of the alleged negligence in the underlying case and the outcome in the Court of Appeals. The affidavit states:

> 5. During the course of the representation of Terry Dondlinger and Valerie Dondlinger, I initiated a telephone conference between myself and Terry Dondlinger and Valerie Dondlinger. In this telephone conference, I personally informed [them] regarding the District Court's finding that we did not properly serve Nickerson Township. This is the alleged negligence that is set forth in [their] Complaint in the above-captioned matter. We discussed at length the facts and circumstances which led to the dismissal and the appeal.
>
> 6. I advised Terry and Valerie Dondlinger that our representation of them would end, and that we would be closing their file, after advising them of the alleged negligence at issue in this Complaint. This fact is reflected in [the Dondlingers'] Statement of Undisputed Facts.

The Dondlingers' answers to the appellees' interrogatories in the current legal malpractice case state that "[w]ithin thirty (30) days after June 23, 2016," (1) the Dondlingers discovered the fact that the appellees had failed to properly file their tort claim in the underlying case and (2) the Dondlingers' attorney-client relationship with the appellees ended. The appellees do not dispute these assertions.

The Dondlingers filed the present action on May 18, 2018, which, given discovery within 30 days after June 23, 2016, was after the 1-year discovery rule contained in § 25-222 but within the general 2-year statute of limitations for professional

negligence set forth in § 25-222. The Dondlingers argued to the district court and again on appeal that their claim did not accrue until the continuing representation by the appellees ended, that the 2-year limitations period started on the termination of the relationship, and that their action was timely. The appellees filed a motion for summary judgment in the district court on the basis of the statute of limitations, § 25-222.

On January 2, 2019, the district court granted the appellees' motion for summary judgment and dismissed the Dondlingers' action with prejudice. The Dondlingers filed a motion to alter or amend the judgment. The district court, on its own motion, vacated its prior order and requested that the parties provide supplemental briefing on the "continuous representation doctrine." On April 30, the district court denied the motion to alter or amend and entered an order granting summary judgment in favor of the appellees. In reaching its decision, the district court concluded that the continuous representation doctrine did not toll the accrual of the action, because the Dondlingers had discovered the alleged negligence during the course of the attorney-client relationship. The court determined that the action was time barred because the Dondlingers filed their claim for professional negligence more than 1 year after discovery of the alleged negligent act.

The Dondlingers appeal.

ASSIGNMENT OF ERROR

The Dondlingers claim that the district court erred when it dismissed their amended complaint as untimely. They contend that the 2-year statute of limitations was tolled because the appellees continued to represent them during the appeals process.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the

moving party is entitled to judgment as a matter of law. *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 925 N.W.2d 39 (2019). An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id*.

ANALYSIS

Reduced to its essence, the Dondlingers argue that the continuous relationship doctrine tolled the statute of limitations, thereby giving them 2 years to file their legal malpractice case after learning of their attorneys' alleged negligence. The Dondlingers claim that the district court erred when it ruled that because the continuous relationship did not apply, the Dondlingers' complaint was subject to the 1-year discovery rule and was time barred. We find no merit to the Dondlingers' argument and therefore affirm the dismissal of the Dondlingers' action.

[3-5] In this case, the appellees successfully moved for summary judgment. The primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled. *Williamson v. Bellevue Med. Ctr.*, 304 Neb. 312, 934 N.W.2d 186 (2019). Neb. Rev. Stat. § 25-1332(1) (Cum. Supp. 2018) provides in part that a motion for summary judgment shall be granted "if the pleadings and the evidence admitted at the hearing show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Williamson v. Bellevue Med. Ctr., supra*. If the party moving for summary judgment makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a

material issue of fact that prevents judgment as a matter of law. *Id*.

The Dondlingers' legal malpractice action is a claim of professional negligence, and we turn to § 25-222 to determine the timeliness of the cause of action. Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided,* if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further,* that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

[6] If a claim for professional negligence in the nature of legal malpractice is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the discovery exception of § 25-222 or has been tolled pursuant to the continuous representation rule. See *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013). We discussed the two exceptions to the 2-year provision in § 25-222 in recent case law. See *Guinn, supra*.

[7-10] With regard to the discovery rule, in *Guinn*, we stated:

> The discovery rule as it pertains to professional negligence claims is set forth in §25-222, quoted above. By the terms of the statute, the discovery rule applies only

> when the cause of action is not discovered and could not reasonably have been discovered within the 2-year limitations period. If the discovery rule applies, then the limitations period is 1 year from the time the cause of action is or could have been discovered. "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed. *Id.* In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000). In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss. *Id.* Legal injury is not damage; damage is the loss resulting from the misconduct. See *id.*

286 Neb. at 597-98, 837 N.W.2d at 817.

[11] With regard to the continuous relationship rule, in *Guinn*, we stated:

> [T]he statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). However, we have limited the reach of the continuous representation rule by stating that continuity does not mean mere continuity of the general professional relationship and that the continuous representation rule is inapplicable when the claimant discovers the alleged negligence prior to the termination of the professional

> relationship. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

286 Neb. at 598, 837 N.W.2d at 817.

The Dondlingers contend that they learned of the appellees' alleged negligence within 30 days after June 23, 2016. The complaint was filed on May 18, 2018. Given that the 1-year discovery rule would not save their action, the Dondlingers rely instead on the continuous representation rule to contend their action was timely filed because the legal malpractice action did not accrue until the conclusion of their first appeal and the termination of their professional relationship with the appellees.

[12] As noted, the controlling principle of law since at least *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991), is that if the client discovers the act or omission *prior* to the termination of the attorney's representation, then the continuous representation exception does not apply. In *Economy Housing Co.*, we explained that "[t]o hold otherwise would merely encourage clients to sit on their hands, with full knowledge of negligence on the part of the professional who is serving them, knowing that the clock would not start to run on their claim until they actually fired the practitioner." 239 Neb. at 269, 475 N.W.2d at 900. To determine whether the continuous representation exception applies, the record would need to demonstrate when the Dondlingers learned of the act or omission and, in particular, whether that occurred prior to or after the end of the appellees' representation.

In an effort to show that the Dondlingers learned of the error prior to the termination of their representation, the appellees offered Nelson's affidavit, which, as previously quoted, states in paragraphs 5 and 6 as follows:

> 5. During the course of the representation of Terry Dondlinger and Valerie Dondlinger, I initiated a telephone conference between myself and Terry Dondlinger and Valerie Dondlinger. In this telephone conference,

> I personally informed [them] regarding the District Court's finding that we did not properly serve Nickerson Township. This is the alleged negligence that is set forth in [their] Complaint in the above-captioned matter. We discussed at length the facts and circumstances which led to the dismissal and the appeal.
>
> 6. I advised Terry and Valerie Dondlinger that our representation of them would end, and that we would be closing their file, after advising them of the alleged negligence at issue in this Complaint. This fact is reflected in [the Dondlingers'] Statement of Undisputed Facts.

[13] If uncontroverted, this evidence satisfied the appellees' objective to establish that the Dondlingers learned of the error during the attorney-client relationship, thus triggering the 1-year discovery period in § 25-222 and rendering the complaint filed on May 18, 2018, untimely. At this point, the burden with respect to this issue shifted to the Dondlingers to overcome the evidence that their complaint was time barred. In this regard, we have noted that where the movant for summary judgment submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

A review of the record shows that by virtue of the evidence, including paragraph 9 of the amended complaint and answer thereto, it is undisputed that one attorney and the Dondlingers participated in a communication during which the attorney advised the Dondlingers that no petition for further review to the Nebraska Supreme Court would be filed after the Court of Appeals dismissed the Dondlingers' appeal. The time for filing a petition for further review is 30 days. Neb. Ct. R. App. P. § 2-102(F)(1) (rev. 2015). We logically understand that this communication occurred within the period available for filing such a petition for further review, i.e., within 30 days after the dismissal by the Court of Appeals. According to the Nelson affidavit, the conversation included an explanation of

the underlying act or omission and an indication that the attorneys would end the relationship.

The Dondlingers' answers to interrogatories Nos. 6 and 7 stated as follows:

> **INTERROGATORY NO. 6:** Please state the date that your attorney-client relationship with Defendants ended.
>
> **ANSWER:** See Complaint.
>
> **SUPPLEMENTAL ANSWER:** Within thirty (30) days after June 23, 2016.
>
> **INTERROGATORY NO. 7:** Please state the date that you discovered the fact that Defendants "negligently failed to properly file a Tort Claim pursuant to the Nebraska Political Subdivision Claims Act, Neb. Rev. Stat. § 13-901 et seq.", as alleged in paragraph six of your Amended Complaint in this action.
>
> **ANSWER:** See Response to Request for Admissions.
>
> **SUPPLEMENTAL ANSWER:** Within thirty (30) days after June 23, 2016.

No party asserts a date upon which the attorney-client relationship ended, but given the exchange regarding filing a petition for further review, and inferring a date favorable to the Dondlingers, the termination happened during the 30-day period available for filing a petition for further review, following the Court of Appeals' dismissal in May 2016. Based on the Dondlingers' responses to interrogatories, it is possible that the Dondlingers learned of the error on any day either before or after the termination of the relationship, but in any event, occurring during the 30 days "after June 23, 2016."

Having reviewed the record, it is clear that the Dondlingers have failed to specifically assert that they did not learn of the error until after the termination of the relationship, as they needed to demonstrate to take advantage of the continuous representation rule. Because the appellees carried their evidentiary burden and showed that the Dondlingers were advised of the error prior to the termination of the relationship, it was incumbent on the Dondlingers to controvert this

assertion; otherwise, their complaint was untimely filed. The Dondlingers have not provided evidence which controverts that of the appellees.

[14] We recognize that the Dondlingers' evidence identifies a 30-day period during which they learned of the appellees' act or omission, and we are aware that at the summary judgment stage, inferences should be in favor of the nonmoving party. However, although we must infer facts favorable to the Dondlingers, we are not permitted to speculate. Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Pitts v. Genie Indus.*, 302 Neb. 88, 921 N.W.2d 597 (2019). In this case, there is no categorical inference that the Dondlingers learned of the appellees' negligent action or omission after the end of the relationship. Although there is a possibility, the Dondlingers did not assert they were unaware of the error until after the termination of the relationship. Given all the evidence and giving the Dondlingers the favorable inferences, their evidence amounts to the following: During the period for filing a petition for further review, we learned of the error on a date which might have been after the appellees terminated the relationship. The appellees' evidence that they communicated the error prior to the end of the attorney-client relationship stands uncontroverted.

CONCLUSION

As explained above, the district court did not err when it ruled that the continuing representation exception did not apply, and that therefore, the Dondlingers' action was time barred, and when it granted summary judgment in favor of the appellees. The district court's dismissal of the Dondlingers' action is affirmed.

Affirmed.

Miller-Lerman, J., concurring.

Given our jurisprudence in the legal malpractice area regarding the continuous representation doctrine, I believe the

opinion is correct. We have stated that the continuous representation rule does not apply when the claimant discovers the alleged professional negligence *prior* to the termination of the professional relationship. *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013); *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991). See *Bonness v. Armitage, ante* p. 747, 942 N.W.2d 238 (2020). However, as one treatise noted and this case illustrates, "[i]f applied rigidly, this approach can produce randomly harsh results." 3 Ronald E. Mallen, Legal Malpractice § 23:45, n.23 at 562 (2020). In the present case, the appellees asserted that they informed the Dondlingers of the alleged malpractice prior to the termination of the relationship and the Dondlingers asserted that it was possible that they discovered the appellees' alleged malpractice either before, simultaneously with, or after the termination of representation.

As I understand it, Nebraska is one of few jurisdictions that resolves the applicability of the continuous representation doctrine by focusing on whether the client discovered the alleged legal malpractice before or after the end of the representation. See *id*. To apply the doctrine in a reasonable manner, I believe, as a substantial majority of other states have recognized, the question is more nuanced. See 3 Mallen, *supra*, § 23:45 (collecting cases).

In *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983), we explained the continuous treatment doctrine as it applied to medical malpractice and how it might apply to accountants and, by inference, other professional services. When we adopted the continuous treatment doctrine in 1941, we acknowledged the occurrence rule but nevertheless sought to avoid premature litigation when we stated:

> [I]t is just to the physician and surgeon that he [or she] may not be harassed by premature litigation instituted in order to save the right of the patient in the event there should be substantial malpractice. The physician and surgeon must have all reasonable time and opportunity to

> correct the evils which made the observation and treatment necessary and to correct the ordinary and usual mistakes incident to even skilled surgery. The [continuing treatment doctrine] is conducive to that mutual confidence which is highly essential in the relation between surgeon and patient. The treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased.

Williams v. Elias, 140 Neb. 656, 662-63, 1 N.W.2d 121, 124 (1941).

Additional concerns, including avoiding disruption of the relationship and the potential for concealment, were articulated in *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001), and may be relevant in the present case. In *Casey*, we stated:

> It is apparent that allowing a physician an opportunity to correct any malpractice and not disrupting the physician-patient relationship are the primary considerations underlying the continuing treatment doctrine in Nebraska. *Id.* See, also, *McDermott v. Torre*, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982) ("the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure [and] implicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so"). It is the trust relationship that may make discovery of a claim difficult. See *Miller v. United States*, 458 F. Supp. 363, 366 (D. Puerto Rico 1978) ("[t]he rationale for the [continuing treatment doctrine] is the protection of the confidential physician-patient relationship . . . as well as the fear that the treating physician, 'knowing of his actionable mistake, might be able to conceal it from his patient or continuously to lull the patient into failing to institute suit within the ordinarily permissible time period'").

261 Neb. at 8, 621 N.W.2d at 488.

The foregoing rationales are in service to permit the professional an opportunity to be forthright and remedy the error. In the legal malpractice area, the continuous representation doctrine tolls the statute of limitations only for ongoing and continuous services by the attorney for the same or related subject matter after the professional negligence. See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). Continuity does not mean the mere continuity of the general professional relationship. *Behrens v. Blunk*, 284 Neb. 454, 822 N.W.2d 344 (2012). In this regard and for completeness, we are aware of the "exhaustion of appeals" approach adopted by some states, e.g., *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991). But see *Story v. Bunstine*, 538 S.W.3d 455 (Tenn. 2017) (rejecting inter alia the appeal-tolling doctrine). Under this approach, a statute of limitations does not commence until *all* appeals from the underlying case in which an error allegedly occurred are exhausted. In Nebraska, we have declined to adopt such a broad rule, see *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985), and it is not necessary to do so here.

Our focus on the timing of an innocent client's knowledge and whether his or her revelation falls either before or after the end of the representation confuses the continuous representation doctrine with the discovery rule and compromises the virtues of the professional attorney-client relationship which the continuous representation rule was designed to preserve. So, as I see it, we should consider abandoning the rigid "prior" test and return to implementing the original purposes of the continuous representation doctrine to enable an attorney the opportunity to resolve the problem or minimize the extent of the injury. *Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140 (1995) (noting that Nebraska's "prior" test does not allow client to work with attorney to correct error). To be thorough, if we persist in rigid application of the "prior" test, we should consider abandoning the doctrine and simply stick to the statute, Neb. Rev. Stat. § 25-222 (Reissue 2016), which provides

the discovery rule exception as the only exception to the statute of limitations.

Here, the appellees continued to represent the Dondlingers on an appeal from their underlying case in an apparent attempt to reverse the consequences of the appellees' alleged act of malpractice. If we do not insist on applying the "prior" test, the 2-year statute of limitations for professional negligence would have accrued on the singular occasion when the appellees informed the Dondlingers of their error, their appellate case was concluded, and the appellees would be closing the file. Without application of the "prior" test, the Dondlingers' legal malpractice case would not be time barred. However, as noted at the outset of this concurrence, applying our current jurisprudence, I concur with the opinion, which concludes that the district court did not err when it determined that the case was time barred and dismissed the Dondlingers' action.

Papik, J., concurring.

I agree with Justice Miller-Lerman that the continuous representation doctrine, as it currently exists in Nebraska, does not appear to further the rationale for having such a rule. I, like Justice Miller-Lerman, understand the primary purposes of a continuous representation rule to be to encourage attorneys to attempt to remedy or mitigate the damages caused by possible errors and to allow clients to rely on their attorneys' efforts to do so without fear that the time to bring a legal malpractice claim is slipping away. See, e.g., *Hiligh v. Sands*, 389 F. Supp. 3d 69 (D.D.C. 2019) (discussing policy justifications for continuous representation rule). I too believe those purposes will rarely, if ever, be served given our rule that the continuous representation doctrine does not apply when the claimant discovers the alleged professional negligence prior to the termination of the professional relationship. See *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

Indeed, it would seem that the only scenario in which the continuous representation doctrine could be successfully

invoked under our precedent would be one in which a former client learns of malpractice committed by his or her attorney only *after* the representation has concluded. But, in that scenario, there is no need for a continuous representation rule. The discovery exception in Neb. Rev. Stat. § 25-222 (Reissue 2016) would extend the period in which the client could timely file his or her claim, and there would be no cause to worry about disrupting an already-concluded lawyer-client relationship.

One way out of this thicket would be to, as Justice Miller-Lerman suggests, do away with our rule that the continuous representation rule does not apply when the client discovers the alleged negligence prior to the termination of the relationship. But while that course may lead to a more coherent continuous representation doctrine, I am concerned that the doctrine as a whole is not consistent with the text of the professional negligence statute of limitations. Section 25-222 provides that in the case of professional negligence, the statute of limitations starts running upon the allegedly negligent act or omission of the professional. It provides one and only one exception to that rule—the discovery exception mentioned above.

Ordinarily, when a statute specifically provides for exceptions, we will not recognize others judicially. See *In re Guardianship of Eliza W.*, 304 Neb. 995, 1006, 938 N.W.2d 307, 315 (2020) ("[o]ne of our rules of statutory interpretation provides that when a statute specifically provides for exceptions, items not excluded are covered by the statute"). We appear not to have followed that principle when we recognized the continuous representation doctrine as an additional exception to § 25-222's direction that the statute of limitations starts running upon the allegedly negligent act or omission of the professional.

It is, I recognize, one thing to note that the justification for an established legal doctrine is questionable and quite another to overrule that doctrine. Stare decisis is entitled to great weight in our system. See *Heckman v. Marchio*, 296 Neb. 458,

894 N.W.2d 296 (2017). But one of the main reasons a court might adhere to a legal doctrine notwithstanding its questionable underpinnings is that parties have relied on the existence of that precedent. See *id.* It is difficult for me to believe, however, that anyone has or would organize their behavior based on our version of the continuous representation doctrine. As I have noted, the doctrine, as currently articulated, rarely applies and when it does, it is unnecessary.

If, in fact, there is minimal reliance on the continuous representation doctrine and it cannot be squared with § 25-222, I suggest that any reconsideration of the doctrine should begin with the question of whether, absent legislative action, the doctrine should be recognized at all.

Stacy, J., joins in this concurrence.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Preston Pope, appellant.

943 N.W.2d 294

Filed May 29, 2020. No. S-18-1151.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Identification Procedures: Due Process: Appeal and Error.** A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
4. **Jury Instructions: Proof: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, the appellant has the burden to show that the allegedly improper instruction or the refusal to give the requested instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant

has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

7. **Homicide: Juries: Verdicts.** The jury need only be unanimous as to its verdict that defendant committed first degree murder, and not as to the theory which brought it to that verdict.
8. **Homicide: Jury Instructions: Proximate Cause.** A defendant in a felony murder case is not entitled to a proximate cause instruction when there is no dispute as to the victim's cause of death.
9. ____: ____: ____. In the context of felony murder, an instruction on proximate cause is appropriate where the evidence presents a jury question as to whether the death of the victim was proximately caused by an act of the defendant or the defendant's accomplice.
10. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
11. **Trial: Witnesses: Testimony.** Neb. Rev. Stat. § 25-1141 (Reissue 2016) does not apply to testimony given by a different witness when no objection is made to that witness' testimony.
12. **Constitutional Law: Identification Procedures: Due Process.** The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.
13. **Identification Procedures: Police Officers and Sheriffs: Motions to Suppress.** Suppression of identification evidence on the basis of undue suggestion is appropriate only where the witness' ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct.
14. **Trial: Identification Procedures.** When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.
15. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence presented; such matters are for the finder of fact.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

A jury convicted Preston Pope of two counts of first degree murder for the killing of Deprecia Neelon and Garion Johnson, two counts of use of a deadly weapon to commit a felony, and one count of possession of a deadly weapon by a prohibited person. On appeal, Pope challenges two of the district court's jury instructions, the affidavit relied upon by law enforcement to obtain a warrant to collect a sample of Pope's DNA, and the identification of Pope by one of the State's witnesses. We affirm.

BACKGROUND

This case involves three shootings which occurred in Omaha, Nebraska, on August 5, 6, and 8, 2015. Neelon lived in a house on Pinkney Street with other family members, including her mother, stepfather, and stepsister, Marcella Mitchell (Marcella). On August 5, 2015, Johnson's vehicle was parked in the street outside Neelon's home. While Johnson was sitting in the driver's seat with the door open, an individual walked up and fired a gun at him. Johnson pushed the shooter and ran away as the shooter chased him.

Marcella and her sister had been standing by the street and were able to see the shooter. Marcella reported that a man dressed in black had walked past her toward Johnson. After hearing the gunshot, Marcella heard a clip drop. She then saw the shooter bend down and pick up the clip before chasing after Johnson. Marcella described the individual as being a light-skinned African-American male, approximately 5 feet 5 inches tall, and wearing a black jacket with a hood, black

pants, and frizzy braids in his hair. She estimated that she had been approximately three to four steps away from the shooter and was able to see his face for at least 3 seconds.

The next day, someone splashed an accelerant onto the siding of Neelon's house on Pinkney Street and lit the house on fire. Upon discovering that the house was on fire, Neelon had gone outside to investigate and was shot seven times. Neelon's stepfather was home at the time and attempted to pull Neelon back into the house after she had been shot. As Neelon's stepfather was attempting to pull her inside, someone fired three to five additional shots. When Neelon's stepfather saw the shooter point the gun in his direction, he was forced to let go of Neelon and close the door. Neelon died as a result of her gunshot wounds.

After Neelon was shot, several suspects had been observed leaving the area of her house on Pinkney Street in two separate vehicles: a blue/green minivan with a distinctive rust pattern and a white four-door sedan. Evidence recovered at the scene included a watch, a black knit glove, and three .45-caliber spent shell casings. A manufacturer's tag from a pair of knit gloves was located in an alley approximately one block away where the minivan had been parked. A fingerprint on the tag was found to match the left thumb of Marcus Short. DNA testing on the watch indicated that Short and another man could not be excluded as partial DNA contributors to a DNA mixture found on the inside of the device.

Johnson lived in a house on Fontenelle Boulevard. On August 8, 2015, law enforcement was dispatched to Johnson's address for a report of a shooting and a vehicle that crashed into a garage. Upon their arrival, officers found Johnson in a white Chevy Impala that had crashed into a garage located at a nearby address on Fontenelle Boulevard. Johnson had been shot seven times and died as a result of his gunshot wounds.

Because the area was muddy from a city sewer project, officers were able to follow the Impala's tire tracks to Johnson's

home. The tracks indicated that Johnson backed from his garage, drove in circles in two yards located along Fontenelle Boulevard, and then crashed into the nearby garage.

Johnson had been pulling his vehicle into his garage when two individuals standing by the driver's side of the vehicle began firing into the driver's-side window. Johnson backed the vehicle into the street. As he circled through the yards, one of the shooters followed the vehicle, firing into the window.

Witnesses reported that the shooters were two African-American males wearing black hooded sweatshirts, one of which had a red Nebraska logo on it. After the Impala crashed, the two shooters were seen running through yards and fleeing in a white Chevy Monte Carlo that had been parked toward the west. The Monte Carlo had white and blue in-transit plates.

Officers located a white Monte Carlo matching the vehicle's description at an address on Binney Street in Omaha, where Short resided with his grandmother. Law enforcement obtained and executed a search warrant at Short's residence. During execution of the warrant, officers seized multiple items from Short's bedroom, including two firearms—a .45-caliber handgun and a .357-caliber Magnum revolver, one black knit glove, a pair of "Mechanix" gloves, a black hooded sweatshirt, a black hooded sweatshirt with a red Nebraska logo, and black pants with dried mud on them.

As a result of the search, Short was arrested and charged with two counts of possession of a deadly weapon by a prohibited person. The State later dismissed the charges and filed an information charging Short with first degree murder for the killing of Johnson and use of a firearm to commit a felony.

When the firearms were dusted for fingerprints, Pope's partial palmprint was found on the barrel of the .357 Magnum. Ballistic test results demonstrated that spent projectiles recovered from Johnson's body had been fired from the .357 Magnum with Pope's palmprint on it. Two of the casings found at the scene of Neelon's murder were found to have been fired from

the .45-caliber handgun found in Short's bedroom. Officers located additional shell casings at each of the three shootings, but the shell casings were unable to be matched to either of the two firearms. However, ballistic tests demonstrated that these casings had all been fired from the same .45-caliber semiautomatic handgun.

On August 14, 2015, officers located a dark-colored minivan that matched the description of the minivan used by the suspects leaving Neelon's house on Pinkney Street after she was shot. The minivan was registered to Pope's mother, and Pope had been seen driving it. Cell phone records placed Pope in the area of Neelon's house near the time she was killed, and in the area of Johnson's house near the time he was killed. These records also indicated Pope was in the area of Short's home soon after Neelon was killed.

Law enforcement obtained a search warrant to get a sample of Pope's DNA under Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 2016), Nebraska's identifying physical characteristics statutes. The warrant permitted the use of detention to obtain the sample. Pope was restrained after he refused to comply with the warrant. A buccal swab was used to collect DNA evidence at the Douglas County correctional facility where Pope was incarcerated on unrelated charges. DNA test results showed Pope as a major contributor to the DNA found on the black hooded sweatshirt and black pants that had been seized from Short's bedroom.

In April 2016, Marcella was at the Douglas County courthouse with a friend for reasons unrelated to this case. While there, Marcella saw Pope and recognized him as the August 5, 2015, shooter. Marcella later testified that after seeing Pope at the courthouse, she contacted the Omaha police officer who had initially interviewed her regarding the August 5 incident. Marcella reported that she had seen Pope at the courthouse and that she recognized him as the shooter.

In May 2016, the State filed an information charging Pope with first degree murder for the killing of Johnson, use of a

deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person.

In October 2016, Marcella was shown a photographic lineup by law enforcement, at which time she identified Pope as the August 5, 2015, shooter. Prior to both the lineup and her recognizing Pope at the courthouse, Marcella had seen a television news story about the investigation into Johnson's homicide. The news story aired a photograph of Pope wearing a bright yellow shirt. The photograph depicting Pope in the lineup was identical to the one used in the news story. Marcella later testified that upon seeing the news story, she thought she recognized Pope as the shooter, but did not contact law enforcement at the time because she was not sure. Marcella stated that when she later saw Pope at the courthouse, from the angle of his face when he walked and when he turned his face toward her, she was able to recognize him as the individual that ran past her on August 5, 2015.

In June 2017, the State filed amended informations against Short and Pope, charging each with a second count of first degree murder for the killing of Neelon and a second count of use of a deadly weapon. The district court ordered Short's and Pope's cases to be tried separately.

Prior to trial, Pope filed motions to suppress evidence of his DNA and of Marcella's identification. After a hearing on the motion to suppress evidence related to Pope's DNA, the district court determined the affidavit used to obtain the warrant lacked sufficient probable cause for issuance of the search warrant. The affidavit requested a sample of Pope's DNA for "comparison purposes." The affidavit stated that during the course of the investigation into Johnson's death, a search warrant executed at Short's home resulted in the seizure of two firearms, one of which had Pope's partial palmprint on it.

The district court noted that the affidavit failed to articulate a connection between the firearm and the homicide and failed to articulate a connection between the fact that Pope had

possessed the firearm and the fact that Pope was prohibited from possessing a firearm. Still, the court overruled Pope's motion to suppress after concluding the good faith exception applied. The court concluded that law enforcement's reliance on the warrant was reasonable because Pope had twice been convicted of felonies and his palmprint was found on a firearm.

Regarding Marcella's identification of Pope, Pope sought to suppress both the photographic lineup and any in-court identification on the grounds that Marcella's prior identification of Pope was unnecessarily and impermissibly suggestive. The motion was overruled. The district court found that the prior identification of Pope was not improperly suggestive and that Marcella's identification of Pope from the August 5, 2015, incident contained sufficient indicators of reliability to outweigh any alleged suggestiveness in the photographic lineup. At trial, both Marcella and her sister identified Pope as the August 5, 2015, shooter.

James Henderson testified that he had been driving in the area of Neelon's house on Pinkney Street and heard gunshots at the time she was killed. As he looked toward her house, Henderson saw the fire. He observed two males wearing all dark clothing standing near the front and the side of the house, and one of the males was holding a gun. Henderson stated that the two males, along with a third, ran across the street in front of his vehicle. Henderson recognized one of them. Henderson testified that he was later incarcerated with Pope and Short and that he recognized them as the other two males.

Pope was convicted on all five counts and sentenced to two terms of life imprisonment for the first degree murder counts, two terms of 49 to 50 years' imprisonment for the counts of use of a deadly weapon, and 49 to 50 years' imprisonment for possession of a deadly weapon by a prohibited person. The district court ordered Pope to serve his sentences consecutively to each other and to a federal sentence, which he was currently serving.

ASSIGNMENTS OF ERROR

Pope's assignments of error, restated, are that the district court erred in (1) providing incorrect jury instructions on the felony murder and corresponding use counts and refusing to give Pope's tendered instruction, (2) providing incorrect jury instructions on the aiding and abetting a crime count and refusing to give Pope's tendered instruction, (3) failing to grant Pope's motion to suppress DNA evidence, and (4) permitting Marcella's identification of Pope.

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[1]

[2] When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[2] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[3]

[3] A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.[4]

ANALYSIS

Jury Instructions.

In his first and second assignments of error, Pope argues that the district court improperly instructed the jury on the elements of felony murder and aiding and abetting a crime.

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[1] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[2] *State v. Weathers*, 304 Neb. 402, 935 N.W.2d 185 (2019).

[3] *Id.*

[4] *State v. Cosey*, 303 Neb. 257, 927 N.W.2d 822 (2019).

Alternatively, Pope asserts that the district court erred in refusing to give his tendered instructions.

[4,5] In reviewing a claim of prejudice from jury instructions given or refused, the appellant has the burden to show that the allegedly improper instruction or the refusal to give the requested instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[5] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[6]

[6] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[7]

Felony Murder Instruction.

[7] On the count of first degree murder for the killing of Neelon, the district court instructed on the alternate theories of either felony murder or premeditated murder. And, as this court has made clear, "the jury need only be unanimous as to its verdict that defendant committed first degree murder, and not as to the theory which brought it to that verdict."[8]

Pope makes two arguments with respect to the felony murder jury instruction. First, Pope argues that the district court erred by failing to instruct that for felony murder, the jury must find that Neelon's death was caused by the fire. Second, Pope argues that the district court erred by refusing to give his tendered instruction, which included these additional elements: (1) that the arson or attempted arson was the

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[5] *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016).

[6] *State v. Mueller*, 301 Neb. 778, 920 N.W.2d 424 (2018).

[7] *Id.*

[8] *State v. Buckman*, 237 Neb. 936, 940, 468 N.W.2d 589, 592 (1991).

proximate cause of Neelon's death and (2) that there was no efficient intervening cause. Pope also sought to include the following definitions:

> "Proximate Cause"
>
> The defendant's aiding and abetting of another to kill Deprecia Neelon during the course [of] committing or attempting to commit arson, caused the death of Deprecia Neelon, if her death occurred in a natural and continuous sequence, and without the defendant's acts Deprecia Neelon's death would not have occurred. Proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.
>
> "Efficient Intervening Cause"
>
> An efficient intervening cause is a new and independent act, itself a proximate cause of death, which breaks the causal connection between the original illegal act and the death.

The district court overruled Pope's objections and declined to give his tendered instruction. As to the material elements of felony murder, the jurors were instructed as follows:

> 1. That the Defendant, Preston Pope, intended to commit the crime of arson; and
>
> 2. That on or about August 6, 2015 the Defendant, Preston Pope, was in the course of committing or attempting to commit that arson; and
>
> 3. That the Defendant, Preston Pope, did so in Douglas County, Nebraska; and
>
> 4. That the Defendant, Preston Pope, either alone or by aiding and abetting another, killed Deprecia Neelon during the course of committing or attempting to commit that arson; and
>
> 5. That the arson, or attempted arson, consisted of each of the following elements:
>
> . . . That the Defendant, Preston Pope, either alone or by aiding and abetting another intentionally perpetrated

an arson, to wit: A person intentionally damages a building or property contained within a building by starting a fire or causing an explosion when another person is present in the building at the time and either;

(a) the actor knows the fact; or

(b) the circumstances are such as to render the presence of a person therein a reasonable probability.

At trial, Pope argued that the shooting itself was an efficient intervening cause, which broke the causal chain of events between the arson and Neelon's death. On appeal, Pope claims that because the jury was not required to find that Neelon's death was caused by the fire, he is entitled to a reversal of both the felony murder conviction and the corresponding use of a deadly weapon conviction. Pope asserts the jury should have been instructed that felony murder requires proof that Neelon's death came as a continuous sequence from the arson and that the arson and the death were closely connected in time and place. Alternatively, Pope argues that the district court erred in failing to give his tendered instruction.

In *State v. Harris*,[9] this court held that a causation instruction was appropriate under the facts presented. The defendant had been found guilty of first degree murder for the killing of an 81-year-old woman during an attempted robbery. The victim had fallen to the ground and was kicked after she resisted the attempt of the defendant and his accomplice to snatch her purse. The victim suffered a broken hip either from the fall or from being kicked by her assailants and was hospitalized. Surgery was performed to treat the hip fracture, and although the hip eventually healed, the patient died approximately 6 weeks after the attempted robbery.

At trial, the defendant in *Harris* presented evidence demonstrating that the victim had suffered a myocardial infarction and a systemic infection after the surgery and argued these were independent intervening causes of her death. The jury

[9] *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

was given a causation instruction along with the definitions of "proximate cause" and "efficient intervening cause." In that case, we held that the defendant was entitled to an instruction on causation because the evidence had raised a factual question for the jury regarding whether the victim's death had been caused by the defendant or by independent intervening acts or causes.[10]

[8] However, in *State v. Quintana*,[11] we concluded that the defendant, David Lee Quintana, was not entitled to a proximate cause instruction because there was no dispute as to the victim's cause of death. Quintana had been convicted of first degree murder for aiding and abetting Jaime Rodriguez to commit the crime of robbery, during which Rodriguez shot and killed the victim. Quintana's defense was that the robbery was an afterthought and that the actual proximate cause of the victim's death was a derogatory comment made by the victim to Rodriguez, which caused Rodriguez to become angered and shoot the victim.

The jury instructions given at trial in *Quintana* required the jury to find, as an element of the offense, that the victim was killed during the course of Rodriguez' robbery of, or attempt to rob, the victim. The relevant part of the instruction stated:

> "A death occurs while in the course of committing or attempting to commit a robbery if the act that killed is closely connected in time and place with the robbery or attempted robbery so that the act that killed and the robbery or attempted robbery may be considered one continuous event.
>
> "If the intent to rob is formed prior to or contemporaneously with the act that results in death, then the death occurs in the course of the commission of the robbery or attempted robbery.

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[10] *Id.*

[11] *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified on denial of rehearing* 261 Neb. 623, 633 N.W.2d 890.

> "If the taking of the property was an after thought then the killing is not in the commission of a robbery or an attempted robbery and you should find the defendant not guilty of aiding and abetting first degree murder."[12]

On appeal, Quintana argued that the victim's remark was an efficient intervening cause, which severed the causal connection between the plan to rob the victim and the shooting, and that the trial court erred in refusing to give his proposed instruction on proximate cause.

[9] Noting that there was no dispute as to why Rodriguez shot the victim, we held that Quintana was not entitled to his proffered instruction on proximate cause. We explained that in the context of felony murder, an instruction on proximate cause is appropriate where the evidence presents a jury question as to whether the death of the victim was proximately caused by an act of the defendant or the defendant's accomplice.[13]

In *Quintana*, there was no dispute as to the cause of death; the question for the jury was whether the shooting occurred during the course of the robbery. We concluded that Rodriguez' motivation for shooting the victim did not affect the fact that the victim's death was caused by the shooting. And the question of whether an alternative motive for the shooting existed was related to whether the shooting took place in the course of the robbery.[14] We therefore held that an instruction on proximate cause was not required.[15]

In the present case, we find that the jury was properly instructed. Pope was not entitled to an instruction on causation because there was no dispute as to the proximate cause of Neelon's death; she died from her gunshot wounds. Nor was there a dispute as to whether the shooting was closely

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[12] *Id.* at 59, 621 N.W.2d at 138 (emphasis omitted).

[13] *State v. Quintana, supra* note 11. See, also, *State v. Harris, supra* note 9.

[14] *Id.*

[15] *Id.*

connected in time and place with the arson.[16] Someone lit Neelon's house on fire, and when Neelon went outside to investigate, she was met with gunfire.

The question for the jury was whether Pope was responsible for the killing of Neelon, either by shooting her himself, by committing the underlying felony of arson, or by aiding and abetting the shooter and/or the individual committing the arson. The jury instructions required the jury to find, as an element of the offense, that "Pope, either alone or by aiding and abetting another, killed . . . Neelon during the course of committing or attempting to commit that arson." The jury was then instructed as to the elements of the crime of arson.

[10] Pope's tendered instruction is a correct statement of law.[17] However, in this case, the instruction was not warranted by the evidence.[18] A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.[19] We find that the instruction given regarding felony murder was a correct statement of the law and that Pope has not met his burden of establishing reversible error.

Aiding and Abetting Instruction.

In regard to aiding and abetting, the jury was given the following instruction from NJI2d Crim. 3.8:

> A person who aids, abets, procures or causes another to commit any offense may be prosecuted as if he were the principal offender.
>
> The Defendant can be guilty of a crime even though he personally did not commit every act involved in the crime so long as he aided someone else to commit it. The Defendant aided someone else if:

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[16] See *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985).

[17] See *State v. Quintana, supra* note 11.

[18] See *id.*

[19] *Id.*

> 1. The Defendant intentionally encouraged or intentionally helped another person to commit the crime; and
>
> 2. The Defendant intended that the crime be committed; or the Defendant knew that the other person intended to commit the crime; or the Defendant expected the other person to commit the crime; and
>
> 3. The crime, in fact, was committed by that other person.
>
> The Defendant can be guilty of felony murder if he is guilty of arson or attempted arson as an aider and a death resulted during the course of committing the arson.

Pope objected to the inclusion of the instruction and to the instruction's definition of "aider." Pope tendered an instruction with the additional language:

> Aiding and abetting requires some participation in the criminal act which must be evidenced by word, act, deed, and mere encouragement or assistance is sufficient to make one an aider or abettor.
>
> Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.

The district court overruled the objections and declined to use Pope's proposed instructions. However, the district court included the second sentence proposed by Pope within its definition of "aider."

Addressing the district court's refusal to give Pope's tendered instruction on aiding and abetting, we recognize that Pope's proposed language, taken from this court's opinion in *State v. Stubbendieck*,[20] is a correct statement of the law and was warranted by the evidence. However, we find that Pope failed to establish that he was prejudiced by the district court's refusal to give the tendered instruction.

The State argues that the language set forth in the instructions is functionally equivalent to Pope's first proposed sentence. We

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[20] *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

agree. Two of the instructions stated that an "aider" must have "intentionally encouraged or intentionally helped another person to commit the crime." Further, the district court's instruction on the definition of "aider" included the second sentence proposed by Pope. The instruction stated: "Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory."

We conclude that Pope was not prejudiced by the district court's refusal to give his tendered instruction on aiding and abetting. Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is not prejudicial error.[21] Here, the district court adhered to the Nebraska Jury Instructions,[22] and the instructions fairly presented the law and covered the issues presented. We conclude that Pope has not established prejudicial error.

Evidence of Pope's DNA.

In his third assignment of error, Pope argues that the district court erred in admitting evidence of his DNA. Pope asserts that the district court correctly found the affidavit used to obtain the warrant to collect his DNA was insufficient to support probable cause and that the district court erred in concluding that the good faith exception applied.

The State submits that Pope waived any objection to the admission of the evidence by failing to properly object at trial. We agree.

Neb. Rev. Stat. § 25-1141 (Reissue 2016) provides:

> Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

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[21] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[22] See NJI2d Crim. 3.8.

[11] During the testimony of the detective who had collected Pope's DNA, Pope was granted a continuing objection "regarding any DNA collection of . . . Pope." However, Pope failed to object to testimony by the State's DNA expert regarding the DNA results, which connected Pope to items of clothing seized from Short's home. Section 25-1141 does not apply to testimony given by a different witness when no objection is made to that witness' testimony.[23]

In order to properly preserve this alleged error on appeal, it was necessary for Pope to object to the admission of testimony by the State's DNA expert regarding the DNA results. Even assuming the district court erred in concluding that the good faith exception applied, Pope waived his right to assert this alleged error on appeal because he failed to properly object to the DNA results introduced at trial.

Marcella's Identification of Pope.

In his fourth assignment of error, Pope argues that the district court erred in denying his pretrial motion to suppress Marcella's identification of him as the August 5, 2015, shooter. Pope asserts that the photographic lineup was unduly suggestive because the photograph depicting Pope in the lineup was the same photograph that Marcella had seen on television during a news report about the case. Pope further asserts that the district court erred in its determination regarding the reliability of Marcella's identification.

[12-14] In *State v. Nolan*,[24] we articulated that "'the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances *arranged by law enforcement*.'" We explained

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[23] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved on other grounds, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[24] *State v. Nolan*, 283 Neb. 50, 63, 807 N.W.2d 520, 535 (2012) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)).

that the suppression of identification evidence on the basis of undue suggestion is appropriate only where the witness' ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct.[25] Finally, we determined that when no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.[26]

In this case, Marcella had seen a photograph of Pope during a television news story about Johnson's murder. However, there was no evidence of improper law enforcement activity so as to render the lineup unduly suggestive. The parties stipulated that the detective who presented the photographs to Marcella was unaware of which photograph depicted Pope. And no evidence was presented to show that law enforcement was aware that the photograph had been used in the news story or that Marcella had seen the news story.

Pope argues that the brief length of time during which Marcella had to observe the shooter, Marcella's degree of attention at the time, her prior description of the shooter, her level of certainty, and the fact that 14 months had elapsed between the shooting and the photographic lineup are all factors weighing against the reliability of her identification of Pope as the shooter. However, absent evidence of affirmative police conduct tainting the identification procedure, a preliminary judicial inquiry into the reliability of the witness' identification is not required.[27] As discussed above, Pope presented no such evidence. Therefore, it was the jury's duty to assess the identification's reliability.[28]

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[25] *State v. Nolan, supra* note 24.

[26] *Id.*

[27] See *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[28] *State v. Nolan, supra* note 24.

[15] The jury heard Marcella's testimony and her cross-examination by Pope's counsel regarding each of the factors Pope uses to challenge the identification's reliability, including inconsistent statements Marcella made regarding her level of certainty and a discrepancy between Marcella's estimation of the shooter's height and Pope's actual height. It was the duty of the jury to assess Marcella's credibility and determine whether she had a sufficient opportunity to see Pope on August 5, 2015, and make a reliable identification of him as the shooter.[29] We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence presented; such matters are for the finder of fact.[30] We find that the district court did not err in permitting Marcella to identify Pope at trial.

CONCLUSION

For the reasons outlined above, we conclude that Pope's assignments of error either are without merit or were not adequately preserved for appellate review. Pope's convictions are affirmed.

Affirmed.

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[29] See *State v. Dixon, supra* note 27.

[30] *Id.*



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Tracy N. Parnell, appellant.

943 N.W.2d 678

Filed May 29, 2020. No. S-19-425.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.
3. **Postconviction.** Postconviction relief is a very narrow category of relief.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Postconviction: Proof.** In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.
6. ____: ____. In the absence of alleged facts that would render the judgment void or voidable, the proper course is to overrule a motion for postconviction relief without an evidentiary hearing.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
8. ____: ____: ____. When a person seeking postconviction relief has different counsel on appeal than at trial, the motion for postconviction

relief is procedurally barred if the person seeking relief (1) knew of the issues assigned in the postconviction motion at the time of the direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.

9. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
10. **Effectiveness of Counsel: Appeal and Error.** When a claim of ineffective assistance of appellate counsel is based on the failure to raise a claim on appeal of ineffective assistance of trial counsel (a layered claim of ineffective assistance of counsel), an appellate court will look at whether trial counsel was ineffective under the two-part test for ineffectiveness established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); if trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.
11. ____: ____. Much like claims of ineffective assistance of trial counsel, a defendant claiming ineffective assistance of appellate counsel must show that but for appellate counsel's failure to raise the claim, there is a reasonable probability that the outcome would have been different.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Funke, J.

Tracy N. Parnell appeals from the denial of postconviction relief without an evidentiary hearing. Parnell asserts that the trial court erred in determining that his claims of ineffective assistance of appellate counsel are procedurally barred. Although we agree that one of Parnell's claims is not procedurally barred, we nonetheless conclude that Parnell is not entitled to relief. We therefore affirm.

BACKGROUND

Convictions and Sentences

In *State v. Parnell*,[1] this court affirmed Parnell's jury trial convictions of first degree murder, attempted first degree murder, two counts of use of a deadly weapon to commit a felony, and possession of a weapon by a prohibited person. The district court for Douglas County sentenced Parnell to life imprisonment on the murder conviction, 40 to 50 years' imprisonment for attempted first degree murder, 40 to 50 years' imprisonment for each count of use of a deadly weapon to commit a felony, and 3 to 20 years' imprisonment for possession of a weapon by a prohibited person, to be served consecutively, with credit for time served. The facts which resulted in Parnell's convictions are set forth in our opinion on direct appeal.

On October 30, 2012, at around 8:14 p.m., Eriana Carr and Nakia Johnson were shot in Omaha, Nebraska. Carr was shot twice and died from her injuries. Johnson was shot 11 times and survived. Johnson told investigators that the shots came from "a blue Nissan Altima with a messed up front bumper." Johnson stated that Parnell and three others threatened her at a party at her friend's apartment 2 days before the shooting, because "they felt like [she] had brought someone into the house from another side," or "[a]nother hood."

Detectives discovered that Parnell had been stopped while driving a blue Nissan Altima several months earlier. The

[1] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

registered owner of the car was Jasmine Nero, the mother of Parnell's child. When interviewed by investigators, Parnell denied any knowledge of an Altima and stated that he never drove any of Nero's vehicles.

Parnell spoke to Nero about the Altima in a call from jail. Nero testified that she understood from that call that Parnell wanted her "to get rid of" the car. Nero moved the car to a garage, where investigators later found it. The car's front bumper was damaged, and it contained a box with Parnell's thumbprint on it.

Pretrial Discovery

Prior to trial, Parnell filed a motion to exclude the State's expert witness William Shute, a special agent with the Federal Bureau of Investigation (FBI) and a member of the FBI's "Cellular Analysis Survey Team" who performs "historical cell site analysis" using call detail records provided by cellular carriers. Shute explained that call records show the tower and the sector that a particular cell phone used. Cell towers usually have three sectors. The towers and sectors can be plotted on a map in order to locate a cell phone at a particular time.

Shute testified regarding the locations of Parnell's cell phone around the time of the shooting. Parnell's call detail records showed that his cell phone connected to tower: (1) 201 at 7:52 p.m., (2) 729 at 8:07 p.m., (3) 201 at 8:11 p.m., (4) 729 at 8:20 p.m., and (5) 201 at 8:20 p.m. Shute plotted the towers and their coverage areas on a map. He testified that the coverage areas for towers 201 and 729 overlap and that the way Parnell's cell phone switched between towers 201 and 729 showed it was definitely located within the overlapping coverage area at the time of the shooting. The court overruled the motion to exclude, finding that Shute was qualified to testify as an expert and that his methods were reliable.

Parnell's counsel later moved to exclude Shute's testimony or continue trial based on the discovery of undisclosed evidence. Counsel filed an affidavit stating that he attended a seminar

with a presentation by cellular analyst Michael O'Kelly. The State had disclosed in discovery that O'Kelly had performed cell phone mapping services on the case for the Omaha Police Department (OPD). In response to a question from Parnell's counsel, O'Kelly stated that he performed more services than disclosed in the report. In supplemental discovery, O'Kelly provided Parnell's counsel with an affidavit detailing his interactions with the State, and the State disclosed a series of emails between O'Kelly, a detective of the OPD, and a deputy county attorney.

In the emails, the detective asked O'Kelly if he had a formal report to present to the county attorney. O'Kelly responded that he could do so in about 10 days. He stated, "Remember, if it's in writing it's Discoverable[.] I would recommend the county attorney and I visiting and then letting them decide." O'Kelly then later wrote to the deputy county attorney, "It was a pleasure visiting Friday[.] I am sending the cell maps and my cell forms, guides and CV[.] When you have a moment after reviewing these, call and I will walk you through each."

In his affidavit, O'Kelly stated that he "reviewed the . . . call detail records and concluded that [Parnell's cell phone] appeared to travel from the west side of Omaha [where Parnell lived] to the east side, then north and south and then traveling back to the general area on the west side." O'Kelly said that he "began processing and mapping the individual cell site registrations. The handset transition west to east, north/south and east to west activities were confirmed." He then provided the OPD detective with "multiple maps depicting handset movements consistent with cell site registrations that supported physical movement from Omaha's west side to the east side and possible travel movements north and south on the east side."

O'Kelly also stated that he informed the detective that "it is impossible to identify a specific location stop(s), specific surface roadway travels based upon the existing cellular data." He stated that "drawing circles and other shapes with defined

boundaries is unreliable and at best simple guessing with an agenda. The 'guessing' may be based upon experience and training but will still have no foundation and/or credible support that is rooted with existing electronic wireless data." And he stated that "in order to possibly place the subject [cell phone] in the immediate area of the crime scene . . . it will be necessary to conduct an RF Signal Field Survey." He explained that his approach to performing such a survey, or drive test, "is time consuming and labor intensive covering days if not weeks."

In his motion to exclude Shute's testimony or continue trial, Parnell argued that the State failed to disclose O'Kelly's opinions that a drive test was necessary and that the FBI's methods were not reliable. In support of his motion, Parnell offered O'Kelly's affidavit, but not the emails. The State responded that O'Kelly's opinion was not exculpatory and that O'Kelly placed Parnell's cell phone in the same area as Shute had, although O'Kelly was not as specific. The court overruled the motion, finding the evidence was not exculpatory and had been provided at an early date. The court permitted Parnell to retain O'Kelly as an expert witness and allowed 12 days to prepare his testimony.

Before trial, Parnell renewed his motion to continue the trial, offering the email exchanges with O'Kelly as support. The court overruled the renewed motion.

Trial

At trial, Johnson testified and described the shooting, the blue Nissan Altima, and the threatening incident 2 days before the shooting. Nero testified regarding the Altima and her relationship with Parnell. Nero testified that she lied to police for Parnell and was charged as an accessory to a felony. Shute testified that towers 201 and 729 form an overlap area and that Parnell was within the overlap area at the time of the shooting. O'Kelly was present throughout the trial but did not testify. The jury returned a verdict of guilty on all counts.

Motion for New Trial

Parnell timely moved for a new trial. He offered a second affidavit from O'Kelly which he contended showed proof of newly discovered evidence which could not have been discovered and produced at trial. O'Kelly averred that after his initial work on Parnell's case, he "informed the government that additional field testing by means of a 'drive test' would be required in order to move from speculation to accuracy in the cell tower connection plotting." A drive test involves making cell phone calls while driving and then obtaining call detail records to see which towers the cell phone used. Shute did not perform such a drive test.

O'Kelly began a drive test on the last day of the trial. He averred that the drive test revealed that the crime scene was between towers 201 and 729, which are 1.84 miles apart. The drive test showed that the coverage areas for towers 201 and 729 do not overlap or border each other, as Shute claimed. O'Kelly stated that Parnell had to have left the crime scene in order to connect to tower 729. However, O'Kelly also said that the data showed that Parnell's cell phone "was in the general vicinity (1 - 2 miles of the crime scene) before, during and after the shooting."

The district court overruled the motion for new trial, finding that O'Kelly's opinions could have been discovered and produced using reasonable diligence. In addition, the court found that Parnell could have disputed Shute's testimony by calling O'Kelly as a witness. The court noted that the State had disclosed early in the discovery process that O'Kelly had worked on the case. Lastly, the court concluded that O'Kelly's opinions were not material, because they would not have affected the outcome of trial. The court found that the drive test results "seem to incriminate [Parnell]."

Direct Appeal

On direct appeal, Parnell assigned that the district court erred in overruling his motion to exclude Shute's testimony

or continue trial and his motion for a new trial. Parnell also claimed that his trial counsel was ineffective because he did not call O'Kelly to testify as an expert witness at trial.

We found no merit to any of Parnell's assigned errors. We found that under *Brady v. Maryland*,[2] the timing of the State's disclosure of O'Kelly's opinions did not violate Parnell's right to due process because the State disclosed the evidence 1 week before trial. We found that the State had no duty to disclose O'Kelly's oral, unrecorded opinions under Neb. Rev. Stat. § 29-1912 (Reissue 2016), because his comments on the need for more data were akin to an internal, informal document and were not results or reports of examinations or scientific tests under § 29-1912(1)(e). We also found Parnell did not make it clear to the district court that O'Kelly required more than 12 days to perform a drive test. We therefore concluded that the district court did not abuse its discretion in overruling Parnell's motion to exclude Shute's testimony or continue trial.

We rejected Parnell's argument that the court erred in overruling his motion for a new trial, finding that, even assuming O'Kelly's opinions constituted newly discovered evidence, there was not a reasonable probability of a substantially different result. We found that even though O'Kelly criticized the precision of Shute's opinions, O'Kelly's opinions still incriminated Parnell, because O'Kelly placed Parnell's cell phone within 1 to 2 miles of the crime scene before, during, and after the shooting. In addition, the incriminating testimony of Johnson and Nero substantially diminished the importance of the evidence regarding the location of Parnell's cell phone.

In addressing Parnell's argument that his trial attorneys were ineffective for failing to call O'Kelly to testify, we first addressed whether Parnell was represented by the same counsel at trial as on appeal and concluded that he was not. We

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

found that the two attorneys who represented Parnell at trial intended to withdraw in the trial court, but because there was no order memorializing their withdrawal, they were certified as appellate counsel to this court, and that they did not then file a motion to withdraw in this court. In response to our show cause order, Parnell's trial counsel submitted affidavits stating that they had no contact with him after sentencing and did not participate in his appeal. As such, we concluded that we were able to address Parnell's ineffectiveness claim on direct appeal. We found that had O'Kelly testified, the outcome would not have been different, because he opined that Parnell's cell phone was near the crime scene when the shooting occurred. We determined that the record conclusively refuted Parnell's claim that he was prejudiced by the actions of his trial counsel.

Postconviction

As a self-represented litigant, Parnell filed a motion for postconviction relief which asserted claims of trial court error, prosecutorial misconduct, and ineffective assistance of trial and appellate counsel. Most of the allegations in Parnell's motion concern issues previously raised and addressed on direct appeal, especially with regard to O'Kelly's opinions and the drive test. Of particular note in this appeal, Parnell alleged that his trial counsel and appellate counsel failed to "submit" the email exchanges with O'Kelly to show that O'Kelly's data is more reliable than Shute's data. Parnell further alleged that the State committed prosecutorial misconduct by "allowing the testimony of Shute at trial knowing that his testimony as an expert was not accurate." He alleged that, contrary to Shute's testimony that cell towers 201 and 729 form an overlap area, O'Kelly opined that the cell tower areas do not overlap and that the performance of a drive test was required in order to obtain more accurate data. The district court dismissed the motion without an evidentiary hearing, concluding that all of Parnell's claims are procedurally barred because they were known or

knowable at the time of his direct appeal. Parnell filed a notice of appeal. Parnell's counsel entered his appearance and filed a brief on his behalf.

ASSIGNMENTS OF ERROR

Parnell assigns, restated, that the district court erred in determining that his claims for postconviction relief are procedurally barred; in particular, his claim in which he alleges that appellate counsel was ineffective by failing to raise trial counsel's failure to "introduce certain evidence and correct prosecutorial misconduct." In the alternative, Parnell assigns that the court erred in determining that any of his claims are procedurally barred because it was unclear as to whether he was represented by the same lawyers during trial and direct appeal.

STANDARD OF REVIEW

[1,2] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[4]

ANALYSIS

Parnell argues that the district court erred in determining that all of his claims are procedurally barred, because his motion raises ineffective assistance of appellate counsel claims and postconviction is his first opportunity to raise such claims. The State does not contest this point, but argues that based on the ineffective assistance of appellate counsel allegations raised in the motion, Parnell is entitled to no relief.

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[3] *State v. Hessler, ante* p. 451, 940 N.W.2d 836 (2020).

[4] *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019).

[3,4] Under the Nebraska Postconviction Act,[5] a prisoner in custody may file a motion for relief on the ground that there was a denial or infringement of the prisoner's constitutional rights that would render the judgment void or voidable. Postconviction relief is a very narrow category of relief.[6] A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.[7]

[5,6] In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.[8] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution.[9] In the absence of alleged facts that would render the judgment void or voidable, the proper course is to overrule a motion for postconviction relief without an evidentiary hearing.[10]

Claims Procedurally Barred

Parnell contends that his claims of prosecutorial misconduct were not procedurally barred. However, we agree with the State that this portion of Parnell's motion asserts in a conclusory fashion, without factual support, that he was denied ineffective assistance of appellate counsel. An evidentiary hearing is not required when a motion for postconviction

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[5] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[6] *State v. Beehn*, 303 Neb. 172, 927 N.W.2d 793 (2019).

[7] *Mata, supra* note 4.

[8] *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018).

[9] *Id*.

[10] *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

relief alleges only conclusions of fact or law without supporting facts.[11]

Upon review of the allegations supporting Parnell's prosecutorial misconduct claims, it is clear that he did not allege that his appellate counsel was ineffective for failing to raise on direct appeal that his trial counsel was ineffective for failing to raise the alleged prosecutorial misconduct with respect to Shute's testimony. Additionally, he did not allege how inclusion of the issue would have changed the outcome of his direct appeal. Because Parnell's prosecutorial misconduct claims do not include factual allegations concerning the effectiveness of appellate counsel, we do not view these claims as ineffective assistance of appellate counsel claims, and as a result, the district court did not err when it determined these claims were procedurally barred.

Claim Not Procedurally Barred

While we agree with the district court's observation that Parnell's motion mainly discusses claims that either were raised or could have been raised on direct appeal, upon de novo review of Parnell's postconviction motion, and in consideration of the errors assigned by Parnell in this appeal, we find that Parnell has raised one ineffective assistance of appellate counsel claim which is not procedurally barred and must be analyzed under *Strickland v. Washington*.[12]

[7] In the instant case, Parnell was represented by different counsel on direct appeal than at trial. Ordinarily, when a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[13]

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[11] *Id.*

[12] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[13] *Parnell, supra* note 1.

Otherwise, the issue will be procedurally barred.[14] A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.[15]

Parnell's counsel on direct appeal argued that trial counsel was ineffective for failing to call O'Kelly as a witness. For reasons previously discussed herein, we rejected Parnell's argument, because O'Kelly's testimony tended to incriminate Parnell and had O'Kelly testified, the outcome of trial would have been the same. In his motion for postconviction relief, Parnell asserts that his appellate counsel was ineffective for failing to raise trial counsel's failure to "submit the e-mails by [the OPD detective, the deputy county attorney,] and O'Kelly, concerning their meeting about O'Kelly's data being more reliable than Shute's data."

[8] When a person seeking postconviction relief has different counsel on appeal than at trial, the motion for postconviction relief is procedurally barred if the person seeking relief (1) knew of the issues assigned in the postconviction motion at the time of the direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.[16] Here, the record reflects that at the time of his direct appeal, Parnell was aware of the factual basis for his claim that trial counsel was ineffective for failing to "submit the e-mails." While trial counsel did offer the emails in support of Parnell's renewed motion to exclude Shute's testimony or continue trial, the emails were not offered into evidence during trial for the jury's consideration. Parnell's appellate counsel did not assert this issue on direct appeal. Because Parnell alleged in his motion for postconviction relief that appellate counsel was ineffective in not doing so, the issue

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[14] *Id*.

[15] *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017).

[16] *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002).

was presented at Parnell's first opportunity and is not procedurally barred.[17]

Because we conclude that Parnell has raised an ineffective assistance of appellate counsel claim that is not procedurally barred, we do not reach Parnell's alternative assignment of error that the court erred in determining that any of his claims are procedurally barred because it was unclear as to whether he was represented by the same lawyers during trial and direct appeal.

An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[18] Moreover, it is clear from the discussion on this issue in our opinion on direct appeal that Parnell's counsel on appeal was different than his counsel at trial.

Appellate Counsel Not Ineffective

Although we find that Parnell's motion raises a discrete issue that is not procedurally barred, given that we concluded on direct appeal that Parnell was not prejudiced by counsel's failure to call O'Kelly as a witness, we similarly conclude that Parnell failed to show that he was prejudiced by counsel's failure to submit the emails by the OPD detective, the deputy county attorney, and O'Kelly into evidence at trial.

[9] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[19] To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[20] To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but

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[17] See *id.*

[18] *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019).

[19] *Vela, supra* note 15.

[20] *Id.*

for his or her counsel's deficient performance, the result of the proceeding would have been different.[21] A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.[22]

[10,11] When a claim of ineffective assistance of appellate counsel is based on the failure to raise a claim on appeal of ineffective assistance of trial counsel (a layered claim of ineffective assistance of counsel), an appellate court will look at whether trial counsel was ineffective under the *Strickland* test.[23] If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.[24] Much like claims of ineffective assistance of trial counsel, the defendant must show that *but for* counsel's failure to raise the claim, there is a reasonable probability that the outcome would have been different.[25] In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.[26]

In analyzing Parnell's claim, we focus on the allegations in his postconviction motion.[27] Here, on the issue of prejudice, Parnell alleged that had his trial counsel submitted the emails into evidence, "[t]his would have proved that the State knew that there existed exculpatorial [sic] material evidence that [Parnell] was possibly in another area of town when the

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[21] *Id*.

[22] *Id*.

[23] *State v. Foster*, 300 Neb. 883, 916 N.W.2d 562 (2018), *disapproved on other grounds, Allen, supra* note 10.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] See *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018), *disapproved on other grounds, Allen, supra* note 10 (appellate court will not consider factual allegations made for first time on appeal).

murder was committed." Based on the record, we find no support for Parnell's claim that counsel's introduction of the emails would have created a probability sufficient to undermine confidence in the outcome at trial. This is because, as stressed by this court in its opinion on direct appeal, the testimony of Johnson and Nero provided powerful and compelling evidence of Parnell's guilt, which significantly reduced the importance of the expert testimony concerning the location of Parnell's cell phone.[28]

Johnson testified that Parnell had threatened her 2 days before the shooting and that the shooter was driving a blue Nissan Altima with a damaged bumper. Nero testified that Parnell drove her Altima on the night of the shooting, and she admitted to lying to police about the Altima in order to help Parnell. When police found the Altima, the car's front bumper was damaged and an item inside the car contained Parnell's thumbprint. Because these witnesses directly incriminated Parnell in several respects, even if the emails were introduced into evidence and effectively used to rebut aspects of Shute's testimony, the likelihood of acquittal is low.

This conclusion is reinforced when the actual content of the emails are considered. Had the jury been presented with the emails, it would have merely learned that O'Kelly met with the prosecution to discuss his report and findings and that the prosecution ultimately had Shute testify as an expert rather than O'Kelly. While Parnell's claim about the emails does not refer to calling O'Kelly as a witness, his motion does state that the emails concern the prosecution's "meeting about O'Kelly's data being more reliable than Shute's data." Parnell's claim of ineffectiveness therefore includes a comparison between the findings of the two experts. In evaluating this claim, we assume for the sake of argument only that Parnell's trial counsel would have introduced the emails through O'Kelly as a witness and that the jury would then have learned O'Kelly's opinions. We

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[28] See *Parnell, supra* note 1.

explained on direct appeal that, although he was not as precise as Shute, O'Kelly's testimony incriminated Parnell, because O'Kelly placed Parnell in the general vicinity of the crime scene at the time of the shooting. We must therefore conclude that trial counsel was not ineffective, because it is clear that trial counsel's strategic decision not to call O'Kelly as a witness and introduce the emails through him benefited Parnell, because O'Kelly would have incriminated Parnell. Because Parnell's trial counsel was not ineffective, Parnell's appellate counsel was not ineffective in failing to raise this issue, and Parnell suffered no prejudice as a result of the actions of appellate counsel. Postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.[29]

CONCLUSION

For the foregoing reasons, although our reasoning differs from that of the district court, we affirm the order of the district court denying Parnell's motion for postconviction relief without an evidentiary hearing.

Affirmed.

Freudenberg, J., not participating.

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[29] *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Michael D. Benson, appellant.

943 N.W.2d 426

Filed May 29, 2020. No. S-19-486.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Pleadings: Judgments: Appeal and Error.** A trial court's denial of a motion to sever will not be disturbed on appeal absent an abuse of discretion.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.
4. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.
5. **Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires law enforcement to give a particular set of warnings to a person in custody before

interrogation, including that he or she has the right to remain silent, that any statement he or she makes may be used as evidence against him or her, and that he or she has the right to an attorney.

6. **Miranda Rights: Self-Incrimination: Evidence.** *Miranda* warnings are considered prerequisites to the admissibility of any statement made by a defendant during custodial interrogation.
7. **Miranda Rights.** *Miranda* warnings are required only when a suspect interrogated by the police is in custody.
8. ____. The ultimate inquiry for determining whether a person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is whether there is a formal arrest or restraint on freedom of movement of degree associated with a formal arrest.
9. ____. Custody under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is to be determined based on how a reasonable person in the suspect's situation would perceive his or her circumstances.
10. **Constitutional Law: Search and Seizure.** A seizure under the Fourth Amendment occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
11. **Miranda Rights.** In considering whether a suspect is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), relevant considerations include, but are not limited to, the location of the interaction, who initiated the interaction, the duration of the interaction, the type and approach of questioning, the freedom of movement of the suspect, the duration of the interaction, and whether the suspect was placed under arrest at the termination of the interaction.
12. ____. The test for determining custody under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is an objective inquiry that does not depend on the subjective views harbored by either the interrogating officer or person being interrogated.
13. **Miranda Rights: Waiver: Words and Phrases.** To be a valid waiver of *Miranda* rights, a waiver must be knowingly and voluntarily made. A waiver is knowing if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. A waiver is voluntary if it is the product of a free and deliberate choice rather than through intimidation, coercion, or deception.
14. **Miranda Rights: Waiver.** Whether a knowing and voluntary waiver of *Miranda* rights has been made is determined by looking to the totality of the circumstances.

15. **Miranda Rights: Waiver: Police Officers and Sheriffs.** While waiver must be knowingly made, law enforcement is not required to inform a suspect of all aspects of the investigation prior to the waiver of the suspect's *Miranda* rights.
16. **Miranda Rights: Police Officers and Sheriffs.** Law enforcement officers are not required to rewarn suspects from time to time of their *Miranda* rights. The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.
17. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.
18. ____: ____: ____: ____. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
19. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
20. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
21. **Search Warrants: Time: Appeal and Error.** A search warrant and application's indicating incorrect dates of their drafting and signing is not per se fatal to the validity of a warrant.
22. **Search Warrants: Appeal and Error.** Misstatements within an application and warrant may still produce a valid warrant if the rest of the warrant and attached application cures any defect resulting from the scrivener's error when read together.
23. **Constitutional Law: Trial: Joinder.** There is no constitutional right to a separate trial.
24. **Trial: Joinder: Appeal and Error.** Whether offenses were properly joined involves a two-stage analysis: (1) whether the offenses were sufficiently related to be joinable and (2) whether the joinder was prejudicial to the defendant.
25. **Trial: Joinder: Presumptions.** There is a strong presumption against severing properly joined counts.

26. **Trial: Joinder: Appeal and Error.** While Neb. Rev. Stat. § 29-2002 (Reissue 2016) presents two separate questions, there is no error under either subsection (1) or (3) if joinder was not prejudicial, and a denial of a motion to sever will be reversed only if clear prejudice and an abuse of discretion are shown.
27. ____: ____: ____. An appellate court will find an abuse of discretion in the denial of a motion to sever only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.
28. **Trial: Joinder.** Prejudice from joinder cannot be shown if evidence of one charge would have been admissible in a separate trial of another charge.
29. **Criminal Law: Witnesses.** Evidence of a defendant's attempted intimidation or intimidation of a State's witness is relevant evidence of a defendant's conscious guilt that a crime has been committed.
30. **Trial: Joinder: Juries: Evidence.** Joined charges do not usually result in prejudice if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Beau Finley, of Law Offices of Beau Finley, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Michael D. Benson was convicted of second degree murder, use of a deadly weapon to commit a felony, possession of a deadly weapon by a prohibited person, and two counts of tampering with a witness. On appeal, Benson claims the district court erred in failing to suppress statements he made to law enforcement and cell phone data acquired pursuant to a search warrant. Benson also claims the court committed reversible error by declining to sever the two counts of tampering with a witness from the other charges. Finally, Benson claims there

was insufficient evidence to support his convictions. For the reasons set forth herein, we affirm.

BACKGROUND

This case concerns the fatal shooting of James Womack on September 18, 2017. Pursuant to this shooting, Benson was charged by amended information with second degree murder, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person. The information was amended a second time to add two counts of tampering with a juror, witness, or informant regarding telephone calls made by Benson to witnesses Deja Jefferson and Erica Guitron on February 11 and 12, 2019.

Motion to Suppress Statements

Prior to trial, Benson filed a motion to suppress and exclude any and all statements made by him to officers of the Omaha Police Department (Department) on September 20 and 23, 2017. On September 20, Benson had made statements to Officer Mark Negrete to report that his pickup had been stolen and that he believed it may have been used in the commission of the shooting. Benson argued that his statements on September 20 were inadmissible because he was subjected to custodial interrogation and never informed of his *Miranda* rights. Benson's statements on September 23 occurred in an interview with Det. Ryan Davis on the report that his pickup had been stolen. Davis, who had been investigating Womack's death, had evidence contradicting Benson's claim that his pickup had been stolen and had evidence that indicated Benson was a party with knowledge of the shooting. While Benson waived his rights following Davis' reading of a *Miranda* notice, Benson argued such waiver was not knowingly and freely given.

At a hearing on the motion, Negrete testified he was working patrol in his police uniform on September 20, 2017, and responded to a call concerning an individual wishing to report a stolen vehicle. Negrete first spoke to Sgt. Michael Ratliff of the homicide division, who gave him the assignment. Negrete

testified that it was not typical on a day-to-day basis to get assignments from the homicide unit. Ratliff told Negrete that he wanted him to take the report from the vehicle's owner, advised that the "vehicle may have been involved in a homicide," and mentioned Benson's name. Ratliff talked to Negrete about Negrete's body camera recording of his interaction with Benson. Ratliff's call with Negrete lasted about 3 minutes and occurred about 15 minutes prior to Negrete's receiving another call from dispatch about taking the report on the stolen vehicle.

When Negrete arrived at Benson's apartment, he met Benson in the parking lot. Negrete asked for Benson's name and proof of identification, but Benson did not have his identification, so he turned to get it from his apartment. Before Benson could go to his apartment, however, Negrete continued to ask him questions and get the information about the stolen vehicle while the parties were in the parking lot. Benson reported that at about 2 to 3 a.m. on September 17, 2017, he was visiting someone's residence and went outside to find his pickup was missing. After taking most of the information for the report, Negrete returned to his patrol vehicle, and Benson went to his apartment, where he located his identification and then provided it to Negrete.

Det. Derek Mois testified that he works on a team within the homicide division led by Ratliff and in which Davis was a member. This team was assigned the Womack homicide, and Davis was its lead detective. Mois explained that through initial investigation, the Department had acquired and released to the public details and photographs of a potential suspect's vehicle. Pursuant to calls from the public describing the location of a pickup matching the released information, officers were able to locate a pickup matching the description and observed particular identifiers known by the Department. This pickup was registered to Benson and to Jefferson, and Mois explained that Davis obtained a search warrant to collect and process it. The processing of the pickup revealed items

including shell casings and a September 18, 2017, receipt from a Hy-Vee grocery store on 96th and Q Streets in Omaha, Nebraska. Mois testified that he conducted followup with Hy-Vee employees and watched Hy-Vee's video surveillance, which showed Benson with his pickup at around 2 p.m., about 3 hours before Womack was shot.

Mois testified that on September 20, 2017, he fielded a call from a man identifying himself as the owner of the pickup which had been seized the day before. The man was concerned about reports that the pickup had been used in connection with a crime and wanted to report it as stolen. Mois told the man that if he had not been in possession of the pickup and believed it was stolen, he first needed to call the 911 emergency dispatch service to issue a report. The parties did not discuss the matter further, and Mois informed Ratliff of the call once he hung up. Mois explained that at the time of the call, the team only had reason to believe the pickup was potentially involved in a crime and had no other reasons to suspect that Benson, as the owner of the pickup, was himself involved.

Mois described that he was in his Department office on September 23, 2017, when Davis interviewed Benson concerning the pickup and the evidence conflicting with the report Benson gave to Negrete. At that point, Mois explained, investigators suspected Benson's participation in Womack's homicide due to the identification of his pickup, evidence found in the search of the pickup, and evidence contradicting Benson's report that his pickup was stolen. Mois testified that the interview was conducted on the fourth floor of Department headquarters in a homicide interview room. Mois had been in and out of a conference room where detectives could listen in on the interview, and he later reviewed a recording of the interview.

Mois explained that Davis read Benson his *Miranda* rights and that Benson waived his rights and agreed to speak. Davis initially asked Benson for details surrounding the theft of his pickup, and Benson's answers did not vary substantively from

the report he gave Negrete. After this initial questioning, Davis left the room for around 90 seconds, and when he returned, Mois described that the questioning changed. For about the next 1½ hours, Davis confronted Benson about evidence which contradicted his report and repeatedly brought up the evidence that showed Benson with the pickup at Hy-Vee after the time he reported the pickup had been stolen. Benson was arrested after the interview once Davis had an opportunity to confer with Ratliff and possibly the county attorney's office.

Davis also testified concerning Benson's interview on September 23, 2017. According to Davis, Ratliff had informed him earlier in the day that Benson would be coming in for the interview. Davis' first interaction with Benson was after he had already been led into the interview room by other law enforcement personnel. Davis explained that he performed a pat-down search, introduced himself, and asked Benson identifying information. At this point, Davis read Benson his *Miranda* rights and Benson waived those rights and agreed to speak with Davis. For around the first 45 minutes, Davis and Benson discussed Benson's report. However, Davis was aware of Benson's previous statements to Negrete and the evidence contradicting his allegations and the timeline. Davis left the interview room briefly, and when he returned, his questioning shifted to confronting and questioning Benson about the contradictions, including the evidence about his presence at Hy-Vee with the pickup after he alleged that it had been stolen. Davis explained that this shift in questioning was because he first wanted to give Benson an opportunity to provide clarifying information that explained the contradictions. After the interview, Benson was arrested.

Following the hearing, the district court denied Benson's motion. The court found Benson's September 20, 2017, statements to Negrete were admissible because Benson was not in custody when Negrete was taking his report and, as such, Benson was not required to make a knowing and voluntary waiver of his *Miranda* rights before he could be questioned.

The court also found Benson's September 23 statements to Davis were admissible because Davis informed Benson of his *Miranda* rights, Benson waived his rights and agreed to talk to Davis, and there is no requirement that law enforcement officers fully inform a suspect of all the evidence they have before that suspect can make a knowing and voluntary waiver.

Motion to Suppress
Cell Phone Data

Benson filed an additional motion to suppress any and all evidence obtained from the execution of a search warrant of Benson's cell phone data. Benson argued that the search warrant and application were facially invalid due to their use of an incorrect date and that there was insufficient credible evidence to establish the necessary probable cause.

A hearing was held in which Davis testified that on September 20, 2017, he applied for a search warrant for telephone numbers connected to Benson, which was granted. Davis explained that the county attorney's office notified him in November 2018 that there appeared to be a discrepancy with some of the dates in the search warrant and application. Davis subsequently reviewed the search warrant and observed typographical errors. Davis testified he did not know about the incorrect date at the time of applying, executing, or returning the search warrant.

Although Davis filled out the application and search warrant on September 20, 2017, the application and search warrant listed September 18, which is the date of Womack's homicide, as the date the application and warrant were filled out and signed. Davis explained he used a template created by the Department's forensic unit and that when he mistakenly put September 18 into the application, the template automatically filled in that date throughout the application and search warrant.

The narrative portion of the affidavit in support of the application lists correct dates in the timeline of the offense and

investigation, including reference to the September 20, 2017, execution of a different search warrant. Additionally, the order to seal attached to the search warrant and signed by the court was dated September 20, 2017, and the return and inventory filed by Davis described serving the warrant on September 20. A fax cover sheet sent with the application for the cell service carrier to execute the search warrant, a confirmation sheet from the fax machine to confirm the fax was sent, and emailed correspondence with the cell service carrier also listed September 20.

Following the hearing, the district court denied Benson's motion. The court found that there was sufficient evidence to establish probable cause and that the erroneous dates appearing on the application and search warrant were inadvertent errors which did not affect their validity.

Motion to Sever

Benson filed a motion to sever the charges of second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person from the two counts of tampering with a juror, witness, or informant. Benson argued that the claimed offenses were not similar in character and that Benson would be prejudiced in the joining of the charges.

The district court overruled Benson's motion. The court found that the counts were properly charged in the second amended information and that joining the tampering charges to the other charges would not prejudice Benson pursuant to Neb. Rev. Stat. § 29-2002(3) (Reissue 2016).

Trial

Evidence presented at trial showed that around 4:30 p.m. on September 18, 2017, law enforcement responded to 911 calls regarding a shooting at the intersection of 60th and L Streets in Omaha. Officers observed a man, later identified as Womack, lying on the median near the intersection. Medical personnel arrived, took over Womack's care, and transported

him to a hospital where he later died from his wounds. Officers discovered a spent "5.7 by 28 caliber casing" on the ground at the scene.

Officers interviewed witnesses as part of their initial investigation. These witnesses, taken together, indicated that Womack and a tan-colored pickup with two occupants were stopped at a red light. Womack's semi-truck was in a through lane while the tan-colored pickup was stopped in a left-turn lane. Womack got out of his semi-truck, approached the pickup, hit the pickup's window with his hand, and said something to the occupants. Womack then turned around and began walking back to his semi-truck, and one of the pickup's occupants fired a gun which hit Womack twice in the back. The pickup then ran the red light, turned left, and sped off.

Law enforcement obtained video recordings from nearby businesses and vehicles at the intersection. From these videos, officers were able to develop a description of the pickup as an older, tan-colored extended-cab model with heavily tinted windows, noticeable damage to the rear quarter panels, and a distinctive rear bumper sticker. The video from a vehicle also allowed officers to confirm that there were two occupants in the pickup, gunshots came from the pickup, and the pickup ran the red light after the shooting. Additionally, this video showed movement of the passenger in the pickup as the shots were being fired.

The Department released still images from the videos displaying the pickup to the media for the public's help in its identification. On September 19, 2017, a Department detective received a telephone call from a special agent who relayed that one of his informants had seen the images of the pickup on the news and believed it belonged to Benson and was parked in a parking lot at 46th and Cass Streets in Omaha. Pursuant to this information, officers, including that detective, went to the parking lot and found a pickup matching the description.

The search and processing of the pickup on the morning of September 20, 2017, revealed a Hy-Vee receipt for flowers

from the store on 96th and Q Streets on September 18 at 1:06 p.m., two spent casings of the same caliber as the one found at the scene, gunshot residue from various parts of the passenger area, and a receipt from an automobile dealership and the pickup's registration indicating Benson and Jefferson were its owners. Following up on the Hy-Vee receipt, Mois obtained video from the Hy-Vee store which showed Benson entering and leaving the store, by himself. The video also showed Benson returning to the pickup around 1 p.m. on September 18.

Later on September 20, 2017, another detective went to the dealership named on the receipt, where he obtained records for the sale of the pickup, including Benson's cell phone number. The dealership had a lien on the pickup and had access to a tracking device on it, data from which the dealership provided law enforcement. This tracking device did not constantly record. Instead, it recorded locations during periodic "health check[s]" and whenever the pickup was turned on or off, which the device determined when it detected movement above a certain threshold or stopped moving for a certain period of time. The tracking device recorded that during data entries on September 17 at around 12:43 a.m., 6:44 a.m., and 7:49 p.m., the pickup was parked in the same location. Additionally, the tracking data recorded that the pickup was at the Hy-Vee parking lot on 96th and Q Streets on September 18 at 1 p.m.

Benson's cell phone records provided data which law enforcement was able to use to estimate the locations of his cell phone around the time of Womack's homicide. These records included a 4:30 p.m. call which put the cell phone around the intersection at 60th and L Streets.

At Benson's direction, Jefferson called law enforcement on September 20, 2017, to report that the pickup had been stolen on September 17. Benson had previously told Jefferson that the pickup was stolen but did not tell her to report it until September 20. Negrete went to their apartment to follow up on

the report, and Benson alleged that the pickup was stolen on September 17.

During the execution of a search warrant of Benson's apartment on September 22, 2017, officers discovered clothing that matched what Benson was wearing in the Hy-Vee video. Testing of samples taken from this clothing revealed the presence of gunshot residue.

On September 23, 2017, Benson went to Department headquarters and was interviewed by Davis concerning the alleged theft of his truck. After an initial discussion where Davis asked about Benson's allegations, Davis confronted Benson about the evidence which contradicted his timeline. Benson maintained he was not involved in Womack's homicide, and at the end of the interview, Benson was arrested.

Jefferson testified that she and Benson were in an intimate relationship and that they had children together. Benson, Jefferson, and the children lived together in the apartment, but Benson did not always stay there. Jefferson identified the suspect pickup as Benson's, explained that Benson had asked her to report it as stolen, and testified that Benson did not stay at the apartment the night of the shooting.

Guitron worked with and was also in an intimate relationship with Benson. Guitron testified that Benson bought her flowers on the afternoon of September 18, 2017, and confirmed text messages he sent her, including two from around the time of the shooting that said "just got in2 sum shitt" and that he could not text anything else about it.

Law enforcement recorded telephone calls from Benson to Jefferson and Guitron while Benson was in jail. During these calls, Benson told Jefferson and Guitron at different times not to cooperate with the authorities.

Marvin Stockdale, who was in jail at the same time as Benson, testified that he and Benson had a conversation while in a holding cell. Stockdale explained that Benson talked with him about his case and said, among other things, that he "'got rid of the gun after [he] smoked the dude'" and that he

was worried about the forensics on the hooded sweatshirt and whether investigators would find gunpowder on it. Additionally, Stormy Figueroa, a friend and coworker of Benson's, said that she talked with him about the shooting and that Benson said, "'Well, yeah, I mean, if somebody like that came in my property, then, yeah, I'd shoot him, too.'"

Following the presentation of evidence and arguments from the parties, Benson was found guilty and sentenced to 40 to 50 years' imprisonment for second degree murder, 20 to 25 years' imprisonment for use of a deadly weapon to commit a felony, 5 to 10 years' imprisonment for possession of a deadly weapon by a prohibited person, and 1 to 2 years' imprisonment on each count of tampering with a witness.

ASSIGNMENTS OF ERROR

Benson assigns, restated, that the district court erred by (1) failing to suppress Benson's statements to Negrete on September 20, 2017; (2) failing to suppress Benson's statements to Davis on September 23; (3) failing to suppress Benson's cell phone data acquired pursuant to a search warrant issued on September 20; and (4) overruling Benson's motion to sever the two tampering counts from the initial charges. Benson also assigns there was insufficient evidence to support his convictions.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[1] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[2]

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[1] *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

[2] *Id*.

[2] A trial court's denial of a motion to sever will not be disturbed on appeal absent an abuse of discretion.[3]

[3] In reviewing a criminal conviction for 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.[4] 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.[5]

ANALYSIS

Benson's September 20, 2017, Statements

Benson claims his statements to Negrete on September 20, 2017, should have been suppressed because he was subjected to custodial interrogation and was not advised of his *Miranda* rights. Benson argues he was detained by Negrete during the encounter as evidenced by his attempt to return to his apartment and Negrete's continued questioning.

[4-6] *Miranda v. Arizona*[6] prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination. *Miranda* requires law enforcement to give a particular set of warnings to a person in custody before interrogation, including that he or she has the right to remain silent, that any statement he or she makes may be used as evidence against him or her, and that he

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[3] See *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015).

[4] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017); *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017).

[5] *Mendez-Osorio, supra* note 4; *Jedlicka, supra* note 4.

[6] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). See, also, *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

or she has the right to an attorney.[7] These warnings are considered prerequisites to the admissibility of any statement made by a defendant during custodial interrogation.[8]

[7-10] *Miranda* warnings are required only when a suspect interrogated by the police is in custody.[9] The ultimate inquiry for determining whether a person is in custody is whether there is a formal arrest or restraint on freedom of movement of degree associated with a formal arrest.[10] Custody is to be determined based on how a reasonable person in the suspect's situation would perceive his or her circumstances.[11] Stated another way, a seizure under the Fourth Amendment occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[12]

[11] In considering whether a suspect is in custody for *Miranda* purposes, relevant considerations include, but are not limited to, the location of the interaction, who initiated the interaction, the duration of the interaction, the type and approach of questioning, the freedom of movement of the suspect, the duration of the interaction, and whether the suspect was placed under arrest at the termination of the interaction.[13]

Here, Benson was not in custody during his interaction with Negrete on September 20, 2017. Benson initiated the interaction by asking Jefferson to call and report the pickup as stolen. Negrete was assigned the task of taking the stolen vehicle report and arrived at Benson's apartment complex, where he made contact with Benson. Throughout the conversation,

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[7] *Miranda, supra* note 6. See, also, *Juranek, supra* note 6.

[8] *State v. Montoya*, 304 Neb. 96, 933 N.W.2d 558 (2019).

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] See *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

[13] See *Montoya, supra* note 8. See, also, *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002); *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

the parties' discussion was centered on the alleged theft of Benson's pickup, which he requested to have documented in the report. The majority of the conversation occurred outside in the apartment's parking lot. Benson's movement was not substantially restricted, and at one point, the parties separated with Negrete returning to his vehicle and Benson going to his apartment to get proof of identification. The interaction was not uncommonly long, and at the conclusion, Benson was not placed under arrest.

Benson argues that his movement was restricted when, after Negrete asked for identification, Benson turned to get his identification from his apartment but Negrete continued to question him in the parking lot instead. Contrary to Benson's argument, this exchange is insufficient to show Benson was restricted in his movement or ability to leave and terminate the conversation. This exchange occurred shortly after the conversation began with Negrete's getting Benson's name and asking whether he had any identification on him. Benson did not have his identification with him, and Negrete asked him whether his identification was in the apartment. At that point, Benson turned to go back to apartment, but before he left, Negrete shifted the conversation by asking questions about the theft Benson sought to report. In context, Benson was not turning to leave and terminate the conversation but was, instead, seeking to continue the interaction by getting the documentation he thought Negrete wanted. This exchange, on its own, does not demonstrate that Benson was in custody requiring *Miranda* warnings.

Benson also points to Ratliff's participation in assigning Negrete to take the report. Benson argues that this fact, coupled with Negrete's previous knowledge of Womack's homicide and the use of his body camera to record the interaction, establishes that Negrete's taking of Benson's report was "plainly to gain a statement from a homicide suspect in a manner that the suspect would not at all anticipate or contemplate."[14]

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[14] Brief for appellant at 30.

[12] Regardless of Ratliff's or Negrete's intent, the test for determining custody is an objective inquiry that does not depend on the subjective views harbored by either the interrogating officer or person being interrogated.[15] Instead, the question is determined based on how a reasonable person in the suspect's situation would perceive the circumstances.[16]

As the district court found, under the totality of the circumstances, a reasonable person would not have believed he or she was unable to leave or terminate the interaction. Benson initiated the interaction, which occurred in an open, neutral space; the subject of the interaction was limited to Benson's report on his allegedly stolen pickup; Benson was not restricted in his movements; and the interaction was a relatively short one after which Benson was not arrested. Benson was not in custody, and Negrete was not required to provide *Miranda* warnings. Accordingly, the district court did not err in declining to suppress Benson's September 20, 2017, statements.

Benson's September 23, 2017, Statements

Benson assigns the district court should have suppressed his statements to Davis on September 23, 2017, because he did not knowingly and voluntarily waive his *Miranda* rights.

[13,14] To be a valid waiver of *Miranda* rights, a waiver must be knowingly and voluntarily made.[17] A waiver is knowing if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.[18] A waiver is voluntary if it is the product of a free and deliberate choice rather than through intimidation, coercion, or deception.[19] Whether a knowing and voluntary waiver

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[15] *Montoya, supra* note 8.

[16] *Id.*

[17] See, *State v. Hernandez*, 299 Neb. 896, 911 N.W.2d 524 (2018); *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[18] *Id.*

[19] *Id.*

has been made is determined by looking to the totality of the circumstances.[20]

There is no dispute that the September 23, 2017, interview occurred after Benson was fully advised of his *Miranda* rights and that Benson issued a waiver of those rights and agreed to speak with Davis. There is also no dispute that Benson had reason to believe the interview would concern the report of his allegedly stolen pickup, which report Benson indicated to Mois he wished to make because he was worried about reports it was involved in a homicide.

Benson, instead, argues this *Miranda* waiver was insufficient because he did not know that he was a suspect in Womack's homicide and that Davis had evidence contradicting his report. Benson also claims Davis misled him during the interview by using Benson's lack of knowledge presumably to gain a "tactical edge" in the interview and get Benson to incriminate himself.[21]

[15] While waiver must be knowingly made, law enforcement is not required to inform a suspect of all aspects of the investigation prior to the waiver of the suspect's *Miranda* rights. In *Colorado v. Spring*,[22] the U.S. Supreme Court stated, "'[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.'" The Court explained:

> This Court's holding in *Miranda* specifically required that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in *Miranda*, conveys to a suspect the nature of his

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[20] *Id.*

[21] Brief for appellant at 34.

[22] *Colorado v. Spring*, 479 U.S. 564, 576-77, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987).

> constitutional privilege and the consequences of abandoning it. Accordingly, we hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.[23]

Davis was not required to disclose his strategy for the interview or his knowledge of contradictory evidence prior to Benson's waiver. Davis was not required to explain to Benson the interrogation strategy Davis planned to use or to disclose to Benson the evidence Davis possessed contradicting Benson's stolen vehicle report. Davis was merely required to advise Benson of his *Miranda* rights. Davis read Benson a sufficient explanation of these rights, and Benson chose to waive them.

Benson cites several instances where he claims Davis made misleading statements that indicated he was concerned only about the return of Benson's allegedly stolen pickup, and, as such, Benson argues such representation prohibited a knowing and voluntary waiver because it caused Benson to be unaware of the actual topic of discussion. It is unclear how Benson is claiming these statements led to an invalid waiver, because they were made after Benson was read and waived his *Miranda* rights. Regardless, and contrary to Benson's argument, he was informed of the nature of the interview. As explained above, Benson had called Mois seeking to report his pickup as stolen due to concerns it may have been involved in Womack's shooting. He then provided a report to Negrete alleging someone had stolen the pickup the day before Womack was killed. It is unchallenged that all parties understood the September 23, 2017, interview as followup to this report.

[16] Benson also takes issue with Davis' shift in questioning from asking questions to clarify Benson's report to confronting Benson on evidence contradicting his report. As

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[23] *Id.*, 479 U.S. at 577.

explained above, Davis was not required to reveal his interrogation strategy prior to Benson's waiver. Additionally, to the extent Benson's argument could be claiming that the difference in interview strategy would necessitate a further waiver, we have previously stated that law enforcement officers "'are not required to rewarn suspects from time to time.'"[24] The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.[25]

In consideration of all of the above, Benson's waiver of his *Miranda* rights before the interview with Davis was knowingly and voluntarily given and the district court did not err in declining to suppress Benson's September 23, 2017, statements.

Search Warrant For Benson's Cell Phone Data

Benson's assignment that the district court erred in failing to suppress his cell phone data centers on his argument that the search warrant granting access to this data was invalidly deficient due to misstatements of the warrant and the application's drafting and approval date.

The Fourth Amendment to the U.S. Constitution provides that warrants may not be granted "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Nebraska Constitution, under article I, § 7, similarly provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

[17-20] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant,

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[24] *Burries, supra* note 17, 297 Neb. at 389, 900 N.W.2d at 504.

[25] *Id.*

an appellate court applies a totality of the circumstances test.[26] The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[27] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[28] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[29]

Benson argues that the application and search warrant fail to provide an "accurate timeline for the events" and make no "chronological sense" due to their use of an incorrect drafting and approval date.[30] As such, Benson claims, they fail to provide sufficient probable cause.

We disagree with Benson's description that the application and warrant fail to provide an accurate timeline of the events to establish probable cause. The incorrect dates used in the application and warrant were limited to descriptions of when the application and warrant were drafted and approved. These dates are not part of the factual basis the State alleged established probable cause. Instead, the narrative portion of the application, where Davis provided a factual basis for the search, lists correct dates in the timeline of the offense and investigation. Misstating the date the application and warrant were drafted and approved is irrelevant to establishing the timeline of events to determine probable cause.

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[26] *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Brief for appellant at 37.

[21,22] A search warrant and application's indicating incorrect dates of their drafting and signing is not per se fatal to the validity of a warrant.[31] Misstatements within an application and warrant may still produce a valid warrant if the rest of the warrant and attached application cures any defect resulting from the scrivener's error when read together.[32] For instance, in the context of warrants and applications misstating addresses of a place to be searched, we have held that even if the numerical address is wrong, a warrant may still be valid if the description is adequate to direct the officer to the correct place for the search.[33]

In this case, the totality of the warrant and its attachments establishes that the date misidentified as the date of drafting and approval was a typographical error and sufficiently identifies September 20, 2017, as the correct date of drafting and approval. As noted above, the narrative section of the warrant correctly lists dates in the timeline of the offense and investigation. This section describes events occurring subsequently to September 18, including reference to the execution of a different search warrant on September 20. Additionally, an order to seal was attached to the search warrant which was signed by the court at the time of the search warrant's approval and was dated September 20, 2017.

We conclude the warrant and application's identification of September 18, 2017, as the drafting and approval date was a scrivener's error corrected when the warrant and its attachments are read together. Moreover, the misuse of these dates does not affect the description of the timeline of the offense and investigation which the State offered as the basis for probable cause. As such, the error did not invalidate the warrant and the district court did not err in declining to suppress Benson's cell phone data.

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[31] See *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019).

[32] *Id*.

[33] See, *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991); *State v. Walters*, 230 Neb. 539, 432 N.W.2d 528 (1988).

Motion to Sever

Benson assigns the district court erred in failing to sever the tampering charges. Benson argues the charges are not sufficiently similar to allow for joinder in that the tampering counts have no elemental similarities, were not a common scheme or plan, and concern acts which occurred nearly 17 months after Womack's killing, which precipitated the other counts. Benson asserts he was prejudiced by this joinder because the State offered evidence to establish the tampering clauses that improperly bolstered Jefferson's and Guitron's testimony and "mudd[ied] the evidentiary waters" for the jury.[34]

[23-25] There is no constitutional right to a separate trial.[35] Instead, the joinder or separation of charges for trial is governed by § 29-2002, which states, in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
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> . . . .
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> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint . . . the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Summarized, whether offenses were properly joined involves a two-stage analysis: (1) whether the offenses were sufficiently related to be joinable and (2) whether the joinder was

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[34] Brief for appellant at 41.

[35] See *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

prejudicial to the defendant.[36] There is a strong presumption against severing properly joined counts.[37]

[26,27] While § 29-2002 presents two separate questions, there is no error under either subsection (1) or (3) if joinder was not prejudicial, and a denial of a motion to sever will be reversed only if clear prejudice and an abuse of discretion are shown.[38] An appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.[39]

A defendant appealing the denial of a motion to sever has the burden to show compelling, specific, and actual prejudice.[40] Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal, a chance that the defendant would have had in a severed trial.[41]

In the instant case, we need not consider whether the tampering counts were sufficiently related to be properly joined under § 29-2002(1), because Benson has failed to show prejudice from the joinder. Essentially, Benson argues that the evidence of the tampering counts, which indicated he did not want Jefferson or Guitron to provide the State damaging testimony, influenced the jury's verdicts because it made him look guilty and added unwarranted emphasis to Jefferson's and Guitron's testimony.

[28,29] Prejudice from joinder cannot be shown if evidence of one charge would have been admissible in a separate trial of another charge.[42] Benson does not explain why evidence

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[36] See *id*. See, also, *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018).

[37] *Cotton, supra* note 36. See, also, *Briggs, supra* note 35.

[38] See *Briggs, supra* note 35.

[39] See *id*.

[40] See *id*.

[41] *Id*.

[42] *State v. Golyar*, 301 Neb. 488, 919 N.W.2d 133 (2018). See, also, *Cotton, supra* note 36.

of Benson's telephone calls with Jefferson and Guitron would be inadmissible in a separate trial on the other three charges. Evidence of a defendant's attempted intimidation or intimidation of a State's witness is relevant evidence of a defendant's "'conscious guilt'" that a crime has been committed.[43] Accordingly, Benson's calls with Jefferson and Guitron could be admissible as relevant to Benson's consciousness of guilt in a separate trial.

[30] Additionally, joined charges do not usually result in prejudice if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations.[44] The jury in this case would have been able to easily separate the evidence of the charges during deliberations in that the evidence that Benson tampered with witnesses was distinct. While the telephone calls may have been relevant to the other charges and a consciousness of guilt, it was clear they were offered to show Benson was attempting to get Jefferson and Guitron not to participate in his prosecution.

Because Benson failed to establish prejudice from the joinder of the charges, the district court did not abuse its discretion in overruling Benson's motion to sever.

Sufficiency of Evidence

On his sufficiency of the evidence assignment of error, Benson first argues that the State presented insufficient evidence on the second degree murder, use of a deadly weapon, and possession of a deadly weapon charges. Benson argues the State failed to meet its burden to show that he was in the pickup at the time of the shooting and that he fired the gun.

As Benson acknowledges, the State did present evidence as to these elements. Evidence was received that Benson owned the pickup that was identified by witnesses and video as being the pickup from which the shots were fired that hit Womack and resulted in his death. Gunshot residue was

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[43] *State v. Thorpe*, 280 Neb. 11, 24, 783 N.W.2d 749, 761 (2010).

[44] *Briggs, supra* note 35.

discovered inside the pickup along with a casing that matched the same weapon as the casing found at the scene. Benson's cell phone location put him in the area around the time of the shooting, and the Hy-Vee video showed Benson driving the truck 3 hours before the shooting. Gunshot residue was found on clothes matching the clothes Benson was wearing in the Hy-Vee video.

Witnesses testified as to statements Benson made indicating his participation. Guitron testified that Benson texted her around the time of the incident that he had "just got in2 sum shitt" but could not text anything about it. Figueroa testified that she talked with Benson about the shooting and that he said, "'Well, yeah, I mean, if somebody like that came in my property, then, yeah, I'd shoot him, too.'" Finally, Stockdale testified that in talking with Benson about his case, Benson said that he "'got rid of the gun after [he] smoked the dude'" and that he was worried about the forensics on the hooded sweatshirt and whether investigators would find gunpowder on it.

The court also received evidence of Benson's consciousness of guilt in his lying to law enforcement about the pickup's being stolen the night before the homicide and contacting witnesses to encourage their noncooperation with the prosecution of his case.

Benson seeks to overcome this evidence by contesting the credibility of Stockdale and Figueroa and the weight of the evidence of gunshot residue and the cell phone location. However, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh evidence when determining the sufficiency of the evidence.[45] The jury, as the finder of fact, heard Stockdale's and Figueroa's testimony, weighed the evidence of the gunshot residue and cell phone location evidence, and determined Benson was in the pickup and was the shooter. We conclude, viewing the evidence in the

[45] See *Mendez-Osorio, supra* note 4; *Jedlicka, supra* note 4.

light most favorable to the State, that there was sufficient evidence to support the jury's finding of these essential elements beyond a reasonable doubt.

As to the two counts of tampering with a witness, Benson claims the State failed to meet its burden to prove he intended to tamper with or obstruct Jefferson and Guitron from testifying or cooperating with law enforcement. Benson argues that the State did not offer any evidence to directly establish intent and that it was "just as plausible" that he wanted the two women, with whom he was in romantic relationships, "not [to] cross paths as they likely would if both participated in the investigation."[46]

When viewed in the light most favorable to the State, there was again sufficient evidence for the jury to find the essential elements of the tampering charges. Benson was charged under Neb. Rev. Stat. § 28-919(1) (Reissue 2016), which provides, in relevant part:

> (1) A person commits the offense of tampering with a witness . . . if, believing that an official proceeding or investigation of a criminal . . . matter is pending . . . , he or she attempts to induce or otherwise cause a witness or informant to:
>
> (a) Testify or inform falsely;
>
> (b) Withhold any testimony, information, document, or thing;
>
> (c) Elude legal process summoning him or her to testify or supply evidence; or
>
> (d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

The State's evidence of Jefferson's and Guitron's telephone calls with Benson provided sufficient basis for finding the required elements that Benson knew of his pending criminal case and that he acted to induce or cause Jefferson and Guitron

[46] Brief for appellant at 48.

to refuse to comply with several subpoenas in the prosecution of that case. The recordings of these calls include Benson's statement to Jefferson regarding her subpoena from the county attorney's office, "'You are not going to go down there.'" Also included is Benson's statement to Guitron, "'You don't have to come and you don't have to testify against me.'" Even if Benson were correct that the only reason for his telephone calls was to prevent Jefferson and Guitron from crossing paths, there was still evidence that he attempted to induce them not to testify or cooperate with law enforcement. Under § 28-919, a defendant's reasons for attempting to induce a witness to commit any of the acts enumerated in it are not relevant.

We find that the State did present sufficient evidence for the jury to find the existence of the essential elements under § 28-919(1).

CONCLUSION

We conclude that Benson was not under custody for *Miranda* purposes in his September 20, 2017, interview with Negrete, that Benson knowingly and voluntarily waived his rights and agreed to speak with Davis in his September 23 interview, and that the search warrant for Benson's cell phone data was not invalidated by the mistaken use of incorrect dates on the warrant and application. Further, Benson did not establish adequate prejudice from the joinder of his charges and the district court did not abuse its discretion in overruling his motion to sever. Finally, there was sufficient evidence to support the verdicts. Benson's convictions are affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Melvin Anderson, appellant.

943 N.W.2d 690

Filed May 29, 2020. No. S-19-1038.

1. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
2. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
3. **Pleas: Waiver.** Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge.
4. **Effectiveness of Counsel: Pleas.** When a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
6. **Effectiveness of Counsel: Appeal and Error.** In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide deficient performance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
7. **Effectiveness of Counsel: Records: Appeal and Error.** The record on direct appeal is sufficient to review a claim of ineffective assistance of trial counsel if it establishes either that trial counsel's performance was

not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.

8. **Effectiveness of Counsel: Proof.** To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
9. ____: ____. To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
11. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading no contest.
12. **Preliminary Hearings: Probable Cause.** The purpose of a preliminary hearing is to ascertain whether or not a crime has been committed and whether or not there is probable cause to believe the accused committed it; it is not a trial of a person accused to determine his or her guilt or innocence, but is a procedural safeguard to prevent a person from being detained in custody without probable cause existing that the crime charged was committed by that person.
13. **Preliminary Hearings: Plea in Abatement.** A plea in abatement is used to challenge the sufficiency of the evidence at a preliminary hearing.
14. **Motions to Dismiss: Plea in Abatement.** Generally, a motion in the nature to dismiss is permitted in criminal cases in various forms, including a motion to quash and a plea in abatement.
15. **Plea in Abatement: Evidence: Probable Cause: Verdicts.** In order to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it; the evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt.
16. **Effectiveness of Counsel.** As a matter of law, counsel is not ineffective for failing to make a meritless objection.
17. **Preliminary Hearings: Probable Cause: Witnesses.** A full adversarial hearing in which witnesses are called is not required for a determination of probable cause in a preliminary hearing under Neb. Rev. Stat. § 29-1607 (Reissue 2016).

18. **Constitutional Law: Preliminary Hearings: Probable Cause.** In an informal preliminary hearing, it does not violate the Confrontation Clause to rely on out-of-court statements to determine probable cause for purposes of continuing a defendant's pretrial detention.
19. **Criminal Law: Depositions: Pretrial Procedure.** There is no obligation for the State to produce the victim or assist in locating the victim for purposes of a pretrial deposition by defense counsel.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

In an appeal from a plea-based conviction, the defendant, through new counsel, asserts that his plea was the result of ineffective assistance of trial counsel. The majority of the allegations of deficient conduct revolve around the victim's failure to appear at the preliminary hearing and law enforcement's inability to serve her with subpoenas for her appearance at the preliminary hearing and subsequent deposition. The defendant also argues that trial counsel was ineffective by failing to move to suppress his inculpatory statement to law enforcement in relation to the charge of third degree domestic assault to which he pleaded.

BACKGROUND

Melvin Anderson was originally charged in county court with strangulation, in violation of Neb. Rev. Stat. § 28-310.01(2) (Reissue 2016), in relation to events occurring on March 14,

2019. Following a hearing on March 15, the court issued an order of probable cause and further detention.

The probable cause affidavit described that law enforcement had responded to a call of domestic assault on March 14, 2019. Law enforcement observed red marks on both sides of the victim's neck consistent with being choked. The victim described that while she was at her and Anderson's apartment, Anderson grabbed her around the neck with one hand and held her against the wall for several minutes while threatening to kill her. She said there were moments when she could not breathe. The victim's cousin witnessed the assault and was able to eventually assist the victim and accompany her out of the apartment. Law enforcement later contacted Anderson, who admitted only to grabbing the victim by her coat so that he could get his wallet and telephone from her. Anderson described that he grabbed the front of the victim's coat near her neck and that it was possible he could have grabbed her neck with the coat.

On April 25, 2019, trial counsel filed a praecipe for a subpoena to be served upon the victim, commanding her appearance at the preliminary hearing scheduled for May 22. The journal entry for the preliminary hearing on May 22 reflects that the court found probable cause and that the case was bound over to the district court for trial. It does not describe the court's reasoning in finding probable cause. The only witness at the hearing was a law enforcement officer. The journal entry does not reflect that the victim appeared at the hearing.

On June 26, 2019, an amended information was filed in district court charging Anderson with the original count of strangulation in violation of § 28-310.01(2) and new counts of tampering with a witness or informant in violation of Neb. Rev. Stat. § 28-919 (Reissue 2016) and violating a protection order in violation of Neb. Rev. Stat § 42-924(4) (Cum. Supp. 2018). The new counts related to events occurring between June 1 and 12. Anderson waived appearance at the arraignment of the

amended information. There is no record that a preliminary hearing was held on the amended charges.

A reciprocal discovery order was entered on June 25, 2019, with depositions to be taken by Anderson within 30 days. A praecipe for a subpoena was filed on June 25, commanding the victim to appear as a witness before the district court on July 16. Records show that the sheriff attempted to serve the subpoena on July 1, 9, and 12. On July 16, at the request of the county attorney, the subpoena was returned unserved.

Another subpoena was issued on July 16, 2019, commanding the victim to appear as a witness before the district court on July 22. Records show that the sheriff attempted to serve the subpoena on July 18, 19, and 22, and it was returned as not served on July 23.

On August 23, 2019, Anderson entered pleas of no contest to the State's second amended information, which then charged Anderson with one count of third degree domestic assault in violation of Neb. Rev. Stat. § 28-323(1) and (4) (Reissue 2016), one count of attempted tampering with a witness or informant in violation of Neb. Rev. Stat. §§ 28-201(4)(e) and 28-919 (Reissue 2016), and one count of violating a protection order under § 42-924(4).

The factual basis provided by the State asserted that on March 14, 2019, law enforcement responded to a report of domestic assault. A protection order had been granted for the victim against Anderson earlier that day, but had not yet been served. Anderson went to the victim's apartment, there was an argument, and Anderson grabbed the victim by the neck, applying so much pressure to her neck that there were moments she was unable to breathe and telling her that he would kill her. The victim's cousin was a witness to the assault and was able to assist the victim in leaving the apartment. Anderson later indicated to law enforcement that he had an argument with the victim and admitted to grabbing her coat, but denied strangling her.

While Anderson was in custody for this offense, the victim received a letter addressed to her from an inmate at the jail who identified himself as "Lucky Luciano." The victim did not open the letter. She knew that "Lucky" was Anderson's nickname. Law enforcement opened the letter, which informed the victim she should tell the courts that there was no fight and no choking, that she feels protected and safe around "Lucky," and that it was a mistake putting him in jail. The letter directed the victim to report that she was off her medication and did not know what she was doing when she made the report. Enclosed with the letter was a piece of a dreadlock that the victim believed was from Anderson. There was a protection order in place when this letter was delivered to the victim.

After an extensive colloquy with Anderson, the court accepted Anderson's pleas as voluntarily, freely, knowingly, and intelligently made, and it found that there was a factual basis for the pleas. Despite trial counsel's request to sentence Anderson immediately, the court ordered a presentence investigation be completed. The State noted that it was trying to reach the victim in order to obtain a victim impact statement, but that its last contact with her had been in May 2019.

Once the presentence investigation was completed, the court proceeded to sentencing. The State noted at the sentencing hearing that the probation office was able to obtain a victim impact statement, which was somewhat surprising because the State had been having difficulty locating her. The State noted that Anderson "had the benefit of a very generous plea agreement from the State simply because we were having difficulty finding [the victim] after we tried to subpoena her several times for a deposition and trying to locate her by mail and by phone."

The court sentenced Anderson to imprisonment for 180 days on count 1, 360 days on count 2, and 360 days on count 3. The sentences on counts 2 and 3 were ordered to be served concurrently to each other and consecutively to count 1.

Anderson appeals, seeking to set aside his pleas and the resulting convictions and sentences, as the result of ineffective assistance of trial counsel. He obtained new counsel for his appeal.

ASSIGNMENTS OF ERROR

Anderson assigns that trial counsel provided ineffective assistance by (1) failing to move to continue the plea in abatement, when the subpoena issued by Anderson was not served on the alleged victim; (2) failing to file a plea in abatement, because there was insufficient evidence to support a probable cause finding that Anderson strangled the alleged victim; (3) failing to move the trial court to require the State to produce the alleged victim for deposition and exclude the alleged victim as a witness; (4) failing to move to suppress Anderson's statement; and (5) counseling Anderson to enter a plea. We disregard Anderson's broad assignment of error that trial counsel provided ineffective assistance of counsel to Anderson in violation of his Sixth Amendment rights, because assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity.[1]

STANDARD OF REVIEW

[1] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[2]

[2] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[3]

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[1] *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

[2] *Id.*

[3] *Id.*

ANALYSIS

[3,4] Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge.[4] Thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.[5] For this direct appeal, Anderson has obtained counsel different from trial counsel, and he asserts that his pleas were the result of ineffective assistance of trial counsel. He does not challenge whether his pleas were otherwise understandingly and voluntarily made.

[5-7] To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[6] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide deficient performance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[7] The record on direct appeal is sufficient to review a claim of ineffective assistance of trial counsel if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.[8]

[8-11] To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal

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[4] *State v. Privett*, 303 Neb. 404, 929 N.W.2d 505 (2019).

[5] *Id.*

[6] See, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018).

[7] See *State v. Lee*, 304 Neb. 252, 934 N.W.2d 145 (2019).

[8] *State v. Iddings*, 304 Neb. 759, 936 N.W.2d 747 (2020).

that of a lawyer with ordinary training and skill in criminal law.[9] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[10] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[11] When a conviction is based upon a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading no contest.[12]

Anderson asserts that but for trial counsel's failure to pursue various pretrial motions pertaining to the victim's lack of appearance at the preliminary hearing and the inability to serve a subpoena upon her, the charges against him would have been dismissed; therefore, he would not have pleaded no contest. He also asserts that counsel was deficient by failing to move in limine to suppress his statements to law enforcement. Anderson's assignment of error that counsel was ineffective in advising him to plead no contest is intertwined with these assertions because, he argues, it was deficient conduct for trial counsel to advise him to plead before pursuing the pretrial motions.

Preliminary Hearing

Anderson first argues that but for trial counsel's ineffective assistance in failing to file a plea in abatement or a motion to continue at the preliminary hearing, the charges against him would have been dismissed before he decided to plead no contest. The undisputed facts contained within the record are sufficient to conclusively determine that trial counsel was

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[9] *Mrza, supra* note 1.

[10] *Id.*

[11] *Id.*

[12] See *Privett, supra* note 4.

not deficient by failing to file a plea in abatement. Further, we are able to conclusively determine upon the record that Anderson will be unable to demonstrate that but for trial counsel's failure to file another motion to continue the preliminary hearing, the charges would have been dismissed—the premise upon which he asserts he would have declined to enter into a plea bargain agreement with the State. Accordingly, the record conclusively demonstrates that the allegedly deficient act of failing to move to continue the preliminary hearing did not prejudice Anderson.

[12] The purpose of a preliminary hearing is to ascertain whether or not a crime has been committed and whether or not there is probable cause to believe the accused committed it.[13] It is not a trial of a person accused to determine his or her guilt or innocence, but is a procedural safeguard to prevent a person from being detained in custody without probable cause existing that the crime charged was committed by that person.[14]

Anderson asserts that the court stated during the preliminary hearing that it was binding the matter over because Anderson had admitted he strangled the victim, and he argues that because the probable cause affidavit did not contain such an admission, the case would have been dismissed had counsel filed a plea in abatement on the grounds of lack of probable cause. With this reasoning, Anderson concludes that trial counsel was ineffective for failing to file a plea in abatement.

[13-15] A plea in abatement is used to challenge the sufficiency of the evidence at a preliminary hearing.[15] It has been observed that, generally, a motion in the nature to dismiss is permitted in criminal cases in various forms, including a motion to quash and a plea in abatement.[16] In order to resist a challenge by a plea in abatement, the evidence received by

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[13] *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

[14] *Id.*

[15] *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

[16] See *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017).

the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it.[17] The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt.[18]

Anderson acknowledges that the county court's alleged statement as to its reasoning in concluding there was probable cause is not in the record, because the preliminary hearing was not preserved. He does not assert that trial counsel was ineffective in failing to insist that the preliminary hearing be part of the record. In any event, whatever was said by the county court at the preliminary hearing, the undisputed facts of the record affirmatively demonstrate there was probable cause to show that a crime was committed and that Anderson committed it.

At the time of the preliminary hearing, Anderson had not yet sent the letter from "Lucky," and his allegations of ineffective assistance of trial counsel at the preliminary hearing appear limited to count 1, strangulation, which was reduced to third degree domestic assault pursuant to the plea bargain agreement.

The affidavit of probable cause described that law enforcement had observed red marks on both sides of the victim's neck consistent with being choked and that the victim reported Anderson had grabbed her around the neck with one hand and held her against the wall for several minutes while threatening to kill her. She told law enforcement there were moments when she could not breathe.

[16] The affidavit provided sufficient evidence to support the court's finding of probable cause. A plea in abatement, had it been made, would have lacked merit. And, as a matter of law, counsel is not ineffective for failing to make a meritless objection.[19]

Anderson also asserts that trial counsel was ineffective for failing to move to continue the preliminary hearing, because

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[17] *Id.*

[18] See *id.*

[19] See *State v. Schwaderer*, 296 Neb. 932, 898 N.W.2d 318 (2017).

the victim did not appear at the hearing despite the issuance of a subpoena. We observe that trial counsel moved to continue the preliminary hearing, albeit not before issuing a summons for the victim's appearance. Anderson articulates his argument as follows:

> Rather than moving to continue the hearing in order to obtain [the victim's] presence and testimony, Anderson's counsel allowed the matter to proceed through the preliminary hearing denying Anderson the right to confront [the victim] at the first opportunity which could have produced the first opportunity to have the case dismissed by the Court.[20]

In his summary of the arguments, Anderson also argues that trial counsel's failure to move to continue the preliminary hearing "theoretically waived Anderson's ability to use the Court's power to enforce the subpoena regarding [the victim's] refusal to appear if she had been served."[21]

[17,18] Anderson's reliance on the right to confrontation under these facts is misplaced. A full adversarial hearing in which witnesses are called is not required for a determination of probable cause in a preliminary hearing under Neb. Rev. Stat. § 29-1607 (Reissue 2016).[22] In an informal preliminary hearing, it does not violate the Confrontation Clause to rely on out-of-court statements to determine probable cause for purposes of continuing a defendant's pretrial detention.[23]

Nor is it clear how trial counsel's inability to cross-examine the victim at the preliminary hearing could have resulted in the dismissal of the strangulation charge. Even if trial counsel could have obtained another continuance and the victim would

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[20] Brief for appellant at 20.

[21] *Id.* at 15.

[22] See, Neb. Rev. Stat. § 27-1101 (Reissue 2016); *State v. Wilkinson*, 219 Neb. 685, 365 N.W.2d 478 (1985); Daniel A. Morris, Nebraska Trials § 4:11 (2019).

[23] See *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

have eventually appeared and been cross-examined at the preliminary hearing, Anderson does not argue that she would have recanted her report to law enforcement. Nor would it follow that the court would have dismissed the case if she had. There was a witness to the strangulation, and law enforcement had observed the victim's injuries.

As already stated, with or without the victim's testimony, there was probable cause to conclude that a crime was committed. The record, accordingly, conclusively demonstrates that Anderson would be unable, in an evidentiary hearing, to prove the strangulation charge would have been dismissed if trial counsel had moved to continue the preliminary hearing. The undisputed facts in the record demonstrate that Anderson was not prejudiced by an alleged failure to obtain dismissal because of trial counsel's failure to move to continue the preliminary hearing.

As for any argument that the failure to move to continue the preliminary hearing prejudiced Anderson because he thereby waived his ability to move for an order compelling the State to produce the victim for a pretrial deposition, as explained in the next section, a motion for an order compelling the State to produce the victim would have lacked merit. Trial counsel's alleged waiver of a nonexistent right could not have prejudiced Anderson.

Alleged Unavailability of Victim

Anderson asserts trial counsel was ineffective by failing to move for a court order that the State produce the victim or otherwise assist in making the victim available for the deposition ordered by the court pursuant to Neb. Rev. Stat. § 29-1917 (Reissue 2016) and for which a subpoena under Neb. Rev. Stat. § 25-1223 (Cum. Supp. 2018) had been issued at trial counsel's request. In conjunction with this allegation, Anderson asserts that his trial counsel was ineffective by failing to move to suppress the victim's testimony.

According to Anderson, if trial counsel had made a request that the State produce the victim or assist in locating her and the request had been granted, and if the State had thereafter acted in bad faith by failing to comply with the order, then trial counsel could have requested that the victim's testimony be excluded as a sanction against the State. Anderson asserts that if this had been done, the court would have granted such a motion and he would have insisted on going to trial. Again, these allegations appear limited to the charge of strangulation that was reduced to third degree domestic assault under the plea bargain agreement.

[19] The long chain of hypothetical variables in this allegation of ineffective assistance of counsel is not amenable to evidentiary proof. Most notably, it fails at its first premise. As Anderson admits, there is no obligation for the State to produce the victim or assist in locating the victim for purposes of a pretrial deposition by defense counsel. There would have been no merit to a motion for a court order compelling the State to produce the victim or otherwise assist in making the victim available for the court-ordered deposition. As a matter of law, counsel is not ineffective for failing to make a meritless objection.[24] Because there is no merit to Anderson's assertion that trial counsel was ineffective for failing to move to compel the State in this manner, it follows that there is no merit to his assertion that trial counsel was ineffective for failing to move to suppress the victim's testimony, under the hypothetical that had such motion been made and granted, the State would have acted in bad faith.

We also note that while there generally are remedies for the State's fault or bad faith, Anderson does not assert that the State was concealing access to exculpatory evidence in any sort of a violation of *Brady v. Maryland*.[25] He does not assert that the victim's testimony would be exculpatory. Nor does he

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[24] See *State v. Schwaderer, supra* note 19.

[25] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

assert that the State was concealing the victim's whereabouts. Indeed, the record indicates that the State had been unable to contact her despite its attempts to do so. The allegation that the State somehow would have acted in bad faith if there had been an order to supply the victim for the deposition is entirely too speculative to be susceptible to proof at an evidentiary hearing. Prejudice for purposes of ineffective assistance of counsel cannot be founded on hypothetical bad acts that did not occur but allegedly would have occurred had counsel not acted deficiently.

We are able to conclusively determine on the record that counsel was not ineffective for failing to move the court to compel the State to produce the victim or assist in locating her so that she could be deposed by trial counsel.

Anderson's Statement to Law Enforcement

Lastly, Anderson argues that trial counsel was ineffective for failing to move to suppress his statement to law enforcement as involuntarily made. Anderson asserts that he was heavily medicated and therefore unable to understandably waive his *Miranda* rights when he made the statement. Anderson does not assert that any statements are at issue other than those described in the affidavit in support of probable cause. According to that report, Anderson specifically denied that he had strangled the victim. Anderson admitted only that he "did grab the victim by her coat" so that he could get his wallet and telephone from her.

Anderson describes this as a "confession."[26] It clearly was not a confession to the original charge of strangulation, but perhaps could be described as such in relation to the charge of third degree domestic assault to which he pleaded. It cannot be determined on the appellate record whether this "confession" was voluntarily made, and thus, we cannot determine on

[26] Brief for appellant at 20.

this record whether a motion to suppress the statement would have had any merit. Neither does the record affirmatively disprove Anderson's assertion that if the statement would have been suppressed, he would not have pleaded no contest to the charge of third degree domestic assault. Therefore, we do not resolve on direct appeal the merits of this allegation of ineffective assistance.

CONCLUSION

For the foregoing reasons, we affirm the judgment below.

Affirmed.

HEADNOTES
Contained in this Volume

Actions 1, 185
Administrative Law 249, 581, 635, 780
Affidavits 809, 868, 894, 949
Agents 230
Aggravating and Mitigating Circumstances 527
Appeal and Error 1, 23, 36, 52, 66, 96, 111, 124, 139, 154, 165, 176, 185, 222, 230, 249, 279, 289, 321, 334, 351, 363, 376, 409, 415, 428, 441, 451, 493, 513, 527, 566, 581, 609, 615, 635, 648, 669, 680, 693, 708, 726, 747, 762, 780, 809, 835, 843, 860, 868, 879, 894, 912, 932, 949, 978
Arbitration and Award 185
Arrests 66, 581
Assignments 1
Attachments 669
Attorney and Client 23, 527, 566, 894
Attorney Fees 185, 780, 868

Blood, Breath, and Urine Tests 66, 581, 680
Breach of Contract 230
Brokers 230

Child Custody 615
Child Support 615
Complaints 843
Confessions 376
Conflict of Interest 566
Constitutional Law 66, 96, 124, 165, 249, 363, 376, 451, 457, 527, 581, 680, 693, 726, 809, 912, 932, 949, 978
Contracts 1, 23, 185, 230, 693, 860, 879
Controlled Substances 726
Convictions 222, 289, 334, 376, 415, 581, 762, 809, 949, 978
Corporations 124
Courts 96, 139, 165, 176, 321, 334, 493, 527, 581, 669, 726, 762
Criminal Law 52, 66, 96, 139, 165, 222, 289, 334, 351, 376, 409, 513, 527, 581, 762, 809, 843, 949, 978

Damages 139, 230, 747, 894
Death Penalty 527
Debtors and Creditors 1
Deeds 457
Depositions 978
Directed Verdict 376, 762
Disciplinary Proceedings 79, 396, 566
Discrimination 96

Dismissal and Nonsuit 96, 457
Divorce 176
DNA Testing 36
Double Jeopardy 52, 249, 409
Drunk Driving 66, 581, 843
Due Process 124, 279, 693, 912
Duress 680

Effectiveness of Counsel 249, 289, 376, 726, 835, 932, 978
Equity 351, 708, 879
Estoppel 1, 441, 747
Evidence 1, 52, 66, 79, 96, 139, 176, 222, 249, 289, 334, 376, 409, 415, 441, 527, 581, 615, 635, 693, 708, 762, 809, 843, 860, 879, 912, 949, 978
Expert Witnesses 879

Federal Acts 176, 185
Final Orders 1, 165, 409, 726
Foreclosure 457

Garnishment 669
Guardians Ad Litem 428
Guardians and Conservators 428

Hearsay 581
Highways 334, 351
Homicide 363, 441, 527, 912

Identification Procedures 912
Immunity 111
Impeachment 376
Indictments and Informations 843
Injunction 351
Insurance 230
Intent 1, 36, 52, 321, 334, 351, 513, 566, 581, 693, 762, 780, 868
Investigative Stops 66, 581, 726, 762

Joinder 949
Judges 176, 185, 289, 581, 615, 762
Judgments 1, 52, 96, 124, 154, 165, 176, 185, 289, 321, 334, 409, 415, 428, 441, 451, 493, 527, 581, 609, 635, 648, 669, 693, 762, 780, 809, 868, 932, 949
Judicial Notice 1
Juries 52, 409, 527, 762, 809, 912, 949
Jurisdiction 1, 23, 124, 154, 165, 185, 409, 493, 609, 635, 693, 708
Jury Instructions 249, 415, 912
Juvenile Courts 279

Legislature 36, 52, 165, 185, 222, 334, 351, 513, 581, 693, 780, 868
Lesser-Included Offenses 415
Liability 230
Liens 457
Limitations of Actions 747, 894

Malpractice 747, 894
Mandamus 648, 780
Mental Competency 726
Minors 176
Miranda Rights 376, 949
Modification of Decree 615
Motions for Mistrial 376
Motions for New Trial 36, 66
Motions to Dismiss 36, 96, 111, 376, 693, 747, 762, 978
Motions to Suppress 66, 376, 581, 680, 726, 809, 912, 949
Motions to Vacate 36, 185
Motor Vehicles 441, 581, 726, 762
Municipal Corporations 351

Negligence 230
Notice 185, 457
Nuisances 351

Ordinances 321, 351

Parental Rights 279
Parties 1, 527
Partition 708
Photographs 363
Plea Bargains 139
Plea in Abatement 52, 978
Pleadings 1, 52, 111, 185, 409, 693, 747, 762, 780, 949
Pleas 36, 52, 409, 726, 978
Police Officers and Sheriffs 66, 581, 680, 726, 762, 809, 912, 949
Postconviction 289, 451, 726, 932
Preliminary Hearings 978
Presentence Reports 139, 527
Presumptions 79, 289, 351, 457, 635, 708, 949
Pretrial Procedure 249, 581, 762, 809, 978
Prior Convictions 441
Probable Cause 66, 581, 726, 809, 949, 978
Probation and Parole 52, 513, 527
Proof 1, 66, 96, 185, 249, 289, 415, 457, 527, 566, 581, 615, 648, 669, 726, 762, 780, 843, 894, 912, 932, 978
Prosecuting Attorneys 52, 96, 376
Proximate Cause 230, 912
Public Health and Welfare 351
Public Officers and Employees 648
Public Policy 185, 780, 868
Public Service Commission 635

Quantum Meruit 23

Rebuttal Evidence 527
Records 1, 139, 249, 289, 513, 581, 648, 726, 762, 780, 978
Recusal 289

Restitution 139
Right to Counsel 165, 249, 376, 527
Rules of Evidence 139, 249, 289, 363, 527, 581
Rules of the Supreme Court 249, 396, 428, 566, 615, 747, 868

Search and Seizure 66, 581, 680, 726, 809, 912, 949
Search Warrants 680, 809, 949
Self-Incrimination 949
Sentences 36, 139, 165, 289, 376, 409, 415, 441, 513, 527, 581, 835
Sexual Assault 289
Social Security 669
Standing 1, 23
States 124, 693
Statutes 36, 52, 111, 124, 154, 176, 222, 249, 289, 321, 334, 351, 376, 457, 513, 527, 581, 609, 762, 780, 843, 868
Summary Judgment 23, 230, 860, 894

Tax Sale 457
Testimony 249, 428, 879, 912
Theft 249
Time 176, 457, 513, 609, 615, 635, 693, 726, 780, 949
Tort Claims Act 111
Trespass 351
Trial 1, 249, 289, 363, 376, 527, 581, 726, 762, 809, 843, 879, 912, 949

Unjust Enrichment 23

Verdicts 669, 809, 912, 978

Waiver 1, 111, 124, 376, 441, 527, 581, 747, 762, 949, 978
Warrantless Searches 680, 726
Witnesses 249, 363, 376, 581, 879, 912, 949, 978
Words and Phrases 1, 23, 52, 66, 124, 165, 176, 185, 249, 289, 334, 351, 376, 441, 457, 493, 513, 527, 566, 581, 609, 615, 635, 648, 693, 726, 747, 780, 809, 860, 894, 932, 949, 978
Workers' Compensation 868

Zoning 321