THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 30, 2015 and MARCH 10, 2016

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXCII

PEGGY POLACEK
OFFICIAL REPORTER

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

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David K. Arterburn	Papillion
Max Kelch	Papillion
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Steven D. Burns	Lincoln
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Jodi Nelson	Lincoln
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Lori A. Maret	Lincoln
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Counties in District: Douglas

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J. Michael Coffey	Omaha
W. Mark Ashford	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

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

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Robert R. Steinke	Columbus
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James C. Stecker	Seward
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JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

Judges in District	*City*
John E. Samson	Blair
Geoffrey C. Hall	Fremont
Paul J. Vaughan	Dakota City

Seventh District

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

Judges in District	*City*
James G. Kube	Madison
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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*
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Counties in District: Buffalo and Hall

Judges in District	*City*
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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*
Donald E. Rowlands	North Platte
James E. Doyle IV	Lexington
David Urbom	McCook
Richard A. Birch	North Platte

Twelfth District

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

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Randall L. Lippstreu	Gering
Leo Dobrovolny	Gering
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Travis P. O'Gorman	Alliance

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
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Linda A. Bauer	Fairbury

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John F. Steinheider	Nebraska City
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Stefanie A. Martinez	Papillion

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Laurie Yardley	Lincoln
Timothy C. Phillips	Lincoln
Thomas W. Fox	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
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Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Susan Bazis	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha

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

Judges in District	*City*
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Patrick R. McDermott	David City
Linda S. Caster Senff	Aurora
C. Jo Petersen	Seward
Stephen R.W. Twiss	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth District

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

Judges in District	*City*
C. Matthew Samuelson	Blair
Kurt Rager	Dakota City
Douglas L. Luebe	Hartington
Kenneth Vampola	Fremont

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

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Judges in District	*City*
Alan L. Brodbeck	O'Neill
James J. Orr	Valentine
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Counties in District: Buffalo and Hall

Judges in District	*City*
Philip M. Martin, Jr.	Grand Island
Gerald R. Jorgensen, Jr.	Kearney
Arthur S. Wetzel	Grand Island
John P. Rademacher	Kearney

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Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

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Kent D. Turnbull	North Platte
Edward D. Steenburg	Ogallala
Anne Paine	McCook
Michael E. Piccolo	North Platte
Jeffrey M. Wightman	Lexington

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 Roland	Sidney
Russell W. Harford	Chadron
Kristen D. Mickey	Gering
Paul G. Wess	Alliance

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Elizabeth Crnkovich	Omaha
Wadie Thomas	Omaha
Christopher Kelly	Omaha
Vernon Daniels	Omaha

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Judges	*City*
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Linda S. Porter	Lincoln
Roger J. Heideman	Lincoln
Reggie L. Ryder	Lincoln

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Judges	*City*
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Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

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Laureen K. Van Norman	Lincoln
J. Michael Fitzgerald	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha
Julie A. Martin	Lincoln

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Admitted Since the Publication of Volume 291

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Sarah Marie Hart
Ted David Hartman
Elizabeth Ann Hoffman
Joseph Edward Huigens
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Joseph W. Jeter
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Christopher Allen Stafford
Amanda Jill Stigge
Michael Jonathan Stump
Jordan Michael Talsma
Jessica Ann Uhlenkamp
Terry Lynn VanEaton
Jennifer Kae Walker
Lisl Elizabeth Zamora

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No. A-14-949: **McBurnett v. Nebraskaland Tire**. Petition of appellant for further review denied on November 25, 2015.

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No. A-14-1124: **In re Interest of Gavin S. & Jordan S.**, 23 Neb. App. 401 (2015). Petition of appellant for further review denied on February 4, 2016.

No. A-14-1124: **In re Interest of Gavin S. & Jordan S.**, 23 Neb. App. 401 (2015). Petition of appellee Daniel S. for further review denied on February 4, 2016.

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No. A-15-873: **State v. Meyer**. Petition of appellant for further review denied on January 5, 2016.

292 Nebraska Reports
STATE v. MUCIA
Cite as 292 Neb. 1

State of Nebraska, appellee, v. Gregory M. Mucia, appellant.

871 N.W.2d 221

Filed October 30, 2015. No. S-14-070.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes: Legislature: Intent.** In reading 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.
3. **Obscenity: Minors.** A person knowingly possesses child pornography in violation of Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2014) when he or she knows of the nature or character of the material and of its presence and has dominion or control over it.

Petition for further review from the Court of Appeals, Irwin, Inbody, and Pirtle, Judges, on appeal thereto from the District Court for Lancaster County, Karen B. Flowers, Judge. Judgment of Court of Appeals affirmed.

Sean J. Brennan for appellant.

Douglas J. Peterson and Jon Bruning, Attorneys General, and Melissa R. Vincent for appellee.

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

McCormack, J.

NATURE OF CASE

We granted further review of the Nebraska Court of Appeals' opinion that affirmed the conviction of appellant, Gregory M. Mucia, of possession of child pornography.[1] The issue raised in the State's petition concerns the meaning of the phrase "knowingly possess" as used in Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2014), which makes it illegal to "knowingly possess any visual depiction" of child pornography.

BACKGROUND

Though the relevant facts are summarized below, greater detail may be found in the Court of Appeals' opinion.[2]

In 2011, Mucia was 23 years old and living with his younger brother in an apartment in Lincoln, Nebraska. On October 24, a search warrant for that apartment was issued after law enforcement software had detected 10 files suspected to be child pornography "available for sharing" from an Internet protocol address linked to the apartment. The next day, Corey Weinmaster, a Lincoln Police Department investigator, executed the warrant and lawfully seized Mucia's two laptop computers.

A forensic search of the computers produced evidence of child pornography. Most notably, four videos of child pornography were located in a folder created by a file-sharing program; that folder had been placed within a "Music" folder. In addition to the four videos in that folder, Weinmaster found 14 files in the recycle bin on Mucia's computer, which Weinmaster later testified were still accessible and able to be restored. Weinmaster also recovered a number of incomplete files, files recovered from the browser cache, and link files, which Weinmaster testified were related to child pornography.

At his 2-day bench trial, Mucia admitted to using file-sharing programs to download multiple pornographic images

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[1] *State v. Mucia*, 22 Neb. App. 821, 862 N.W.2d 89 (2015).

[2] *Id.*

and videos at once, i.e., "'batch downloading'" pornography. Mucia testified that he intended to obtain adult pornography and that he never intentionally searched for or intentionally obtained child pornography.

Mucia admitted there were times he suspected some of the files he downloaded contained child pornography. But Mucia testified that when he saw or suspected that an image or video depicted a child in a sexually explicit manner, he would delete the file because he "didn't want anything to do with child pornography" and "wasn't interest[ed] in it at all." Mucia testified he was unaware that the four videos found by Weinmaster were on his computer.

The trial court found Mucia guilty of possession of child pornography, age 19 and over, which is a Class IIA felony, and sentenced him to 3 years' probation. Mucia's conviction also caused him to be subject to the Nebraska Sex Offender Registration Act.

Mucia appealed his conviction to the Court of Appeals. Of relevance to this review, Mucia assigned that the trial court erred in finding that the State adduced sufficient evidence to demonstrate Mucia "knowingly" possessed child pornography. Mucia argued that the evidence showed he did not knowingly save illegal files, but "unintentionally received illegal files and subsequently deleted them whenever he discovered their presence."[3] He asserted that the "few undeleted files that remained were not knowingly possessed,"[4] and the State did not present evidence to overcome that defense.

In the Court of Appeals' opinion, it determined that "§ 28-813.01 requires sufficient proof that [Mucia] had the specific intent to possess child pornography, and not merely a general intent to download files that, unbeknownst to him, turned out to be child pornography."[5] After finding such proof

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[3] Brief for appellant at 17.

[4] *Id.*

[5] *State v. Mucia, supra* note 1, 22 Neb. App. at 830, 862 N.W.2d at 96.

and resolving all other issues, the Court of Appeals affirmed Mucia's conviction.

In response to the Court of Appeals' interpretation of § 28-813.01, the State timely filed a petition for further review, which was granted.

ASSIGNMENT OF ERROR

In its petition for further review, the State assigns that "[t]he Court of Appeals erred in finding that *knowing* possession of child pornography in violation of Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2010) is a specific intent crime that requires the State to prove the defendant *intentionally* sought out files depicting child pornography." (Emphasis in original.)

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[6]

ANALYSIS

Both in the State's brief and at oral argument, the State places great emphasis on the classification of the violation of § 28-813.01 as a "general intent" or "specific intent" crime. The State argues that violation of § 28-813.01 is a "general intent" crime and that the Court of Appeals inaccurately classified it as a "specific intent" crime.[7] The State is concerned that the Court of Appeals' interpretation of § 28-813.01 requires the State to prove, in a child pornography case, that the defendant intentionally "sought out" child pornography and "exclude[s] from the statute's reach any person who comes into possession of child pornography unintentionally but nevertheless decides to keep it."[8]

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[6] *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

[7] Memorandum brief for appellee in support of petition for further review at 6-9.

[8] *Id.* at 9.

We do not believe the classification of the violation of § 28-813.01 as a "general intent" or "specific intent" crime is helpful in determining what the statute requires. These terms have been the source of considerable confusion, perhaps because of the inconsistent definitions given to these terms over time.[9] Indeed, the Court of Appeals and the State appear to define these terms differently. The Court of Appeals used the terms "specific intent" and "general intent" to distinguish between an intent to possess child pornography and an "intent to possess files that, unbeknownst to the defendant, turn out to be child pornography."[10] The State, on the other hand, appears to use the term "general intent" the way the Court of Appeals used "specific intent," and uses "specific intent" to mean that a defendant must have intentionally sought out files depicting child pornography in order to have violated § 28-813.01.

We return to the language of § 28-813.01(1), which provides: "It shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct . . . which has a child . . . as one of its participants or portrayed observers." The issue faced by the Court of Appeals, and the issue we face today, is the meaning of the phrase "knowingly possess."

[2] In reading 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]

Section 28-813.01 makes no reference to the intentional *seeking* of child pornography, and the State mischaracterizes the Court of Appeals' opinion as "interpreting § 28-813.01 to require proof that the defendant intentionally *sought out* files

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[9] See 1 Wayne R. LaFave, Substantive Criminal Law § 5.2(e) (2d ed. 2003) (citing courts' various definitions of "general intent" and "specific intent").

[10] *State v. Mucia, supra* note 1, 22 Neb. App. at 830, 862 N.W.2d at 96.

[11] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *State v. Lasu, supra* note 6.

depicting child pornography."[12] Although the Court of Appeals did note that "the State was unable to adduce direct evidence that Mucia intentionally sought out child pornography files," the Court of Appeals never indicated such evidence was required.[13] Instead, the Court of Appeals held that "§ 28-813.01 requires sufficient proof that [Mucia] had the specific intent to *possess* child pornography."[14] The Court of Appeals stated that despite the lack of direct evidence that Mucia intentionally sought out child pornography, "the evidence [actually adduced] circumstantially supports a conclusion that Mucia *knowingly possessed* child pornography."[15]

In reaching the conclusion that a conviction under § 28-813.01 requires proof of the "specific intention to possess child pornography," the Court of Appeals stated it was unable to locate any Nebraska cases on the question but found *State v. Schuller*[16] instructive.

In *Schuller*, this court found that the evidence was sufficient to support a finding that the defendant had knowingly possessed child pornography. The defendant admitted to purposefully searching the Internet for child pornography, downloading child pornography, and watching child pornography before deleting it. Despite the defendant's efforts to delete the files, remnants of the files remained on his hard drive at the time it was confiscated.

We applied the common-law principle of constructive possession, which "may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same,"[17] and explained that the

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[12] Memorandum brief for appellee in support of petition for further review at 9 (emphasis omitted) (emphasis supplied).

[13] *State v. Mucia, supra* note 1, 22 Neb. App. at 832, 862 N.W.2d at 98.

[14] *Id.* at 830, 862 N.W.2d at 96 (emphasis supplied).

[15] *Id.* at 832, 862 N.W.2d at 98 (emphasis supplied).

[16] *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014).

[17] *Id*. at 511, 843 N.W.2d at 635.

remnants of the files on the defendant's hard drive, coupled with the fact that he "repeatedly searched for, downloaded, viewed, and deleted child pornography,"[18] constituted knowing possession, not merely viewing.

We acknowledged there was "no question that [the defendant] *knowingly* possessed those files,"[19] because his confession confirmed he acted knowingly. But we emphasized that the defendant "did not simply click on an innocuous banner advertisement and end up at a child pornography Web site"[20]; he knowingly downloaded them.

In response to the defendant's argument in *Schuller*, that downloading alone could not be sufficient evidence of possession, we said:

> [W]e agree that just because child pornography was downloaded onto a computer does not necessarily mean that there was knowing possession. Take, for example, a person who was legally browsing adult pornography online but mistakenly clicked on a link leading him to a child pornography Web site, which he immediately closed. The record shows that, in such a situation, child pornography would be downloaded to the computer's "cache" folder as temporary Internet files, through no further action by the user. In such a case, the person would not be guilty of knowingly possessing child pornography—he neither downloaded the files knowingly nor constructively possessed them, because there was no intent to control them.[21]

We then explained that such was not the case in *Schuller*.

We have previously said that the meaning of "knowingly" in a criminal statute commonly imports a perception of facts

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[18] *Id.* at 509, 843 N.W.2d at 633.

[19] *Id.* at 512, 843 N.W.2d at 635 (emphasis in original).

[20] *Id.* at 511, 843 N.W.2d at 635.

[21] *Id.* at 514, 843 N.W.2d at 636.

required to make up the crime.[22] That evidentiary standard has been routinely used in cases where a defendant has been charged with possessing contraband other than child pornography. For example, we have said that a person knowingly possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it.[23] We see no reason for a different standard when the contraband is child pornography.

[3] Accordingly, we hold that a person knowingly possesses child pornography in violation of § 28-813.01 when he or she knows of the nature or character of the material and of its presence and has dominion or control over it. The means or methods of exercising dominion or control over an electronic image may well differ from those typically applicable to physical contraband. But we need not address such questions in the case before us.

We note that Mucia does not challenge the Court of Appeals' conclusion that there was sufficient circumstantial evidence to support a finding that Mucia knowingly possessed child pornography. We therefore do not question that finding.

CONCLUSION

Our holding is consistent with the Court of Appeals' opinion, and we therefore affirm.

Affirmed.

Stacy, J., not participating.

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[22] See, *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977); *R. D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 178 N.W.2d 277 (1970).

[23] See, *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995); *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

Connolly, J., concurring.

I agree with the majority's implicit conclusion that under Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2014), a person

knowingly possesses child pornography on a computer when the person exercises dominion or control over the computer or any external component containing the images; knows that the images are stored on the computer or external component; and knows that they depict sexually explicit conduct involving a child.[1] I write separately because I believe the Nebraska Court of Appeals incorrectly characterized the statute as a specific intent crime. Additionally, I part company with the majority's suggestion that the concepts of general and specific intent are too ill defined to be helpful in determining the proof requirements of criminal offenses.

It is true that the distinction between general and specific intent is sometimes confusing. And the answer is not always obvious. But the distinction was clearly relevant in the Court of Appeals' decision: "§ 28-813.01 requires sufficient proof that [a defendant] had the specific intent to possess child pornography, and not merely a general intent to download files that, unbeknownst to him, turned out to be child pornography."[2] This is the holding that the State has petitioned this court to further review.

I acknowledge that this is a difficult issue, primarily because of a paucity of published opinions deciding this issue.[3] But there are well-reasoned unpublished decisions holding that the possession of child pornography is a general intent crime.[4] And the Court of Appeals' conclusion that § 28-813.01 sets forth a specific intent crime is against the weight of the

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[1] See *U.S. v. Wright*, 625 F.3d 583 (9th Cir. 2010).

[2] *State v. Mucia*, 22 Neb. App. 821, 830, 862 N.W.2d 89, 96 (2015).

[3] See, e.g., *State v. Cooley*, 165 So. 3d 1237 (La. App. 2015).

[4] See, *United States v. Ballieu*, 480 Fed. Appx. 494 (10th Cir. 2012); *United States v. Larson*, 346 Fed. Appx. 166 (9th Cir. 2009); *U.S. v. Benz*, No. 4:13CR3121, 2015 WL 575094 (D. Neb. Feb. 11, 2015) (unpublished memorandum and order); *People v. Artieres*, No. A123661, 2011 WL 901985 (Cal. App. Mar. 16, 2011) (unpublished opinion). See, also, *U.S. v. Dyer*, 589 F.3d 520 (1st Cir. 2009).

authority, even if much of it is unpublished. Besides, the Court of Appeals' holding is contrary to our holding and statements in *State v. Thurman*.[5]

In *Thurman*, we rejected the defendant's argument that because his convictions for first degree sexual assault and false imprisonment were general intent crimes, they could not be the predicate offense underlying his conviction for use of a weapon to commit a felony. We acknowledged that we have held an unintentional crime cannot be the predicate offense.[6] But we rejected the argument that first degree sexual assault, which contains no mens rea component,[7] could not be a predicate offense. We reasoned that it does not lack an intent component. Citing *State v. Koperski*,[8] we stated that for general intent crimes, the defendant's intent is inferred from his commission of the acts constituting the elements of the crime.

Perhaps we could have been more explicit. But we implicitly meant that for general intent crimes, the State is only required to prove that a defendant intended to commit the acts proscribed by statute and that this intent is shown by proving that the defendant did commit those acts.

In support of our conclusion that false imprisonment—which has a "knowledge" mens rea component[9]—is also a general intent crime, we quoted the U.S. Supreme Court's decision in *United States v. Bailey*[10]:

> The U.S. Supreme Court has held that "'the limited distinction between knowledge and purpose has not been considered important since "there is good reason for imposing liability whether the defendant desired or

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[5] *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

[6] See *id.*, citing *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989).

[7] See Neb. Rev. Stat. § 28-319(1) (Reissue 2008).

[8] *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998).

[9] Neb. Rev. Stat. § 28-314(1) (Reissue 2008).

[10] *United States v. Bailey*, 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980).

> merely knew of the practical certainty of the results."'" The Court also noted that "'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."
>
> Given this "limited distinction," it is clear that *since the State must show* [*the defendant*] *acted knowingly in order to show he falsely imprisoned* [*the victim*]*, such a requirement is an indication that first degree false imprisonment as charged in this case is a general intent crime*. As noted above, with a general intent crime, a showing of intent by the State is required, but may be inferred from the commission of the acts constituting the elements of the crime.[11]

In sum, in *Thurman*, we rejected the defendant's argument that false imprisonment could not be the predicate offense for use of a weapon to commit a felony because the "knowingly" component of § 28-314 showed it was a general intent crime; as such, the defendant must have intended to commit the acts that the statute proscribed. That conclusion is consistent with other cases in which we have discussed the distinction between general and specific intent crimes.

For example, in *State v. Tucker*,[12] we discussed the general/specific intent distinction because it was relevant to rejecting the defendant's argument that his convictions were inconsistent:

> We find no inherent inconsistency between the trial court's rejection of the murder charges and its conclusion that [the defendant] had committed intentional assault or intentional terroristic threats. . . . While it may at first appear the judge concluded the same act was both intentional and unintentional, a closer examination of the

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[11] *Thurman, supra* note 5, 273 Neb. at 525, 730 N.W.2d at 812 (emphasis supplied), quoting *Bailey, supra* note 10.

[12] *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009).

> object of the mens rea for the different offenses reveals that the crimes do not involve the same act and that the judge's findings were reconcilable.
>
> Both first and second degree murder are specific intent crimes. Thus, by acquitting [the defendant] of first and second degree murder, the trial court made the implicit finding that [the defendant] lacked the specific intent to kill and that he also lacked the specific intent to commit any of the listed felonies for felony murder. . . .
>
> The crime of terroristic threats requires the specific intent to terrorize, not an intent to kill, and it is not one of the felonies listed for felony murder. Assault is a general intent crime that requires only the intent to commit the assault, and not the specific injury that results. Assault also is not a listed predicate felony for felony murder. It was consistent for the court to conclude that [the defendant] intended to commit assault but did not intend for [the victim] to die as a result of the assault. It was likewise legally consistent for the court to conclude that [the defendant] intended to terrorize [the victim], but did not intend to kill him.[13]

Thurman and *Tucker* illustrate that the distinction between general and specific intent crimes is frequently a relevant consideration. And our case law seems to be generally consistent with the explanation in *Tucker* of these terms.[14] In short, for specific intent crimes, a defendant must have intended to cause a specific result by his conduct.[15] For example, in *State v. Ramsay*,[16] we held that

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[13] *Id.* at 942-43, 774 N.W.2d at 759-60.

[14] See, e.g., *Thurman, supra* note 5; *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). See, also, 25 Am. Jur. 2d *Drugs and Controlled Substances* § 156 (2014).

[15] See, Black's Law Dictionary 931 (10th ed. 2014); 21 Am. Jur. 2d *Criminal Law* § 119 (2008 & Cum. Supp. 2015).

[16] *State v. Ramsay*, 257 Neb. 430, 436, 598 N.W.2d 51, 56 (1999).

> because the offense of unlawful discharge of a firearm requires a specific intent, in order to convict [the defendant] as an aider and abettor, the State was required to prove either that he intended to discharge a firearm into the residence or that he knew that [the principal] possessed such an intent prior to committing the act.

In contrast, when a statute simply proscribes specified conduct, the statute sets forth a general intent crime and the State only needs to show that the defendant knew what he was doing—i.e., understood the nature of his acts—and intended to commit the acts that constitute the crime. The State does not have to prove that the defendant intended to cause a proscribed result or to violate a specific statute.[17] And in *Thurman*, we applied the same principles to an offense with a mens rea requirement of knowledge.

It is true that in *Bailey*, the U.S. Supreme Court stated that the distinction between general and specific intent crimes has been a source of confusion because, historically, courts have not consistently used the terms to mean the same thing.[18] For that reason, the Court stated that the Model Penal Code substitutes a hierarchy of culpable mental states—acting with purpose, knowledge, recklessness, or negligence.[19]

But the Court acknowledged that even under the Model Penal Code's hierarchy, the distinction between the mental states of knowledge and purpose remains the most significant and esoteric; it pointed out that for some crimes, that distinction remains important.[20] That is, punishment for some crimes hinges on a mental state that shows a heightened culpability.[21] Similarly, legal commentators have pointed out that although

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[17] See, Black's Law Dictionary, *supra* note 15; 21 Am. Jur. 2d, *supra* note 15, § 118.

[18] See *Bailey, supra* note 10.

[19] See, *id.*; Model Penal Code § 2.02, 10A U.L.A. 92 (2001).

[20] See *Bailey, supra* note 10.

[21] See *id.*

the Model Penal Code has abandoned the distinction between general intent and specific intent, the distinction "is not without importance in the criminal law."[22] Our case law is consistent with that statement.

In particular, the distinction between general and specific intent is important when a defendant claims that his or her diminished capacity should be a defense to a crime, because that defense is irrelevant to general intent crimes.[23] Additionally, when a statute fails to specify a mental state, many courts have held that the statute sets out a general intent crime.[24] We have followed this reasoning.[25]

So, I do not think we should imply that the general/specific intent dichotomy is archaic or irrelevant. Instead, we should focus on the more important issue that the U.S. Supreme Court discussed in *Bailey*: whether a required mental state applies to every element of the crime.[26] And this analysis will sometimes require courts to ask what kind of culpability is needed for each material element to establish the offense.

As stated, the Court of Appeals concluded that under § 28-813.01, a defendant must have a specific intent to possess child pornography, and not merely a general intent to download files that, unbeknownst to him, turned out to be child pornography. I agree that the statute does not criminalize the downloading of electronic files with child pornography unless the evidence establishes that the defendant knew the files contained child pornography. A person cannot knowingly possess contraband unless he or she knows the nature of the material.

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[22] See 1 Wayne R. LaFave, Substantive Criminal Law § 5.2(e) at 355 (2d ed. 2003).

[23] See, e.g., *U.S. v. Jackson*, 248 F.3d 1028 (10th Cir. 2001). Compare *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[24] See 21 Am. Jur. 2d, *supra* note 15, § 118.

[25] See *Koperski, supra* note 8.

[26] See *Bailey, supra* note 10.

Contrary to the State's argument, this conclusion does not require the State to prove that a defendant intentionally sought out files depicting child pornography. The Legislature did not proscribe *knowingly receiving* child pornography; it proscribed *knowingly possessing* it.[27] Yet, the Court of Appeals incorrectly held that the statute requires proof that a defendant had the specific intent to possess child pornography.

Because this is a general intent statute, the State is only required to show that Mucia knowingly possessed child pornography, not that he purposefully possessed it. And I do not think this is a case in which the distinction between purposeful and knowing possession is irrelevant. For example, if a fact finder determines that a defendant had dominion or control over a computer and knew that child pornography was stored on it, the defendant would be guilty of knowingly possessing child pornography even if the defendant allowed access to another person who had downloaded the materials to the computer.[28]

The Legislature's intent in prohibiting the possession of child pornography is clearly to stop activities that perpetuate the sexual exploitation of children.[29] Possessing child pornography is an activity that perpetuates this societal scourge regardless of whether a person only knowingly possesses it or purposefully possesses it. Accordingly, I would overrule the Court of Appeals' holding that § 28-813.01 requires the State to prove that a defendant had the specific intent to possess child pornography. The statute requires the State to prove a defendant knowingly did so.

In sum, contrary to the tenor of the majority opinion, I believe that the distinction between general and specific intent continues to have relevance in criminal law and that it has relevance under § 28-813.01.

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[27] Compare 18 U.S.C. § 2252A(a)(2) and (a)(5)(B) (2012).

[28] See *Wright, supra* note 1.

[29] Compare Annot., 2 A.L.R. Fed. 2d 533, § 2 (2005).

State of Nebraska, appellee, v. Victor L. Carter, appellant.

870 N.W.2d 641

Filed October 30, 2015. Nos. S-14-1089, S-15-024.

1. **Judgments: 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, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
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. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
5. **Postconviction.** Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief.
6. ____. The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

Appeals from the District Court for Douglas County: Gary B. Randall, Judge. Appeal in No. S-14-1089 held under submission. Judgment in No. S-15-024 affirmed.

Steve Lefler, of Lefler, Kuehl & Burns, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Victor L. Carter, pro se.

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

Cassel, J.

INTRODUCTION

Two appeals arose from Victor L. Carter's fifth postconviction proceeding and have been consolidated on appeal. After the district court summarily overruled Carter's postconviction motion, he filed the first appeal. And after the district court denied Carter's application to proceed in forma pauperis (IFP) on appeal, on the basis that the underlying motion was frivolous, he filed another appeal to challenge that denial. The second appeal lacks merit, and we affirm the order denying leave to proceed IFP. But because the statute[1] nevertheless permits Carter, upon payment of the statutory docket fee within 30 days, to proceed with the first appeal, we hold it under submission for that purpose.

BACKGROUND

Carter was convicted of first degree murder and use of a firearm in the commission of a felony in 1986. He was sentenced to life in prison for the murder and 10 years' imprisonment for the firearm conviction. The circumstances that led to Carter's convictions and sentences may be found in *State v. Carter*.[2] We affirmed his convictions on direct appeal in 1987.[3]

Carter has made numerous unsuccessful attempts to collaterally attack his convictions. Before the motion which is the subject of our first appeal, Carter filed four other motions for postconviction relief—in 1989, 2002, 2008, and 2012. The Douglas County District Court denied relief in each case, and

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[1] Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008).

[2] *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987).

[3] *Id.*

in each case, we affirmed the district court's order on appeal. He has also attempted to collaterally attack his convictions by means of a motion for new trial and a petition for writ of error coram nobis.

We summarize the timeline of the most recent proceedings as follows:

- May 28, 2014: Carter files a "Motion for Successive Postconviction Relief."
- November 18, 2014: The district court overrules the motion without an evidentiary hearing.
- December 4, 2014: Carter files a notice of appeal from the November 18 order. The appeal is docketed in this court as case No. S-14-1089 (first appeal). In lieu of the statutory docket fee, Carter files an application to proceed IFP on appeal.
- December 23, 2014: On its own motion, the district court denies Carter's application to proceed IFP on appeal, after concluding that Carter's underlying postconviction motion is frivolous.
- January 8, 2015: Carter files a notice of appeal from the December 23, 2014, order. The appeal is docketed in this court as case No. S-15-024 (second appeal). This notice of appeal was also accompanied by an application to proceed IFP.

ASSIGNMENTS OF ERROR

In the first appeal, Carter assigns, restated, that the district court erred in denying (1) his motion for postconviction relief without an evidentiary hearing and (2) his motion requesting appointment of counsel and application for IFP status.

In the second appeal, Carter assigns, restated, that the district court erred in denying his application to proceed IFP on appeal.

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, which requires the appellate court to reach a conclusion independent from the lower court's decision.[4]

[2] A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.[5]

ANALYSIS

Jurisdiction of Second Appeal

[3] 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.[6] The State claims that we do not have jurisdiction over this appeal because Carter has not paid the statutory docket fee. We disagree.

We decided in *Glass v. Kenney*[7] that we can acquire jurisdiction, without payment of the docket fee, over an appeal from an order denying IFP status on appeal. Greg A. Glass filed a petition for a writ of habeas corpus and an application to proceed IFP. Without ruling on the habeas petition, the district court denied Glass' application to proceed IFP because it concluded that his allegations in the habeas petition were "frivolous."[8] Glass appealed, filing an application to proceed with the appeal IFP, which the district court denied. Glass separately appealed from this second denial, filing a proper application to proceed IFP and a poverty affidavit with his notice of appeal. The State argued that we did not have jurisdiction to hear Glass' second appeal because Glass had not paid any filing fees.

The interaction of several statutes led us to conclude that we had jurisdiction. We first observed that under the controlling

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[4] *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

[5] *State v. Sims*, 291 Neb. 475, 865 N.W.2d 800 (2015).

[6] *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014).

[7] *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

[8] *Id.* at 706, 687 N.W.2d at 909.

statute,[9] following a denial of an application to proceed IFP, a party may either proceed with the action or appeal the ruling denying IFP status.[10] For completeness, we note that this statute underwent minor revisions after *Glass* that have no bearing on this analysis. Second, we recognized that under this statute, there is a statutory right of interlocutory appellate review of a decision denying IFP eligibility.[11] Third, we observed that although another statute[12] generally governing appeals and a specific fee statute[13] require payment of a docket fee, "'[a] poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal . . . .'"[14] Finally, we noted that "'[t]his court obtain[s] jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit.'"[15] We acquired jurisdiction over Glass' second appeal because Glass filed a timely notice of appeal from the order denying leave to appeal IFP, accompanied by a proper application to proceed IFP and a poverty affidavit.

The procedural posture of the instant appeal is slightly different than that in *Glass*; however, the same principles apply. As in *Glass*, the district court denied Carter's motion to proceed IFP on appeal. Like Glass, Carter appealed from the district court's denial to this court. And as in *Glass*, we obtained jurisdiction over the second appeal because Carter filed a proper application to proceed IFP and a poverty affidavit with his timely notice of appeal. (We note that the State

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[9] § 25-2301.02(1).

[10] See *Glass v. Kenney, supra* note 7.

[11] See *id*.

[12] Neb. Rev. Stat. § 25-1912 (Reissue 2008).

[13] Neb. Rev. Stat. § 33-103 (Reissue 2008).

[14] *Glass v. Kenney, supra* note 7, 268 Neb. at 709, 687 N.W.2d at 911 (quoting *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996)).

[15] *Id*. (quoting *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002)).

may have overlooked the IFP application and poverty affidavit, as they were transmitted with the docketing documents[16] and did not appear in the transcript of filings.)

Merits of IFP Application

We now turn to the merits of Carter's application to proceed IFP on appeal. The district court, on its own motion, denied Carter's application because it concluded that his underlying motion for postconviction relief was frivolous.

The statute authorized the district court to deny leave if it determined that Carter's motion for postconviction relief was frivolous. Except in those cases where the denial of IFP status "would deny a defendant his or her constitutional right to appeal in a felony case," § 25-2301.02 allows the court "on its own motion" to deny IFP status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issues "a written statement of its reasons, findings, and conclusions for denial."[17] A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.[18] The district court's order set forth the required finding.

To review the district court's finding, we must consider Carter's underlying motion for postconviction relief. In that motion, Carter argues that his jury should have received a voluntary manslaughter instruction pursuant to *State v. Smith*.[19] However, he admits that he also relied upon *Smith* in his 2012 motion. He also claims that *Smith* and the U.S. Supreme Court's 2013 decision in *Alleyne v. United States*,[20] taken

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[16] See Neb. Ct. R. App. P. § 2-101(B)(4) (rev. 2010).

[17] § 25-2301.02(1). See *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

[18] *Castonguay v. Retelsdorf*, 291 Neb. 220, 865 N.W.2d 91 (2015).

[19] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[20] *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

together, render the "absence . . . of [a] sudden quarrel" an element of first degree murder. He argues that *Alleyne* requires this conclusion because "the absence or presence of sudden quarrel, raises the sentencing floor from 20 years to life." (Emphasis in original.)

Carter's arguments regarding *Alleyne* are frivolous. *Alleyne* is the most recent decision in a line of cases where the U.S. Supreme Court has wrestled with the distinction between the elements of a crime and "'sentencing factors,'" which are "facts that are not found by a jury but that can still increase the defendant's punishment."[21] In *Alleyne*, the Court held that facts that increase the mandatory minimum sentence must be submitted to the jury, rather than be decided by the judge as sentencing factors. *Alleyne* is an extension or application of *Apprendi v. New Jersey*,[22] where the Court held that facts that increase the prescribed statutory maximum sentence must be submitted to the jury, rather than submitted to the judge as sentencing factors. Carter's reliance on *Alleyne* is misplaced; the absence or presence of a sudden quarrel is not a sentencing factor under Nebraska law. *Alleyne* simply does not apply here.

[4-6] More important, Carter's previous attempt to invoke *Smith* renders his current argument frivolous. Carter's claim that *Smith* entitles him to relief is wholly without merit because he relied upon *Smith* in his 2012 motion for postconviction relief. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.[23] Postconviction proceedings are not a tool whereby a

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[21] *Id.*, 570 U.S. at 105.

[22] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[23] *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

defendant can continue to bring successive motions for relief.[24] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[25] Carter cannot rely upon *Smith* again. And without it, his argument is frivolous.

CONCLUSION

Because we conclude that Carter asserted only frivolous legal positions in his motion for postconviction relief, we resolve the second appeal by affirming the district court's order. Thus, pursuant to § 25-2301.02(1), we will not have jurisdiction of the first appeal unless Carter pays the statutory docket fee within 30 days of the date of release of this opinion. We therefore hold the first appeal under submission for payment of the statutory docket fee. If Carter fails to timely pay the statutory docket fee, his first appeal will be dismissed for lack of jurisdiction. We direct that upon payment of the fee or upon expiration of the 30-day period without payment, whichever occurs first, the clerk of the district court for Douglas County shall file a supplemental certificate in case No. S-14-1089 accordingly.

Appeal in No. S-14-1089 held under submission.
Judgment in No. S-15-024 affirmed.

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[24] *Id.*

[25] *Id.*

State of Nebraska, appellee, v.
David E. Ware, appellant.
870 N.W.2d 637

Filed October 30, 2015. No. S-15-155.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Natalie M. Andrews for appellant.

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

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

Heavican, C.J.

INTRODUCTION

David E. Ware's motion for postconviction relief was denied without an evidentiary hearing. Ware appeals and argues he was

entitled to an evidentiary hearing on his claims that his sentence violated the Eighth Amendment to the U.S. Constitution and that his trial counsel was ineffective. We affirm.

BACKGROUND

On April 13, 1984, Ware was convicted of first degree murder following a bench trial. Ware was subsequently sentenced to life imprisonment. This court affirmed his conviction and sentence.[1]

On August 16, 2012, Ware filed a motion for postconviction relief. In that motion, Ware alleged that (1) his mandatory life sentence was unconstitutional under *Miller v. Alabama*[2] because the sentencing court did not have the opportunity to consider any mitigating circumstances; (2) his trial counsel was ineffective (a) for failing to advise him of his right to testify in his own behalf and (b) for failing to adequately inform him of his right to a jury trial; and (3) he did not knowingly, intelligently, and voluntarily waive his right to have a presentence investigation conducted.

Originally, Ware's motion was stayed pending this court's decision in *State v. Mantich*.[3] But after this court issued its opinions in *Mantich* and *State v. Castaneda*,[4] Ware's motion proceeded and a hearing on the State's second motion to deny an evidentiary hearing was held. At this hearing, Ware sought to introduce into evidence the deposition of an adolescent neuropsychologist. That request was denied at the hearing, and Ware's motion seeking postconviction relief was denied on January 22, 2015.

In its order, the district court noted that Ware had no *Miller* claim, because he was 18 years of age at the time of the

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[1] *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985).

[2] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[3] *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014).

[4] *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

commission of the crime for which he was convicted. The court further addressed the claim that his counsel was ineffective for not informing him of his right to testify in his own behalf, and concluded that this allegation was not supported by the record. Finally, the district court found that Ware's claims regarding his presentence investigation were procedurally barred.

ASSIGNMENTS OF ERROR

Ware assigns that the district court erred in not granting him an evidentiary hearing, because (1) his life sentence was unconstitutional and (2) his trial counsel was ineffective for failing to inform him of the consequences of his waiver of a jury trial.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[5] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[6] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[7]

ANALYSIS

Constitutionality of Life Sentence.

In his first assignment of error, Ware argues that his life sentence is unconstitutional. Ware's argument is based upon

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[5] *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

[6] *Id.*

[7] *Id.*

the U.S. Supreme Court's decision in *Miller*.[8] In that decision, the Court concluded that a mandatory life-without-parole sentence for "those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[9] Subsequent to *Miller*, this court observed that life imprisonment sentences imposed upon juveniles in Nebraska for first degree murder prior to *Miller* were effectively sentences of life imprisonment without parole.[10] We further held, in accordance with *Miller*, that those defendants were entitled to resentencing.[11]

In Ware's case, the district court found, and the record shows, that Ware was 18 years of age at the time he committed the murder for which he was sentenced to life imprisonment. Ware does not contest that fact, but argues that because the age of majority in Nebraska is 19 under the juvenile code, this court should conclude that *Miller* applies to protect those minors under the age of 19. Ware acknowledges that we rejected this same argument in *State v. Wetherell*,[12] but asks us to reconsider that conclusion.

In connection with Ware's contention that he should be resentenced under *Miller*, Ware relies on the deposition of a neuropsychologist who testified that the brains of young adults do not stop growing until age 19 or 20 and are not fixed until age 25 or 26. Ware offered this deposition as an exhibit at the hearing on the State's motion to dismiss; the district court did not admit it, and Ware does not assign this as error. But Ware nevertheless urges us to consider this deposition.

In *State v. Glover*,[13] we opined on the appropriateness of a district court allowing the introduction of evidence at a

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[8] *Miller v. Alabama, supra* note 2.

[9] *Id.*, 567 U.S. at 465.

[10] *State v. Castaneda, supra* note 4.

[11] *State v. Mantich, supra* note 3.

[12] *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014).

[13] *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008).

hearing on a motion for an evidentiary hearing (as opposed to an evidentiary hearing). We noted that

> receiving new evidence at a records hearing would create chaos. Either the State or the prisoner could be unprepared to respond to new evidence. That unpreparedness could result in unnecessary due process challenges from prisoners. And appellate courts would constantly have to backtrack and consider whether an evidentiary hearing was warranted based solely on the allegations and the information contained in the case records and files—a question that the district court should initially address.[14]

This deposition was inadmissible, and we decline to consider it.

We also decline Ware's invitation to reconsider *Wetherell*. By its very language, *Miller* applies to those individuals who were under the age of 18 at the time a crime punishable by a life sentence without the possibility of parole was committed. We further note that Neb. Rev. Stat. § 28-105.02(1) (Cum. Supp. 2014) codifies *Miller* for "any person convicted of a Class IA felony for an offense committed when such person *was under the age of eighteen years*." (Emphasis supplied.) The district court did not err in not granting a new sentencing hearing under *Miller*. Ware's first assignment of error is without merit.

Waiver of Jury Trial.

In his second assignment of error, Ware argues that the district court erred in not considering his claim that his counsel was ineffective for failing to properly advise him of the consequences of waiving his right to a jury trial. Ware is correct that the district court did not address this allegation.

But we conclude that Ware is not entitled to postconviction relief. If the records and files in the case affirmatively show

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[14] *Id.* at 629, 756 N.W.2d at 163.

that the movant is entitled to no relief, no evidentiary hearing is required.[15] And in this case, the record shows that Ware was informed and questioned in some detail about the consequences of waiving his right to a jury trial.

The bill of exceptions shows an extensive discussion between Ware and the district court on this issue. The right to a jury trial was explained to Ware. Ware was asked whether he wanted to waive that right, and the consequences of that decision were discussed. Ware was asked to explain why he wanted to waive his right to a jury trial. During this discussion, the court explicitly noted that it wanted Ware "to understand that this Court is certainly very willing to afford you a jury trial, and it's set for jury trial starting Monday morning, if you want."

Moreover, Ware's counsel explained to the court that "probably on at least four occasions at some length [he and Ware] have talked about the possibility of waiving a jury trial." This colloquy occurred days in advance of trial, which was originally scheduled to be a jury trial. On the day of trial, Ware was again asked whether he still wished to waive his right to a jury trial; he indicated that he did.

The record shows that Ware was aware of his right to a jury trial and was aware of the consequences of waiving that right. As such, the record affirmatively shows that Ware is not entitled to postconviction relief on this issue. There is no merit to Ware's second assignment of error.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

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[15] See *State v. Hessler, supra* note 5.

State of Nebraska, appellee, v. Sarah A. Cullen, appellant.

870 N.W.2d 784

Filed November 6, 2015. No. S-14-509.

1. **Motions for Mistrial: Appeal and Error.** Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the trial court abused its discretion.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **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.
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. **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. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record 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?
6. **Rules of Evidence: Other Acts.** Under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

7. ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
8. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
9. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless the error was harmless beyond a reasonable doubt.
10. **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.
11. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument.
12. **Trial: Evidence: Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
13. **Appeal and Error.** Plain error may be found 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.
14. **Trial: Prosecuting Attorneys: Juries.** 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.
15. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
16. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as

well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

17. ____. 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.
18. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must show, first, that counsel was deficient and, second, that the deficient performance actually caused prejudice to the defendant's case.
19. **Effectiveness of Counsel: Proof: Presumptions: Appeal and Error.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.
20. **Effectiveness of Counsel: Proof.** Prejudice caused by counsel's deficiency is shown when there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
21. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
22. **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. The determining factor is whether the record is sufficient to adequately review the question.
23. **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.
24. **Motions to Strike: Jury Instructions.** When an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Barry S. Grossman and Michael J. Fitzpatrick for appellant.

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

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

Cassel, J.

I. INTRODUCTION

In this direct appeal, Sarah A. Cullen challenges her conviction, pursuant to jury verdict, and her sentence for intentional child abuse resulting in death.[1] An infant died after being in Cullen's care. She primarily argues that evidence of the child's prior injuries while in her care should have been excluded as prior bad acts under rule 404 of the Nebraska Evidence Rules.[2] We conclude that the prior injuries were inextricably intertwined with the fatal ones. We also reject Cullen's assertions of improper closing argument, prosecutorial misconduct, excessive sentence, and ineffective assistance of trial counsel. Accordingly, we affirm.

II. BACKGROUND

1. Cash's Injuries and Death

Cash Christopher Bell, born in October 2012, was the son of Christopher (Chris) Bell and Ashley Bell. Prior to the events summarized below, Cash had no medical issues.

In January 2013, the Bells hired Cullen to work temporarily as a nanny for Cash in their home, pending the opening of a new daycare in June 2013. Cullen's first day alone with Cash was on January 7, when Ashley returned to work from maternity leave. Cash was about 3 months old.

On the morning of February 28, 2013, Chris woke up at approximately 6 a.m. He changed Cash's diaper, fed him a bottle, and then brought him downstairs to Ashley. Ashley put Cash in a bassinet while she finished getting ready for work. The Bells testified that it was a typical morning. Cash was active, making eye contact, smiling, cooing, and laughing.

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[1] See Neb. Rev. Stat. § 28-707 (Cum. Supp. 2012).

[2] See Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014).

Chris left for work between 6:45 and 7 a.m. Cullen arrived for work at the Bells' home at 7:15 a.m. Ashley left for work around 7:40 a.m.

Shortly after 9:19 a.m., Chris returned home to get his checkbook. As Chris entered the house, he yelled out to Cullen that he had forgotten his checkbook. He then heard Cash breathing. He turned and found Cash lying face down in the Pack 'N Play nearby. Chris rolled him over. Cash did not open his eyes, and he took "a little breath." Cash's blanket was around his face and chest area, and Chris moved it down to his waist. Chris believed that Cash was sleeping. At about the same time he heard Cash breathing, Chris heard Cullen in the nearby bathroom. After he rolled Cash over, Chris grabbed his checkbook. As he was leaving, he heard Cullen ask him if he woke Cash up. Chris estimated that he was in the house not more than a minute. As Chris was getting into his car, Cullen came to the door with Cash in her arms and asked Chris what he said when he first walked in the house. Chris could see only the back of Cash's head.

At approximately 10:15 a.m., Cullen called her boyfriend, Andrew Ullsperger, and told him that Cash was not breathing and that his feet were blue. Ullsperger immediately proceeded to the Bell residence to take Cash and Cullen to a local hospital. When Ullsperger arrived at the Bell residence, Cash was not responsive, but he was breathing. Cullen told Ullsperger nothing about the events of that morning on the way to the hospital. When they arrived at the hospital's emergency room, Cullen stated that she found Cash "sleeping on his belly and he doesn't normally sleep like that."

Previously, Ashley had requested that Cullen log Cash's diaper changes, feedings, naps, and anything else of note, and the last entry in the log was at 8 a.m. on February 28, 2013, when Cullen noted that Cash began to nap. At 10:18 a.m., Cullen called Ashley and frantically told her that she was taking Cash to the hospital because Cash had just woken up from a 1- to 1½-hour nap and was not breathing right. Ashley

and Chris later arrived at the emergency room where they waited with Cullen and Ullsperger. Ashley testified that she questioned Cullen during that time about whether anything had happened that morning after Ashley left, but Cullen maintained that Cash woke up from his nap in that condition. A nurse eventually summoned Ashley and Chris to be with Cash until "Life Flight" transported him to a pediatric hospital due to the extent of his injuries.

Deputy Brenda Wheeler and Sgt. John Pankonin of the Douglas County Sheriff's Department interviewed Cullen at the sheriff's office on February 28 and March 1, 2013.

During her February 28, 2013, interview, Cullen told primarily four different versions of what occurred to Cash that morning. Initially, she stated that Cash started the day acting normally, but that when he woke up from his nap, his breathing was not normal. Cullen denied to Wheeler that Cash had an accident or fell that morning. Wheeler then informed Cullen that Cash's skull was fractured and that his head had to have hit something or something had to have hit his head. Cullen eventually told Wheeler that when she was walking out of the back door with Cash, she may have accidentally hit his head somewhere on the door. When she came back in, Cash was not "breathing right."

After consulting Dr. Suzanne Haney, a pediatrician, outside of Cullen's presence, Wheeler informed Cullen that Cash's injuries could not have been caused by hitting his head on the door. Cullen continued to deny that anything else happened that morning, but then she told Wheeler that Cash had fallen out of his swing at about 8:15 a.m. According to Cullen, Cash whimpered but then fell asleep at about 8:45 a.m.

While Wheeler was again absent consulting Haney, Ullsperger and Cullen communicated via text messages. Ullsperger texted Cullen, "They said [C]ash is going to be ok." Cullen replied, "I know. But it's still my fault. I didn't buckle him in the swing, he flopped out of it . . . idk." ("Idk" is a texting term that means "I don't know.") Ullsperger responded,

"Oh really? What all did they say then?" Cullen wrote, "Idk, that's the very only thing that happened out of the ordinary but he didn't even really cry so [I] didn[']t think it did anything! She's talking to the doctor now."

After talking to Haney, Wheeler informed Cullen that Cash's injuries could not have been caused by a short fall from the swing. Wheeler and Pankonin informed Cullen that Cash's injuries were consistent with shaking and that he was set down or thrown down hard. Cullen began to cry and admitted that she had lied. She stated that Cash had fallen out of the swing the day before. According to Cullen, at about 8:15 a.m. on February 28, 2013, she had slipped on the stairs while carrying Cash and he had fallen onto the tile floor below without hitting any of the steps. Cullen stated that Cash landed on his back with his hands clenched but did not cry. She put a bag of frozen vegetables on the back of his neck and then put him in his Pack 'N Play after he fell asleep on her chest.

According to Cullen, she called Ullsperger instead of the 911 emergency dispatch service because Cash "wasn't that bad right away" and because it was her fault. Cullen denied shaking Cash. She wrote a statement about Cash's falling down the stairs and generally maintained this version of events during the interview with Wheeler on March 1, 2013.

Haney is a child abuse pediatrician who specializes in the diagnosis and care of suspected abused and neglected children. She consulted on Cash's case. When she examined Cash on February 28, 2013, she noticed that he was "not acting well." He was irritable and not focusing his eyes, and he had "an obnoxious shrill kind of a scream." At that time, Cash was breathing on his own. He had injuries that concerned Haney on a 4-month-old, including a bruise on the left side of his forehead, two tiny circular abrasions under his chin, and a bruise on his tongue. Wheeler confronted Cullen during the March 1 interview about the abrasions under Cash's chin. Cullen told Wheeler that she first saw them on Monday, February 25, and

that Ashley told her the abrasions occurred over the weekend when Ashley put Cash's bib on him. The abrasions matched metal clasps on the inside collar of the "Onesie" that Cash wore on February 28.

Between March 1 and 5, 2013, Cash's neurological condition rapidly deteriorated as evidenced by his lack of responsiveness and an onset of frequent seizures that could be controlled only through high doses of medication. Doctors determined that Cash would not have any significant neurologic recovery. Ashley testified that Cash's doctors gave them the long-term prognosis that Cash would never be able to see, hear, walk, or be without a feeding tube and a ventilator and that he would likely never understand his parents. Based on this information, the Bells decided to take Cash off of life support on March 5, and that day, he died.

Several medical experts testified about the extent of Cash's injuries and their possible causes. That evidence demonstrates that Cash sustained a large hematoma on the right back of his head, a smaller bruise on the back of his head, a skull fracture on the back of his head, a second skull fracture on the right side of his head that extended to the base of his skull, subdural and subarachnoid hemorrhages in and around all surfaces of his brain, actual injury to his brain including torn blood vessels and long filaments as well as bruising to both sides, and multiple retinal hemorrhages that extended to the back of his eyes. Doctors testified that Cash sustained a global or diffuse brain injury, meaning that it affected his entire brain. Ninety percent of his brain was permanently damaged and abnormal due to a lack of oxygen.

The medical experts agreed that Cash's injuries were consistent with nonaccidental trauma caused by shaking or impacts to the head or both. There was testimony comparing the significant force involved in Cash's injuries to a one- to two-story fall, a high-speed motor vehicle accident, and a television falling on a child's head and crushing it. There was testimony that separation between the two skull fractures

indicated that they were caused by two separate forces. While none of the experts could pinpoint an exact date and time of injury, they estimated that Cash's brain and eye injuries occurred within 0 to 2 days of February 28, 2013, and that his skull fractures occurred within 0 to 14 days of that date; though in light of Cash's brain injury, it was highly unlikely that the fractures occurred 14 days before February 28.

Based on the history given by the Bells, Cullen's statements, and the medical evidence, two medical experts opined that Cash's brain injury occurred sometime after Ashley left for work on February 28, 2013. They testified that children with Cash's type of brain injury are immediately unwell and do not respond appropriately and that symptoms would manifest fairly quickly and may be intermittent, but would be noticeable and cause concern. Several medical experts testified that Cullen's versions of events could not have accounted for all of Cash's injuries.

2. Charge

The State charged Cullen with intentional child abuse occurring on or about January 1 through February 28, 2013, that resulted in Cash's death, a Class IB felony in violation of § 28-707(1) and (8). The district court conducted a trial, and we have already summarized part of the evidence relevant to this appeal. Additional evidence relevant to specific issues on appeal is summarized below.

3. Rule 404 Evidence

Prior to trial, the State filed its notice of intent to offer evidence of prior bad acts pursuant to rule 404. A rule 404 hearing was held where the State presented evidence that Cullen had injured children at two daycares where she had worked prior to working for the Bells. At this hearing, the State did not present evidence of prior injuries that Cash suffered while in Cullen's care.

The State explained that its approach was intentional. The prosecutor informed the court that the State did not consider

evidence of prior injuries that Cash suffered while in Cullen's care to be rule 404 evidence. Rather, the State believed this evidence was inextricably intertwined with the charged offense. For that reason, the rule 404 hearing was confined to the prior daycare evidence.

The district court ruled the prior daycare evidence inadmissible. While the court found that the evidence would be probative regarding absence of mistake, it determined that the risk of unfair prejudice substantially outweighed its probative value. It attributed the unfair prejudice to the dissimilarities in the severity and cause of the injuries between the children at the daycares and Cash.

4. Cash's Prior Injuries

During trial, Cullen made an oral motion in limine seeking to prohibit the State from offering text messages and photographs of injuries that Cash sustained prior to February 28, 2013. Defense counsel argued that the injuries constituted prior bad acts evidence and should have been excluded under the district court's order on the rule 404 evidence.

The State responded that the text messages showed that Cullen previously notified Ashley of any accidental injuries Cash sustained but did not disclose any accident to her on February 28, 2013. Thus, the State argued, the evidence was inextricably intertwined with the charged offense, because Cullen's inconsistent conduct was highly relevant to whether the injuries that resulted in Cash's death were intentional or accidental.

The district court ruled that the State could not offer evidence of specific injuries to Cash unrelated to his cause of death, but that it could offer evidence in general about the arrangement between Ashley and Cullen to communicate about Cash and any accidents as well as the frequency of those communications. However, the district court further ruled that it would revisit the issue if Cullen's statements about the prior injuries were received into evidence.

At trial, Ashley testified that she and Cullen communicated with each other by text or telephone call almost every day while Ashley was at work. Ashley testified that between January 7 and February 27, 2013, Cash sustained minor injuries. Despite Ashley's instructions to contact her or Chris about any accidents, Cullen notified Ashley about only three of six injuries.

After Cullen's statements to law enforcement were admitted at trial, the State recalled Ashley to testify about the minor injuries that Cash sustained while in Cullen's care. Before Ashley could testify about the minor injuries, defense counsel requested to approach the bench where an off-the-record discussion was held. The district court overruled Cullen's objection and allowed her a continuing objection.

Ashley testified that Cash's first injury while in Cullen's care occurred on January 9, 2013. Cullen texted Ashley on that day that the Bells' dog, named "Mugsy," trampled Cash and her on the floor after a noise outside "freaked Mugsy out." When Ashley returned home from work, Cash had a bruise under his left eye and a scratch on the left side of his neck. Ashley explained that she and Chris trained Mugsy to respect Cash's space and that she never observed Mugsy run over or trample Cash. Although Ashley had never observed Mugsy "freak out" over a noise outside, she testified that she believed Cullen's explanation.

One week later, on January 16, 2013, Cullen texted Ashley that Cash had a fever. On January 29, Cullen texted Ashley, "Oh Ashley I have no idea what just happened but theres [sic] a big mark under Cash eye :(I went to answer the door and he started crying!" Ashley testified that according to Cullen, Cash was on his toy mat on the floor when the doorbell rang, which caused Mugsy to jump off the couch. Cullen told Ashley that she did not know what had happened, but that Cash sustained a bruise and scratch under his left eye. Ashley testified that she believed it was plausible that Mugsy jumped off the couch when the doorbell rang.

Ashley testified that she and Chris were out of town between February 7 and 11, 2013. Cullen cared for Cash during the day, while Ashley's mother cared for him at night. When the Bells returned on February 11, Cash had a bump and a bruise on the right side of his head above his eyebrow. Ashley did not address the injury with Cullen because she understood that her mother had. Rose Bergerson, Ashley's mother, testified over Cullen's continuing objection that she came to the Bells' home from work on February 7 to find Cash with the bruise and bump. Defense counsel stated the grounds for the objection to be relevance and rule 404: "The same objection that we had to Ashley Bell's testimony." Bergerson testified that when she confronted Cullen about the injury, Cullen told her that she had Cash on her hip when she was taking Mugsy outside. According to Cullen, the wind caught the door and hit Cash in the head. Bergerson documented Cash's injury by taking photographs of it with her cell phone, and those photographs were received into evidence over Cullen's objections.

In mid-February 2013, Chris and Ashley observed a broken blood vessel on the inside of Cash's eye. Cullen told Ashley that she had never seen it before. On February 15, Cullen texted Ashley, "Cash must have scratched himself? We ran and ate a late lunch, when we got back there was a small mark on him but it was not there when [I] put him in . . . he wad [sic] rubbing his eyes awfully hard though . . . have a good weekend!" Ashley could not recall if Cullen was referring in the text to a new scratch or the broken blood vessel.

On the evening of Monday, February 25, 2013, Chris and Ashley noticed that Cash had two round abrasions under his chin and a bruise on his temple. Ashley confronted Cullen about the abrasions, and Cullen told her that they did not happen during her care and that she had not seen them. Ashley testified that she told Cullen on February 28 that she hoped she did not cause the abrasions over the weekend with his wet bib. Ashley testified that she dismissed the idea after she

said it, because the bib would not have caused the two abrasions under Cash's chin or the bruise on his temple. Therefore, according to Ashley, Cullen was inaccurate when she told Wheeler that Ashley admitted causing the two abrasions.

Ashley testified that Cullen never notified her that Cash fell out of the swing on February 27, 2013, as Cullen had claimed during her interview with police.

The record contains no motion for mistrial based on the admission of evidence of Cash's prior injuries.

5. Motion for Mistrial

During Chris' testimony, Cullen's counsel objected, based on hearsay grounds, before Chris could testify about what a nurse had told him and Ashley. The district court permitted Chris to continue, because "[i]t may be a diagnostic statement." Chris then testified, "[The emergency room nurse] grabbed my wife Ashley . . . and said, She did this to him, meaning [Cullen]." After this testimony, Cullen's counsel immediately said, "Okay, Judge." The district court struck the testimony, and counsel approached the bench for an off-the-record discussion. The jury was excused briefly, and Cullen's counsel made a motion for mistrial. The district court denied the motion. Before proceeding with the trial, the district court admonished the jury "totally to disregard that comment entirely."

The only other reference to a mistrial occurred during a discussion about striking jurors, but it did not result in a motion.

At the close of the State's case in chief, Cullen renewed "[t]wo motions" for mistrial, immediately after which the district court noted for the record that it had allowed Cullen ongoing objections during testimony about Cash's injuries that occurred prior to February 28, 2013. It then denied Cullen's "motions" for mistrial.

6. Closing Statements

During closing statements, the prosecutor argued:

> Let's look at [Cullen's] demeanor in this trial, because that's something you can take into consideration.

> I don't know about you, ladies and gentlemen, but I was watching her every minute that I could. I didn't see one ounce of emotion out of her, not when we were looking at photographs of Cash, this baby she claims to have loved and cared for, not one ounce of emotion. Not in that interview, not during this trial, not when the autopsy pictures are being presented, not when we're looking at his brain or his subdural brain bleeds. Not once. Is that reasonable? She's completely detached. She's completely unaffected. No emotion whatsoever. It's unbelievable.
>
> Let's compare that demeanor to Andrew Ullsperger's demeanor, because, again, he represents a reasonable person. Andrew Ullsperger who had had two interactions with baby Cash before the 28th, very limited contact with this baby versus Sarah Cullen, who spent from 7:15 to 5:00 in the evening every day with Cash for seven weeks. Andrew Ullsperger is visibly distraught during his interviews, Sergeant Pankonin tells you and Andrew told you himself. I asked him, Why were you so upset? What was your number one concern? And without hesitation, he said, Cash. Because why wouldn't it be? He said, This is a baby we're talking about. Completely different physical and emotional response than this woman (pointing), the one who was paid and entrusted with the care of a life.

Cullen's attorney did not object.

Cullen's attorney objected only during closing statements when the prosecutor spoke about the Bells' loss:

> And [Cullen] did it. She did it with her own hands, nobody else's. In those moments when this woman was taking out her rage on a child, a four-month-old helpless baby in her care, shaking him, slamming him, she broke his body, she shattered that child's body, she shattered that child's life and she shattered the lives of everybody who loved Cash Bell.

> You know what? At the close of this we all get to go home. We get to go home to our kids and our grandkids. We get to get our children dressed for school and pick out Halloween costumes when it rolls around and open presents and celebrate birthdays.

Cullen's counsel objected stating, "[T]his is improper closing argument and it's asking for sympathy and that's inappropriate." The district court overruled the objection.

7. Conviction and Sentence

The jury convicted Cullen of intentional child abuse resulting in death. The district court sentenced Cullen to a term of imprisonment of 70 years to life.

III. ASSIGNMENTS OF ERROR

Cullen assigns that the district court erred in (1) denying her motion for mistrial on the basis of allowing admission of prior bad acts evidence pursuant to rule 404 and overruling Cullen's objection to the prosecutor's closing argument, (2) failing to sustain Cullen's objection and to order a mistrial due to prosecutorial misconduct during closing argument, and (3) abusing its discretion by imposing an excessive sentence. Cullen additionally assigns that she received ineffective assistance of counsel.

IV. STANDARD OF REVIEW

[1-4] Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the trial court abused its discretion.[3] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404, and the trial court's decision will not be reversed absent an abuse of discretion.[4] We will not disturb a sentence

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[3] *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

[4] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

imposed within the statutory limits absent an abuse of discretion by the trial court.[5] 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.[6]

[5] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[7] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record 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?[8]

V. ANALYSIS

1. Evidence of Cash's Prior Injuries

At trial, the State presented evidence of injuries Cash sustained while in Cullen's care during the weeks prior to the fatal injuries he sustained on February 28, 2013. Cullen assigns that the district court erred in denying her motion for mistrial in response to this evidence, which was based on the improper admission of prior bad acts evidence pursuant to rule 404.

We begin by clarifying the evidence at issue in this assigned error. First, Cullen argues in her brief that a pretrial order concerning rule 404 evidence addressed Cullen's statements to law enforcement. However, the rule 404 hearing addressed only Cullen's abuse of children at prior daycares, not her statements to law enforcement concerning Cash's prior injuries while in her care. Although one of Cullen's pretrial motions

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[5] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[6] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[7] *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[8] *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014).

did address whether her statements to law enforcement were made freely, voluntarily, and intelligently, no error is assigned to the court's ruling determining that the statements were voluntary. Cullen opposed the admission of her statements to law enforcement before and during trial, but her opposition addressed the voluntariness of her statements and not their admissibility under rule 404. Thus, we will not consider her statements to law enforcement in analyzing her assignment of error based on rule 404.[9]

Second, Cullen claims that she made a motion for mistrial in response to evidence of Cash's prior injuries. While a motion for mistrial may have occurred off the record, the record before this court does not contain a motion for mistrial premised upon evidence of Cash's prior injuries. However, Cullen's counsel did make a motion in limine to prevent the admission of the text messages concerning Cash's prior injuries pursuant to rule 404, as well as timely and specific continuing objections during testimony about those injuries. On this basis, we now evaluate the admissibility of testimony by Ashley and Bergerson and text messages and photographs pertaining to Cash's prior injuries.[10]

Before considering Cullen's argument about rule 404, we observe that all of the questioned injuries occurred during the period of time charged in the information as a single offense. As we have already stated, the information charged Cullen with intentional child abuse occurring on or about January 1 through February 28, 2013. Thus, Cullen was clearly on notice that all of these events were within the scope of the charged crime.

Cullen argues that the risk of prejudice produced by evidence of Cash's prior injuries outweighed the evidence's probative

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[9] See *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015) (objection, based on specific ground and properly overruled, does not preserve question for appellate review on any other ground).

[10] See *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

value under rule 404. The State counters that because the evidence of Cash's prior injuries was intrinsic or inextricably intertwined with the injuries that resulted in his death, rule 404 did not apply. We agree with the State.

[6] Rule 404 provides, in part:

> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

[7,8] Rule 404(2), however, does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. Our jurisprudence initially adopted a broad concept of this class of evidence.[11] Although in other cases we have partially backed away from the inextricably intertwined exception and instead applied a broader notion of rule 404, the exception is still viable.[12] Recently, in *State v. Ash*,[13] we articulated our narrowed concept of the exception, stating that inextricably intertwined evidence

> "includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime

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[11] See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[12] See, e.g., *State v. Freemont, supra* note 10; *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013).

[13] *State v. Ash, supra* note 12, 286 Neb. at 694, 838 N.W.2d at 283.

> will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime."

We summarized four types of circumstances under which we had previously upheld the admission of such intrinsic evidence:

> (1) The defendant's other bad acts showed his pattern of sexually abusing a child or exposing the child to sexually explicit material; (2) the defendant destroyed evidence of the crime soon afterward; (3) the defendant's arrest for a different theft resulted in the discovery of evidence of the charged theft, and the evidence established that the items were stolen; and (4) the defendant was using a controlled substance at the time that the crime was committed.[14]

The first circumstance refers to our holdings in *State v. Baker*[15] and *State v. McPherson*.[16]

In *Baker*, we held that the inextricably intertwined exception to rule 402(2) applied where the defendant's other bad acts showed his pattern of sexually abusing a child. There, the State's evidence included testimony that the defendant threatened the victim with harm if she reported him, the mother's testimony that the defendant threatened her and physically assaulted her if she did not bring the victim to the bedroom at his direction, and the mother's testimony that the defendant became sexually aroused while watching the victim administer a massage. The defendant claimed this evidence was inadmissible under rule 404(2). On appeal, we considered whether the evidence was intrinsic to the charged crimes of first degree sexual assault and third degree sexual assault of a child and concluded the State was entitled to present this evidence as part of a coherent factual setting of the crime. We observed

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[14] *Id.* at 695, 838 N.W.2d at 283.

[15] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[16] *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

that the evidence was not offered to prove the defendant's propensity or character to act a certain way.

In reaching our conclusion in *Baker*, we relied on *McPherson*, where the defendant was convicted on two counts of child abuse and two counts of first degree sexual assault on a child. The victims were his two minor daughters. The girls testified about sexual activity that occurred in their home. On appeal, the defendant argued that evidence about sexual devices and sexually explicit videos in the home was inadmissible under rule 404(2). We disagreed, concluding that the evidence was "so closely intertwined with both crimes charged that it cannot be considered extrinsic."[17]

Similarly, in the recent case of *State v. Smith*,[18] the defendant was convicted of one count of murder in the first degree, four counts of assault in the second degree, and five counts of use of a deadly weapon to commit a felony. On appeal, we concluded that the trial court did not err in admitting evidence that the defendant threatened the shooting victims each time he saw them after they had entered plea agreements with the federal government. We determined that this evidence was inextricably intertwined with the shooting and not subject to rule 404. We likened the scenario to the one in *Baker*, inter alia, and reasoned that such evidence was part of the factual setting of the crimes and was necessary to present a coherent picture. Further, we explained that the evidence of the prior encounters did not show propensity for the shootings, but, rather, established that the defendant had made threats and acted on them.

Like the disputed evidence in *Baker*, *McPherson*, and *Smith*, the evidence of Cash's prior injuries was necessary to establish the factual setting of the fatal injuries Cullen inflicted on Cash on February 28, 2013. Furthermore, there was a pattern or history in this case that is similar to the scenarios in

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[17] *Id.* at 744, 668 N.W.2d at 513.

[18] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

Baker and *McPherson*. Although the abuse here was physical rather than sexual, we see no reason not to apply the same rationale to cases of intentional physical abuse of children as we have in sexual abuse cases. Evidence of Cash's prior injuries presented a picture of Cullen's relationship with Cash and his parents on the day of Cash's fatal injuries and placed those fatal injuries in the context of an escalating pattern of abuse, rather than presenting them as wholly isolated incidents which, considering the severity of Cash's injuries, would have told an incomplete story of the crime charged. Further, the evidence of Cash's prior injuries shed light on whether Cullen's actions were intentional or negligent.

We recognize that in *State v. Freemont*,[19] we chose not to allow the intrinsic or inextricably intertwined exception where the prior bad acts occurred several days to a week before the charged offense. In that case, the defendant was convicted of second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. On appeal, this court held that the State's evidence that several days before the murder at issue, the defendant, who was a felon, had been in the possession of a firearm was inadmissible under rule 404(2). The majority concluded that the intrinsic or inextricably intertwined exception to rule 404(2) did not apply, holding that "[t]he prior misconduct did not provide any insight into [the defendant's] reason for allegedly killing" the victim and "was not part of the same transaction and occurred several days or a week before" the murder.[20] This court determined that holding otherwise would "open the door to abuse" of the exception and noted that several federal courts have limited or rejected the exception.[21]

The instant case is distinguishable from *Freemont*. In that case, the character of the offense that the State sought

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[19] *State v. Freemont, supra* note 10.

[20] *Id.* at 192, 817 N.W.2d at 291.

[21] *Id.*

to put in evidence—possession of a firearm—was entirely different from the most serious charged offense—murder. However, in this case, both the evidence that the State sought to introduce and the crime charged involved the same type of offense, child abuse, and it involved the same victim, Cash. As such, as we have already observed, evidence of nonfatal injuries perpetrated on Cash by Cullen prior to the fatal injuries he sustained on February 28, 2013, painted a coherent picture of an increasing pattern of abuse and tended to show that Cullen's fatal actions were intentional rather than merely negligent.

Further, the State argues that the instant case is also distinguishable from two child abuse cases in which we held that prior injuries, as extrinsic evidence, were subject to rule 404(2). In *State v. Kuehn*,[22] we held that evidence of two prior incidents in which a 10-month-old child was injured while in the defendant's care was properly admitted under rule 404(2) as proof of absence of mistake or accident as to the charged offense of intentional child abuse. In *State v. Chavez*,[23] we concluded that evidence of remote injuries indicative of battered child syndrome as seen in a nearly 4-month-old child's autopsy was properly admitted under rule 404(2) as proof of intent or absence of mistake or accident as to the charged offense of intentional child abuse resulting in death. We assumed without deciding in *Chavez* that evidence of a prior bruise on the child's forehead while in the defendant's care was erroneously admitted under rule 404(2) as proof of intent or absence of mistake or accident, but concluded that its admission was harmless.

We agree that the case before us differs from *Kuehn* and *Chavez*. *Kuehn* was limited to two prior injuries occurring over a month prior to the charged offense. *Chavez* addressed remote injuries unconnected to the defendant and only one injury

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[22] *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[23] *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011).

while in the defendant's care occurring a month before the charged offense. The case before us, however, presents injuries occurring almost weekly over approximately 7 weeks while Cullen cared for Cash. Moreover, they were part of an escalating pattern of abuse that ended in Cash's death.

We conclude that Cash's injuries incurred prior to February 28, 2013, were inextricably intertwined with the charged crime and that, therefore, rule 404(2) does not apply. The incidents were not used for impermissible propensity purposes, but, rather, they formed the factual setting, and they were necessary to present a coherent picture of the crime. Furthermore, the frequency and the increasing severity of Cash's injuries tended to prove that his fatal injuries resulted from Cullen's intentional actions, rather than negligence. The district court did not err in admitting this evidence.

[9,10] Even if the district court had erred in admitting this evidence of Cash's prior injuries, the error would have been harmless. An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless the error was harmless beyond a reasonable doubt.[24] 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.[25]

In Cullen's interviews with police, she admitted that Cash had previously sustained injuries while in her care. These injuries, by her own admission, became increasingly serious. Cullen attempted to attribute them to accidental causes. But her statements provided powerful evidence that after she began caring for Cash, a pattern emerged of increasingly serious injuries. Cullen's own statements illuminated the pattern.

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[24] *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015).

[25] *Id.*

Testimony by Ashley and Bergerson merely reinforced it. Thus, a jury's conclusion that the pattern of increasingly serious injuries demonstrated intentional actions on Cullen's part was surely unattributable to testimony by Ashley and Bergerson. Therefore, even if admission of that evidence had been in error, it would have been harmless error.

2. Prosecutorial Misconduct

Cullen asserts that the district court erred in failing to sustain her counsel's objection and to order a mistrial due to prosecutorial misconduct during closing statements. Cullen argues that the prosecutor's statements pointing out her lack of emotion during the trial unduly influenced the jury.

[11,12] Cullen failed to preserve this issue. In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument.[26] Cullen's counsel did not object to the prosecutor's statements about her lack of emotion and made no motion for mistrial during closing arguments. Cullen claims that her counsel objected "globally" to the prosecutor's closing statements, by objecting to closing statements about the Bells' loss.[27] However, that objection, stating that the prosecutor's remarks were "asking for sympathy," was specific to comments about the Bells' loss. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.[28] As such, Cullen did not preserve for appeal issues to which she did not object at trial.[29]

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[26] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[27] Brief for appellant at 16.

[28] *State v. Newman, supra* note 9.

[29] *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992) (any objection to prosecutor's arguments made after jury has been instructed and has retired is untimely and will not be reviewed on appeal).

[13] Because Cullen did not timely object to the comments concerning her lack of emotion, we review this issue only for plain error. Plain error may be found 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.[30] But, as we have noted, "'the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."'"[31]

[14,15] 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.[32] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[33] In the present case, the prosecutor's remarks about Cullen's lack of emotion could not have misled or unduly influenced the jurors. They had observed Cullen's demeanor for themselves. Thus, there was no misconduct by the prosecutor. Obviously, if there was no misconduct, there can be no plain error. Accordingly, this assignment of error is without merit.

3. Excessive Sentence

Cullen argues that her sentence of 70 years' to life imprisonment was excessive. The jury convicted Cullen of a Class IB felony, which carries a sentence of 20 years' to

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[30] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[31] *Id*. at 336, 821 N.W.2d at 369 (quoting *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). See, also, *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[32] See *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[33] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

life imprisonment. Cullen's sentence was within the statutory range. Accordingly, we review the sentence for an abuse of discretion.

[16,17] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[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]

Cullen contends that in determining her sentence, the district court did not consider her willingness to plead to an attempt charge. She points out that she is a mother to two children and that she had pursued a degree in early childhood development. Cullen asserts that there was no evidence of an intent to kill Cash. Cullen further argues that the district court abused its discretion by basing her sentence on the prosecutor's statements.

Based upon the relevant sentencing factors, we do not find Cullen's sentence to be an abuse of discretion. Cullen was 25 years old at the time of the offense. She reported having a happy childhood and rewarding and satisfying relationships with her family. Cullen, a mother, had experience and education in caring for children and a history of abusing them, although her relatively minimal criminal history contains no previous convictions for violent crimes. We have recounted the details of the current offense and need not repeat them here. Suffice it to say, the circumstances surrounding Cash's death were simply abhorrent, and the evidence demonstrates that

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[34] See, e.g., *State v. Bauldwin, supra* note 6.

[35] *Id.*

Cullen's treatment of Cash, a helpless infant, was assaultive and violent. This assignment of error clearly lacks merit.

4. Ineffective Assistance of Counsel

Cullen argues that her trial counsel was ineffective in these respects: (1) failing to timely object when Chris testified that he heard a nurse tell Ashley, "She did this to him"; (2) failing to timely object to the prosecutor's statements during closing arguments that Cullen lacked emotion during the trial; (3) failing to investigate and call an expert medical witness on behalf of Cullen; and (4) failing to file a motion for new trial based on the improper admission of rule 404 evidence and on prosecutorial misconduct.

[18,19] In order to show ineffective assistance of counsel under *Strickland v. Washington*,[36] a defendant must show, first, that counsel was deficient and, second, that the deficient performance actually caused prejudice to the defendant's case. The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.[37]

[20-23] Prejudice caused by counsel's deficiency is shown when there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[38] A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[39] This court follows the approach to the prejudice inquiry outlined by the U.S. Supreme Court in *Strickland*:

> "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the

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[36] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[37] See, *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[38] See *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[39] *Id.* at 774, 822 N.W.2d at 849.

> evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."[40]

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.[41] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[42]

(a) Chris' Testimony

Cullen argues that her trial counsel failed to timely object to Chris' testimony that a nurse implicated Cullen as the perpetrator of Cash's injuries and that the testimony affected the jury's verdict. We disagree with Cullen's assertion on appeal that trial counsel failed to timely object. In the above section titled "II. BACKGROUND," under the subheading "5. Motion for Mistrial," we have described how this event unfolded at trial.

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[40] *Id.* at 774-75, 822 N.W.2d at 849 (quoting *Strickland v. Washington, supra* note 36).

[41] *State v. Newman, supra* note 9.

[42] *Id.*

The record shows that trial counsel's conduct was not deficient. Not only did he timely make and, in effect, renew a specific objection, he also timely moved for a mistrial. But more to the point, he succeeded in having the offending testimony stricken.

[24] Moreover, Cullen suffered no prejudice. Not only did the court strike the evidence, it admonished the jury "totally to disregard that comment entirely." When an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.[43] Cullen's argument fails on both prongs of *Strickland*.

(b) Motion for New Trial

Cullen asserts that her trial counsel was ineffective in failing to file a motion for new trial based on the improper admission of purported rule 404 evidence concerning Cash's prior injuries. We have already concluded that because the evidence of Cash's prior injuries was intrinsic or inextricably intertwined with the injuries that resulted in his death, rule 404 did not apply. Further, even if testimony of Cash's prior injuries had been admitted in error, such error would have been harmless. Thus, a motion for new trial based on evidence of Cash's prior injuries would have been unsuccessful. It necessarily follows that trial counsel did not provide ineffective assistance by not filing a motion that had no merit.

Cullen also contends that her trial counsel was ineffective in failing to file a motion for new trial based on prosecutorial misconduct during closing statements. We have rejected Cullen's claim that the prosecutor committed misconduct in commenting on Cullen's lack of emotion during trial. Hence, we conclude that trial counsel was not deficient in opting not to file a motion for new trial based on prosecutorial misconduct. Such a motion would have had no merit.

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[43] *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

(c) Closing Statements

Cullen argues that her trial counsel was ineffective for not making a timely objection to the prosecutor's reference to her lack of emotion during trial. We have concluded above that these remarks did not constitute misconduct; therefore, Cullen's trial counsel was not deficient in allowing them without objection.

(d) Expert Medical Witness

Cullen argues that the jury's decision was affected by her trial counsel's failure to investigate and call a medical expert to testify on her behalf. The State asserts, and Cullen concedes, that the record is inadequate to address this claim. We agree. The record contains copious medical evidence, but none of it suggests that another medical expert would offer an opinion that would support Cullen's version of events. Without a more complete record, we decline to address this issue. We express no opinion whether Cullen's assigned error, if set forth as an allegation in a motion for postconviction relief, would be sufficient to require an evidentiary hearing.

VI. CONCLUSION

We find no merit to Cullen's assertion that the district court abused its discretion by imposing an excessive sentence. And the district court did not err in admitting evidence of Cash's prior injuries or overruling Cullen's objection to the prosecutor's closing statements. Further, Cullen's claims of ineffective assistance of trial counsel either lack merit or cannot be resolved because the record on direct appeal is insufficient. We affirm Cullen's conviction and sentence.

Affirmed.

State of Nebraska, appellee, v. Ryan L. Poe, appellant.

870 N.W.2d 779

Filed November 6, 2015. No. S-14-1106.

1. **Postconviction: Evidence.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact.
2. **Postconviction: Evidence: Appeal and Error.** An appellate court upholds the trial court's findings in an evidentiary hearing on a motion for postconviction relief unless the findings are clearly erroneous. An appellate court independently resolves questions of law.
3. **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 exclude evidence on hearsay grounds.
4. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.
5. **Rules of Evidence: Hearsay.** Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere.
6. **Hearsay.** A statement is not hearsay if the proponent offers it to show its impact on the listener and the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.
7. **Appeal and Error.** Error that does not prejudice the appellant is not a ground for relief on appeal.
8. **Trial: Evidence: Appeal and Error.** The exclusion of evidence is ordinarily not prejudicial if the court admits substantially similar evidence without objection.
9. **Effectiveness of Counsel: Proof: 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.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Michael J. Wilson and Glenn Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

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

Wright, Connolly, McCormack, Miller-Lerman, Cassel, and Stacy, JJ.

Connolly, J.

SUMMARY

Ryan L. Poe moved for postconviction relief from his convictions for first degree murder and use of a deadly weapon to commit a felony. After the district court overruled the motion, we remanded the cause for an evidentiary hearing on one of Poe's ineffective assistance of counsel claims. Specifically, we directed the court to decide if Poe's trial counsel should have impeached the State's key witness with a statement the witness made to Poe's girlfriend to the effect that Poe was innocent. On remand, the district court found that Poe's girlfriend did not tell his trial counsel about such a statement. The district court again overruled Poe's postconviction motion. Poe appeals, arguing that the court erroneously excluded certain out-of-court statements on hearsay grounds. We affirm.

BACKGROUND

Trial

The State charged Poe with first degree felony murder and use of a deadly weapon for the killing of Trever Lee. Lee died during a robbery of his townhouse in 2004.

One of Lee's roommates sold marijuana to a friend of Poe's, Antwine Harper. Harper was the State's key witness at Poe's trial. The State produced no physical evidence linking Poe to the crime.

Harper testified that Poe had asked him for permission to rob Lee's roommate and that Poe later confessed to the crime in great detail. Poe's attorney, Thomas Riley, extensively cross-examined Harper. Harper admitted that he initially denied knowing anything about the shooting and identified Poe as the killer only after the police threatened to arrest him. Harper acknowledged that he cried after the officers made the threat. He said that the officers told him that he would not "go to jail today" if he talked to them about the shooting.

A jury convicted Poe of first degree murder and use of a deadly weapon to commit a felony. The court sentenced him to life imprisonment and a consecutive term of 10 to 20 years' imprisonment for use of a deadly weapon. We affirmed Poe's convictions on his direct appeal.[1]

First Postconviction

Poe moved for postconviction relief in 2011. He alleged that the prosecutor had committed misconduct, that exculpatory evidence came to light after the trial, and that Riley, his trial counsel, was ineffective. Poe alleged that Harper told Poe's girlfriend, Michelle Hayes, that Poe was innocent. Poe faulted Riley for not impeaching Harper with this statement.

The district court overruled Poe's postconviction motion without an evidentiary hearing. Poe appealed. We remanded the cause with directions to "conduct[] an evidentiary hearing on Poe's claim of ineffective assistance of trial counsel relating to the allegation that counsel failed to utilize Harper's alleged inconsistent statement to Hayes that Poe was innocent."[2]

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[1] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[2] *State v. Poe*, 284 Neb. 750, 776-77, 822 N.W.2d 831, 850 (2012).

Second Postconviction

On remand, Poe offered four exhibits at the evidentiary hearing: (1) a deposition of Hayes; (2) a deposition of Riley; (3) an affidavit of his mother, Velma Poe (Velma); and (4) his own affidavit.

Hayes testified that she was working as a cashier when Harper walked up to her register a couple of days before Poe's trial. Hayes knew Harper because he once dated her sister. According to Hayes, Harper greeted her and then said, "'[D]on't worry about it, [Poe] is going to get out. I'm not going to show up to court. They are making me do something that's not true. He didn't do it. Don't worry about it, he's going to get out.'"

Hayes told Poe's parents about her encounter with Harper, and Poe's father suggested that she talk with Riley. She and Velma met with Riley a day or two before the trial. Hayes said that she "told [Riley] everything," but that he did not seem interested and did not take any notes.

Riley recalled meeting with Hayes, but remembered the substance of their exchange differently. According to Riley,

> the focus of what she was telling me was that [Harper] had apologized, he felt bad that he was doing what he was doing, and that he told her he wasn't coming to court. I do not recall her saying anything about him saying [Poe] didn't commit this crime or didn't shoot him . . . . [H]er purpose, as I perceived it, was primarily saying, hey, Harper says he's not coming to court, what happens if he doesn't come to court.

Riley stated several times that he did not remember Hayes telling him that Harper told her that Poe was innocent.

Riley said that he went through "six boxes of stuff" before his deposition and "couldn't find anything." He talked to several of the other attorneys who worked on Poe's case, and they could not recall such a statement either. Riley said that he would have asked "follow-ups" if Hayes had told him that Harper said that Poe was innocent.

In her affidavit, Velma, Poe's mother, averred that she and Hayes met with Riley a couple of days before Poe's trial. In the second paragraph, Velma stated:

> I heard [Hayes] tell Riley that Harper came through her checkout line at Wal-Mart. [Hayes] told Riley that Harper said he was not going to show up for trial. [Hayes] told Riley that Harper told her the police were trying to make him lie, and that [Poe] did not commit the crime.

The State objected to the second paragraph of Velma's affidavit on hearsay grounds. Poe responded that he was "not offering it for the truth of the matter asserted by either [Hayes] or the truth of the matter asserted by . . . Harper." Instead, he offered Velma's affidavit "solely to corroborate deposition testimony from . . . Hayes that she told Riley these things." The court sustained the State's hearsay objection.

After the evidentiary hearing, the court overruled Poe's motion for postconviction relief. It emphasized Riley's testimony that he could not recall Hayes telling him that Harper told her Poe was innocent or that the police were trying to make him lie. The court found that "the allegation that Counsel failed to utilize Harper's alleged inconsistent statement to Hayes that Poe was innocent was in fact not an accurate reflection of any conversation between . . . Hayes and . . . Riley."

ASSIGNMENTS OF ERROR

Poe assigns that the court erred by (1) sustaining the State's hearsay objection to the second paragraph of Velma's affidavit and (2) determining that he did not receive ineffective assistance of counsel.

STANDARD OF REVIEW

[1,2] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact.[3] An appellate

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[3] *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015).

court upholds the trial court's findings unless they are clearly erroneous.[4] In contrast, an appellate court independently resolves questions of law.[5]

[3] 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 or exclude evidence on hearsay grounds.[6]

ANALYSIS

Hearsay

Poe argues that the court erred by excluding the second paragraph of Velma's affidavit on hearsay grounds. He contends that he did not offer it for the truth of the matter asserted. Instead, he states that he offered it to show that Riley knew Harper had made a statement to the effect that Poe was innocent.

[4,5] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.[7] Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere.[8]

[6] Of course, an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted.[9] For example, a statement is not hearsay if the proponent offers it to show its impact on the listener and the listener's knowledge, belief, response, or state

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[4] *Id.*

[5] *Id.*

[6] See *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

[7] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[8] *Id.*

[9] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

of mind after hearing the statement is relevant to an issue in the case.[10]

[7,8] But we need not decide if the second paragraph of Velma's affidavit is admissible as evidence of Riley's knowledge, because its exclusion did not prejudice Poe. Error that does not prejudice the appellant is not a ground for relief on appeal.[11] The exclusion of evidence is ordinarily not prejudicial if the court admits substantially similar evidence without objection.[12] Hayes repeatedly testified that she told Riley that Harper said that he was lying and that Poe was innocent. Poe himself stated in his affidavit that he told Riley that he had "reason to believe . . . Harper had recently admitted lying to detectives about my involvement." The second paragraph of Velma's affidavit was substantially similar to other evidence that the court received. Its exclusion therefore did not prejudice a substantial right of Poe.

Ineffective Assistance of Counsel

Poe argues that the court was clearly wrong in finding that Hayes did not tell Riley about Harper's inconsistent statement. Poe contends that Riley did not testify "on personal knowledge."[13] Instead, Riley's "basis for his conclusion that Hayes did not tell him is his belief that he would have asked more follow-up questions," which Poe believes is "an untenable basis for the district court's finding."[14] Because of its

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[10] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). See, *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014); *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977); 2 McCormick on Evidence § 249 (Kenneth S. Broun et al. eds., 7th ed. 2013).

[11] See *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[12] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[13] Brief for appellant at 15.

[14] *Id.*

mistaken factual finding, Poe argues that the court's legal conclusion was also faulty.

[9] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[15] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[16] A court may address the two prongs of this test, deficient performance and prejudice, in either order.[17]

We conclude that the court's finding that Hayes never told Riley about Harper's inconsistent statement is not clearly wrong. Riley testified that he did not believe Hayes told him about the statement, because he could not remember Hayes telling him about the statement. Whether a person can have any other type of "personal knowledge" of an event that did not occur is a question for a metaphysician, not a court. Poe argues that Riley testified in "less specific terms" than Hayes,[18] but it is not our role to reweigh the credibility of witnesses or resolve conflicts in the evidence.[19]

CONCLUSION

The court's exclusion of the second paragraph of Velma's affidavit did not prejudice Poe and is therefore not a basis for relief on appeal. The court's finding that Hayes did not inform Riley of Harper's inconsistent statement is not clearly wrong. So, the court did not err by concluding that Riley did not perform deficiently by failing to impeach Harper with the inconsistent statement.

Affirmed.

Heavican, C.J., not participating.

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[15] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[16] *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

[17] *Id.*

[18] Brief for appellant at 14.

[19] See *State v. Armstrong, supra* note 3.

State of Nebraska on behalf of Jakai C., minor child, appellee, v. Tiffany M., appellee, and Damian C., appellant.

871 N.W.2d 230

Filed November 13, 2015. No. S-13-1052.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Affidavits: Fees: Appeal and Error.** The filing of a poverty affidavit, properly confirmed by oath or affirmation, serves as a substitute for the docket fee for an appeal.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. ____: ____. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
6. **Child Custody: Appeal and Error.** In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
7. **Child Custody: Proof.** In a child custody modification case, 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.

8. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known at the time of the initial decree, would have persuaded the court to decree differently.
9. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing as an initial matter that there has been a change in circumstances.
10. **Child Custody: Evidence: Time.** In 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 motion to modify is of more significance than the behavior prior to that time.

Appeal from the District Court for Sarpy County: Max Kelch, Judge. Affirmed.

Amy Sherman for appellant.

Paul J. Gardner, John C. Wieland, and Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellee Tiffany M.

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

Miller-Lerman, J.

NATURE OF CASE

Damian C., the appellant, and Tiffany M., the appellee, have a minor child together, Jakai C. In July 2011, the district court for Sarpy County filed a "Decree of Paternity, Custody, and Parenting Time," which awarded joint legal custody to the parties, awarded physical custody to Tiffany, and ordered Damian to pay child support. In 2012, Damian filed a complaint to modify the decree, seeking sole legal and physical custody and an order that Tiffany pay child support. Tiffany filed a cross-complaint requesting that Damian's child support obligation be increased. After a modification hearing, on November 8, 2013, the district court filed its order in which it

denied a change of custody and increased Damian's child support obligation. This is the order currently on appeal.

On December 2, 2013, Damian filed his first notice of appeal seeking review of the merits of the November 8 order, along with a motion to proceed in forma pauperis on appeal and a poverty affidavit. On December 12, the district court denied the motion to proceed in forma pauperis without comment, but later vacated that ruling. Without holding an evidentiary hearing, on December 16, the district court filed an amended order denying Damian's motion to proceed in forma pauperis on appeal based on the district court's determination that Damian had sufficient funds. On January 13, 2014, Damian filed a second notice of appeal, posted a bond, and paid the appellate docket fee. The January 13 filing sought review of the December 16, 2013, amended order denying him in forma pauperis status on appeal.

The appeal proceeded to oral argument on November 6, 2014, but there was no bill of exceptions filed for our review of the in forma pauperis ruling or the merits. On November 12, we entered an order in which we vacated the December 16, 2013, amended order and remanded the in forma pauperis issue to the district court for an evidentiary hearing on the issue of Damian's ability to pay. On November 14, 2014, the district court filed an order which granted Damian the right to proceed in forma pauperis on appeal.

The in forma pauperis issue has been resolved, and a record of the proceedings in the district court have now been prepared and filed. As explained below, following our de novo review of the record, we determine that the district court did not abuse its discretion when it declined to modify custody of Jakai, and in all respects, we affirm the November 8, 2013, order of the district court.

STATEMENT OF FACTS

Damian and Tiffany had a child together, Jakai, who was born in October 2009. Damian and Tiffany were never married.

On February 17, 2010, the State on behalf of Jakai filed a "Paternity Complaint" against Damian, seeking the entry of a judgment of paternity against Damian and the entry of an order of child support against Damian. The district court entered a determination of paternity finding Damian to be the biological father of Jakai and entered a temporary order of child support against Damian in the amount of $50 per month.

On July 29, 2011, the district court filed its "Decree of Paternity, Custody, and Parenting Time." The decree provided that Tiffany and Damian would have joint legal custody of Jakai, and Tiffany was awarded physical custody subject to Damian's parenting time. The decree also incorporated a previous order of child support, which set Damian's child support obligation in the amount of $121 per month.

On March 21, 2012, Damian filed a complaint to modify the decree. Damian alleged that there had been a material change in circumstances since the entry of the decree. Damian stated that Tiffany had failed to comply with the decree in the following ways: interfering with Damian's parenting time; failing to comply with the terms of joint legal custody, specifically regarding Jakai's medical treatment, daycare provider, education, and religion; and failing to comply with provisions regarding exchanging the child. Damian requested that he be granted sole legal and physical custody of Jakai and that Tiffany be ordered to pay child support. During the approximately 1½ years that Damian's complaint to modify was pending, the district court twice found Tiffany guilty of contempt for failing to provide parenting time as previously ordered by the Court.

On January 23, 2013, Tiffany filed a cross-complaint seeking to modify the decree. She sought an increase in Damian's obligation of child support, alleging that there had been a substantial and material change in circumstances warranting a modification of the decree. She also requested that the decree be modified to change the arrangements for exchanging the child between the parties and to allow the parties to

communicate telephonically with Jakai during the other party's parenting time.

A trial regarding the cross-motions for modification was held on November 5, 2013. Tiffany, Damian, and Damian's mother testified at the trial. Damian offered and the court received 12 exhibits. Tiffany offered and the court received five exhibits.

After the trial, on November 8, 2013, the district court filed an order which did not modify custody but did increase Damian's child support obligation. This is the order at issue in this appeal. In its November 8 order, the court determined that Damian failed to show a material change in circumstances which would require a change of custody of Jakai and, in any event, that the evidence failed to show a change in custody was in Jakai's best interests. The court further determined that there had been a material change in circumstances with respect to Damian's finances, and the court increased Damian's child support obligation to $407 per month. The court denied all other requests of the parties.

On December 2, 2013, Damian filed a notice of appeal seeking review of the rulings in the November 8 order. He also filed a motion to proceed in forma pauperis on appeal and a poverty affidavit in support of the motion. On December 12, the district court filed an order in which it simply stated that Damian's "Motion to Proceed In Forma Pauperis is denied."

On December 16, 2013, the district court filed an amended order, which stated:

> On December 12, 2013, this Court entered an Order without hearing or opinion denying [Damian's] Motion to Proceed In Forma Pauperis. However, pursuant to Neb.Rev.Stat. §25-2301.02 [(Reissue 2008)] and Glass v. Kenney, 268 Neb. 704[, 687 N.W.2d 907] (2004), this Court failed to hold an evidentiary hearing or provide written statement of its reasons, findings, and conclusions. Therefore, this Court finds that the Order, dated December 12, 2013, must be vacated and an Amended

> Order be issued which complies with both the Nebraska Statute and the case law of our Supreme Court.

In its December 16, 2013, amended order, the court denied Damian's December 2 motion to proceed in forma pauperis on appeal based on its determination that Damian "is not a person who qualifies to proceed In Forma Pauperis." The court provided written reasons for its determination that Damian was not eligible to proceed in forma pauperis, all to the effect that Damian had sufficient funds. However, according to the record on appeal, an evidentiary hearing on the matter was not held.

Neb. Rev. Stat. § 25-2301.02 (Reissue 2008), to which reference is made in the district court's order of December 16, 2013, provides:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application or at any time if the ground for the objection is that the initial application was fraudulent. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security

> notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.
>
> (2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

On January 13, 2014, Damian filed a second notice of appeal seeking review of the December 16, 2013, amended order which denied his December 2 motion to proceed in forma pauperis on appeal. With the filing of his second notice of appeal, Damian paid the docketing fee and bond. Damian's appeal of the denial of his application to proceed in forma pauperis on appeal was docketed in the existing appeal. We moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

The appeal was set for oral argument on November 6, 2014, but there was no bill of exceptions pertaining to either the in forma pauperis issue or the modification trial to review. Because the threshold issue in this appeal was Damian's eligibility to proceed in forma pauperis, we considered this issue, and on November 12, we entered the following order:

> Damian C., appellant, moves this Court for an order reversing the district court's amended order filed December 16, 2013, which denied his motion to proceed in forma pauperis on appeal based on a finding regarding indigency, but not based on any finding pertaining

> to frivolous grounds. Upon due consideration, the order of December 16, 2013, is ordered vacated and the in forma pauperis on appeal [issue] based on indigency is remanded to the district court for an evidentiary hearing in accordance with Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008). The Clerk of the Supreme Court is directed to send a copy of this minute entry to the Clerk of the District Court, and the Clerk of the District Court is directed to certify a supplemental transcript reflecting the district court's decision following the evidentiary hearing and, if denied, the district court reporter is directed to prepare a bill of exceptions from the hearing at the expense of the county.

On November 14, 2014, the district court filed an order which granted Damian the right to proceed in forma pauperis on appeal. As a result, a bill of exceptions was filed on March 2, 2015.

The testimony from the modification trial held November 5, 2013, was in conflict. The record generally showed that the parties disputed the propriety of the manner in which the child was exchanged and whether each party interfered with the parenting time of the other. The record further showed that with respect to living circumstances, Damian lived with his parents and was employed at a bank, and Tiffany worked as a certified nursing assistant and was in nursing school but maintained her own apartment. Damian testified that Tiffany disparages him on social media. However, both parties were shown to be able parents.

In an order filed November 8, 2013, the district court denied a change in custody and increased Damian's child support obligation. Damian appeals.

ASSIGNMENTS OF ERROR

Damian claims, restated, that the district court erred when it (1) determined that Damian did not establish a material change in circumstances since the entry of the decree, failed to modify custody so that Damian had sole legal and physical

custody, and failed to order Tiffany to pay child support and (2) increased Damian's child support obligation. Because Damian does not argue the second assignment of error in his appellate brief, we do not analyze it in this appeal. See *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015) (stating that errors that are assigned but not specifically argued will not be addressed by appellate court).

STANDARDS OF REVIEW

[1] A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2); *State v. Sims*, 291 Neb. 475, 865 N.W.2d 800 (2015); *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015).

[2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

ANALYSIS

In Forma Pauperis Issue.

When this appeal was initially presented to this court, the threshold issue was whether the district court erred when, without conducting an evidentiary hearing, it denied Damian's motion to proceed in forma pauperis on appeal for the reason that Damian had sufficient funds. We determined that the district court had erred when it did not conduct a hearing before denying Damian's motion to proceed in forma pauperis on appeal on the grounds of his ability to pay. In our November 12, 2014, order, we vacated the district court's order denying Damian's motion and remanded the issue with directions to the district court to conduct a hearing on Damian's ability to pay before ruling on Damian's motion to proceed in forma pauperis on appeal. Below, we discuss our reasoning for this determination.

[3] Proceedings in forma pauperis are governed by chapter 25, article 23, of the Nebraska Revised Statutes. See Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2008). The term "in forma pauperis" is defined by statute as "the permission given by the court for a party to proceed without prepayment of fees and costs or security." § 25-2301(2). A party seeking such permission must file an application including a poverty "affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress." § 25-2301.01. We have often observed that the filing of a poverty affidavit, properly confirmed by oath or affirmation, serves as a substitute for the docket fee for an appeal. *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013). See, also, *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

The centerpiece for our discussion of the in forma pauperis issue in this case is found in § 25-2301.02, which provides:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application or at any time if the ground for the objection is that the initial application was fraudulent. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions

for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

(2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

Except in certain circumstances, the provisions of § 25-2301.02(1) generally direct the trial court to grant an application to proceed in forma pauperis. The trial court can deny an application for in forma pauperis status if the party filing the application "has sufficient funds to pay costs, fees, or security" or if the party filing the application "is asserting legal positions which are frivolous or malicious," except where such denial "would deny a defendant his or her constitutional right to appeal in a felony case." § 25-2301.02(1).

We note that in *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995), we determined under a predecessor statute that a trial court must hold a hearing before denying an application to proceed in forma pauperis. The requirement set forth in *Flora* to the effect that a court provide a hearing

before denying any application to proceed in forma pauperis is no longer a correct requirement. In 1999, the statute relied on in *Flora* was substantially amended, see § 25-2301 (Supp. 1999), and two statutes were added, see §§ 25-2301.01 and 25-2301.02 (Supp. 1999). Section 25-2301.02 (Reissue 2008), which is at issue in the present case, has remained largely unchanged since its addition in 1999.

Leaving aside the circumstance where a defendant has a constitutional right to appeal in a felony case, under the plain language of § 25-2301.02, a hearing is required on an objection to an applicant's request to proceed in forma pauperis, except that a hearing is not required on the application to proceed in forma pauperis if the denial of the application is because the court, on its own motion, objects on the grounds that the position asserted by the applicant is frivolous or malicious. See *Moore v. Nebraska Bd. of Parole*, 12 Neb. App. 525, 679 N.W.2d 427 (2004) (recognizing that § 25-2301.02 superseded requirement set forth in *Flora* wherein trial court formerly was required to hold hearing before denying any application to proceed in forma pauperis). Specifically, § 25-2301.02(1) states that in the event an objection is made to the application to proceed in forma pauperis, "[a]n evidentiary hearing shall be conducted on the objection *unless* the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious." (Emphasis supplied.) To summarize, as we read § 25-2301.02(1), the trial court cannot deny in forma pauperis status based on the frivolous or malicious nature of the appeal where a defendant has a constitutional right to appeal in a felony case, and a hearing is required on an objection to a party's application for in forma pauperis status, whether the objection is based on the applicant's ability to pay or the applicant is asserting a frivolous position, except where the objection is made on the court's own motion on the grounds that the legal positions asserted by the applicant are frivolous or malicious.

We recently considered a denial of in forma pauperis status based on ability to pay in a case where the objection was raised by the court on its own motion. See *State v. Sims*, 291 Neb. 475, 865 N.W.2d 800 (2015). In *Sims*, we stated that a "hearing is required by the plain language of § 25-2301.02 in the event the court objects to an application to proceed in forma pauperis on the basis that the party filing the application 'has sufficient funds to pay costs, fees, or security.'" 291 Neb. at 478-79, 865 N.W.2d at 803. The present in forma pauperis issue is controlled by § 25-2301.02 and our reading of the statute as stated in *Sims*.

In this case, on December 2, 2013, Damian filed his notice of appeal from the district court's November 8 order on the merits of the case, and on the same day, he filed his motion and poverty affidavit to proceed in forma pauperis on appeal. The rulings made by the district court show that it believed that Damian had sufficient funds and, on its own motion, denied Damian's motion without holding an evidentiary hearing. Specifically, on December 12, the district court filed an order in which it simply stated that Damian's "Motion to Proceed In Forma Pauperis is denied." And on December 16, the district court filed an amended order in which it stated:

> On December 12, 2013, this Court entered an Order without hearing or opinion denying [Damian's] Motion to Proceed In Forma Pauperis. However, pursuant to Neb. Rev.Stat. §25-2301.02 and Glass v. Kenney, 268 Neb. 704[, 687 N.W.2d 907] (2004), this Court failed to hold an evidentiary hearing or provide written statement of its reasons, findings, and conclusions. Therefore, this Court finds that the Order, dated December 12, 2013, must be vacated and an Amended Order be issued which complies with both the Nebraska Statute and the case law of our Supreme Court.

In the amended order, the district court set forth Damian's income and expenses as reflected in Damian's motion and affidavit to proceed in forma pauperis on appeal. Based on

this information, the district court determined that Damian had sufficient funds and thus "is not a person who qualifies to proceed In Forma Pauperis." On January 13, 2014, Damian filed his notice of appeal from the December 16, 2013, amended order denying his motion to proceed in forma pauperis on appeal.

Under § 25-2301.02(1), the court was required to hold a hearing on Damian's motion to proceed in forma pauperis where the objection was made on the court's own motion on the grounds of ability to pay. The district court erred when it failed to conduct a hearing—hence, our order remanding the issue to the district court.

For the sake of completeness, we note that Tiffany asserted that Damian waived his right to proceed in forma pauperis because he paid the docketing fee and bond when he filed his January 13, 2014, notice of appeal from the December 16, 2013, amended order which denied his motion to proceed in forma pauperis on appeal. Tiffany also asserted that the foregoing demonstrated Damian's ability to pay for the appeal. Because the docket fee paid by Damian is not inconsistent with in forma pauperis eligibility, Damian did not waive his right to seek to proceed in forma pauperis, and we reject Tiffany's arguments.

We have observed that there is a statutory right of interlocutory appellate review of a decision denying in forma pauperis eligibility to be conducted "de novo on the record based on the transcript of the hearing or the written statement of the court." § 25-2301.02(2). See *State v. Sims*, 291 Neb. 475, 865 N.W.2d 800 (2015). See, also, *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001). The statutory provisions anticipate an appeal achieved by filing a docket fee or by filing a poverty affidavit in lieu of the docket fee and the filing of a record sufficient for appellate review. Because Damian had a statutory right to appeal, the district court's denial of his motion for in forma pauperis status on appeal based on ability to pay

without a hearing deprived this court of a record other than the district court's statement by which to perform a meaningful appellate review of the in forma pauperis ruling. A record, the cost of which is statutorily to be paid by the county, was necessary for our review, and a record prepared at the county's expense does not demonstrate a party's ability to pay for the entire record or other costs of an appeal.

In *Jacob v. Schlichtman, supra*, we discussed what costs, fees, or security a litigant proceeding in forma pauperis was excused from paying. We stated:

> After defining "in forma pauperis" and establishing a statutory procedure for determining whether a litigant may proceed in that status, the Legislature made specific provisions for waiver or payment of various costs and expenses which the in forma pauperis litigant is excused from paying. Section 25-2302 provides that upon determining that a party may proceed in forma pauperis, the court "shall direct the responsible officer of the court to issue and serve all the necessary writs, process, and proceedings and perform all such duties without charge." Counties are required to pay other essential costs incurred by the in forma pauperis litigant. See, § 25-2303 (expense of process by publication, if required); § 25-2304 (payment of process and fees to secure presence of witnesses whom court finds to have evidence material and necessary to case); §§ 25-2305 to 25-2307 (costs associated with briefs and record on appeal).

Jacob v. Schlichtman, 261 Neb. at 175-76, 622 N.W.2d at 856. See, also, *Glass v. Kenney*, 268 Neb. at 708, 687 N.W.2d at 911 (stating that "[t]he fees, costs, or security referred to in § 25-2301.02(1) are those customarily required to docket an appeal. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002). We read §§ 25-2301.02 and 25-1912 in pari materia"). Although Damian paid the docketing fee and bond when he sought review of the district court's in forma pauperis ruling, there are other costs and fees associated with proceeding with an

appeal that can be costly, and such costs and fees would not be borne by Damian if Damian were granted in forma pauperis status. Therefore, we determined that Damian did not waive his right to proceed in forma pauperis on appeal when he paid a docketing fee.

To summarize the proceedings, based on our determination that the district court erred when it failed to hold an evidentiary hearing regarding whether Damian had "sufficient funds to pay costs, fees, or security" before denying his motion to proceed in forma pauperis on appeal, we entered an order on November 12, 2014, in which we vacated the December 16, 2013, amended order and remanded the issue for an evidentiary hearing to be held in accordance with § 25-2301.02. On November 14, 2014, the district court filed an order which granted Damian the right to proceed in forma pauperis on appeal. Thus, this issue has been resolved and a record of the proceedings below, including the hearing on the merits of the modification and support issues, has been prepared and filed and is available for our review.

The District Court's Denial of Modification of Custody.

With respect to the merits of this case, Damian claims that the district court erred when it determined that Damian failed to establish that a material change in circumstances had occurred since the entry of the decree and thus declined to modify custody of Jakai solely to Damian or order that Tiffany pay child support. Having reviewed the record, we find no merit to these assignments of error.

[4-6] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if

its action is clearly against justice or conscience, reason, and evidence. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Schrag v. Spear, supra*. In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

[7-9] The legal principles governing modification of child custody are well settled. As summarized in *Adams v. Adams*, 13 Neb. App. 276, 285, 691 N.W.2d 541, 548-49 (2005), "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." A material change in circumstances means the occurrence of something which, had it been known at the time of the initial decree, would have persuaded the court to decree differently. See *Schrag v. Spear, supra*. The party seeking modification of child custody bears the burden of showing as an initial matter that there has been a change in circumstances. See *id*.

In this case, the district court stated in its November 8, 2013, order that Damian had failed to establish at the hearing there had been a material change in circumstance since the decree had been filed 2 years prior thereto and, in any event, that the evidence was insufficient to determine it was in the best interests of the minor child to modify custody. In making these determinations, the district court set forth the evidence as follows:

> 1. That the minor child came for parenting time with, what [Damian] characterized as bruises on the body of the child. [Note: It is disputed as to when the bruising

occurred.] [Brackets in original.] This incident was investigated by law enforcement and the Department of Health and Human Services, and according to [Damian], the marks on the child were determined to be heat rashes. Further, and of significance, is that no action was taken by any agency in regard to this incident.

2. That [Tiffany] failed to allow parenting time, as ordered by this Court, on multiple occasions and was held in contempt on two separate occasions. Although this reflects negatively upon [Tiffany], she has since corrected these poor decisions.

3. That both parties fail to appropriately communicate in regard to the child, which has caused numerous, unnecessary, problems for both parents.

4. That [Damian] complains about [Tiffany] not following the parenting plan in regard to his right of first refusal to parent the child, but, yet, [Damian] has not requested any additional parenting time pursuant to his right of first refusal. As a result, [Damian] is as much at fault as [Tiffany] on this issue. Again, the lack of communication skills by both parties only magnifies this issue.

5. The evidence is completely void of any direct harm to the child caused by any alleged parenting deficiencies of [Tiffany]. In fact, the evidence reflects that, for a single parent with limited resources, she has matured as a parent.

6. [Tiffany's] negative comments about [Damian] on social media is concerning, but no direct connection was made as to how these comments impact the child.

7. Lastly, even if [Damian's] concerns are reflective of the situation, the evidence does not reflect how these circumstances are any different, now, than they were at the time that the Decree was entered.

Based on this evidence, the district court declined to modify custody.

[10] Upon our de novo review of the record in this case, we agree that the evidence adduced at the modification trial did not establish a material change in circumstances since the entry of the decree warranting a change in custody. At trial, both Damian and Tiffany presented conflicting evidence concerning their own parenting strengths and the weaknesses of the other parent. Both parties showed that they are employed and that they love and are able to care for Jakai. Regarding why he believed custody of Jakai should be modified, Damian presented evidence that Tiffany had interfered with his parenting time on various occasions, and the record showed that she had earlier been held in contempt for such interference. However, the record also showed, as noted by the district court, that in the year prior to the modification trial, Tiffany had addressed this problem and adhered to the parenting time schedule. In 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 motion to modify is of more significance than the behavior prior to that time. *Schrag v. Spear,* 290 Neb. 98, 858 N.W.2d 865 (2015); *State on behalf of Dawn M. v. Jerrod M.*, 22 Neb. App. 835, 861 N.W.2d 755 (2015).

Damian testified that Tiffany made disparaging remarks about him on social media, and we agree with the district court that this is concerning. But the record did not show that this disrespect was communicated to the child or affected him up to the point of trial. The record shows that Damian claimed that Tiffany did not adhere to Damian's right of first refusal and failed to consult with him on decisions regarding Jakai's medical treatment and daycare. However, Tiffany presented contrary evidence regarding Damian's failure to communicate effectively about decisions regarding Jakai and that Damain had not requested any additional parenting time with Jakai through his right of first refusal.

In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court

considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Schrag v. Spear, supra*. Based on the evidence presented at trial, the district court determined that there was not a change in circumstances warranting a modification of custody. The district court also determined that the evidence failed to show that a change of custody solely to Damian was in Jakai's best interests. Given the record in this case, and given our standard of review and deference to the trial court's determinations with respect to the credibility of the witnesses, we cannot say that the court's denial of the modification of custody was clearly untenable or an abuse of discretion. Accordingly, we affirm the decision of the district court.

CONCLUSION

The issue of Damian's in forma pauperis status on appeal has been resolved. Upon our de novo review of the record of the modification trial, we determine the district court did not abuse its discretion when it determined that Damian failed to show a material change in circumstances since the entry of the decree or that the best interests of the child demonstrably required modification and thus concluded that a modification of custody was not warranted and adjusted child support. Therefore, we affirm the November 8, 2013, order of the district court in all respects.

Affirmed.

State of Nebraska, appellee, v. Jason William Custer, appellant.

871 N.W.2d 243

Filed November 13, 2015. No. S-14-332.

1. **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.
2. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a claim that the evidence was insufficient to support 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. **Trial: Prosecuting Attorneys: Appeal and Error.** When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, an appellate court will review the record only for plain error.
5. **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.
6. **Sentences.** Whether a defendant is entitled to credit for time served and in what amount are questions of law.
7. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.

8. **Self-Defense.** The choice of evils defense provided by Neb. Rev. Stat. § 28-1407 (Reissue 2008) requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur.
9. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The duration of time required to establish premeditation may be so short that it is instantaneous.
10. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.
11. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
12. **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.
13. **Trial: Prosecuting Attorneys: Words and Phrases.** Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
14. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
15. **Trial: Prosecuting Attorneys: Juries.** 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.
16. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
17. **Trial: Confessions: Miranda Rights: Impeachment.** The State may not seek to impeach a defendant's exculpatory story, told for the first

time at trial, by cross-examining the defendant about his or her failure to have told the story after receiving *Miranda* warnings at the time of the defendant's arrest.

18. **Sentences: Probation and Parole.** A sentence of life imprisonment "without the possibility of parole" is erroneous, but not void.
19. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
20. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
21. **Courts: Sentences.** Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence.
22. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
23. ____. 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.
24. **Homicide: Sentences.** When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has maximum and minimum terms, the defendant is entitled to receive credit for time served against the consecutive sentence.
25. **Sentences.** A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.
26. ____. When consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the aggregate of all terms imposed.

Appeal from the District Court for Cheyenne County: Derek C. Weimer, Judge. Affirmed as modified.

James R. Mowbray and Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

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

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

Miller-Lerman, J.

NATURE OF CASE

Jason William Custer appeals his convictions and sentences for first degree murder, use of a firearm to commit a felony, and being a felon in possession of a firearm. We affirm Custer's convictions, and we affirm his sentences as modified.

STATEMENT OF FACTS

The charges against Custer arose from an incident in which he shot and killed Adam McCormick outside a residence in Sidney, Nebraska, on November 3, 2012. In the information filed in the district court for Cheyenne County, Custer was originally charged with second degree murder and use of a firearm to commit a felony. The information was amended to upgrade the murder charge to first degree and to add a charge of being a felon in possession of a firearm. Custer was alleged to be a habitual criminal, but the State ultimately chose not to pursue the habitual criminal enhancement.

Custer grew up in Chico, California, where he met and became friends with Billy Fields. In 2012, Custer decided to move to Humboldt, Nebraska, where his son and his son's mother lived. Fields was then living in Sidney with his girlfriend, Amber Davis. Fields invited Custer to stay with him and Davis for a time while he was in the process of moving to Humboldt. Custer arrived in Sidney on October 5. While in Sidney, Custer met various friends of Davis, including McCormick and Syrus Leal.

After Davis told Custer and Fields they needed to move out of her house, Fields arranged for the two to stay at another friend's apartment. At around this time, in mid-October, McCormick gave Custer $150. Although Custer testified that the money was a loan to help Custer pay his share of rent and utilities at the new apartment, Fields and Leal testified that McCormick gave Custer the money to purchase drugs and that after Custer failed to deliver the drugs, McCormick wanted his money back. Custer testified that he intended to pay McCormick back after he received an unemployment check on October 16, 2012, but that he ended up using the money from the check to pay other expenses. On or around October 20, McCormick came to the apartment where Custer and Fields were staying to collect the money. After Custer told McCormick he would pay him from his next check, Fields, who was upset that McCormick had come to confront Custer, told McCormick that he would pay McCormick by the end of the week. In the following days, McCormick exchanged threatening text messages and telephone calls with Custer and Fields.

On or about October 26, 2012, Custer and Fields attended Halloween parties at some local bars. While they were walking between bars, McCormick confronted them, demanding his money. Fields testified that when McCormick approached them, it looked like McCormick was reaching into his pocket for something, and that Fields thought it was a knife that he knew McCormick carried. Custer and Fields told McCormick they could not repay the $150 at that time, but in order to calm McCormick, Fields paid him $40 for another debt he owed. Fields testified that he later met up with Leal, who told him that the money McCormick gave Custer was actually Leal's and that the money should be repaid to him rather than to McCormick. Custer thought the matter had been resolved by agreeing to pay Leal, but McCormick later sent text messages to Custer and Fields suggesting that the matter could be resolved if they both left town.

A few days later, on November 1, 2012, McCormick sent Fields text messages threatening physical violence if the debt was not repaid soon. The text messages prompted Custer to arrange with McCormick to meet in a park for a fight. Custer and Fields went to the park at the arranged time. McCormick did not show up, but he continued to exchange confrontational text messages and telephone calls with Custer and Fields.

Custer and Fields went to Davis' house that night and told her about the ongoing conflict with McCormick. Other friends of Davis were at her house and heard about the conflict. Evidence at trial showed that the gun that was later used to shoot McCormick belonged to one of Davis' friends, but there was a conflict in the evidence as to how the gun came into Custer's possession. Fields testified that at Davis' house on November 1, 2012, Custer had talked to this friend about obtaining a gun and that after the shooting, Custer told Fields that prior to the shooting, he had kept the gun stashed in a culvert behind the apartment building where they were staying. In contrast, as will be discussed further below, Custer testified that he found the gun in Fields' truck immediately before the shooting and that he had not known before that time that the gun was in the truck.

The next night, November 2, 2012, Davis hosted a gathering at her house. A conflict arose when Davis saw that McCormick had come to her house with Leal. Davis insisted that McCormick leave. Davis sent text messages to Custer and Fields, who were not at Davis' house, letting them know about her confrontation with McCormick. She also let them know that the gathering was relocating to Leal's house, that McCormick would be there, and that although Custer and Fields should not fight McCormick there, they could "be waiting and watching for him." The conflict between Davis and McCormick continued at Leal's home. Throughout the evening, Davis updated Custer and Fields through text messages and telephone calls regarding McCormick's activities and whereabouts. Around 11:20 p.m., Custer responded to one of Davis' updates with a

text message stating that he and Fields were coming over to handle matters with McCormick.

Custer testified that throughout the night of November 2, 2012, he had also been exchanging text messages and telephone calls with McCormick and that although Custer tried to explain to McCormick that Fields was going to repay the money, McCormick continued to threaten him. Around 11:35 p.m., Custer asked McCormick whether they could "FINISH THIS RIGHT NOW ONE ON ONE." McCormick responded in the affirmative about 15 minutes later. In the same timeframe, Custer was exchanging texts with Davis to see whether anyone at Leal's home would have a problem if Custer came there to resolve things with McCormick. Custer testified that in light of mixed messages he received from both Davis and McCormick, he determined it would be better to wait until McCormick left and then come to resolve things with Leal instead of with McCormick.

Shortly after midnight on November 3, 2012, Davis texted Custer saying that McCormick was leaving the gathering at Leal's house. Custer borrowed Fields' truck to drive to Leal's house. Fields did not accompany Custer. When Custer arrived at Leal's house, he saw that McCormick, Leal, and Joshua Wright were standing outside on the lawn. Thereafter, an incident ensued in which Custer shot McCormick twice. The testimony at trial presented differing stories regarding the incident; therefore, Custer's testimony regarding the incident will be presented herein after discussion of Leal's and Wright's testimony.

Leal testified that after midnight on November 3, 2012, he, McCormick, and Wright were leaving the house; Wright was going to walk home, and Leal was going to give McCormick a ride home. As they were leaving, a truck pulled up to the house. When Leal saw the truck arrive, he thought it was Fields until he heard Custer call McCormick's name. Custer left the truck idling with the lights on while he got out of the truck and headed straight toward McCormick. Leal did not see

a gun but as soon as McCormick responded to Custer's calling his name, Leal heard a shot and saw McCormick buckle over. Leal heard another shot 1 or 2 seconds after the first shot. Leal went to attend to McCormick; he tried to catch McCormick's fall, but McCormick was already on the ground. Leal looked up and saw that Custer was almost back to the truck. Leal ran toward the truck and punched at Custer through the open window. Leal saw a gun on the seat next to Custer as Custer drove away in the truck. Leal then turned to see McCormick trying to walk around Leal's Jeep, which was parked in the driveway. By the time Leal reached McCormick, he was on the ground again.

Wright testified that he, Leal, and McCormick were standing in front of Leal's house smoking after midnight on November 3, 2012, when a truck pulled up and stopped in the street. Wright did not recognize the truck, but one of the other men said it belonged to Fields. Wright started to walk toward the truck because he knew about the tension between McCormick and Fields and he wanted to tell Fields to "chill out." The truck was still running with its lights on. A man got out of the truck, and Wright realized that it was not Fields and that, instead, it was Custer. Custer walked toward the front door of the house. At first Wright did not see anything in Custer's hands, but when Custer picked up his hands, Wright saw that he had a black assault rifle. Custer raised the rifle to his shoulder, and Wright moved to escape. Wright heard Custer call for McCormick, and then he heard a shot. Wright did not see where the shot had been fired because he was trying to escape. Wright heard another shot 1 or 2 seconds later, and then he saw Custer return to the truck. Wright saw Leal run to the truck and punch Custer before the truck left quickly. After he saw the truck leave, Wright started to run home, but when he heard Leal yell for him, he ran to the driveway where he saw McCormick on the ground. McCormick was unresponsive and bleeding, so Wright called for emergency assistance.

Other evidence presented by the State indicated that the bullet from the second shot entered McCormick's body under the left arm, continued in a downward trajectory, nicking a rib and perforating McCormick's lower left lung, esophagus, and liver, and exited his right side. McCormick died as a result of the gunshot wounds. In addition, an officer who arrived at the scene shortly after the shooting testified that he searched McCormick's pockets and that he found a pocketknife inside McCormick's front left pants pocket. The officer testified that when he found the pocketknife, it was closed up and clasped and was all the way inside the pocket. The officer further testified that he did not find any other weapon in McCormick's proximity.

Custer testified in his own defense at trial. He testified that when he arrived at Leal's house, he was confused that McCormick was still there and that he became concerned he was being set up. Custer therefore retrieved a gun that was in the back seat of the truck. Custer testified that he did not know that the gun was there until after he became concerned about a setup and started looking through the truck to find something to protect himself. Custer concealed the gun under his coat as he got out of the truck. As he walked up the driveway, he told McCormick that he was there "to talk so we can settle this." Custer testified that McCormick replied, "yeah, I'm going to settle it," and that then McCormick pulled out a knife and rushed at Custer. Custer testified that he backed up but ran into a Jeep that was parked in the driveway and could not retreat farther. He therefore pulled the gun out and fired a shot aimed at McCormick's knee as McCormick ran at him with the knife raised. McCormick continued toward Custer, despite having been shot in the thigh. As McCormick lunged at Custer with the knife, Custer jumped out of the way, raised the gun, and fired a shot as he twisted.

Custer testified that Leal began to scream at him and chase him; so he got back to the truck and returned to the apartment where he had been staying. He called Fields to tell him that

he had shot at McCormick, and Fields made arrangements for Davis to pick up Custer and get him out of town. Custer stayed at a motel in Big Springs, Nebraska, until some hours later when police came to arrest him based on a tip from Fields and Davis.

During the State's cross-examination of Custer, it asked questions which pointed out that shortly after the shooting, Leal and Wright gave statements to police consistent with their testimony at trial, while Custer "had 15 months" and "the opportunity to sit through all of the trial and listen to all of the testimony" before he testified to his version of events. The State also asked questions which pointed out that after the shooting, Custer had made no attempt to report to the police the shooting or McCormick's alleged aggressive actions. Custer did not object to any of these questions.

Argument at the jury instruction conference shows that Custer requested a "choice of evils" instruction with respect to the charge of being a felon in possession of a firearm. He argued that the instruction was appropriate because of his testimony that he grabbed the gun he found in the back seat of the truck only because he was concerned that he was being set up when he arrived at Leal's house and that he needed to protect himself. The court refused such an instruction after determining that such an instruction was not appropriate under the facts of this case. Custer also objected to an instruction defining premeditation because the instruction included a statement to the effect that the "time needed for premeditation may be so short as to be instantaneous," which statement was not included in the statutory definition of premeditation. The court overruled Custer's objection and gave the instruction. The court also gave a self-defense instruction.

During closing arguments, the State pointed out that Custer had not reported to police McCormick's alleged aggressive actions with the knife. The State also suggested that Custer had 15 months and knowledge of the testimony and evidence against him before he gave his testimony regarding the

shooting. Custer did not object to the statements in the State's closing arguments, and he did not move for a mistrial based on the statements.

The jury found Custer guilty of first degree murder, use of a firearm to commit a felony, and being a felon in possession of a firearm. The court sentenced Custer to imprisonment for life for first degree murder, for 20 to 50 years for use of a firearm to commit a felony, and for 10 to 20 years for being a felon in possession of a firearm. The court ordered that the sentences be served consecutively to one another.

When imposing the sentence for first degree murder, the court orally stated at the sentencing hearing that the sentence was "a sentence of not less than a period of your natural life without the possibility of parole." However, the written sentencing order omitted the language regarding the possibility of parole.

In addition, at the sentencing hearing, the court orally stated in connection with both the sentence for use of a firearm to commit a felony and the sentence for being a felon in possession of a firearm that Custer would be given credit for 503 days he had previously served. The written order stated, in a paragraph separate from the paragraphs setting forth the sentences, that Custer "shall receive credit for five hundred three (503) days for time already served."

Custer appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Custer claims that the district court erred when it refused a choice of evils instruction and when it gave an instruction defining premeditation that did not follow the statutory definition. He also claims that there was not sufficient evidence to sustain a conviction for first degree murder. He further claims that the State committed prosecutorial misconduct when it made certain remarks in closing arguments. Finally, with regard to sentencing, Custer claims that the district court erred when it orally pronounced sentence on the

murder conviction as life imprisonment "without the possibility of parole" and that the court imposed excessive sentences for the two other convictions.

In the State's brief, it asserts that the district court committed plain error in the manner it ordered the credit for time served to be applied.

STANDARDS OF REVIEW

[1] 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. *State v. Planck*, 289 Neb. 510, 856 N.W.2d 112 (2014).

[2] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[3] In reviewing a claim that the evidence was insufficient to support 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. *State v. Davis*, 290 Neb. 826, 862 N.W.2d 731 (2015).

[4] When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

[6] Whether a defendant is entitled to credit for time served and in what amount are questions of law. *Id*. An appellate court reviews questions of law independently of the lower court. *Id*.

ANALYSIS

Discussion of Proposed Choice of Evils Instruction.

Custer first claims that the district court erred when it refused to instruct the jury regarding a choice of evils defense to the charge of being a felon in possession of a firearm. Custer failed to include his proposed instruction in the record on appeal, and we are not able to review the instruction on appeal. However, even if we favor Custer with various assumptions, a choice of evils instruction was not warranted by the evidence and we reject this assignment of error.

The record of the jury instruction conference shows that Custer objected to the court's proposed instruction setting forth the elements of being a felon in possession of a firearm and that his objection was based on the failure to include language regarding a choice of evils defense. The parties argued their respective positions regarding whether such language should be included, and the court determined that an instruction regarding choice of evils was not appropriate under the facts of this case.

[7] Although the court indicated at the jury instruction conference that a proposed instruction was on file, Custer did not include a proposed choice of evils instruction in the record on appeal. Custer needed to show that his tendered instruction was a correct statement of law and that it was warranted by the evidence. See *Planck, supra*. In order to do so, he needed to include his proposed instruction in the record on appeal. It is incumbent upon an appellant to supply a record which supports his or her appeal. *State v. Robinson*, 287 Neb. 799, 844 N.W.2d 312 (2014). Because Custer did not include the proposed instruction in the record on appeal, "we have no instruction

to review in order to determine whether it ought to have been given." See *id*. at 805, 844 N.W.2d at 318.

[8] Custer argues that although the proposed instruction is not included in the record, it is clear from the arguments of counsel at the jury instruction conference that Custer requested an instruction that followed the language of Neb. Rev. Stat. § 28-1407 (Reissue 2008). He asserts that the same language was proposed by the defendant in *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003). In *Mowell*, we stated that the defendant had presented an instruction which set forth the choice of evils defense provided by § 28-1407 and that the choice of evils defense

> requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur.

267 Neb. at 94, 672 N.W.2d at 399. We did not decide in *Mowell* whether the instruction proposed by the defendant was a correct statement of law, and we further questioned whether a choice of evils justification was available as a defense to a charge of being a felon in possession of a firearm. Without deciding either issue, we assumed for the sake of argument that the proposed instruction was a correct statement of law and that the defense was generally available against a charge of being a felon in possession of a firearm. Having made such assumptions, we nevertheless concluded that under the facts of the case at hand, the defendant in *Mowell* was not entitled to an instruction on the choice of evils defense. If we were to make the same assumptions in this case, and if we were to assume that Custer's proposed instruction was based on the language of § 28-1407, similar to *Mowell*, we would again conclude that the evidence in this case did not entitle the defendant, Custer, to a choice of evils instruction.

In *Mowell*, we emphasized that the choice of evils defense requires that the defendant's actions are "'necessary to avoid a specific and immediately imminent harm'" and that "generalized and nonimmediate fears are inadequate grounds upon which to justify a violation of law." 267 Neb. at 96, 672 N.W.2d at 400. After reviewing the evidence in *Mowell*, we noted that "even if [the defendant] felt threatened and harassed by [the victim] to a point where he feared for his safety, [the defendant] had ample opportunity" to avoid the danger. 267 Neb. at 97, 672 N.W.2d at 401.

Custer argues that the facts of the present case are different from those in *Mowell*, because the threat in *Mowell* was vague and the defendant in *Mowell* possessed the firearm for a longer period of time. He contends that in this case, McCormick's threats against him "were far more repeated, direct, and unambiguous," brief for appellant at 23, and that he did not possess the firearm until he was faced with a specific and immediate harm.

Although the facts of this case differ from those in *Mowell*, the evidence in this case does not show that at the time Custer took possession of the firearm he faced a specific and immediately imminent harm. The evidence most favorable to Custer was his own testimony that when he arrived at Leal's house, he saw that McCormick was still there and that, fearing that he was being set up, he retrieved the gun from the back seat of the truck. At the time he retrieved the gun, Custer was still inside the truck and he had the opportunity to drive away; instead, he grabbed the gun, got out of the truck, and walked toward McCormick. Under Custer's version of events, he did not face a specific and immediately imminent harm until McCormick rushed at him with a knife, which did not occur until after Custer had already grabbed the gun, gotten out of the truck, and approached McCormick. That is, Custer possessed the firearm—the crime of which he was convicted—not to avoid a specific and immediate harm, but instead, before the harm developed. Therefore, even if we were to

assume Custer tendered a proposed instruction that followed the language of § 28-1407, and the defense was available to a charge of being a felon in possession of a firearm, we conclude that the district court did not err when it determined that a choice of evils instruction was not warranted by the evidence in this case.

Jury Instruction Defining Premeditation Was Not Improper.

Custer next claims that the district court erred when it gave an instruction defining premeditation which included language that was not included in the statutory definition of premeditation. We conclude as a matter of law that the district court did not err when it gave the instruction.

The district court gave jury instruction No. 7 which instructed the jury on definitions of various terms relevant to the charges against Custer. The instruction included a definition of premeditation based on NJI2d Crim. 4.0. The court instructed: "Premeditation means to form the intent to do something before it is done. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act." Custer objected to the second sentence of the definition for premeditation because it did not conform to the statutory definition of premeditation under Neb. Rev. Stat. § 28-302 (Reissue 2008). The definition of premeditation in jury instruction No. 7 is nearly identical to the definition provided in NJI2d Crim. 4.0. In comparison to instruction No. 7, § 28-302(3) provides one sentence, i.e.: "Premeditation shall mean a design formed to do something before it is done," but does not contain a second sentence regarding the time needed for premeditation.

[9] The argument made by Custer regarding the variance between the statutory definition in § 28-302(3) and instruction No. 7 was rejected by this court in *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). In *Taylor*, we noted that

the second sentence of NJI2d Crim. 4.0 had "apparently been added to further specify the meaning of 'before' as it was used in § 28-302(3)." 282 Neb. at 310, 803 N.W.2d at 758. We reviewed our precedent to the effect that no particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death, as well as other precedent to the effect that the duration of time required to establish premeditation may be so short that it is instantaneous. *Id*.

Custer argues that the instruction was erroneous because "these two words ['instantaneous' and 'simultaneous'] are synonyms that mean something occurring in the same moment." Brief for appellant at 30. He contends that instructing the jury that premeditation may be "instantaneous" violates the statutory requirement that intent must be formed before the act is done. We disagree.

"Instantaneous" is defined as "done, occurring, or acting without any perceptible duration of time," Webster's Third New International Dictionary of the English Language, Unabridged 1171 (1993), whereas "simultaneous" is defined as "existing or occurring at the same time," *id.* at 2122. The two words are not synonymous; "instantaneous" refers to the passage of time during which something occurs, while "simultaneous" refers to the point in time at which two or more things occur. Thus, premeditation may occur instantaneously, or in an amount of time of imperceptible duration, but without occurring simultaneously with, or at the same point in time as, the act. The instruction makes it clear that although premeditation may be instantaneous, it must nevertheless occur before the act and not simultaneous with it. The instruction therefore does not contradict the statutory requirement that premeditation must occur before the act. The instruction instead explains that, while premeditation must occur before the act and not simultaneous with it, premeditation need not occur for any minimal duration of time and may occur in an instant, that is, may be

instantaneous. Custer also argues that the instruction is a violation of the separation of powers because it adds to the definition of premeditation provided by the Legislature. However, a court's proper role is to interpret statutes and clarify their meaning. See *Taylor, supra*. The instruction given in this case interprets and clarifies the statutory definition; it does not change or contradict the statutory definition.

Similar to our discussion in *Taylor, supra*, we conclude that jury instruction No. 7 in this case conformed to our interpretation of premeditation as it is used in § 28-302(3). Accordingly, as a matter of law, the district court did not err when it gave the definition of premeditation in instruction No. 7, and we reject this assignment of error.

The Evidence Was Sufficient to Support Custer's Conviction for First Degree Murder.

Custer claims that there was not sufficient evidence to sustain a conviction for first degree murder because the evidence did not show that he killed McCormick with deliberate and premeditated malice. The theory of Custer's defense was essentially that he killed McCormick in self-defense. The State contends that its evidence established that Custer committed first degree murder, that there was no sudden quarrel, and that Custer did not kill McCormick in self-defense. We conclude that there was sufficient evidence from which the jury could have found that Custer committed first degree murder.

As an initial matter, we note that Custer's claim of insufficient evidence of deliberate and premeditated malice relies in part on his argument, which we rejected above, that premeditation cannot be "instantaneous" because instantaneous premeditation is synonymous with intent formed simultaneously with the act. To the extent Custer's argument is that there was not sufficient evidence of premeditation because the State proved only instantaneous premeditation, we reject such argument, because instantaneous premeditation is sufficient.

Custer's main argument is that there was insufficient evidence of first degree murder, because there was evidence that

he did not come to Leal's house planning to kill McCormick, that he instead came to settle the dispute over the money he owed to McCormick, that he grabbed the gun from the back seat of the truck only after he became concerned that he was being set up, and that he did not shoot McCormick until McCormick lunged at him with a knife. Custer contends that this evidence shows that the killing was not done with deliberate and premeditated malice and that instead, it was done upon a sudden quarrel and in self-defense.

Although there was evidence in support of the version of events as urged by Custer, the State presented evidence which contradicted Custer's version of how the incident occurred and from which the jury could have found that Custer killed McCormick with deliberate and premeditated malice and that the killing did not result from a sudden quarrel and was not justified as self-defense. The State's evidence included the testimony by Leal and by Wright which indicated that Custer got out of the truck armed with a gun, left the engine running, walked toward McCormick, and shot him twice within seconds—all before a sudden quarrel developed or self-defense was justified.

The main evidence supporting Custer's version of events was his testimony in his own defense. But he also directs our attention to physical evidence, including evidence regarding the trajectory of the gunshots, which he asserts supports his version of events over the version of events recounted by other witnesses. Thus, in this trial, there was conflicting testimony regarding the events surrounding the shooting, and there was other evidence which the jury may have found relevant to its determination of the accuracy or credibility of the witnesses' testimony. As the finder of fact, the jury resolved the tension and conflicts in the evidence.

In reviewing a claim that the evidence was insufficient to support 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. *State v. Davis*, 290 Neb. 826, 862 N.W.2d 731 (2015).

Viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to support Custer's conviction for first degree murder. We therefore reject this assignment of error.

Prosecutor's Comments During Closing Arguments Were Not Improper.

Custer next claims that the State committed prosecutorial misconduct when it made certain statements during closing arguments. Custer takes issue with the State's comments regarding the amount of time he had to prepare his testimony for trial and the State's comments highlighting his failure to report the shooting and McCormick's alleged aggressive actions to the police. He contends that the statements were improper comments on the exercise of his right to remain silent. We conclude that the State's comments during closing arguments were not improper and did not constitute prosecutorial misconduct.

[10,11] We note that Custer did not object when the State questioned him about these issues on cross-examination or when the State remarked on these issues during closing arguments; the claim on appeal is limited to the prosecutor's comments made during closing arguments. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015). A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *Id*.

Although Custer acknowledges that he failed to object to the alleged prosecutorial misconduct at trial, he argues that

we should note the alleged misconduct as plain error. When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). We apply the plain error exception to the contemporaneous-objection rule sparingly. *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012). Therefore, in this case, we will review the record for plain error with regard to Custer's allegations of prosecutorial misconduct.

[12] 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. *Id*. Generally, we will find plain error only when a miscarriage of justice would otherwise occur. *Id*.

[13,14] Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *Dubray, supra*. In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). The first step in our analysis, then, is to determine whether the State's comments to the jury regarding the amount of time Custer had to consider his testimony and Custer's failure to report the incident were improper.

[15,16] With regard to whether remarks made during closing arguments are improper, we have stated that 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. *Id.* A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct. *Id*.

Custer asserts that it was improper for the State to note that Custer did not report to police his allegations that McCormick had threatened him with a knife, which allegations form the basis for his claim of self-defense. The State further noted that Custer had 15 months and the advantage of hearing other witnesses' testimony in order to prepare his testimony in his own defense. The State contrasted this with the trial testimony of Leal and Wright, which was consistent with statements they gave to police within hours after the incident.

[17] Custer argues that these comments by the prosecutor violated a line of cases beginning with *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), in which the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." In *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the U.S. Supreme Court clarified that the *Doyle* rule did not necessarily apply to a prosecutor's remarks about a postarrest silence occurring before *Miranda* warnings and stated:

> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings [to the effect that his silence will not be used against him or her], we do not believe that it violates due process of law for a State to permit cross-examination as to [pre-*Miranda*] postarrest silence when a defendant chooses to take the stand.

Similar to *Fletcher, supra*, in Nebraska, we have stated that "it is not a violation of fundamental fairness for the State to use a defendant's pre-*Miranda* silence as impeachment or as substantive evidence of sanity." *State v. Harms*, 263 Neb. 814, 824-25, 643 N.W.2d 359, 371 (2002). We have explicitly extended the protection of *Doyle* to a prosecutor's comments on the defendant's silence made in closing argument. See *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008). The *Doyle* challenge in the instant case is to the prosecutor's remarks during closing argument.

Custer directs our attention to *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). In *Lofquest*, we noted that the State's remarks, some of which were made during the prosecutor's closing, referred to the defendant's failure to tell his story to police at any time prior to the trial. We stated in *Lofquest* that the dispositive factor with respect to a prosecutor's remarks regarding a defendant's silence is the period of silence to which the prosecutor referred—that is, whether it is the period before or the period after the defendant received *Miranda* warnings. We determined that the prosecutor's "generalized questions and comments [made] it nearly impossible to discern, for purposes of a *Doyle* inquiry, what period of silence the prosecution was referring to, pre-*Miranda* or post-*Miranda*" and that "the prosecutor's remarks could be construed as referring to [the defendant's] silence from the first police contact through the moment before [the defendant] told his story at trial." 227 Neb. at 570, 418 N.W.2d at 597. We concluded that the prosecutor's remarks in *Lofquest* were improper because "[w]e cannot allow prosecutors to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence." 227 Neb. at 570, 418 N.W.2d at 597.

Custer argues that, similar to *Lofquest*, the State's remarks made during closing argument in this case encompassed the entire period until he testified at trial and that the remarks were therefore improper. However, we note that the remarks in which the State referred specifically to Custer's silence clearly pertained to a time before his arrest and before *Miranda* warnings were given. During closing arguments, the State discussed Custer's actions immediately after the shooting and stated that he did not call police. The State remarked, "He even sees the police car drive by and never bothers to tell anybody that he was just in this life and death struggle. Never tells the police about that." These remarks clearly refer to Custer's silence at a time before he was arrested and given *Miranda* warnings. They were unlike the remarks we found improper in *Lofquest, supra*, in which the State imprecisely

referred to the defendant's silence prior to trial, which period might have included times after the defendant received post-*Miranda* warnings.

Custer argues that in addition to the remarks discussed above specifically referring to Custer's failure to report the incident to police, the State's remarks regarding the amount of time he had to prepare his testimony prior to trial were effectively improper comments on his silence. He argues that the time period before trial necessarily includes some time after his arrest and after he invoked his rights. He notes that in closing arguments, the State remarked that "Custer wrapped his story around the forensics after having 15 months to look at it by hearing the testimony about seeing—here's the angle here and know that [McCormick] go [sic] wounded right here," and later repeated that "Custer forms his story around the forensics."

We do not read these remarks as commenting on Custer's silence after his arrest and after invocation of his right to remain silent. Instead, the remarks are similar to those in *State v. Jacob*, 253 Neb. 950, 974, 574 N.W.2d 117, 137 (1998), *abrogated on other grounds, State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), in which the prosecutor stated during closing arguments that before the defendant testified at trial, he "'had five years to think of his answers, five years to run through all of this. Five years to prepare'" and that he had "'sat through this trial and heard every witness and every question.'" We characterized the State's remarks in *Jacob* as commenting on the defendant's credibility and as implying that "in evaluating the credibility of [the defendant's] testimony, the jury should consider that [the defendant] had the benefit of first hearing all the witnesses' testimony and had 5 years to prepare his testimony." *Id*. at 975-76, 574 N.W.2d at 138. We stated that we found "nothing in the argument that can be construed as a comment on [the defendant's] silence." *Id*. at 976, 574 N.W.2d at 138. Similar to the remarks in *Jacob*, the remarks by the State in closing argument in this case were directed to

the credibility of Custer's testimony rather than remarks on Custer's silence.

We conclude that the State's remarks during closing arguments were not improper, and we therefore need not consider whether the comments prejudiced Custer's right to a fair trial. Because there was no prosecutorial misconduct and no plain error, we reject Custer's assignment of error.

District Court Properly Modified Custer's Sentence of Life Imprisonment by Removing Erroneous Language Regarding Parole in the Valid Written Order.

Custer claims that the district court erred when, at the sentencing hearing, it orally sentenced him on the first degree murder conviction to life imprisonment "without the possibility of parole." Because we conclude that the district court properly modified the invalid oral sentence by entering a valid written order that removed the erroneous language of "without the possibility of parole," there is no merit to this assignment of error.

When imposing the sentence for first degree murder, the court stated at the sentencing hearing that the sentence was "a sentence of not less than a period of your natural life without the possibility of parole." However, the subsequent written sentencing order omitted the language regarding the possibility of parole.

[18] Custer was convicted of first degree murder, a Class IA felony. Under Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014), a Class IA felony is punishable by life imprisonment, but the statute does not authorize a sentence of life imprisonment without the possibility of parole. Therefore, a sentence of life imprisonment "without the possibility of parole" is erroneous, but not void. See *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). Custer urges us to remand the cause for resentencing. Although the State does not dispute that a sentence of life imprisonment without the possibility of parole is erroneous, it argues that in this case, the written sentencing order,

which does not contain the "without the possibility of parole" language, is controlling over the earlier sentence orally pronounced and that there is no need to remand the cause for resentencing. We agree with the State.

[19,20] We have held that a sentence validly imposed takes effect from the time it is pronounced. *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009). And when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *Id.* As a result, we have held that when there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the verbatim record of the earlier proceedings in open court prevails. See *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). These holdings presume an initial sentence was validly imposed.

[21] In this case, the sentence pronounced at the sentencing hearing was erroneous to the extent the court stated that imprisonment would be without the possibility of parole. See *Conover, supra*. We have held that where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978). We therefore determine that the district court had authority to modify the sentence to remove the erroneous language, and the relief sought in this assignment of error has been accorded to Custer.

Sentences Imposed by District Court for Custer's Convictions for Use of a Firearm to Commit a Felony and Being a Felon in Possession of a Firearm Were Not an Abuse of Discretion.

Custer further claims that the district court imposed excessive sentences on the convictions for use of a firearm to commit a felony and being a felon in possession of a firearm.

We find no abuse of discretion in the sentences imposed for these convictions.

In addition to the sentence of life imprisonment it imposed for first degree murder, the district court sentenced Custer to imprisonment for 20 to 50 years for use of a firearm to commit a felony and for 10 to 20 years for being a felon in possession of a firearm. The court ordered all sentences to be served consecutively. Life imprisonment was the only sentence available for the first degree murder conviction; therefore, Custer's excessive sentence arguments focus on the sentences for use of a firearm to commit a felony and being a felon in possession of a firearm.

Custer's conviction for being a felon in possession of a firearm, first offense, is a Class ID felony under Neb. Rev. Stat. § 28-1206(3)(b) (Cum. Supp. 2014). A Class ID felony is punishable by imprisonment for a mandatory minimum of 3 years and a maximum of 50 years under § 28-105. Use of a firearm to commit a felony is a Class IC felony under Neb. Rev. Stat. § 28-1205(1)(c) (Cum. Supp. 2014). A Class IC felony is punishable by imprisonment for a mandatory minimum of 5 years and a maximum of 50 years under § 28-105. And the sentence for use of a firearm to commit a felony must be consecutive to any other sentence imposed under § 28-1205(3). The sentences imposed by the district court were therefore within statutory limits.

[22,23] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing

judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

Custer notes that although § 28-1205(3) requires that the sentence for use of a firearm to commit a felony must be consecutive to any other sentence imposed, there is no similar requirement with respect to the sentence for being a felon in possession of a firearm under § 28-1206. He therefore urges that the sentence for being a felon in possession of a firearm should have been ordered to be served concurrently to the sentence for first degree murder. He also contends that a lesser term of years was appropriate for the sentence for use of a firearm to commit a felony. He asserts that mitigating factors include the lack of a significant history of violent crime, the role his addiction to methamphetamine played in contributing to this and his prior offenses, his remorse for this offense, and his subjective belief that he acted in self-defense.

With regard to Custer's criminal history, although it may not include numerous violent offenses, it dates back to 1999 and includes several serious offenses, including burglary, theft, and assault. Custer also showed a history of substance abuse and a high risk to reoffend.

The record of the sentencing hearing shows that the court considered the appropriate factors in determining Custer's sentences, and the record does not show that the court considered improper factors. With regard to Custer's argument that he acted in self-defense, the district court noted that "[t]here were any number of points in the time that this lead [sic] to the event of the night that . . . McCormick was killed where any number of people, including yourself could have stopped it, any of you could have stopped it and you didn't." The court particularly questioned why Custer got out of the truck after he suspected he may have been set up.

Having reviewed the record, we cannot say that the sentences imposed by the district court were an abuse of discretion. We reject this assignment of error.

Sentencing Order Is Modified to Reflect Proper Credit for Time Served.

Finally, the State contends that the court committed plain error in the manner in which it ordered time served to be credited. The State asserts that the court ordered the time to be credited against all three of Custer's sentences. We agree that there was plain error in the crediting of time served, and we therefore modify the sentencing order to reflect the proper crediting of time served.

At Custer's sentencing hearing, the district court stated in connection with both the sentence for use of a firearm to commit a felony and the sentence for being a felon in possession of a firearm that Custer would be given credit for 503 days he had previously served. The written order stated in a paragraph separate from the paragraphs imposing sentences that Custer "shall receive credit for five hundred three (503) days for time already served." The State argues that the sentencing order indicates that time is to be credited against all the sentences, including the sentence for first degree murder.

[24,25] When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has maximum and minimum terms, the defendant is entitled to receive credit for time served against the consecutive sentence. *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014). A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled. *Id*.

[26] Although under Neb. Rev. Stat. § 83-1,106 (Reissue 2014), an offender shall be given credit for time served as a result of the charges that led to the sentences, presentence credit is applied only once. Therefore, when consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the

aggregate of all terms imposed. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

In this case, the court's oral pronouncement of sentence appeared to apply the full credit to each of the sentences for use of a firearm to commit a felony and for being a felon in possession of a firearm; the written sentencing order was unclear with regard to how the credit should be applied. We therefore modify the sentencing order to state that Custer is entitled to credit for time served in the amount of 503 days for time already served against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment for use of a firearm to commit a felony and for being a felon in possession of a firearm. See *Williams, supra*.

CONCLUSION

Having rejected Custer's assignments of error, we affirm Custer's convictions. We affirm Custer's sentences as modified to correct plain error in the application of the credit for time served. The sentencing order shall be modified to state that Custer is entitled to credit for time served in the amount of 503 days for time already served against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment for use of a firearm to commit a felony and for being a felon in possession of a firearm.

Affirmed as modified.

State of Nebraska, appellee, v. Joshua W. Nolan, appellant.

870 N.W.2d 806

Filed November 13, 2015. No. S-15-106.

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: Constitutional Law: Proof.** 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, causing the judgment against the defendant to be void or voidable.
3. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
4. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
5. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
6. **Effectiveness of Counsel: Proof: 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.

7. ____: ____: ____. To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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.
8. **Proof: Words and Phrases.** 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.
9. **Effectiveness of Counsel.** A court may address the two prongs of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, deficient performance and prejudice, in either order.
10. **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.
11. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.
12. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
13. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
14. **Trial: Prosecuting Attorneys.** Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.
15. **Trial: Prosecuting Attorneys: Words and Phrases.** Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
16. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.

17. ____: ____. When a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. These types of comments are a major purpose of summation, and they are distinguishable from attacking a defense counsel's personal character or stating a personal opinion about the character of a defendant or witness.
18. **Trial: Prosecuting Attorneys: Juries.** A distinction exists between arguing that a defense strategy is intended to distract jurors from what the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct.
19. **Trial: Photographs.** If the State demonstrates that a police photograph in question is not unduly prejudicial and that it has substantial evidential value independent of other evidence, it is admissible.
20. ____: ____. Caution must be exercised when introducing police file photographs so that the defendant is not prejudiced by evidence of a prior contact with the police. In order to avoid such a prejudicial effect where the fact of a prior criminal record is not properly before the jury, the prosecution should avoid (1) use of such pictures in a form in which they may be identified as police pictures and (2) references in testimony to the files from which they were obtained.
21. **Trial: Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

Joshua Nolan, pro se.

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

Miller-Lerman, J.

I. NATURE OF CASE

Joshua W. Nolan, the appellant, was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with the killing of Justin Gaines. He was sentenced to a term of life imprisonment for the first degree murder conviction and a term of 10 years' imprisonment for the use of a deadly weapon to commit a felony conviction, to be served consecutively. On direct appeal, we affirmed Nolan's convictions and sentences. See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). On March 31, 2014, Nolan filed a pro se motion for postconviction relief. On January 21, 2015, the district court for Douglas County filed an order in which it denied the motion without holding an evidentiary hearing. Nolan appeals. We determine that the district court erred when it denied Nolan an evidentiary hearing on three of his claims, identified as A, B, and C, set forth in detail below, and we reverse the decision of the district court on these claims and remand the cause for an evidentiary hearing on these claims. In all other respects, we affirm the decision of the district court.

II. STATEMENT OF FACTS

The events underlying Nolan's convictions and sentences involve the shooting killing of Gaines. Nolan was 19 years old at the time of the shooting. In our opinion regarding Nolan's direct appeal, we set forth the facts as follows:

> The events leading up to Gaines' death began on the morning of September 19, 2009, the day of the shooting. Joshua Kercheval testified that at around 11:30 a.m. that day, [Trevelle J.] Taylor and Nolan had shown up at his house and that Kercheval drove Taylor and Nolan around Omaha. Kercheval explained that Taylor asked him to drive, although Kercheval was not told where to go. Kercheval ended up driving them around town for roughly 30 minutes before deciding to drive to a gas station near 72d Street and Ames Avenue. Video

surveillance from the gas station places the three of them at the gas station from 1:21 to 1:30 p.m. Kercheval testified that when they left the gas station, he began driving back toward his house. But as they approached the intersection of 45th and Vernon Streets, Taylor told Kercheval to stop the car and Nolan and Taylor both got out. At that point, Kercheval parked the car and was sitting in the car texting on his telephone when he heard a number of gunshots.

Meanwhile, at around 1 p.m., Gaines had driven past a home near 45th Street and Curtis Avenue and had seen Catrice Bryson, a close family friend, in the driveway. Bryson was at the house visiting a friend and her baby, but had stepped outside to smoke a cigarette. Gaines pulled into the driveway, parked right behind Bryson's car, and greeted Bryson with a hug. Bryson and Gaines began talking; Gaines sat back in his car, on the driver's side, one foot in, one foot out, with the car door open. Bryson, standing with the open car door between her and Gaines, continued talking with Gaines for roughly 10 to 15 minutes. Toward the end of their conversation, Bryson went to get a pen from her car to give Gaines her telephone number.

When Bryson turned back around, she saw two individuals with guns behind Gaines' car and she heard shooting. The two shooters were on each side of Gaines' car, angled toward each other. Bryson described the shooter on the passenger's side of Gaines' car as a black male in his early twenties with a beard and goatee and shoulder-length hair in braids, wearing a "do-rag." Bryson identified the shooter on the passenger's side of Gaines' car as Nolan.

Gaines, while still sitting in the driver's-side seat of his car, was shot in the back. Once Gaines had been hit, the shooters made their escape, each fleeing in opposite directions on Curtis Avenue. At that point, Bryson began screaming for help. Several people responded, and the

police arrived quickly thereafter. Gaines was transported to a nearby hospital, but never regained consciousness and was pronounced dead.

Several eyewitnesses to the aftermath of the shooting testified at trial. Heather Riesselman, at the time of the shooting, lived close to the house where the shooting took place. On the day of the shooting, at approximately 1:40 p.m., Riesselman was outside on her porch with her daughter. At that time, Riesselman saw a young black man "jogging down the street." Riesselman described him as being roughly 5 feet 10 inches tall, medium build, medium complexion, with his hair in braids and with a long, thin goatee. Riesselman identified the man, in court, as Nolan.

Carrie Schlabs was Riesselman's next-door neighbor. At approximately 1:30 p.m. on the day of the shooting, Schlabs was at home with her husband and two friends when they heard gunshots and dove to the floor. Once the gunfire ceased, Schlabs heard screaming, so she got to her feet and ran out to her front porch. Once outside, Schlabs started running toward the screams on Curtis Avenue, to the south, and she saw a young man running to the north. Schlabs saw the young man holding his left side, which made her think that he had been shot. Schlabs ran up to him, getting to within a foot of him, and asked if he needed help. In response, the individual just smiled at Schlabs. At that point, Schlabs continued on toward the screams. While Schlabs could not remember any specific details of the young man's physical appearance or clothing, she remembered his face. Schlabs identified the man, in court, as Nolan.

Kercheval testified that after he had heard the gunshots, he had started the car, getting ready to drive off. But then Kercheval saw Nolan approaching the car and waited until Nolan jumped into the back passenger seat. Once Nolan was in the car, he told Kercheval to "Drive. Go." Kercheval said that he began driving toward

his house, but, at Nolan's direction, Kercheval dropped Nolan off near a school. Whether it was Nolan or Taylor who was dropped off near the school was in dispute. Kercheval's next thought was to "go dump the car." But before he was able to do so, he was arrested. Taylor was also arrested that day. Nolan, however, was not taken into custody that day.

Eight days after the shooting, Nolan, driving in his car, was pulled over for making an improper turn. The officers received identification for both the driver and the passenger. The officers knew that Nolan was associated with a local gang. Upon approaching the driver's-side door of the car, the arresting officer noticed bullet holes in the car. After running data checks on both the driver and the passenger, the officer saw that the Omaha police homicide unit had put out a "locate" for Nolan. A "locate" means that an officer wishes to speak with the individual, but it does not give the officers authority to arrest the individual.

At that point, the officer asked Nolan to get out of his car and stand near the back fender area. Instead, Nolan went past that area and sat on the curb. The officer observed that Nolan moved "[v]ery quickly" and was grabbing his waistband. The officer also observed that Nolan's pants were falling down and that it appeared as if there was something heavy in his pants. Finally, when asked if he had any weapons or other dangerous objects on his person, Nolan did not respond. The officer conducted a pat-down of Nolan, looking for weapons. The pat-down revealed a .44-caliber gun, found in Nolan's waistband. A subsequent search of Nolan's person uncovered live ammunition, and Nolan was placed under arrest at that time. The gun and ammunition were admitted into evidence at trial over objection.

Nolan was charged with one count of murder in the first degree and one count of use of a deadly weapon to commit a felony. Nolan filed several pretrial motions.

> The motions relevant to this [direct] appeal are (1) a motion to suppress the gun and ammunition recovered from Nolan during the traffic stop, (2) a motion to suppress identifications of Nolan by Riesselman and Schlabs, and (3) a motion for the judge to recuse himself from the case. Each of these motions was denied. The case proceeded to a jury trial, and Nolan was convicted of both crimes. Nolan was then sentenced to a term of life imprisonment for the first degree murder conviction, and a consecutive term of 10 years' imprisonment for the use of a weapon conviction. Nolan appeals.

State v. Nolan, 283 Neb. 50, 53-56, 807 N.W.2d 520, 529-30 (2012).

Approximately 2 months after Gaines was killed, a gun was found that was that was later matched to some of the bullet casings that were found at the scene of the shooting. We wrote about the finding of this gun in *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014). Trevelle J. Taylor was also convicted of first degree murder and use of a deadly weapon to commit a felony in connection with Gaines' death. With respect to the gun that was found, we stated in *Taylor*:

> The State also adduced evidence that more than 2 months after the shooting, [Joseph] Copeland's son found a gun hidden in the bushes or trees of a nearby school. The weapon was a semiautomatic 9-mm pistol. Three bullet casings recovered from the scene of the shooting were matched to the pistol.

287 Neb. at 390, 842 N.W.2d at 776.

The foregoing facts are also supported by the trial record in this case. Joseph Copeland testified that he called the police on November 27, 2009, because his son had found a gun at a school near his residence. Copeland testified regarding his son's informing him of finding a gun and the location thereof: "My son and his friend had been down at the school flying an airplane, and at some point they lost the airplane in the bushes, and they had went looking for it, and they had came across a pistol," and "he had brought it to the house and gave

it to me, and then we called the police and had them come pick it up." When asked if the son physically took Copeland to the area where the son had found the pistol, Copeland testified: "He did."

At the current trial, the State's firearms expert, Daniel Bredow, testified that a spent bullet retrieved from Gaines' body was a .44-caliber bullet, but it could not conclusively be linked to the gun found on Nolan. Bullets at the scene were fired from a .44-caliber weapon.

In our opinion in Nolan's direct appeal at which he was represented by counsel different from trial counsel, we restated and consolidated Nolan's assignments of error as follows:

> [T]he district court erred in (1) denying [Nolan's] motion to suppress the gun and ammunition resulting from the traffic stop, (2) denying his motion to suppress the identifications of Nolan made by [Heather] Riesselman and [Carrie] Schlabs, (3) admitting the .44-caliber gun into evidence in violation of Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404 (Cum. Supp. 2010), (4) allowing a cellular telephone company employee to testify regarding telephone records, (5) denying his motion to recuse the trial judge, (6) giving a "step" jury instruction, and (7) concluding that the evidence was sufficient to sustain his convictions. Nolan, as his eighth assignment of error, also claims that he received ineffective assistance of counsel at trial.

State v. Nolan, 283 Neb. at 56, 807 N.W.2d at 530-31. We found no merit to any of Nolan's assignments of error on direct appeal.

With respect to the eighth assignment of error claiming ineffectiveness of trial counsel, we stated:

> Nolan claims, consolidated and restated, that his trial counsel, who was different from appellate counsel, provided ineffective assistance in three respects, by failing to (1) file a motion to suppress evidence retrieved from the investigatory stop of Nolan's car, (2) object to prejudicial statements obtained through custodial

> interrogation in violation of *Miranda*, and (3) consult and call a fingerprint expert or identification expert to rebut the State's testimony.

State v. Nolan, 283 Neb. 50, 74, 807 N.W.2d 520, 542 (2012).

With respect to Nolan's first and second claims of ineffective assistance of counsel, we determined that the record was sufficient to review the claims and that trial counsel's performance was not deficient. With respect to Nolan's third claim of ineffective assistance of counsel, we determined that the record was not sufficient to review this claim on direct appeal and declined to consider the claim at that time. We stated:

> Nolan claims that trial counsel should have called expert witnesses in order to rebut aspects of the State's case. In particular, Nolan claims that trial counsel should have consulted with experts on fingerprint evidence and the reliability of eyewitness identification. But, while we know such rebuttal evidence was not presented at trial, the record does not establish whether trial counsel considered or explored such strategies, what may or may not have led trial counsel not to pursue the strategies, or what such experts would have said had they been retained and called to testify. In other words, from our review of the record, we cannot make any meaningful determination whether expert testimony beneficial to Nolan could have been produced or, if it could have, whether trial counsel made a reasonable strategic decision not to present certain evidence. The record is, therefore, not sufficient to adequately review these claims on direct appeal, and we decline to consider them at this time.

State v. Nolan, 283 Neb. at 76-77, 807 N.W.2d at 543. In the present postconviction action, Nolan repeated his allegations regarding trial counsel's assistance with respect to experts on eyewitness identification and fingerprints, as claims A and B respectively, but the district court did not hold an evidentiary hearing on these claims. Having found no merit to Nolan's

assignments of error on direct appeal, we affirmed his convictions and sentences.

On March 31, 2014, Nolan filed a pro se motion for postconviction relief. In his motion, Nolan alleged 14 claims of ineffective assistance of trial and/or appellate counsel, which he labeled "A" through "N." Nolan alleged that his trial and/or appellate counsel was ineffective for failing to

A. consult with and call an identification expert to rebut the State's case;

B. consult with and call a fingerprint expert to rebut the State's case;

C. call Gwendolyn Anderson to testify on behalf of Nolan;

D. object to prosecutor's remarks during closing arguments about the testimony of Joshua Kercheval;

E. consult with and call a firearms expert to rebut the State's case;

F. move for a rehearing of our opinion on direct appeal regarding the identifications of Nolan made by Carrie Schlabs and Heather Riesselman;

G. object to exhibits 169 and 170 presented by the State;

H. assign and argue on direct appeal that the handgun found in Nolan's possession 8 days after the murder was inadmissible under Neb. Rev. Stat. § 27-403 (Reissue 2008);

I. move for a rehearing of our opinion on direct appeal regarding the admissibility of the gun and ammunition found during the traffic stop and subsequent pat-down of Nolan 8 days after the murder;

J. object to the prosecutor's remarks during closing arguments regarding "defense counsel's job";

K. object on grounds of prosecutorial misconduct to the State's use of tainted identifications and testimony of Schlabs and Riesselman;

L. and M. object to Nolan's sentence of life without parole, which is unlawful under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); and

N. object to the State's presenting inadmissible hearsay evidence from Copeland as to where the 9-mm gun was found.

On January 21, 2015, the district court denied Nolan's motion for postconviction relief without holding an evidentiary hearing. With respect to Nolan's claims A through K and N, the district court determined that his motion should be denied because

> the allegations were raised and addressed in his direct appeal. In addition, these arguments relate to tactical or strategic decisions made by trial counsel which . . . Nolan is bound by and he is [sic] not made a requisite showing of how he may have been prejudiced by the decisions of trial counsel.

With respect to Nolan's claims L and M, the district court denied relief because Nolan was 19 years old at the time of the offense, and therefore was not entitled to relief under *Miller v. Alabama, supra*. Accordingly, the district court denied Nolan's motion for postconviction relief without holding an evidentiary hearing.

Nolan appeals.

III. ASSIGNMENT OF ERROR

Nolan assigns that the district court erred when it denied his motion for postconviction relief without holding an evidentiary hearing.

IV. 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. *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015).

V. ANALYSIS

1. Relevant Postconviction Law

We begin by reviewing general propositions relating to postconviction relief and ineffective assistance of counsel claims before applying those propositions to the claims alleged and argued by Nolan in this appeal.

[2] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015). Thus, 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, causing the judgment against the defendant to be void or voidable. *State v. Crawford, supra.*

[3,4] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Huston, supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

[5-9] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Crawford, supra*. 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. *State v. Crawford, supra*. 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. *State v. Huston, supra*. 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. *Id*. A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

[10-13] A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015). When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. *Id*. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*. When a case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test. *Id*. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *Id*.

2. Nolan's Claims for Postconviction Relief: Claims A, B, and C Warrant an Evidentiary Hearing

In his motion for postconviction relief, Nolan alleged 14 claims of ineffective assistance of trial and/or appellate counsel, which he listed as claims A through N. The State concedes that reversal is warranted with respect to claims A, B, and C, and on appeal, the parties focus on claims J, G, E, and N. Accordingly, we consider Nolan's claims in this order.

As an initial matter, we note that the State indicates in its appellate brief that the district court erred when it denied Nolan's motion for postconviction relief without a hearing on claims A, B, and C. The State therefore concedes that reversal and remand for an evidentiary hearing should be ordered limited to claims A, B, and C. We agree with the State.

In claim A, Nolan alleges that his trial counsel was ineffective for failing to consult with and call an identification expert to rebut the State's case regarding the eyewitness identifications of Nolan as a shooter. In claim B, Nolan alleges that his trial counsel was ineffective for failing to consult with and call a fingerprint expert to rebut the State's case regarding the presence of Nolan's fingerprints found in the vehicle in which Nolan, Taylor, and Kercheval were riding just before the shooting occurred. In claim C, Nolan alleges that his trial counsel was ineffective for failing to call Anderson to testify on Nolan's behalf and that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal. Anderson's testimony would allegedly be at odds with the State's witnesses regarding, inter alia, what color clothing the shooter was wearing.

In our opinion in Nolan's direct appeal, we stated that the record was insufficient to evaluate the substance of Nolan's complaints, now identified on postconviction as claims A and B. See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). The record is still insufficient, and an evidentiary hearing is warranted. See *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012) (stating that district court erred when it failed to grant evidentiary hearing on counsel's ineffectiveness because, after declining to address claim on appeal due to insufficient record, we determined record was still insufficient to analyze claim on defendant's motion for postconviction relief). We also agree with the State that claim C warrants an evidentiary hearing. Based on the allegations in Nolan's motion for postconviction relief, the record in this case, and the applicable law, an evidentiary hearing is warranted on Nolan's claims A, B, and C. Thus, we determine that the district court erred with respect to claims A, B, and C, and we reverse the district court's ruling denying these claims without an evidentiary hearing and remand the cause for an evidentiary hearing on claims A, B, and C.

3. Nolan's Claims for Postconviction Relief: Claims J, G, E, and N

(a) Claim J: Prosecutor's Remarks During Closing Regarding Defense Counsel Summation

In claim J, Nolan alleges that his trial counsel was ineffective for failing to object to the prosecutors' remarks regarding "defense counsel's job" made during closing arguments, because the comments amounted to prosecutorial misconduct, and that appellate counsel was deficient for not raising this issue on appeal. We determine that the comments were not improper and that the district court correctly rejected this claim without an evidentiary hearing.

During the State's initial closing argument, the prosecutor stated:

> So what do you have? What are the odds? Is this all just mere coincidence? I mean, is the defense going to get up here and do the smoke screens and mirrors. I assume he will. That's his job. That's what he's supposed to do. He will get up here and try to pick apart every inconsistency with every witness, and I concede to you that there are inconsistencies. There are going to be inconsistencies. It's human error.

During the State's rebuttal closing argument, a second prosecutor stated:

> Now, as [the other prosecutor] told you before she sat down, it's [defense counsel's] job to get up here and go through mirrors and smoke screens. And so what I'm going to do is go through everything he had to say to you and let you know how that's not what you heard. And I will tell you that our arguments are not evidence. Okay. You twelve collectively will make that decision. You twelve will talk about what you all remember hearing. You will have every single one of those exhibits with you. You will have the jury instructions with you. Closing arguments are designed to just let you know how we believe all the evidence fits together and whether

> you collectively think it fits together in that same way. It's not evidence. So some of the things — and I'll point them out — that [defense counsel] said you will have to recall was not the evidence.

[14,15] We have stated that prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Because prosecutors are held to a high standard for a wide range of duties, the term "prosecutorial misconduct" cannot be neatly defined. *Id*. Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *Id*.

[16] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008); *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *Id*.

In *State v. Barfield, supra*, during closing arguments, the prosecutor strongly insinuated that all defense lawyers are liars. We stated, inter alia, that the evidence in the case was not overwhelming and that the credibility of the witnesses was a key factor and that accordingly, "the implication that defense counsel was a liar, and by extension was willing to suborn perjury, was highly prejudicial when viewed in that context." *Id.* at 516, 723 N.W.2d at 315. We concluded that the prosecutor's remarks were misconduct and required a new trial.

[17,18] However, in *Dubray,* we stated:

> [W]hen a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to

> highlight the relative believability of witnesses for the State and the defense. These types of comments are a major purpose of summation, and they are distinguishable from attacking a defense counsel's personal character or stating a personal opinion about the character of a defendant or witness.
>
> So a distinction exists between arguing that a defense strategy is intended to distract jurors from what the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct.

289 Neb. at 227, 854 N.W.2d at 604-05.

In this case, the prosecutors made statements during closing arguments that the defense counsel was going to use "smoke screens and mirrors" to point out inconsistencies in the evidence. These statements, when read in context, constituted an argument by the State that defense counsel was intending to divert the jurors' attention from what the State believed the evidence showed and to point out inconsistencies in the evidence. The prosecutors' statements, when read in context, did not assert that defense counsel personally or defense lawyers generally are deceitful, nor did the prosecutors state that it is the job of defense counsel generally to mislead the jury. Accordingly, we determine that the prosecutors' remarks made during closing arguments were not improper and therefore were not prosecutorial misconduct.

Following our examination of the record, we determine that given the absence of prosecutorial misconduct, trial counsel was not deficient, and that therefore, appellate counsel was not deficient for not claiming error on appeal. The district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

(b) Claim G: Exhibits 169 and 170

In claim G, Nolan alleges that his trial counsel was ineffective for failing to object to exhibits 169 and 170 and that appellate counsel was ineffective for not raising this

claim of ineffectiveness on appeal. We determine that the district court correctly rejected this claim without an evidentiary hearing.

Exhibits 169 and 170, which are black-and-white photographs of Nolan, were offered by the State. In exhibit 169, Nolan was facing toward the camera, and in exhibit 170, Nolan was facing away from the camera. Nolan asserts that exhibits 169 and 170 are mugshot photographs taken in connection with a prior arrest and that the admission of the photographs was improper and prejudicial because they implied to the jury that Nolan had prior contact with the police or had been arrested and/or convicted of prior crimes.

[19,20] We have previously stated that a police photograph is admissible to show the reasonableness of a witness' identification that the defendant and the person depicted are the same, but such a photograph is not admissible simply to prejudice the jurors by suggesting to them that the defendant has a prior criminal record. See *State v. Birge*, 215 Neb. 761, 340 N.W.2d 434 (1983). If the State demonstrates that the police photograph in question is not unduly prejudicial and that it has substantial evidential value independent of other evidence, it is admissible. See *id*. However, caution must be exercised when introducing police file photographs so that the defendant is not prejudiced by evidence of a prior contact with the police. *Id*. In order to avoid such a prejudicial effect where the fact of a prior criminal record is not properly before the jury, the prosecution should avoid (1) use of such pictures in a form in which they may be identified as police pictures and (2) references in testimony to the files from which they were obtained. See *id*.

Exhibits 169 and 170 were not prejudicial. There was no indication at trial that they are mugshots or police pictures. The attire does not signal the clothing of an incarcerated person. The photographs do not look like traditional mugshot photographs; in the photographs, Nolan is standing in front of a wall with wood paneling and there are no writings, numbers, or other insignia in the photographs that would indicate that

Nolan is under arrest. Furthermore, there was no testimony at trial that exhibits 169 and 170 were taken in connection with a prior arrest. Even if the jury had speculated that the photographs were mugshots, as urged by Nolan, there would be no basis for the jury to conclude that the photographs were taken in connection with a prior arrest instead of the current arrest for the crimes at issue in this case, and the photographs had independent value regarding, inter alia, eyewitness descriptions of the shooter.

Nolan's trial counsel was not deficient for not objecting to the photographs, and therefore, appellate counsel was not deficient for not claiming error on appeal. The district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

(c) Claim E: Firearms Expert

In claim E, Nolan alleges that his trial counsel was ineffective for failing to consult with and call a firearms expert for the purposes of rebutting the State's evidence to the effect that some of the bullets recovered from the scene of the shooting were consistent with having been fired from a .44-caliber gun, such as the .44-caliber gun found in Nolan's possession. Nolan further alleges that appellate counsel was deficient for not raising this issue on appeal. Nolan asserts that if his trial counsel had obtained a firearms expert, the expert could have rebutted the State's evidence and perhaps distinguished the gun found in Nolan's possession from a gun capable of firing the bullets found at the scene of the shooting. The district court correctly rejected this claim without an evidentiary hearing.

The premise of Nolan's argument and Nolan's speculation regarding the usefulness of a firearms expert's testimony are belied by the record. The record shows that Bredow, the State's expert, testified that some of the bullets found at the scene were consistent with having been fired from a .44-caliber gun, such as the .44-caliber gun found in Nolan's possession.

However, Bredow testified that there was not enough evidence to determine that any of the bullets found at the scene were in fact fired from the particular gun found on Nolan. According to Bredow's testimony, the evidence regarding the .44-caliber gun found in Nolan's possession was inconclusive and did not directly tie Nolan to Gaines' murder.

Because the evidence regarding the .44-caliber gun found in Nolan's possession was inconclusive and did not tie Nolan to Gaines' murder, the scope and potential for rebutting Bredow's testimony was limited. There is not a reasonable probability that Nolan would have been acquitted if a firearms expert had been obtained by Nolan. Therefore, Nolan was not prejudiced by trial counsel's decision to not obtain a firearms expert. The records and files in this case affirmatively show that Nolan was entitled to no relief on this claim. Trial counsel's conduct was not deficient, and appellate counsel was not deficient for not claiming error on appeal. We affirm this portion of the district court's order.

(d) Claim N: Copeland's Testimony

In claim N, Nolan alleges that his trial counsel was ineffective for failing to make a hearsay objection to Copeland's testimony regarding the location where his son found the 9-mm gun which was later connected to the shooting of Gaines and that appellate counsel was deficient for not raising this issue on appeal. Even though Copeland's testimony was inadmissible hearsay, we determine the district court correctly rejected this claim without an evidentiary hearing, because admission of the testimony was harmless.

At trial, Copeland testified about how his son notified Copeland of the location of the 9-mm pistol which was found by his son months after the shooting. Copeland testified in part:

> [Prosecution:] After September 19th of 2009, did you then have the occasion to call officers out to your residence on November 27th of 2009?
>
> [Copeland:] We did.

Q. And was that at approximately 12:30 in the afternoon?

A. Yes.

Q. And do you recall on that day whether there was any snow on the ground or anything like that?

A. There was none, no.

Q. And what — why did you call the police to your residence?

A. My son and his friend had been down at the school flying an airplane, and at some point they lost the airplane in the bushes, and they had went looking for it, and they had came across a pistol, and —

. . . .

A. — he had brought it to the house and gave it to me, and then we called the police and had them come pick it up.

Q. And did your son physically take you to the area where he found the pistol?

A. He did.

Q. And can you, using Exhibit 119, show the jury where your son took you?

A. This corner house right here (indicating), on the backside of the house, there's some bushes and stuff that set right along the edge of the street, and it was approximately two to three feet off the street in some bushes. About right here (indicating).

Nolan alleges that Copeland's testimony regarding where his son found the gun was inadmissible hearsay. The State concedes that the testimony is inadmissible hearsay but contends its admission was harmless.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008). A "statement" for hearsay purposes includes "nonverbal conduct of a person, if it is intended by him as an assertion." § 27-801(1). Under Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008),

hearsay is not admissible unless a specific exception to the hearsay rule applies. The State does not argue that Copeland's statement fell within any of these exceptions.

Copeland's statement concerning the location where the 9-mm gun had been found as conveyed by the out-of-court statement of his son should have been objected to and should not have been admitted. Copeland did not personally find the gun. Copeland knew the precise location at which the gun was found only because of his son's conduct, which was an assertion by the son as to where the gun was found. See, similarly, *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014) (determining that Copeland's similar testimony regarding location where his son found 9-mm pistol was inadmissible hearsay).

[21] However, the State maintains that the admission of Copeland's testimony regarding how he learned of the gun and where the gun was found was harmless error. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. See *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

We determine that the admission of Copeland's testimony concerning the location where the 9-mm gun was found was harmless error. The 9-mm gun was not found in Nolan's possession, and there was no direct evidence that he had been in possession of this gun. Nolan's guilt was established in this case by other relevant evidence, including eyewitness testimony, Kercheval's testimony, video footage from the gas station, and Nolan's fingerprints in the vehicle that Nolan, Taylor, and Kercheval had been in just before the murder, and the guilty verdict against Nolan was surely unattributable to the error in admitting Copeland's hearsay testimony.

The records and files in this case refute Nolan's allegation that his trial counsel was ineffective for failing to object

to Copeland's testimony. Furthermore, the allegations surrounding this case do not demonstrate a violation of Nolan's constitutional rights. The record shows that Nolan was not prejudiced by trial counsel's conduct, and appellate counsel was not deficient for not claiming error on appeal. Therefore, the district court did not err when it denied relief without an evidentiary hearing on this claim. We affirm this portion of the district court's order.

4. Claims D, F, H, I, K, L, and M

(a) Claim D: Prosecutor's Remarks During Closing Regarding Kercheval's Testimony

In claim D, Nolan alleges that his trial counsel was ineffective for failing to object to remarks the prosecutor made during closing arguments regarding Kercheval's testimony. During closing arguments, the prosecutor stated:

> I mean, let's call a spade a spade here. [Kercheval is] not giving you full disclosure. He's not going to sit here and tell you what they're saying word for word. These were his friends. He's charged with a crime. You think he wants to seal the deal for this defendant? He knows what he's capable of. He gave you just enough that's consistent with what he said from the beginning to Detective Tramp over and over again. But he's not giving you everything [that was] said in that car.

Nolan alleges that these comments constituted prosecutorial misconduct and that his trial counsel was ineffective for failing to object to them and appellate counsel was ineffective for not raising this issue on appeal. The district court correctly rejected this claim without an evidentiary hearing.

As stated above, generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008); *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). It is then necessary to determine the

extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *Id*. As we have noted above, "when a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and *to highlight the relative believability of witnesses for the State and the defense*." *State v. Dubray*, 289 Neb. 208, 227, 854 N.W.2d 584, 604 (2014) (emphasis supplied).

In this case, during closing arguments, the prosecutor made statements regarding Kercheval's credibility that were based on the evidence and the inferences that could be drawn therefrom. These comments were not improper and did not constitute prosecutorial misconduct. In this regard, we note that defense counsel also made comments regarding Kercheval's credibility during closing arguments and suggested that Kercheval had lied to the police and had lied to the jury at trial. Defense counsel also made comments to the effect that Kercheval lacked credibility because he had an incentive to cooperate with the State in exchange for a reduced sentence on his pending charges.

Because both parties challenged the credibility of Kercheval, the record refutes Nolan's allegation that his trial counsel was deficient for failing to object to the prosecutor's remarks made during closing arguments regarding Kercheval's credibility or that he was prejudiced by this alleged failing. Thus, appellate counsel was not deficient for not claiming error on appeal. Nolan is entitled to no relief on this claim. The district court did not err when it denied postconviction relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

(b) Claim F: Rehearing Regarding Identifications

In claim F, Nolan alleges that his appellate counsel was ineffective for failing to move for a rehearing of our decision in Nolan's direct appeal. See *State v. Nolan*, 283 Neb.

50, 807 N.W.2d 520 (2012). Nolan contends that our opinion was incorrect because it misstated the facts surrounding the identifications made before trial by Schlabs and Riesselman and that thus, we incorrectly determined that the identifications made by Schlabs and Riesselman did not need to be suppressed and were admissible.

Our opinion on Nolan's direct appeal reflected a synthesis of several somewhat inconsistent versions of the testimony surrounding the identifications. Our description on direct appeal was supported by testimony. More important, the argument Nolan implies is that the identification procedure was unduly suggestive. We discuss this issue below in connection with claim K, wherein we reject the claim of an unduly suggestive procedure. In *State v. Nolan, supra*, we rejected Nolan's argument, and upon our further review of the records and files in this case, we determine that Nolan's argument that these identifications should not have been admitted is without merit. At the trial of this matter, it was for the finder of fact to determine the weight to be accorded to the witnesses' identifications.

Another challenge to the admissibility of the identifications would not have succeeded on rehearing. Because a motion for rehearing on this issue would not have yielded a different result, appellate counsel was not deficient for not so moving. The district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

(c) Claim H: Admissibility of the .44-Caliber Gun

In claim H, Nolan alleges that his appellate counsel was ineffective for failing to vigorously argue on direct appeal that the .44-caliber gun found in Nolan's possession 8 days after the murder of Gaines was inadmissible under § 27-403 for the reason that its admission was unfairly prejudicial. Section 27-403 generally provides that 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. Nolan recognizes that his appellate counsel raised this issue on direct appeal, but he asserts that his appellate counsel failed to sufficiently argue the issue.

We have reviewed the record in this case, including the appellate arguments made on direct appeal, and we determine that the issue of the admissibility of the .44-caliber gun under § 27-403 was adequately raised and considered, and properly decided on direct appeal. See *State v. Nolan, supra*. The fact that appellate counsel did not persuade us is not to be equated with deficient performance. We determine that the records and files in this case affirmatively show Nolan was entitled to no relief on this claim and that Nolan has failed to allege any facts in his motion which, if proved, constitute an infringement on his constitutional rights. The district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

(d) Claim I: Rehearing Regarding Motion to Suppress .44-Caliber Gun

In claim I, Nolan alleges that his appellate counsel was ineffective for failing to move for a rehearing of our decision on direct appeal because, according to Nolan, we incorrectly determined that the trial court properly denied Nolan's motion to suppress evidence of the .44-caliber gun found in Nolan's possession. Nolan asserts that our opinion was in error because it misstated the facts surrounding the evidence adduced in connection with the motion to suppress and that thus, we made an incorrect determination based on incorrect facts. Specifically, Nolan contends our opinion incorrectly stated that there was evidence that Nolan was affiliated with a gang and reasoned that this affiliation justified the pat-down that resulted in the discovery of the .44-caliber gun on Nolan's person.

The records and files in this case refute Nolan's allegation. We have reviewed the record in this case. The record shows

that Nolan's conduct and lack of cooperation after exiting the vehicle justified the pat-down, quite apart from the fact that one of the officers believed that Nolan was affiliated with a gang. In our opinion on direct appeal, we described Nolan's conduct after exiting the vehicle, in part, as "grabbing his waistband," having "something heavy in his pants," and moving very quickly. *State v. Nolan*, 283 Neb. 50, 55, 807 N.W.2d 520, 530 (2012). We continue to believe that the trial court properly denied the motion to suppress evidence of the .44-caliber gun discovered during the traffic stop and pat-down as we previously concluded. A motion for rehearing on this issue would not have yielded a different result, and appellate counsel was not deficient for not so moving.

The record shows that Nolan was not entitled to relief on this claim, and Nolan has failed to allege any facts in his motion which, if proved, constitute an infringement of his constitutional rights. The district court did not err when it denied relief on this claim without holding an evidentiary hearing. We affirm this portion of the district court's order.

(e) Claim K: Prosecutorial Misconduct Regarding Identifications

In claim K, Nolan alleges that his trial counsel was ineffective for failing to object to the identifications of Nolan made by Schlabs and Riesselman on the grounds of prosecutorial misconduct. Nolan asserts that it was improper for the prosecution to allow both Schlabs and Riesselman to attend the meeting (initially set for only Riesselman) at which the identifications were made. Nolan argues that the procedures followed at the meeting resulted in both Schlabs and Riesselman making tainted identifications and that the procedures amounted to prosecutorial misconduct. This issue of the identifications made by Schlabs and Riesselman was raised and rejected on direct appeal. See *State v. Nolan, supra*.

We have reviewed the record and believe the steps taken by the prosecution to separate the witnesses as they made their identifications before trial were timely, effective, and proper.

Based on the reasoning set forth in our opinion on direct appeal, we determine that the facts surrounding the identifications made by Schlabs and Riesselman did not constitute prosecutorial misconduct. Nolan's claim that trial counsel was deficient for failing to object to the identifications based on prosecutorial misconduct is refuted by the record, and appellate counsel was not deficient for not claiming error on appeal. The district court did not err when it denied relief without an evidentiary hearing with respect to this claim. We affirm this portion of the district court's order.

5. Claims L and M: *Miller v. Alabama*

In claims L and M, Nolan claims that his trial counsel was ineffective for failing to object to his sentence of life without parole and that his appellate counsel was ineffective for not raising this issue on direct appeal. Nolan argues that because he was only 19 years old at the time of the crime, his sentence of mandatory life imprisonment without the possibility of parole is improper under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Although *Miller* was decided after Nolan's direct appeal was concluded and we have held it is to be applied retroactively, see *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014), *cert. denied* 574 U.S. 921, 135 S. Ct. 67, 190 L. Ed. 2d 229, the holding in *Miller* would not afford Nolan relief. The district court correctly rejected this claim without an evidentiary hearing.

Miller generally held that mandatory life sentences without the possibility of parole for persons under 18 years old at the time they committed their offense were unconstitutional. Specifically, *Miller* provides that "mandatory life without parole for those *under the age of 18 at the time of their crimes* violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465 (emphasis supplied). In *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014), we determined that *Miller* applies only to those persons who were under the age of 18 at the time of their crimes. In *Wetherell*, we determined that *Miller* did not apply

to the appellant therein who was 18 years old at the time of her crime.

In the present case, Nolan was 19 years old at the time of Gaines' murder, and accordingly, because he was not under the age of 18 at the time of the crime, *Miller* does not apply to him. Nolan has failed to allege facts in his motion which, if proved, constitute an infringement on his constitutional rights, and the records and files show that he is entitled to no relief. Trial counsel was not deficient for not raising this issue with the sentencing court, and appellate counsel was not deficient for not claiming error on appeal. The district court did not err when it concluded that Nolan was not entitled to relief under *Miller* and denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

VI. CONCLUSION

The district court erred when it denied Nolan relief without an evidentiary hearing on three claims: claim A, that trial counsel was ineffective for failing to consult with and call an identification expert to rebut the State's case; claim B, that trial counsel was ineffective for failing to consult with and call a fingerprint expert to rebut the State's case; and claim C, that trial counsel was ineffective for failing to call Anderson to testify on Nolan's behalf and that appellate counsel was deficient for not raising this issue on direct appeal. We reverse the decision of the district court on these three claims and remand the cause for an evidentiary hearing on these claims. In all other respects, the decision of the district court is affirmed.

Affirmed in part, and in part reversed and remanded for further proceedings.

Roskop Dairy, L.L.C., appellant, v. GEA Farm Technologies, Inc., and Midwest Livestock Systems, Inc., appellees.

871 N.W.2d 776

Filed December 4, 2015. No. S-14-115.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.
2. ____: ____: ____. An appellate court reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.
3. **Summary Judgment: Appeal and Error.** 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.
4. **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.
5. **Prejudgment Interest: Appeal and Error.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2010), and whether prejudgment interest should be awarded is reviewed de novo on appeal.
6. **Summary Judgment.** A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
7. **Evidence: Proof.** Failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.
8. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.

9. ____: ____. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
10. **Summary Judgment: Evidence.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.
11. **Products Liability: Warranty.** All implied warranty theories of recovery and strict liability claims for manufacturing defect, design defect, or failure to warn seek to recover for a "defect."
12. **Actions: Negligence: Warranty: Proximate Cause.** Whether a plaintiff is proceeding under negligence, defect theories, or breach of express warranty, proximate cause is a necessary element of the plaintiff's case.
13. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause is the cause that in a natural and continuous sequence unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
14. **Negligence: Proximate Cause: Proof.** To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule or "cause in fact"; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.
15. **Expert Witnesses: Testimony.** Findings of fact as to technical matters beyond the scope of ordinary experience are usually not warranted in the absence of expert testimony supporting such findings.
16. **Testimony.** It is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore unreliable.
17. **Products Liability: Proof.** Under the malfunction theory, also sometimes called the indeterminate defect theory or general defect theory, a plaintiff may prove a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as a result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.
18. **Circumstantial Evidence: Verdicts.** Circumstantial evidence is not sufficient to sustain a verdict that depends solely thereon unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.

19. **Juries: Evidence.** Where, under the facts viewed in a light most favorable to the nonmoving party, the nonexistence of the fact to be inferred is just as probable as its existence, the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.
20. **Evidence.** The line between impermissible speculation and reasonable inferences is drawn by the laws of logic.
21. ____. Reasoning causation from temporal correlation represents a logical fallacy. A conclusion based upon such reasoning is not a reasonable inference but is mere speculation and conjecture.
22. **Rules of the Supreme Court: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned. Neb. Rev. Stat. § 25-1140 (Reissue 2008) and Neb. Ct. R. App. P. § 2-105(B)(1)(b) (rev. 2010) place the burden on the appellant to file a praecipe identifying the matter to be contained in the bill of exceptions.
23. **Prejudgment Interest: Claims.** A claim is liquidated for purposes of prejudgment interest when there is no reasonable controversy as to both the amount due and the plaintiff's right to recover.

Appeal from the District Court for Gage County: Paul W. Korslund, Judge. Affirmed in part, and in part reversed.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Stephen L. Ahl and Nathan D. Anderson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Midwest Livestock Systems, Inc.

William M. Bremer and Ann M. Byrne, of Bremer & Nelson, L.L.P., and Catherine L. Stegman and Joseph S. Daly, of Sorodo, Daly, Shomaker & Selde, P.C., L.L.O., for appellee GEA Farm Technologies, Inc.

Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

McCormack, J.

NATURE OF CASE

A dairy appeals from the district court's order of summary judgment in favor of a manufacturer of a microprocessor-based

milking control unit and the dealer of that unit (collectively the defendants). The principal issue is whether the dairy rebutted the defendants' prima facie case that mechanical components of the milking system maintained by the dairy and not a part of the microprocessor-based control unit were the proximate cause of the alleged damages.

BACKGROUND

Roskop Dairy, L.L.C. (Roskop Dairy), owned by Michael Roskop (Roskop), is a commercial dairy operation. GEA Farm Technologies, Inc. (GEA), manufactures automated dairy equipment used in dairy systems. Midwest Livestock Systems, Inc. (Midwest), was an authorized dealer of GEA products.

Roskop Dairy sued the defendants for damages allegedly stemming from the "Dematron 60 Air Detacher Package" (Dematron) manufactured by GEA and purchased by Roskop Dairy from Midwest. The total purchase price was $153,027.88. Roskop Dairy paid Midwest a downpayment of $33,600 and made a second payment of $70,000. Roskop Dairy never paid the remainder.

The installation of the Dematron at Roskop Dairy occurred in June 2008. There was no evidence of a service agreement by which Midwest was to regularly inspect or maintain other component parts of Roskop Dairy's milking system that were not provided by Midwest.

Roskop Dairy sued the defendants for breach of express and implied warranties and negligence. Roskop Dairy theorized that Midwest negligently and defectively installed and programmed the Dematron. Specifically, Roskop Dairy asserted that improper parameter settings caused the milking units to detach while still under significant vacuum and thereby harmed the teats of the dairy cows, resulting in mastitis and lowered milk production. Roskop Dairy did not allege liability based on negligent maintenance of the physical component parts of the milking system that are not part of the Dematron.

The defendants generally denied liability and asserted that Roskop Dairy's contributory negligence barred any claim

against them. Midwest counterclaimed for the principal amount still due under the sales contract agreement, as well as for 8 percent interest per annum from the payment due date. After discovery, the defendants moved for summary judgment.

Milking System, Dematron, and Somatic Cell Counts

Roskop Dairy has 50 milking "parlors" used to milk approximately 700 cows. When a cow enters a parlor, an employee of Roskop Dairy manually prepares the cow's teats by cleaning them and stimulating let down. The employee then presses a button to apply vacuum to the milking "claw." The employee applies the claw to the teats, and milking begins. Milk flows through tubes into holding tanks. The claw, vacuum, tubes, and tanks are not part of the Dematron.

The Dematron is a microprocessor-based milking control unit that monitors signals from milking sensors in the milking system and sends signals to that system to control when various processes take place after manual application of the claw. There are multiple parameter settings involved in the functioning of the Dematron. These settings are preset at the factory, but are regularly adjusted to accommodate dairy owners' preferences.

The "milk flow threshold" level is an adjustable Dematron parameter that indicates when the system should finish milking. Another Dematron parameter, "blink time," is the length of time a cow must be below the milk flow threshold before detachment of the claw will start. A component in the system actually blinks during the blink time, and milk flow can also be observed through clear lenses attached to the top of the claw. After the cow is below the milk flow threshold for the desired blink time, the Dematron shuts off the vacuum by sending a signal to a "shifting valve" that is also part of the Dematron.

After the vacuum is shut off, it should quickly dissipate. Depending on the model of claw, vacuum dissipates either through vents in the metal claw itself or in clear plastic

replaceable lenses that attach to the top of the claws. In the model of claw used at Roskop Dairy, the vents were located in the lenses and not in the claw itself.

The "detach delay" is a setting of the Dematron that controls the time between when the vacuum is shut off and the claw is retracted by the automated system. Retraction ideally occurs when most, but not completely all, of the residual vacuum has dissipated through the vents. If no residual vacuum is left when the claw retracts, the claw will fall, rather than be retracted, and will land on the parlor deck.

The "milk sweep delay" is a Dematron setting controlling the time between when the claw is retracted and when the "milk sweep begins." The "milk sweep" is an optional setting and consists of a short burst of vacuum to pull any residual milk into the tubes of the milking system.

After detachment, the cows' udders are manually dried with a cloth by Roskop Dairy employees.

The somatic cell count of the milk at a dairy is an indicator of the number of mastitis organisms in the herd. Increased somatic cell count can mean either many cows with a lesser degree of infection or fewer cows with a worse infection. Somatic cell counts above 400,000 are "concerning." Below 200,000 represents a well-managed herd.

While the somatic cell count in Roskop Dairy's herd had previously been in the 200,000 range, in January 2008, before the installation of the Dematron, it significantly increased to 409,000, from 285,000 the previous month. The somatic cell count continued in the 409,000 to 476,000 range until June 2008, when it reached 510,000.

In July 2008, after installation of the Dematron, the somatic cell count rose to 627,000. It went back down to 493,000 in August, after Dematron employees visited Roskop Dairy. It is undisputed that during that visit, Dematron employees adjusted some parameter settings of the Dematron.

Roskop Dairy claims that the rise in somatic cell counts in the herd after installation of the Dematron corresponded to a reduction in milk production that had not occurred during

the pre-Dematron rise in somatic cell counts. Roskop did not address the extent to which any changes in milking practices entered into this conclusion. Roskop had milked his cows three times a day until July 2, 2008. Since July 2, however, he has milked his cows twice a day. Milking three times a day versus twice a day would increase milk yield by 12 to 15 percent.

Deposition of Michael Roskop and Karen Cass' Mastitis Reports

Roskop's deposition was entered into evidence at the summary judgment hearing. Roskop testified that due to the timing of events, he believed the July 2008 increase in the somatic cell count was caused by the parameters of the Dematron's being set incorrectly the previous month. Roskop admitted that he was not an expert on milking machines. He admittedly did not fully understand the Dematron settings. But he stated that approximately 20 days after the system was installed, his herd experienced an increase in mastitis.

Roskop suspected, first, that from the time the system was installed until July 31, 2008, when Midwest employees made further adjustments to the Dematron's parameter settings, the blink time was set too short, such that the machines were detaching before the cows were fully milked. He believed this based on the appearance of the cow udders and the fact that the cows were not producing as much milk as he expected.

Roskop admitted the blink time setting did not lead to mastitis, however. Roskop testified that his employees manually reattached the system when the cows' udders appeared to not be completely milked out. Roskop did not specifically recall which of the original blink time settings and adjustments may have been made at his request.

Roskop suspected that incorrect parameters for the sweep time led to the increase in mastitis. Roskop believed that from the time of installation until adjustments were made on July 31, 2008, incorrect sweep time settings resulted in the machine's detaching while still under a vacuum. This, in

turn, tugged on the cows' teats, causing physical injury that made them more susceptible to mastitis. Since discovery, Roskop Dairy no longer asserts that the sweep time settings led to mastitis.

Roskop testified that from late June 2008 when the system was installed until Midwest employees made adjustments to the parameter settings in late July, he witnessed the claw units being "jerked off" the cows with a lot of "tugging." He testified that the units were coming off under vacuum and that vacuum lasted for approximately 3 seconds before it dissipated. Roskop did not clearly explain whether he could determine that this vacuum was active vacuum versus residual vacuum. At one point, he affirmed that he could hear the hissing of air being sucked into the machine for about 3 seconds, but that at another point, he affirmed this was the failure of the vacuum to dissipate for approximately 3 seconds.

During the time period that the units were detaching under vacuum, Roskop observed approximately one-third of his dairy cows with "everted" teat ends. Roskop explained that normally only about 2 percent of his cows demonstrated everted teat ends. Roskop further observed bruised teats during that time.

Roskop testified that he had concluded the Dematron was in some manner the cause of the detachment under vacuum because "when they made the change off of the sweep time, that's when we had the instant change of no more damage to the teat end on the cows." Roskop explained that although the cows with damaged teat ends took some time to heal, new cases of teat-end damage significantly decreased after Midwest employees changed the parameter settings of the Dematron in late July.

Roskop confirmed that Roskop Dairy employees were supposed to check the lenses of the claws constantly to make sure the vents, through which the residual vacuum escapes, were not clogged. The most common cause of vent clogging was manure. His employees were supposed to unclog the vents if they observed them clogged. Roskop did not specify to what

extent his employees were successfully carrying out these duties in the summer of 2008. Roskop indicated that sometime in June 2008, four Roskop Dairy employees quit, because cows were kicking them. Roskop testified that it took approximately 2 months to replace those employees.

Roskop testified that he hired Karen Cass, a mastitis consultant, to "come in and give me an outside look and test the herd." She observed the dairy and tested the cows on July 19, 2008. Roskop admitted that Cass observed several behaviors of Roskop Dairy's employees that were concerning from the standpoint of mastitis prevention. Roskop acknowledged that Cass' report found various deficiencies in his employees' care of the cows during the milking process. Roskop did not deny the veracity of Cass' observations, but hoped those deficiencies were isolated instances.

Cass found there were too many cows with clinical mastitis in line being milked with nonclinical cows. Cass found that the milk and air tubes were falling off the equipment. Cass also saw employees "flipping towels," meaning that they were using the same towel to wipe off the teats of more than one cow, and were using towels that were still damp. Cass observed that employees were not wearing gloves during manual cleaning and stimulation before attaching the claw. Cass wrote that the herd's teat-end condition "look[ed] good."

Roskop blamed the incidents of cows in the line showing clinical mastitis on the fact that the number of sick cows exceeded the capacity of his hospital pen. Roskop believed that the backflush system between each cow, in any case, prevented cross-contamination.

Depositions of Dennis Nissen, Gerald Farrier, and Jeff Hunt Concerning Installation and Adjustments to Dematron

Dennis Nissen and Gerald Farrier are Midwest employees who install and maintain equipment sold by Midwest, including the Dematron. Nissen was the employee who primarily installed the Dematron at Roskop Dairy, and Farrier

occasionally assisted. Their depositions were entered into evidence at the summary judgment hearing. Jeff Hunt, a GEA technical specialist who the parties do not dispute qualifies as an expert, was also deposed on two occasions, and his depositions were entered into evidence at the summary judgment hearing.

Nissen explained that it is normal to adjust the parameter settings for the blink time and low milk threshold according to the dairy owner's preferences as to how thoroughly the cows are milked. Although Nissen believed that the factory settings were correct given his observation of the milk flow when he installed the Dematron at Roskop Dairy, he testified that he acceded to Roskop's request to have the cows milked more thoroughly by adjusting the parameters of the blink time and low milk threshold accordingly. Nissen testified that before doing so, he told Roskop that these were not well-advised changes and that the cows just needed to get used to the new detacher.

Nissen made followup visits on July 30 and 31, 2008, after Roskop had complained of an increase in mastitis. At those times, Nissen checked the vacuum settings and observed the detachers coming off the cows after milking. He testified that he found no problems with the Dematron. Nissen testified that he made some "minute" parameter changes.

Three out of the 50 milking units had plungers that were not seating properly, and they were fixed promptly. Hunt testified that plungers do not create enough vacuum to cause the kind of problems reported by Roskop.

Nissen and Farrier testified that during their visits in late July 2008, they found numerous claws that either did not have vented lenses in them or were placed with the vent upside down. Of the 50 claws at Roskop Dairy, Nissen found that half had to have the lenses replaced. Farrier assumed that Roskop or his employees had improperly replaced the lenses. Nissen explained that the dairy must be aware of what kind of claws it has when ordering replacement lenses, because other models of claws do not require vented lenses. Apparently,

the vented lenses and unvented lenses are indistinguishable besides the presence or absence of a vent.

Nissen explained that lenses were not part of the detacher system sold by Midwest, but were preexisting components that mount to the claws. Hunt likewise testified that there is no part of the claw system that is part of the Dematron package. According to Nissen, Midwest was not charged with maintaining the claws or the lenses. Most dairy owners, according to Nissen, handle their own maintenance of the lenses. Farrier similarly explained that it was not "cost conducive" for dairy owners to have Midwest maintain their lenses. Although they did not consider it to be part of a maintenance obligation, Nissen and Farrier used the vented lenses that Roskop had on hand and replaced the lenses during their visits in late July 2008.

Hunt visited Roskop Dairy in September 2008. He made some "routine adjustments" to a portion of the database kept for the parlors, but he did not make any changes affecting the detachers. He did not observe anything out of the ordinary in the operation of the detacher system.

Hunt testified that the factory setting for detach delay is 0 seconds. He explained that the reason for that setting is that vacuum detachment cylinders typically do not operate instantaneously. And if the detach delay is set for longer than 0 seconds, the claw will usually drop before the rope is taut and allow the claw to fall to the deck. But detach delay, like other settings, may be adjusted by dairy personnel and the installer at the time of installation or first use.

Hunt testified that based on computer records of the Dematron settings at the time of installation, the detach delay was originally set for 3 seconds around the time of installation. When Nissen and Farrier visited Roskop Dairy in late July 2008, they changed the detach delay setting from 3 seconds to 10 seconds. By February 2013, however, the detach delay setting had been reduced from 10 seconds to 1 second.

Hunt explained that, generally, "[l]enses without vent holes or claws with no venting is a cause of poor residual vacuum

decay." Likewise, Nissen and Farrier testified that improper venting will cause the claws to detach while still under vacuum. Without proper venting, these witnesses explained, there is no way to quickly release the residual vacuum when the vacuum is signaled by the Dematron to be turned off.

Hunt testified that "one of the most prominent and most probable" reasons for residual vacuum during retraction of the claw is vents not functioning properly. Other physical components of the milking system, however, can also cause residual vacuum not to dissipate, such as short air tubes or vacuum pulsation. Those other physical components are likewise not matters controlled by the Dematron settings or maintained by the defendants.

Having reviewed the records, reports, and Nissen's deposition, and taking into account other possible causes, Hunt opined that the most likely cause for the claws to retract under vacuum in the summer of 2008 was the condition described by Nissen of the vents in the lenses of the claws.

Limited Exclusion of William Wailes' Testimony

Roskop Dairy had designated William Wailes as an expert witness. Wailes has a bachelor's degree in animal science and is a member of the National Mastitis Council. He considers himself an expert in management systems, including treatment protocols, in the overall operation of a dairy farm. Wailes testified that he was not an expert in milking machine equipment and that he is not a veterinarian.

Wailes explained that there are two forms of mastitis. Environmental mastitis comes from organisms that are in the cow's environment and typically involve issues of cleanliness, keeping the manure under control, changing the bedding, and other sanitary conditions. Contagious mastitis does not grow in the environment but is passed from cow to cow depending on a number of factors. Usually, contagious mastitis is passed from infected cows to uninfected cows during milking time. Wailes confirmed that according to Cass' report,

both environmental and contagious mastitis was present in Roskop's herd in the summer of 2008. Most of the cases were contagious mastitis.

Wailes testified generally that there are many reasons why a dairy herd might have an outbreak of mastitis, which have nothing to do with the milking machine. For instance, using bare hands rather than gloves when preparing cows for the milking machine can increase the spread of mastitis. Using damp cloths in the milking parlor is also not advisable, because there are opportunities for more colonies of bacteria within the damp cloth. Using the same towel for two different cows by flipping it over was "unacceptable," "[b]ecause you can cross-contaminate two cows if you use a single towel on two different cows."

Further, Wailes testified that milking clinical cows in the same line as nonclinical cows can lead to the spread of mastitis. Wailes testified that a backflush system will help prevent certain types of contagious mastitis from spreading when clinical cows are in the line with nonclinical cows, but not all. Buying infected cows from other herds could also cause an outbreak.

Wailes had reviewed Cass' reports in which Cass stated that in July 2008, she had observed Roskop's employees failing to use gloves and using damp towels, which they flipped for use on multiple cows. Wailes was also aware of Cass' observation that cows with clinical mastitis were being milked with cows who did not have mastitis and that other cows with mastitis were being kept in sick pens with other cows that did not have mastitis. Wailes acknowledged these were "unacceptable" practices that could cause the spread of contagious mastitis. Wailes did not specifically address the causal role of these practices in the rise of mastitis in the Roskop Dairy herd.

Wailes explained that, physically, the "first and second lines of defense" against mastitis are a healthy teat end, "from a sphincter muscle skin condition," and the keratin that is in the teat canal. But Wailes did not otherwise elaborate on how much more susceptible to contagious mastitis a cow with

damaged teat ends might be. Wailes did not testify that teat-end damage alone can cause mastitis.

Wailes further explained that teat-end lesions are "pretty rare" and, in normal circumstances, would only result from teats being stepped on or similar injuries. Wailes testified that vacuum not properly shutting off before retraction of the claw could lead to teat-end damage. In addition, certain practices leading to overmilking, such as prepping the cow too long before milking or a low flow rate setting, could "possibly" lead to teat-end damage.

Although Cass purportedly checked teat health and found little evidence of teat-end damage in the herd in July 2008, Wailes relied on Roskop's statement that 30 percent of the cows had visible teat-end damage, which would be approximately 200 cows. Wailes considered Cass to be qualified to evaluate teat-end health—more so than Roskop—and she was "[v]ery diligent" in her work. But Wailes questioned the logistics of Cass' making such observations while carrying out her primary duty of obtaining clean samples from the cows to test for mastitis.

Wailes testified that he did not have the factual information he needed to make a report or a "differential diagnosis as to the causes of the cows having mastitis at the Roskop Dairy farm in 2008." Wailes had not reviewed Nissen's deposition and had no knowledge of the allegedly clogged vents. Neither did Wailes consider, in reaching his opinion, the rise in somatic cell count from January to June 2008, before installation of the Dematron. Wailes specifically stated that he had not ruled out the various other possible causes of a mastitis outbreak at Roskop Dairy that would be unrelated to the Dematron, because he did not have the necessary records to do so.

Wailes did not know how long the milking system was coming off under vacuum. Wailes did not know how many units in the system were coming off under vacuum. Wailes had no specific information about the hygienic practices at the

dairy in the summer of 2008 other than Cass' report and his longtime relationship with Roskop Dairy.

Wailes stated that he had generally found throughout the years that Roskop Dairy was well maintained. When asked whether through his discussions with Roskop he had learned of any changes in the sanitation practices at Roskop Dairy from May to June 2008, Wailes responded, "I think he had protocols in place for his milking facility, his people, and so that's, that's my answer, he had protocols in place." Wailes testified that he did not specifically review what the protocols were. Wailes further testified that he was not specifically aware of what steps were taken at Roskop Dairy to enforce its protocols.

Wailes summarized, "[M]y analysis is that there had to be some event to trigger somatic cell counts to take that much of a spike." Citing as the factual foundation for his opinion the documentation of a spike in the somatic cell count and his conversation with Roskop in which Roskop related observing the units coming off under vacuum and the teat-end damage during the time of that spike, Wailes concluded that the alleged damage to Roskop's herd was "consistent with" the units detaching under vacuum.

Wailes stated that he did not have the facts to say that units coming off under vacuum was the "probable" cause of the spike in mastitis. He elaborated that, based on the facts he had, he could only say it was "possible" that detachment under vacuum caused the spike in mastitis:

> A. It's very possible, but my, my only backup to that would be that when we see a spike in somatic cell counts something is causing the mastitis.
>
> Q. And we've agreed it could be many things?
>
> A. Yes.
>
> Q. One of which could be something wrong with the detacher if indeed there was?
>
> A. Yes.
>
> Q. But a lot of other things that have nothing to do with the detacher?

A. Yes.

Q. And we can't rule anyone in or rule anyone out based on the facts we have right now?

A. It's a dynamic issue.

But later, Wailes mentioned that "when you try to eliminate events that could occur during that period of time, the one that you can't eliminate is the installation of new equipment that was not working properly at the time." Wailes further stated at counsel's prompting that he did not find any other cause for the spike in mastitis and loss of production in the summer of 2008.

On this point, Wailes elaborated only that there was no change in feed, that Roskop had "protocols in place," that Cass' report did not necessarily mean that none of the dairy workers were exercising good hygiene practices, and that he had no reason to believe new cows had been introduced into the herd. Wailes then answered affirmatively to Roskop Dairy's counsel's question as to whether his "analysis that the detacher system caused the damage [was] based in part on the fact that [Wailes had] either eliminated or not been provided with any evidence of any other causes during that time frame."

But when Midwest's counsel asked, "You said you didn't find any other cause other than the installation, but fair to say you didn't really look for any other cause other than the installation; is that correct?" Wailes answered, "My main concern at the time was the timing of the events, and the timing of the events match up to the installation." Midwest's counsel then pressed, "But, sir, the question I asked you was did you look for any other causes?" Wailes answered, "No."

Wailes again clarified that he did not know what, if anything, was wrong with the Dematron and had no opinion about the parameter settings. Wailes stated that he was not an expert in the design, installation, diagnosis, settings, or repair of milking machine equipment.

Wailes confirmed generally that "a properly operating detacher system" does not "come off under pressure as

described by . . . Roskop." But Wailes also acknowledged that there were many reasons other than the Dematron why units could come off under vacuum. Wailes described these as including improper venting of the claws, misapplication of the unit to the udders, kinks in the hoses, and cow movement. Wailes further conceded there were other parts of the milking system that, if not properly maintained by the dairy farmer, could cause conditions conducive to cows' getting contagious forms of mastitis. Thus, Wailes agreed that it would not be "scientific reasoning" to conclude that the Dematron was responsible for the claws' detaching under vacuum.

The defendants moved to strike Wailes' testimony on the issue of causation, asserting that his testimony represented mere speculation and conjecture and was based on unscientific methodology and insufficient facts to meet the requirements of *Schafersman v. Agland Coop*.[1] The district court granted the motion and excluded Wailes' testimony insofar as Wailes sought to opine that the units were coming off under vacuum because of something wrong with the Dematron or that the increase in mastitis was caused by the units detaching under vacuum. Wailes' deposition was not offered at the summary judgment hearing.

Limited Exclusion of Michael Slattery's Testimony

Michael Slattery is Roskop Dairy's veterinarian. In his deposition, Slattery discussed in the abstract several possible causes of an increased somatic cell count in a dairy herd. In addition to the factors discussed by Wailes and acknowledged by Roskop in his discussion of Cass' report, Slattery testified that the "inflations" components of the milking machine could be worn out and porous, therefore harboring bacteria and leading to an increase in mastitis. He also added that high temperatures and humidity can lead to an increase in

[1] *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004).

the spread of mastitis. Finally, milking cows on manual for too long could lead to overmilking and increased incidents of mastitis.

Slattery stated he believed that the increase in mastitis at Roskop Dairy was due to the Dematron, although he did not observe anything wrong with the Dematron and explained that he was not an expert on milking machines. Rather, he testified that he based his conclusion solely on Roskop's statement that the somatic cell count of the herd increased after the Dematron was installed. Slattery conceded he did not look at any data and did not eliminate the other possible causes of increased somatic cell count that had been discussed.

Upon the defendants' motion in limine, the court excluded Slattery's testimony to the extent that it concerned the proximate causation of the increased somatic cell count at Roskop Dairy in the summer of 2008. Slattery's deposition was offered by Roskop at the summary judgment hearing. It was allowed into evidence only to the extent that it contained "factual observations."

Order Granting Summary Judgment

The court granted the defendants' motions for summary judgment. In its order, the court noted that it had stricken the causation testimony of both Slattery and Wailes as unreliable. But it also noted in its order that "[b]oth Slattery and Wailes admitted there are numerous possible causes for spikes in a dairy herd's mastitis rate that could not be ruled out in this case." The court noted that there was evidence that Roskop Dairy was not following proper hygiene procedures to prevent the spread of mastitis. Indeed, the court noted, the somatic cell counts indicated a mastitis problem before the Dematron was installed.

The court further noted that Midwest's expert, Patrick Gorden, testified that there was no scientific basis to conclude that the detacher system caused mastitis or decreased milk production. Rather, Gorden testified that the mastitis was preexisting and likely exacerbated by hot weather and Roskop

Dairy's failure to implement a milk quality program and to properly maintain the milking system. Gorden's affidavit is not in the record and apparently was not entered into evidence at the summary judgment hearing.

Finally, the court noted that Hunt opined that Roskop Dairy's failure to properly maintain the vents caused the mastitis. The court noted that Roskop had failed to present any expert to contradict Hunt's expert opinion.

The court reasoned that the fact the detacher units came off under vacuum did not in itself demonstrate a product defect. Although parameter settings were changed throughout the installation process, there was no evidence that any settings were incorrect or defective. While, under *Genetti v. Caterpillar, Inc.*,[2] proof that a warranted product is defective may be circumstantial and inferred from the evidence, the court concluded that *Genetti* was inapplicable. There were various possible causes of the increase in the somatic cell count or for the units detaching under vacuum, which were beyond the normal experience and understanding of the jury.

The court concluded that expert testimony was required for a jury to determine which component parts or settings of the milking system caused it to come off under vacuum. Expert testimony was also required for the jury to determine which, among a number of possible causes of the spike in mastitis in the herd, was more probable. Roskop Dairy had no such expert testimony.

Prejudgment Interest

The court subsequently granted summary judgment in favor of Midwest on its counterclaim for the remaining principal due of $78,026.56 plus prejudgment interest. Because the contract did not provide for interest, the court applied Neb. Rev. Stat. § 45-104 (Reissue 2010):

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due

[2] *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

> on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

The court observed that Midwest sent a payment request to Roskop Dairy which bore a date of October 14, 2008, but there was no evidence of when it was actually sent. Therefore, the court utilized the date of November 1, because Roskop Dairy admitted that the outstanding principal was owed to Midwest as of November 1. The court utilized the rate of 8 percent per annum rather than the statutory 12 percent, because 8 percent was what Midwest had requested. The court did not expressly discuss whether there had been a "reasonable controversy" over the amount due to Midwest.[3]

ASSIGNMENTS OF ERROR

Roskop Dairy asserts that the district court erred by (1) excluding the testimony of Wailes, (2) denying Roskop Dairy's motion to compel, (3) granting the defendants' motions for summary judgment, and (4) awarding prejudgment interest to Midwest.

STANDARD OF REVIEW

[1,2] We review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.[4] We review for abuse of discretion how the trial court applied

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[3] See, e.g., *Wilson Concrete Co. v. A. S. Battiato Constr. Co.*, 196 Neb. 185, 188, 241 N.W.2d 819, 821 (1976).

[4] *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

the appropriate standards in deciding whether to admit or exclude an expert's testimony.[5]

[3] 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.[6]

[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.[7]

[5] Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2010), and whether prejudgment interest should be awarded is reviewed de novo on appeal.[8]

ANALYSIS

Exclusion of Wailes' Testimony and Whether There Was Material Issue of Fact

[6,7] The central question in this case is whether we should affirm the district court's order of summary judgment for the defendants. A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[9] Failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[10]

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[5] *Id.*

[6] *Rent-A-Roofer v. Farm Bureau Prop. & Cas. Ins. Co.*, 291 Neb. 786, 869 N.W.2d 99 (2015).

[7] *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012).

[8] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[9] See *Rent-A-Roofer v. Farm Bureau Prop. & Cas. Ins. Co., supra* note 6.

[10] See *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[8-10] A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.[11] Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.[12] Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment[13]; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.[14]

The defendants made a prima facie case for summary judgment through expert testimony that poor maintenance of the vents in the claws was the proximate cause of the units detaching under vacuum and, thus, of any mastitis resulting therefrom. Without endorsing the sufficiency of the evidence on any other aspect of Roskop Dairy's case, we focus our analysis on this element of mechanical causation. Doing so, we conclude that Roskop Dairy failed to produce admissible contradictory evidence creating a material issue of fact to rebut the defendants' prima facie case.

Wailes neither purported to opine on the mechanical cause of the units detaching under vacuum, nor was he qualified to do so. And Roskop Dairy did not present other sufficient circumstantial evidence that could lead a reasonable person to accept its theory that the Dematron was the proximate cause

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[11] *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

[12] See, *Borrenpohl v. DaBeers Properties*, 276 Neb. 426, 755 N.W.2d 39 (2008); *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

[13] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006); *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

[14] *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

of the purported injury. As will be explained in more detail below, we agree with the district court that Roskop Dairy's reliance on the malfunction theory is misplaced, because it is limited to proving a specific defect through circumstantial evidence and because Roskop Dairy failed to present evidence that could establish the elements of the malfunction theory. Any other circumstantial evidence that Roskop Dairy relies on to rebut the defendants' prima facie case for summary judgment amounts to speculative reasoning based on observations of a temporal correlation.

[11] All implied warranty theories of recovery and strict liability claims for manufacturing defect, design defect, or failure to warn seek to recover for a "defect."[15] Express warranty claims are not merged with implied warranty claims or strict liability claims due to the "'dickered'" aspects of the individual bargain,[16] but express warranty claims, like implied warranty theories and strict liability claims, require a showing that the goods were defective.[17] While a "defect" traditionally falls under the category of either a design, manufacturing, or warning defect, "defective" installation is also cognizable under the Uniform Commercial Code's breach of warranty theories when the installation is incident to the sale; in other words, when the purchase is for a system that is dependent upon proper installation.[18] And the user of a product may also assert a cause of action for negligent installation concurrently with actions under express and implied warranty theories.[19]

[12-14] Whether a plaintiff is proceeding under negligence, defect theories, or breach of express warranty, proximate cause

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[15] See *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000).

[16] *Id*. at 574, 618 N.W.2d at 844.

[17] *Genetti v. Caterpillar, Inc., supra* note 2.

[18] See, *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985); 3 American Law of Products Liability 3d § 37:12 (2015).

[19] 3 American Law of Products Liability 3d, *supra* note 18.

is a necessary element of the plaintiff's case.[20] Proximate cause is the cause that in a natural and continuous sequence unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.[21] To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule or "cause in fact"; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.[22]

[15] In this case, proving the elements of defect/negligence and proximate cause involves the mechanical functioning of a dairy farm milking system and its various component parts. Such technical matters are outside the scope of ordinary experience. Findings of fact as to technical matters beyond the scope of ordinary experience are usually not warranted in the absence of expert testimony supporting such findings.[23]

Hunt testified that the clogged and upside-down vents reported by Nissen and Farrier were the cause of the milking units detaching under vacuum. Roskop presented no reliable expert opinion to the contrary. Roskop admitted that he was not an expert on milking machines. Wailes likewise stated

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[20] See, *Powell v. Harsco Corp.*, 209 Ga. App. 348, 433 S.E.2d 608 (1993); 1 American Law of Products Liability 3d § 4:1 (2007).

[21] See, *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Pendleton Woolen Mills v. Vending Associates, Inc.*, 195 Neb. 46, 237 N.W.2d 99 (1975).

[22] See, *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015); *Belgum v. Mitsuo Kawamoto & Assoc.*, 236 Neb. 127, 459 N.W.2d 226 (1990); *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975).

[23] See, *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991); *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). See, also, *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012); *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004); *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974); *Clark v. Village of Hemingford*, 147 Neb. 1044, 26 N.W.2d 15 (1947).

clearly that he was not an expert in the design, installation, diagnosis, settings, or repair of milking machine equipment. Wailes stated that he did not know what, if anything, was wrong with the Dematron and had no opinion about the parameter settings.

Roskop points out that Wailes confirmed that "a properly operating detacher system" does not "come off under pressure as described by . . . Roskop." This statement, in combination with Roskop's testimony, may support the occurrence of some kind of malfunction of the milking system. But this was not an opinion as to whether the Dematron was the cause of that malfunction. To the contrary, Wailes acknowledged that there were many possible mechanical causes of the units coming off under vacuum, which have nothing to do with the Dematron. Wailes agreed that it would not be "scientific reasoning" to conclude that the Dematron was responsible for the claws' detaching under vacuum.

Even if Wailes had been qualified to opine on which component part of the milking system caused the units to detach under vacuum, and had actually attempted to do so, such opinion would be unreliable under *Schafersman v. Agland Coop.*[24] The expert must have "good grounds" for his or her belief "in every step of the analysis."[25] The term "good grounds" means an inference or assertion derived by scientific method and supported by appropriate validation.[26]

[16] Wailes testified, "[M]y analysis is that there had to be some event to trigger somatic cell counts to take that much of a spike" and "[m]y main concern at the time was the timing of the events, and the timing of the events match up to the installation." It is well settled that a causation opinion based solely on a temporal relationship is not derived from the

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[24] *Schafersman v. Agland Coop, supra* note 1.

[25] *King v. Burlington Northern Santa Fe Ry. Co., supra* note 4, 277 Neb. at 227, 762 N.W.2d at 43.

[26] *Id.*

scientific method and is therefore unreliable.[27] Such an opinion is also unreliable because it is not based upon sufficient facts or data.[28]

An expert can challenge hypotheses formulated through the observation of association[29] or utilize a challenge/dechallenge/rechallenge methodology, or the expert can systematically eliminate other reasonably probable causes in conjunction with observation of temporal correlation.[30] But the reliability of such methodologies to support a causation opinion is directly related to the degree of scientific rigor.[31] Wailes' assertion that "when you try to eliminate events that could occur during that period of time, the one that you can't eliminate is the installation of new equipment that was not working properly at the time," and his further assertions that the feed had not changed, that Roskop had a good reputation, and that Roskop had unspecified protocols in place, demonstrate little scientific rigor. Furthermore, this testimony concerns, at most, alternate etiologies of mastitis and not the alternate mechanical causes of the malfunction. Thus, to the extent that Roskop makes an argument that the court should have admitted Wailes' testimony for purposes of mechanical causation, we find that the district court did not err.

Roskop alternatively argues that expert testimony is not required to create a material issue of fact rebutting the

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[27] See, *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993); *Derzavis v. Bepko*, 766 A.2d 514 (D.C. 2000); *Terry v. Bd. of Mental Retardation*, 165 Ohio App. 3d 638, 847 N.E.2d 1246 (2006), *reversed in part on other grounds sub nom. Terry v. Caputo*, 115 Ohio St. 3d 351, 875 N.E.2d 72 (2007). See, also, e.g., *Schafersman v. Agland Coop, supra* note 1; *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[28] *King v. Burlington Northern Santa Fe Ry. Co., supra* note 4.

[29] See *id.*

[30] See *Heller v. Shaw Industries, Inc.*, 167 F.3d 146 (3d Cir. 1999). See, also, *Carlson v. Okerstrom, supra* note 27.

[31] See *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233 (11th Cir. 2005). See, also, *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986 (8th Cir. 2001).

defendants' prima facie case for summary judgment. In making this argument, Roskop apparently relies on the "malfunction theory." The malfunction theory is based on the same principle underlying res ipsa loquitur, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of the wrongful act.[32]

[17] Under the malfunction theory, also sometimes called the indeterminate defect theory or general defect theory,[33] a plaintiff may prove a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as a result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.[34]

The malfunction theory should be utilized with the utmost of caution. Although some circumstances may justify the use of the malfunction theory to bridge the gap caused by missing evidence, the absence of evidence does not make a fact more probable but merely lightens the plaintiff's evidentiary burden despite the fact that the missing evidence might well have gone either way, and this rationale is too often subject to misapplication by courts in situations in which evidence is actually available.[35]

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[32] Restatement (Third) of Torts: Products Liability § 3, comment *a*. (1998).

[33] See, *id*., § 3; David G. Owen, *Manufacturing Defects*, 53 S.C. L. Rev. 851 (2002). See, also, e.g., *Sochanski v. Sears, Roebuck and Co.*, 621 F.2d 67 (3d Cir. 1980); *Stewart v. Ford Motor Co.*, 553 F.2d 130 (D.C. Cir. 1977); *Higgins v. General Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741 (1985); *Wakabayashi v. Hertz*, 66 Haw. 265, 660 P.2d 1309 (1983); *Gillespie v. R. D. Werner Co.*, 71 Ill. 2d 318, 375 N.E.2d 1294, 17 Ill Dec. 10 (1978); *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984); *Moraca v. Ford Motor Co.*, 66 N.J. 454, 332 A.2d 599 (1975); *Brownell v. White Motor Corp.*, 260 Or. 251, 490 P.2d 184 (1971).

[34] *Genetti v. Caterpillar, Inc., supra* note 2; Restatement, *supra* note 32, § 3.

[35] See *Metro. Property & Cas. Ins. Co. v. Deere & Co.*, 302 Conn. 123, 25 A.3d 571 (2011).

We have explained that as a matter of policy we allow circumstantial proof of a product defect without evidence of the specific defect because in many instances the dealer or manufacturer has either purposefully or inadvertently tampered with the evidence. Further, in light of the technological complexity in proving a specific defect, "forcing consumers to identify the cause, rather than the effect, of a defect would be unrealistically burdensome."[36]

The malfunction theory is narrow in scope. The malfunction theory simply provides that it is not necessary for the plaintiff to establish a specific defect so long as there is evidence of some unspecified dangerous condition or malfunction from which a defect can be inferred[37]—the malfunction itself is circumstantial evidence of a defective condition.[38] The malfunction theory does not alter the basic elements of the plaintiff's burden of proof and is not a means to prove proximate cause or damages.[39]

Other courts have set forth a nonexhaustive list of the kind of circumstantial evidence that may be used to support a reasonable inference of a specific defect. In *DeWitt v. Eveready Battery Co., Inc.*,[40] for example, the court illustrated six evidentiary factors that a plaintiff may present to create a genuine issue of fact on the element of defect through circumstantial evidence: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) the timeframe of the malfunction's occurrence after the plaintiff first obtained the product and other relevant history of the product, such as its age and prior usage by the plaintiff and others, including evidence of misuse, abuse, or similar relevant treatment

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[36] *Genetti v. Caterpillar, Inc., supra* note 2, 261 Neb. at 114, 621 N.W.2d. at 542.

[37] 1 American Law of Products Liability 3d, *supra* note 20, § 1:15 (2013).

[38] *Ducko v. Chrysler Motors Corp.*, 433 Pa. Super. 47, 639 A.2d 1204 (1994).

[39] See *Sochanski v. Sears, Roebuck and Co., supra* note 33.

[40] *DeWitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 565 S.E.2d 140 (2002).

before it reached the defendant; (4) similar incidents, when accompanied by proof of substantially similar circumstances and reasonable proximity in time; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect.

Roskop relies on *Genetti v. Caterpillar, Inc.*, in which we applied the principles of the malfunction theory and some of these factors to conclude that the circumstantial evidence of a defect was sufficient to support a verdict in the plaintiffs' favor.[41] The plaintiffs in *Genetti* sought recovery for the total failure of their truck's engine. Subsequent to purchasing the truck new, multiple engine failures had occurred. The defendant had first repaired the engine and, upon subsequent failures, replaced it. In replacing the engine, the defendant utilized some components from the old engine. The defendant did not keep records of which components of the engine were replaced and which were reused. Eventually, the truck was sold, and the defendant replaced the engine again after another engine failure subsequent to the purchase.

The plaintiffs' expert witness, a mechanic, admitted he was not an expert in engine design, but illustrated his expertise in repairing, rebuilding, and overhauling the kind of engine at issue. The mechanic reviewed documentation of the repairs, photographs, and interviews, and concluded that a coolant leak caused the engine failures. The mechanic negated alternate, reasonably possible causes of the engine failures. The mechanic was unsure whether the coolant leak was specifically due to a cracked head, cracked head gasket, or some other failure allowing the intrusion of coolant. He testified, however, that the uncontroverted testimony concerning the use of the truck was not a misuse that should have resulted in engine failure.

We held that because the plaintiffs presented evidence eliminating abuse or misuse as the alternate cause of the engine

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[41] *Genetti v. Caterpillar, Inc., supra* note 2.

failure, it was reasonable for a jury to conclude that if the failure was not due to improper use of the truck, then it was due to a defect, such as one of those suggested by the mechanic.[42] We held that the plaintiffs were not required to prove the specific defect that caused the failures in order to prove that the engine was defective.[43]

But more apposite to the facts of this case is *Wilgro, Inc. v. Vowers & Burback*.[44] In *Wilgro, Inc.*, although (unlike here) there was direct evidence of a specific defect, we held that the circumstantial evidence was insufficient to support a finding of proximate cause. The defendant in *Wilgro, Inc.* had provided the plaintiff with feed supplements for the plaintiff's cattle that contained slightly higher levels of nonprotein nitrogen, urea, than warrantied. Shortly after obtaining the feed, the cattle became sick. Some eventually died. Autopsies on some of the cattle were performed, and they were found to have died of urea poisoning.

Other causation theories unrelated to the defect and supported by the record could account for the poisoning. For instance, given the method of merely spreading the supplement on the bottom of a truck and pouring silage on top where the cattle "free fed," the feed could have been improperly mixed with the supplement. Or, some cows could have eaten more feed than they were allotted. Furthermore, the plaintiff's own immature silage could account for the symptoms observed in the majority of the animals that the plaintiff claimed had been injured.

[18,19] We explained that circumstantial evidence is not sufficient to sustain a verdict that depends solely thereon unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be

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[42] See *id.*

[43] *Id.*

[44] *Wilgro, Inc. v. Vowers & Burback*, 190 Neb. 369, 208 N.W.2d 698 (1973).

drawn therefrom.[45] Where, instead, under the facts viewed in a light most favorable to the nonmoving party, the nonexistence of the fact to be inferred is just as probable as its existence, the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.[46] We concluded in *Wilgro, Inc.* that the plaintiff had failed to adduce evidence that would lead the reasonable person to accept the plaintiff's theory of causation over those theories presented by the defendant.

In *Pendleton Woolen Mills v. Vending Associates, Inc.*,[47] a negligence case, we similarly found the circumstantial evidence to be insufficient for any determination of proximate cause in the plaintiff's favor to rise above speculation. The plaintiff's building had been damaged by the flooding of a sticky substance. A large amount of water and syrup was found on the floor in the vicinity of a soft drink machine, which was the apparent source of the flooding. The machine obtained its water supply from a water pipe in the building, to which it was connected by copper tubing. The defendant was allegedly responsible for the maintenance of the machine.

We found "a total lack of evidence establishing that any negligence . . . was the 'proximate cause' of either the leak or the damages; or to state it more accurately, that there was any 'causation in fact' between the alleged negligence, and the occurrence and the water damage."[48] Only one nonexpert witness reported a hearsay statement loosely attributing the leak to a malfunctioning shutoff valve. And there was no proof that the absence of regular inspection was a substantial factor in causing the valve to malfunction, if it indeed did. Nor was there evidence that but for the absence of such inspection, the leak would not have occurred. In particular,

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[45] *Id.*

[46] See *Ehler et ux v. Portland Gas & Coke Co.*, 223 Or. 28, 352 P.2d 1102 (1960).

[47] *Pendleton Woolen Mills v. Vending Associates, Inc., supra* note 21.

[48] *Id.* at 50, 237 N.W.2d at 102.

there was no evidence indicating the location of the shutoff valve in the machine and whether a leak could be detected. Again, we said that speculation and conjecture are not sufficient to establish causation; there must be something more that will lead a reasonable mind to one conclusion rather than another.[49]

In considering Roskop Dairy's argument that the malfunction theory applies, we first note that there is no apparent loss of the evidence of a specific defect, because there is a record of the parameter settings. Indeed, from these records, Roskop has suggested a very specific theory that the detach delay setting of 3 seconds was defective and negligent and that it should have been 10 seconds, the setting it was changed to in late July 2008. While we have found little case law specifically addressing whether the malfunction theory applies when there is no loss of evidence or when there is an allegation of a specific defect, we find no cases that have done so. And we observe that the related doctrine of res ipsa loquitur does not apply when specific acts of negligence are alleged or there is evidence of the precise cause of the accident.[50]

Assuming that the malfunction theory can be utilized when there has been no loss of evidence relating to the alleged specific defect, Roskop presented insufficient evidence to establish a material issue of fact supporting the malfunction theory. Roskop presented no reliable evidence that the incident causing the harm was of a kind that would ordinarily occur only as a result of a product defect, as he had no expert on milking systems. And he presented no reliable evidence negating causes other than the alleged product defect—despite undisputed evidence that detachment under vacuum could have multiple possible mechanical sources.[51] Roskop did not even present evidence negating Nissen's and Farrier's testimony that the vents

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[49] *Pendleton Woolen Mills v. Vending Associates, Inc., supra* note 21.

[50] See *Maly v. Arbor Manor, Inc.*, 225 Neb. 276, 404 N.W.2d 419 (1987).

[51] See, *Genetti v. Caterpillar, Inc., supra* note 2; Restatement, *supra* note 32, § 3.

of the lenses had been placed upside down and that nonvented lenses had been placed in the claws.

[20,21] In any event, the malfunction theory would not serve to create a material issue on the element of proximate cause, because it is a theory only utilized to prove the element of defect.[52] Roskop Dairy seeks more than just a bridge over the gap of difficult-to-obtain and highly technical evidence of a specific defect. Roskop attempts to create a material issue of fact on little more than his observation of a temporal correlation. But the line between impermissible speculation and reasonable inferences is drawn by the laws of logic.[53] And reasoning causation from temporal correlation represents a logical fallacy. A conclusion based upon such reasoning is not a reasonable inference but is mere speculation and conjecture.[54]

We find no merit to Roskop's argument that Hunt's testimony confirming that the settings for the detach delay were changed from 3 seconds to 10 seconds rebuts the defendants' prima facie case. It would be speculative to derive any conclusion as to either negligence/defect or proximate cause based on the record of the parameter settings without an expert opinion interpreting those settings in the larger context of the milking system. Roskop Dairy's conclusion based on the correlation of the 3-second setting to detachment under vacuum and of the 10-second setting to no detachment under vacuum remains at its core an application of the logical fallacy that correlation equals causation.

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[52] See, *White v. Mazda Motor of America, Inc.*, 313 Conn. 610, 99 A.3d 1079 (2014); *Barnish v. KWI Bldg. Co.*, 916 A.2d 642 (Pa. 2007).

[53] *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir. 1981), *abrogated on other grounds, Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982).

[54] See, *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511 (10th Cir. 1987); *Loesch v. United States*, 645 F.2d 905 (Ct. Cl. 1981); *Dodge Motor Trucks, Inc. v. First Nat. Bank of Omaha*, 519 F.2d 578 (8th Cir. 1975); *Genesee M. B. & T. Co. v. Payne*, 6 Mich. App. 204, 148 N.W.2d 503 (1967).

At oral arguments, Roskop Dairy also suggested that summary judgment was improper because cross-examination of Hunt at trial might lead to a more favorable and direct admission regarding the Dematron settings and their connection to the detachment under vacuum. In two depositions, Roskop Dairy has failed to obtain an opinion from Hunt that the Dematron settings during the relevant time period were in any way improper or a substantial factor in causing the units to detach under vacuum. Roskop's hope that this testimony might change at trial is insufficient to rebut the defendants' prima facie case for summary judgment.

Under the malfunction theory or otherwise, Roskop Dairy failed to present evidence from which a jury could determine, without resorting to speculation, that the Dematron was the proximate cause of the alleged injury to Roskop Dairy's cows. The district court accordingly did not err in granting the defendants summary judgment. Although we share the district court's concerns over the lack of evidence that the Dematron was defectively or negligently installed and the lack of reliable evidence causally linking the detachment under vacuum to the medical condition of mastitis, we need not examine those aspects of the district court's ruling in order to affirm its decision.

Considering Testimony Not in Evidence

We find no merit to Roskop Dairy's assertion that we should reverse the district court's order because it erroneously relied on facts not in evidence when it granted summary judgment. Roskop argues that in reasoning that there are several causes of mastitis, the district court erroneously relied on Gorden's affidavit, which was not entered into evidence. Roskop argues that, even "more egregiously," the district court relied on Wailes' excluded testimony and upon the deposition of Slattery, which was admitted for limited purposes only.[55]

[55] Brief for appellant at 28.

Roskop argues that the district court could not rely on any aspect of Wailes' testimony, because neither party reoffered it for summary judgment. Finally, Roskop characterizes the district court's order as expressing an improper factual finding that other factors could have contributed to or caused mastitis in the herd.

It is unclear how Roskop believes it helpful to argue that Wailes' deposition was not in evidence for purposes of summary judgment. The absence of Wailes' testimony in its entirety provides only less evidence from which we could conclude there was a material issue of fact. And such argument renders fruitless Roskop Dairy's argument that Wailes' testimony should not have been excluded.

Furthermore, the alternate causes of mastitis that Roskop believes the court erred in considering were generally listed in other admitted testimony, such as Roskop's deposition and the limited receipt of Slattery's deposition. A summary judgment hearing is similar to a bench trial of an action at law; thus, ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.[56]

Regardless, none of Roskop Dairy's arguments on this assignment of error concern the absence of reliable evidence rebutting the defendants' prima facie case that improper maintenance by Roskop Dairy employees of the physical components of the milking system was the proximate cause of the malfunction. Therefore, these arguments are not grounds for reversal under our reasoning set forth above.

Denying Discovery

Roskop Dairy also argues that the district court erred in denying its motion to compel. Roskop Dairy argues vaguely

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[56] *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

that there is a series of correspondence listed on the privilege log between an employee of Midwest and its designated expert witness. Roskop Dairy further argues generally that it was entitled to discover underlying facts contained in privileged documents, such as parameter settings and changes, facts regarding the operation and maintenance of the system, and facts relating to the investigations of the malfunction of the system. Lastly, Roskop Dairy asserts broadly that information and parameter settings gathered by Hunt in the ordinary course of business were not privileged.

[22] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[57] For our review, Roskop Dairy requested only that sealed exhibit 9 be included in the bill of exceptions. It is incumbent upon the party appealing to present a record which supports the errors assigned. Neb. Rev. Stat. § 25-1140 (Reissue 2008) and Neb. Ct. R. App. P. § 2-105(B)(1)(b) (rev. 2010) place the burden on the appellant to file a praecipe identifying the matter to be contained in the bill of exceptions. Thus, we consider Roskop's assignment of error only as pertains to exhibit 9.

After an in camera review, the district court found that the documents contained in exhibit 9 were protected by attorney-client privilege and work-product privilege. The court also noted that GEA had produced for Roskop Dairy its most knowledgeable witness, Hunt, to be deposed on the topics contained in the deposition notice duces tecum attached to Roskop Dairy's motion to compel discovery. Further, the court found that GEA had produced the records required by Roskop Dairy's discovery request, except for those protected by privilege, but that Roskop Dairy had difficulty opening certain computer records and that Hunt did not have them all with him during his deposition. Because of this, the court allowed Roskop Dairy "latitude in discovery" and ordered that Roskop Dairy be able to reconvene the

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[57] *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

deposition of Hunt and that Hunt should have with him copies of any records he relied on for his testimony. That second deposition occurred, and Hunt brought with him records of the Dematron parameter settings.

We find no abuse of discretion in the district court's order partially denying Roskop Dairy's motion to compel. There is no evidence that Roskop Dairy was denied discovery of relevant underlying facts or business records pertaining to parameter settings or to any changes or facts regarding the operation and maintenance of the system. Furthermore, the court did not abuse its discretion in finding the documents contained in sealed exhibit 9 to be protected by the attorney-client privilege and the work-product privilege.

We have recognized that it is difficult to show that a party has been prejudiced by a discovery order, or that the question is not moot; and the harmless error doctrine, together with the broad discretion the discovery rules vest in the trial court, will bar reversal save under very unusual circumstances.[58] This case is no exception. We find no merit to Roskop Dairy's assignment of error concerning the motion to compel discovery.

Prejudgment Interest

Finally, we turn to Roskop Dairy's argument that the district court erred in granting Midwest prejudgment interest on its counterclaim for the unpaid amount of the purchase agreement. Prejudgment interest may be awarded only as provided in § 45-103.02, and whether prejudgment interest should be awarded is reviewed de novo on appeal.[59]

[23] A claim is liquidated for purposes of prejudgment interest when there is no reasonable controversy as to both the amount due and the plaintiff's right to recover.[60] The amount

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[58] *Brozovky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

[59] *Countryside Co-op v. Harry A. Koch Co., supra* note 8.

[60] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013). See, also, § 45-103.02(2).

due was uncontroverted. But we conclude that, given the technical complexity of the matters at issue, until discovery was completed, there was a reasonable controversy over Roskop Dairy's right to recover. The fact that summary judgment was properly granted is not decisive of whether there was until that point a reasonable controversy over a plaintiff's right to recover.[61] We therefore reverse the district court's order granting prejudgment interest on Midwest's counterclaim.

CONCLUSION

The opponent of a motion for summary judgment must be given the benefit of every reasonable inference from the evidence, but not inferences based on guess or speculation.[62] The defendants made a prima facie case that there was no issue of fact that components other than the Dematron were the proximate cause of the detachment under vacuum. Roskop's eyewitness observation of a temporal correlation between installation of the Dematron and the units detaching under vacuum calls for speculation and is insufficient to create an issue of fact on the essential element of proximate cause. We therefore affirm the order of the district court granting summary judgment for the defendants in Roskop Dairy's action against them. But we reverse the district court's order granting prejudgment interest on Midwest's counterclaim.

Affirmed in part, and in part reversed.

Heavican, C.J., participating on briefs.
Stephan, J., not participating in the decision.
Wright, J., not participating.

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[61] See, *Countryside Co-op v. Harry A. Koch Co., supra* note 8; *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[62] See *Giordano v. Sherwood*, 968 A.2d 494 (D.C. 2009).

State of Nebraska, appellee, v. Jack E. Harris, appellant.

871 N.W.2d 762

Filed December 4, 2015. No. S-14-953.

1. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **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.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **Postconviction: Election of Remedies.** A remedy is cumulative when it is created by statute and is in addition to another remedy which still remains in force.
5. **Judgments: Evidence: Appeal and Error.** The purpose of a writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition.
6. ____: ____: ____. A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
7. **Judgments: Appeal and Error.** A writ of error coram nobis is not available to correct errors of law.
8. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.
9. **Testimony: Appeal and Error.** A writ of error coram nobis cannot be invoked on the ground that an important witness testified falsely about a material issue in the case.

10. **Final Orders: Appeal and Error.** There are three types of final orders that may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008): (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
11. ____: ____. An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

Appeal from the District Court for Douglas County: William B. Zastera, Judge. Reversed and remanded with directions.

Sarah P. Newell and James Mowbray, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Wright, Connolly, McCormack, Miller-Lerman, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

Jack E. Harris appeals the order of the district court which dismissed his motion for postconviction relief without prejudice pursuant to Neb. Rev. Stat. § 29-3003 (Reissue 2008), because it was filed simultaneously with a motion for new trial and a motion for writ of error coram nobis. We reverse, and remand the cause to the district court for consideration of Harris' postconviction motion on its merits.

SCOPE OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a

matter of law. *State v. Meints*, 291 Neb. 869, 869 N.W.2d 343 (2015).

[3] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion. *State v. Thorpe, supra.*

FACTS

Trial and Direct Appeal

Harris was convicted by a jury in 1999 of first degree murder and use of a deadly weapon to commit a felony in connection with the killing of Anthony Jones. He was sentenced to life in prison for the murder conviction and to a consecutive term of 10 to 20 years' imprisonment for the weapon conviction. We affirmed Harris' convictions and sentences on direct appeal in *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

First Postconviction Action

On June 3, 2002, Harris filed a pro se motion for postconviction relief and was appointed counsel. An evidentiary hearing was granted as to some, but not all, of the issues raised in Harris' motion for postconviction relief. Harris filed an interlocutory appeal, and we reversed the judgment and remanded the cause for an evidentiary hearing on two additional claims. See *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004). Following an evidentiary hearing in November 2005, the district court denied postconviction relief and Harris timely appealed that denial to this court. In December 2006, while the appeal was still pending, Harris filed a motion to stay the appeal and remand to the district court for further proceedings on grounds of newly discovered evidence. We overruled the motion and, on July 27, 2007, affirmed the district court's denial of postconviction relief. See *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

Present Postconviction Action

On January 17, 2008, Harris filed a second motion for postconviction relief, along with a motion for new trial and a

motion for writ of error coram nobis. All three motions contained allegations regarding newly discovered evidence that Howard "Homicide" Hicks, who was the primary witness for the State, testified falsely at trial that it was Harris who shot and killed Jones when, in fact, it was Hicks who acted alone in committing the murder. In support of the motions, Harris submitted an affidavit from Terrell McClinton, an inmate to whom Hicks allegedly confessed to killing Jones. Harris also submitted an affidavit from Curtis Allgood, a witness who provided details placing Hicks near the crime scene at the time of the murder and corroborated some of the information provided by McClinton. The motions further alleged that Harris was not aware of this information until McClinton contacted Harris' postconviction counsel in August 2006 and that Harris was prevented from discovering the evidence due to the misconduct of the prosecuting attorney and the State's witness.

The district court granted an evidentiary hearing seemingly limited to the postconviction motion, stating that "[b]ecause the Court is granting [Harris'] motion for an evidentiary hearing, his motions for new trial and writ of error coram nobis will not be addressed." Before the evidentiary hearing was held, the entire Douglas County District Court bench recused itself when the prosecutor of the case was appointed to the bench. On August 27, 2009, a district court judge from Sarpy County was appointed to preside over the matter.

On December 20, 2010, Harris was permitted to file a third amended motion for postconviction relief, which added allegations of newly discovered evidence relating to Hicks' plea deal, contending that the prosecutor engaged in misconduct by misrepresenting or allowing Hicks to misrepresent the nature of the plea agreement at Harris' trial.

An evidentiary hearing on the third motion for postconviction relief was held in the district court on June 28, 2013. During the hearing, the State argued that the postconviction action must be dismissed pursuant to § 29-3003 because the

motion for new trial and the motion for writ of error coram nobis were still pending in the district court.

On October 16, 2014, the district court agreed with the State and dismissed Harris' postconviction motion pursuant to § 29-3003, without addressing the merits of his claims. It cited the language of the statute and concluded:

> [Harris'] simultaneous filing of a Motion for New Trial and Writ of Error Coram Nobis constitutes an acknowledgment that he had other remedies available to him and that a postconviction motion was not the exclusive remedy available to him as required by Neb. Rev. Stat. § 29-3003. Accordingly, this Court finds that it is not necessary to address the claims asserted by [Harris] in his postconviction motion, as it should be dismissed.

Harris timely appeals from that judgment.

ASSIGNMENTS OF ERROR

Harris assigns that the district court erred in dismissing his motion for postconviction relief under § 29-3003, because the remedies are mutually exclusive, not cumulative. He also assigns that the district court's judgment is not a final, appealable order, because the remedies constitute separate causes of action and the district court did not direct final entry of judgment as required under Neb. Rev. Stat. § 25-1315 (Reissue 2008).

ANALYSIS

Dismissal of Postconviction Motion

Harris first assigns that the district court erred in dismissing his motion for postconviction relief on the basis of § 29-3003, which provides:

> The remedy provided by sections 29-3001 to 29-3004 is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of sections 29-3001 to 29-3004 which states facts which if true

would constitute grounds for relief under another remedy shall be dismissed without prejudice.

[4] A remedy is cumulative when it is created by statute and is in addition to another remedy which still remains in force. *State v. Turner*, 194 Neb. 252, 231 N.W.2d 345 (1975). The cumulative remedy may not be pursued simultaneously with the previously existing remedy. *Id.*

Harris argues that the remedies sought in a motion for new trial and a motion for writ of error coram nobis are not cumulative to the postconviction remedy, because they are mutually exclusive. But whether those remedies are mutually exclusive is not important to our analysis. By virtue of § 29-3003, the postconviction remedy is clearly a cumulative remedy that may not be pursued concurrently with any other remedy existing under state law, including the remedies sought in a motion for new trial and a motion for writ of error coram nobis. Thus, the question we must consider is whether the allegations, if true, under the above remedies would constitute grounds for relief.

We agree with Harris that the district court erred when it dismissed the postconviction action solely on the basis that other motions for relief were pending. The question is not whether the petitioner believes he is entitled to other remedies, but, rather, whether the allegations, if true, would constitute grounds for relief under the other remedies sought.

Accordingly, we hold that a court presented with a motion for postconviction relief which exists simultaneously with a motion seeking relief under another remedy must dismiss the postconviction motion without prejudice when the allegations, if true, would constitute grounds for relief under the other remedy sought. See § 29-3003. If the district court determines the other remedy has no grounds for relief, the postconviction motion is not procedurally barred under § 29-3003 and should be considered on its merits.

Applying this framework and analyzing the other remedies sought in the case at bar, we conclude that Harris' motion for

new trial and his motion for writ of error coram nobis provide no grounds for relief.

Harris' motion for new trial is based on the grounds set forth in Neb. Rev. Stat. § 29-2101(1), (2), and (5) (Reissue 2008). At the time Harris filed his motion, the applicable statute of limitations was 10 days from the date of the verdict for claims under subsections (1) and (2), and 3 years from the date of the verdict for claims under subsection (5). See Neb. Rev. Stat. § 29-2103(3) and (4) (Reissue 2008). The verdicts Harris is challenging were entered on July 27, 1999. His motion for new trial was filed on January 17, 2008. On its face, Harris' motion for new trial is barred by the applicable statute of limitations and there is no possibility of relief.

[5-8] We also conclude that there is no possibility of Harris' obtaining relief through his motion for writ of error coram nobis. The purpose of a writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *State v. Sandoval*, 288 Neb. 754, 851 N.W.2d 656 (2014). The writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. *Id.* The writ is not available to correct errors of law. *Id.* The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result. *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

Here, the affidavits from McClinton and Allgood are statements which imply that Hicks testified falsely against Harris at Harris' trial. McClinton stated that he knew Hicks and that it was Hicks' job to kill people for a drug dealer named "Corey Bass." McClinton said that during a conversation with Hicks in 2001, Hicks told him that Hicks was the person who shot Jones and described to McClinton the details

of the killing, including the fact that he walked to Allgood's house afterward.

Allgood stated that at approximately 10:30 p.m. on August 22, 1995, he was at home having a conversation with Bass when Hicks hurriedly entered Allgood's home through the back door without knocking. Allgood overheard Hicks telling Bass that "'it was handled.'" According to Allgood, Hicks was normally "very laid back," but that night, he was very agitated. About a week later, Allgood learned that Jones had been murdered in his apartment, which was just around the corner from Allgood's home.

[9] Assuming these allegations are true, Harris would not be entitled to a writ of error coram nobis. The writ of error coram nobis cannot be invoked on the ground that an important witness testified falsely about a material issue in the case. See, *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), *superseded by statute on other grounds, State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015); *Parker v. State*, 178 Neb. 1, 131 N.W.2d 678 (1964); *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949). Thus, we conclude that Harris' motion for writ of error coram nobis, on its face, provides no possibility of relief.

Because Harris has no possibility of obtaining relief through the motion for new trial and the motion for writ of error coram nobis that were filed simultaneously with the postconviction action, the district court erred in dismissing the postconviction action under § 29-3003. We therefore remand the cause to the district court for consideration of the postconviction motion on its merits.

Finality of Order

In his second assignment of error, Harris argues that the district court's judgment is not a final, appealable order, even though he is the one who appealed from it. He argues that the dismissal of his postconviction motion is not a final, appealable order, because there were two other claims for relief presented in this action and the district court did not expressly

determine that there was no just reason for delay or expressly direct the entry of final judgment as to this claim, as required under § 25-1315(1).

[10] There are three types of final orders that may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008): (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015). We have previously held that postconviction actions are special proceedings within the context of § 25-1902. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[11] An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *State v. Jackson, supra.* The order in the present case affected a substantial right of Harris. It concluded that his postconviction motion was procedurally barred under § 29-3003 and dismissed his action entirely, albeit without prejudice. Because the district court's order affected a substantial right and was made in a special proceeding, it is final and appealable under § 25-1902.

CONCLUSION

The district court erred in dismissing Harris' motion for postconviction relief pursuant to § 29-3003. We reverse the district court's judgment and remand the cause to the district court for consideration of the postconviction motion on its merits.

Reversed and remanded with directions.

Heavican, C.J., not participating.

James E. Robertson et al., appellants, v. Jacobs Cattle Company, a partnership, et al., appellees.

874 N.W.2d 1

Filed December 4, 2015. No. S-15-026.

1. **Partnerships: Accounting: Appeal and Error.** An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
3. **Courts: Judgments.** The proper place to pay a judgment is the clerk of the court in which the judgment is obtained.
4. **Courts: Appeal and Error.** Where the Nebraska Supreme Court reverses a judgment and remands a cause to the district court for a special purpose, on remand, the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court's opinion.

Appeal from the District Court for Valley County: Karin L. Noakes, Judge. Affirmed.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellants.

David A. Domina and Megan N. Mikolajczyk, of Domina Law Group, P.C., L.L.O., and Gregory G. Jensen for appellees.

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

Cassel, J.

INTRODUCTION

For the third time, we consider an appeal from a judicial dissociation of four partners from a family agricultural partnership having assets consisting primarily of real estate. The main issue is whether the district court, in recalculating the buyout distributions, correctly implemented our mandate from the second appeal. The dissociating partners rely on a hypothetical capital gain on the real estate but ignore that this "gain" exceeds the total profit on the hypothetical sale of all of the partnership's assets. We affirm the district court's judgment.

BACKGROUND

In *Robertson v. Jacobs Cattle Co.* (*Robertson I*),[1] we upheld the judicial dissociation of four partners of the Jacobs Cattle Company, a family partnership owning agricultural land in Valley County, Nebraska. However, we reversed the district court's calculation of the buyout price to be paid to the four dissociating partners and remanded the cause for further proceedings on that issue.

In the second appeal (*Robertson II*),[2] we again reversed the district court's calculation of the buyout price to be paid to the dissociating partners. We remanded the cause with direction that the court calculate the buyout distributions "by adding 12.5 percent of the profit received from a hypothetical sale of the partnership's assets . . . to the value of each dissociated partner's capital account."[3] The district court purported to follow our mandate, but the dissociating partners filed this appeal from its order.

The underlying facts concerning this appeal are primarily contained in *Robertson I* and will be briefly summarized here.

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[1] *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[2] *Robertson v. Jacobs Cattle Co.*, 288 Neb. 846, 852 N.W.2d 325 (2014).

[3] *Id.* at 853, 852 N.W.2d at 331.

The Jacobs Cattle Company was organized in 1979. As noted above, the partnership consisted of agricultural land, comprising 1,525 acres. As of September 2011, the land was appraised at a value of $5,135,000.

At the time of litigation, the partnership consisted of seven partners. (Our opinion in *Robertson I* stated that the partnership had six partners. But as indicated in *Robertson II*, one individual represented two trusts, and thus, the partnership had seven partners.) The partners included:

- Ardith Jacobs, as trustee of the Leonard Jacobs Family Trust;
- Ardith Jacobs, as trustee of the Ardith Jacobs Living Revocable Trust;
- Dennis Jacobs;
- Duane Jacobs;
- Carolyn Sue Jacobs;
- James E. Robertson; and
- Patricia Robertson.

In July 2007, Duane, Carolyn, James, and Patricia (collectively the dissociating partners) filed a complaint against the partnership, Ardith, and Dennis (collectively the remaining partners). The complaint sought a dissolution and winding up of the partnership under the Uniform Partnership Act of 1998. In an amended answer and counterclaim, the remaining partners alleged that dissociation, not dissolution, was the appropriate remedy.

After a bench trial, the district court determined that no grounds for dissolution of the partnership had been established under Neb. Rev. Stat. § 67-439(5) (Reissue 2009). However, the court ordered dissociation of the four partners by judicial expulsion pursuant to Neb. Rev. Stat. § 67-431(5)(a) and (c) (Reissue 2009). And after receiving buyout proposals from the parties, the court arrived at a distribution scheme wherein each of the dissociating partners received 5.33 percent of the total liquidation value of the partnership.

In *Robertson I*, we affirmed the dissociation of the four partners and the date of the judicial expulsion as the valuation

date of the partnership's assets. We also observed that the buyout price was governed by Neb. Rev. Stat. § 67-434(2) (Reissue 2009), which provides:

> The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection (2) of section 67-445 if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

And another statute requires that profits and losses be credited and charged to the partners' accounts. Neb. Rev. Stat. § 67-445(2) (Reissue 2009) provides:

> Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an obligation for which the partner is not personally liable under section 67-418.

We concluded that based upon the plain language of § 67-434(2), "the proper calculation must be based upon the assumption that the partnership assets, here the land, were sold on the date of dissociation, even though no actual sale occurs."[4]

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[4] *Robertson I, supra* note 1, 285 Neb. at 877, 830 N.W.2d at 205.

And as to the appreciation in the land's value, we determined that the capital gain from a hypothetical sale of the land was to be considered "profit" in the context of § 67-445(2). However, there was no indication as to whether such profit should have been distributed based upon the partners' capital account ownership or their right to partnership income.

Under the operative partnership agreement, each partner was allotted a capital account and an income account. A partner's capital account was "directly proportionate to the original Capital contributions as later adjusted for draws taken from the Partnership." As for the income account, the partnership's "net profits and net losses . . . as determined by generally accepted accounting principles" were to be credited or debited to each partner's income account in proportion to the partner's votes in the partnership. Out of a total of eight votes in the partnership, the dissociating partners each possessed one vote. Thus, each of the dissociating partners was entitled to 12.5 percent of the partnership's "net profits."

In determining its initial buyout price, the district court considered the value of the partnership's assets, including the appreciated value of the land, less the partnership's liabilities, and arrived at a liquidation value of $5,212,015 for the partnership. The court then applied each partner's capital account ownership percentage to the partnership's total liquidation value. Thus, because each dissociating partner possessed 5.33 percent capital account ownership, each dissociating partner received 5.33 percent of the total liquidation value.

We reversed the district court's buyout price and remanded the cause for further proceedings concerning the treatment of the appreciation in the value of the land. In *Robertson I*, it was unclear whether the capital gain which would be realized from a hypothetical sale of the land should be distributed based upon the partners' capital account ownership or as "net profits" of the partnership. As the district court determined, if the capital gain was distributable based upon capital account

ownership, each of the dissociating partners was entitled to 5.33 percent. But if the capital gain was to be treated as "net profits," each of the dissociating partners was entitled to 12.5 percent.

On remand, the district court received expert testimony from both the dissociating partners and the remaining partners. Ultimately, the court determined that the capital gain from a hypothetical sale of the land did not constitute "net profits." Rather, the court determined that the capital gain should be distributed in accordance with the partners' capital account ownership. This resulted in a lower buyout distribution to the dissociating partners, and the dissociating partners appealed.

In *Robertson II*, we concluded that the district court erred in determining that the capital gain from a hypothetical sale of the land would not constitute "net profits." In making its determination, the court had relied upon expert testimony that gain or income could not be recognized until an actual sale of the land took place. But this testimony was based upon the premise that no actual sale occurred. And we determined that this premise was inconsistent with the controlling statute. As we explained, "Appellees' experts' analysis ignored the statutory requirement that the buyout distributions be calculated based on the assumption that the assets had been sold and the resulting profits distributed to the partners."[5]

However, we determined that there was sufficient evidence for the district court to calculate the buyout distributions on remand. The dissociating partners' expert witness testified that under generally accepted accounting principles, the term "net profits" includes capital gain from the sale of land. Thus, we concluded that the "capital gain from the hypothetical sale of land should be distributed to the partners in accordance with [the provision] governing the distribution of 'net

[5] *Robertson II, supra* note 2, 288 Neb. at 852, 852 N.W.2d at 330.

profits.'"[6] And we remanded the cause with direction that the district court "enter an order which calculates a buyout distribution by adding 12.5 percent of the profit received from a hypothetical sale of the partnership's assets . . . to the value of each dissociated partner's capital account."[7]

On remand, the dissociating partners offered seven exhibits for the district court's consideration: this court's opinion and mandate, a certified copy of the application to spread mandate and determine judgment amount filed with the district court, affidavits and e-mails pertaining to attempts by the dissociating partners' counsel to obtain a bill of exceptions for the evidentiary hearing following our mandate in *Robertson I*, and the bill of exceptions for that hearing. The remaining partners objected, essentially based on this court's determination that there was sufficient evidence already in the record for the district court to calculate the buyout distributions on remand. The district court sustained the objections.

The district court purported to follow our mandate in *Robertson II*. To that effect, it again identified the net liquidation value of the partnership as $5,212,015. From that amount, it subtracted the total balance of the partners' capital accounts to arrive at a gain of $4,052,201 from the liquidation:

Net liquidation value	$5,212,015
Total balance of capital accounts	($1,159,814)
Gain on liquidation of partnership	$4,052,201

The court then distributed 12.5 percent of the gain to each of the dissociating partners, in addition to the balance of the dissociating partners' capital accounts. Thus, the dissociating partners received:

- Duane $598,497 = ($4,052,201 × .125) + $91,972
- Carolyn $598,501 = ($4,052,201 × .125) + $91,976
- James $598,977 = ($4,052,201 × .125) + $92,452
- Patricia $598,976 = ($4,052,201 × .125) + $92,451

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[6] *Id.*

[7] *Id.* at 853, 852 N.W.2d at 331.

Finally, the court ordered that the buyout distributions be paid to the "Clerk of the District Court of Valley County."

The dissociating partners filed a timely notice of appeal. We denied the remaining partners' motion for summary affirmance. After briefing and oral argument, the appeal was submitted.

ASSIGNMENTS OF ERROR

In the current appeal, the dissociating partners assign nine errors. In those errors, summarized and condensed, they contest (1) the ultimate amount of their buyout distributions; (2) the district court's authority, under this court's mandates, to require that payment be made to the clerk of the district court; and (3) the exclusion of the evidence offered by the dissociating partners.

STANDARD OF REVIEW

[1,2] An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.[8] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[9]

ANALYSIS

Buyout Distributions.

In *Robertson II*, we concluded that the "capital gain from the hypothetical sale of land should be distributed to the partners in accordance with [the provision] governing the distribution of 'net profits.'"[10] We remanded the cause, directing the district court to "enter an order which calculates a buyout distribution by adding 12.5 percent of the profit received from a hypothetical sale of the partnership's assets . . . to the value

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[8] *Robertson II, supra* note 2.

[9] *Id.*

[10] *Id.* at 852, 852 N.W.2d at 330.

of each dissociated partner's capital account."[11] On remand, the district court utilized a net liquidation value of the partnership in the amount of $5,212,015. From that figure, it subtracted the total balance of the partners' capital accounts, resulting in a gain of $4,052,201 from the liquidation.

The dissociating partners contend that the district court should have calculated the buyout distributions beginning with a capital gain from the hypothetical sale of the farmland. From the land's market value, they would compute the capital gain by subtracting the land's original purchase price. They assert that they each should have received 12.5 percent of this capital gain, in addition to the balance of their capital accounts. According to the dissociating partners, such a calculation would result in distributions of $718,685 to Duane, $718,689 to Carolyn, $719,165 to James, and $719,164 to Patricia.

We acknowledge that we made frequent reference to "capital gain" in *Robertson I* and *Robertson II*; however, the dissociating partners' proposed calculation is too simplistic. The dissociating partners overlook the proper framework of a hypothetical liquidation of the partnership. As we stated in *Robertson II*, "[T]he buyout distributions were to be calculated based on the assumption that the partnership assets had been liquidated and the profits from such liquidation were credited to the partners."[12] And in determining the buyout price, § 67-445(2) provides that "profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts."

The capital gain from the sale of the land does not represent the "profits and losses" from the liquidation of all of the partnership's assets. As the dissociating partners conceded at oral argument, the record does not reflect what the profit or

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[11] *Id.* at 853, 852 N.W.2d at 331.

[12] *Id.*

loss would have been on the hypothetical sale of the remaining assets, i.e., the assets other than the land. They attempt to minimize the significance of this concession by stating that the "value" of the personal property was only about $35,000. But the liquidation *value* of the remaining assets tells us nothing regarding the *gain or loss* from their hypothetical sale. Thus, the dissociating partners' arguments are premised only on the gain or loss from part of the assets. Our discussion in *Robertson II* makes it abundantly clear that the hypothetical sale must apply to *all* of the partnership assets. The dissociating partners' calculations fail this basic requirement.

As determined by the district court, the net liquidation value of the partnership was $5,212,015. And none of the parties contested this figure in *Robertson I*.

In order to calculate the "profits and losses," the total balance of the partners' capital accounts in the amount of $1,159,814 must be subtracted from the net liquidation value. The partners' capital accounts are not profits derived from the hypothetical liquidation of the partnership's assets, but represent equity in the partnership and, as the dissociating partners conceded at oral argument, included all of the cumulative profits and losses during the life of the partnership other than those flowing from the hypothetical sale of net partnership assets. Thus, as identified by the district court, the net profits from the liquidation would be $4,052,201. And each of the dissociating partners was entitled to 12.5 percent of this amount, in addition to the balance of his or her capital account.

Based on the above analysis, we conclude that the district court correctly followed our mandate to determine a buyout distribution by adding "12.5 percent of the profit received from a hypothetical sale of the partnership's assets" to the balance of each dissociating partner's capital account. The dissociating partners rely wholly upon the use of pure capital gain in calculating the buyout distributions. But that approach

fails to implement the statutory framework of §§ 67-434(2) and 67-445(2).

Adopting the dissociating partners' argument would lead to an absurd result. Their argument assumes a total partnership "pie," as of the valuation date, of at least $6,173,514 ($5,013,700 capital gain on real estate + $1,159,814 capital accounts). But the "pie" to be divided cannot exceed the total hypothetical liquidation value of all of the partnership's assets less the total amount of the partnership's liabilities. The undisputed evidence shows that this amount was $5,212,015. Their argument simply does not "add up." The assigned errors concerning the buyout distribution have no merit.

Payment to Clerk of District Court.

[3] The dissociating partners assert that the district court was without authority, within the parameters of this court's mandate, to order that the buyout distributions be paid to the clerk of the district court. They argue that there was no previous order or mandate that buyout payments be made to the clerk of the district court. But under Neb. Rev. Stat. § 25-2214 (Reissue 2008), the clerk of each court "shall exercise the powers and perform the duties conferred and imposed upon him by . . . the common law" and is "under the direction of his court." And we have previously indicated that the proper place to pay a judgment is the clerk of the court in which the judgment is obtained.[13] This assigned error lacks merit.

Exclusion of Evidence on Remand.

[4] Finally, the dissociating partners claim that the district court erred in refusing to receive the exhibits they offered at the hearing on remand following *Robertson II*. Our opinion in *Robertson II* indicated that the record was sufficient to determine the appropriate buyout distributions to be paid to the dissociating partners. And our mandate did not permit

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[13] See *Myers v. Miller*, 134 Neb. 824, 279 N.W. 778 (1938).

a further evidentiary hearing to be conducted. Where the Nebraska Supreme Court reverses a judgment and remands a cause to the district court for a special purpose, on remand, the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court's opinion.[14] Thus, the district court did not err in refusing to receive additional evidence.

CONCLUSION

We find no error in the district court's calculation of the buyout distribution on remand, or in its order that such distributions be paid to the clerk of the district court. Further, we find no error in the district court's exclusion of evidence. Therefore, we affirm.

Affirmed.

Wright, J., not participating.

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[14] *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

State of Nebraska, appellee, v. Lyle J. Carman, appellant.

872 N.W.2d 559

Filed December 4, 2015. No. S-15-167.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, which an appellate court resolves independently of the conclusion reached by the lower court.
2. **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.
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. **Criminal Law: Statutes: Intent.** 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. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Reversed and remanded with directions.

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

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

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

Wright, J.

NATURE OF CASE

Lyle J. Carman appeals his conviction for "unlawful act manslaughter" under Neb. Rev. Stat. § 28-305 (Reissue 2008). Carman's dump truck struck the rear of a car that had stopped or slowed due to highway construction. The collision forced the car off the highway, causing it to roll, and the driver was killed as a result. The unlawful acts for which Carman was convicted were following too closely and driving too fast for the conditions present. He claims these acts were traffic infractions which were insufficient to sustain his conviction. For the reasons stated below, we reverse, and remand with directions to vacate Carman's conviction and sentence.

SCOPE OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, which an appellate court resolves independently of the conclusion reached by the lower court. See *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).

[2] 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. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

BACKGROUND

Carman was driving a dump truck on an interstate highway that was closed to one lane eastbound due to construction, and traffic was stop and go. Carman stated that he looked down at his side mirrors and that when he looked up, the victim's car had stopped and he was unable to timely stop. Carman's truck struck the victim's car from the rear, causing it to go off

the Interstate and roll. The driver of the car died as a result of the collision.

Carman was charged and ultimately convicted of manslaughter pursuant to § 28-305, a Class III felony. Section 28-305 codifies what has been referred to as "unlawful act manslaughter" or "involuntary manslaughter." Unlawful act manslaughter is defined as causing the death of another "unintentionally while in the commission of an unlawful act." See § 28-305.

Carman waived his right to a jury trial and proceeded with a bench trial. The district court found him guilty of the unlawful acts of "following too close," under Neb. Rev. Stat. § 60-6,140 (Reissue 2010), and "driving too fa[s]t for [the] conditions," under Neb. Rev. Stat. § 60-6,185 (Reissue 2010). Carman was found not guilty of driving under the influence, reckless driving, and careless driving.

Before trial, Carman raised the issue of being charged with felony manslaughter instead of misdemeanor motor vehicle homicide. Motor vehicle homicide occurs when a person causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of Nebraska law or a city ordinance. See Neb. Rev. Stat. § 28-306 (Cum. Supp. 2014). Carman claimed that he should have been charged with motor vehicle homicide and that § 28-306 was the proper statute if the unintentional killing of another occurred during the operation of a motor vehicle. He claimed that a prosecutor should not be permitted to charge a defendant under the general unlawful act manslaughter statute if the unintentional death was caused by a motor vehicle accident.

In his motion for new trial, Carman alleged that the provisions of § 28-305 were unconstitutional as applied to his conviction. The motion was overruled without discussion or written order. The district court did not expressly address whether the use of traffic infractions as a basis for a felony conviction for manslaughter violated due process, but rejected Carman's arguments by overruling his motion. Carman timely appealed.

ASSIGNMENTS OF ERROR

Carman argues, summarized and restated, that the district court erred in concluding the evidence was sufficient to convict him of manslaughter. He claims that § 28-306 precludes a conviction for unlawful act manslaughter when the underlying offense is a traffic infraction or other public welfare offense and that, therefore, the evidence was insufficient to convict him of manslaughter.

ANALYSIS

The issue is whether Carman's traffic infractions were sufficient unlawful acts to support a manslaughter conviction under § 28-305. Carman argues that recent amendments to § 28-306, the motor vehicle homicide statute, demonstrate the Legislature's intent to preclude convictions for manslaughter when an unintentional death results from an unlawful act occurring while operating a motor vehicle. He claims the predicate unlawful acts, which were traffic infractions, were insufficient to sustain his conviction.

[3,4] Our analysis is governed by the following principles. Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. See *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009). 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. *Id*. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose. See *Fisher v. Payflex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013). An appellate court will try to avoid, when possible, a statutory construction which would lead to an absurd result. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

"A person commits manslaughter if he . . . causes the death of another unintentionally while in the commission of an unlawful act." § 28-305. At the time Carman was charged,

manslaughter was a Class III felony, with a penalty between 1 and 20 years' imprisonment, up to a $25,000 fine, or both.

"A person who 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* commits motor vehicle homicide." § 28-306(1) (emphasis supplied). Motor vehicle homicide is a Class I misdemeanor, but the statute provides for penalty enhancements if the offender is convicted of driving under the influence, reckless or willful reckless driving, or driving under revocation. These predicate offenses enhance motor vehicle homicide to varying degrees of felonies.

Carman opines that "there has always existed, just below the surface, an issue as to what criminal intent or *mens rea* had to be present in the unlawful act to support a manslaughter conviction." Brief for appellant at 21. He claims that a manslaughter conviction cannot be upheld when the unlawful act was an infraction or petty offense. He points out that all prior manslaughter cases involving the use of a motor vehicle evidenced a showing that the driver was impaired or driving recklessly.

While both §§ 28-305 and 28-306 require some kind of unlawful act which proximately causes an unintentional death of another, neither statute defines the type of unlawful act required. The district court acquitted Carman of driving recklessly, pursuant to Neb. Rev. Stat. § 60-6,213 (Reissue 2010), and driving carelessly, pursuant to Neb. Rev. Stat. § 60-6,212 (Reissue 2010). But it found him guilty of following too closely, in violation of § 60-6,140, and driving too fast under the conditions, in violation of § 60-6,185, both traffic infractions.

A traffic infraction is a violation of the Nebraska Rules of the Road. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). Neither of the infractions for which Carman was convicted is punishable by incarceration; the infractions carry only a fine. But the district court found that these infractions

were unlawful acts which caused the death of the victim unintentionally and, therefore, constituted the crime of manslaughter.

It is apparent to this court that such traffic infractions are not the type of unlawful acts that were typically considered in connection with the crime of manslaughter. Nevertheless, the State asserts that *any* unlawful act which proximately causes the death of another is sufficient under § 28-305 and that the State could validly exercise prosecutorial discretion to charge the unlawful act as manslaughter. We agree with the State's assertion that it had discretion to elect under which statute to charge Carman. But the election to charge under § 28-305 did not define what unlawful act the State was required to prove in order to sustain the manslaughter conviction. The State's argument that it had discretion to charge Carman with manslaughter or motor vehicle homicide does not answer the question. Prosecutorial discretion does nothing to define what unlawful act is required for manslaughter.

We have repeatedly held that the same conduct may constitute both involuntary manslaughter and motor vehicle homicide and that the State has prosecutorial discretion to pursue charges for either offense. But the State's argument misapplies prosecutorial discretion as a basis for its position that traffic infractions that would sustain a conviction for misdemeanor motor vehicle homicide would also sustain a conviction for felony manslaughter. This argument ignores a fundamental difference between those unlawful acts required for manslaughter and those which would sustain a conviction for misdemeanor motor vehicle homicide. A public welfare offense which would sustain misdemeanor motor vehicle homicide does not require mens rea. In contrast, the predicate unlawful act for manslaughter must have a mens rea.

Although §§ 28-305 and 28-306 do not refer to mens rea or criminal intent in the unlawful act, the distinction between the two statutes cannot be ignored. Because of the different context in which the offenses of manslaughter and motor vehicle homicide arise, §§ 28-305 and 28-306 are clearly

distinct crimes and must be interpreted differently. Whereas the offense of unlawful act manslaughter or involuntary manslaughter has its origins in common law, motor vehicle homicide does not.

In *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011), we examined the requirements for misdemeanor motor vehicle homicide in the context of the requirement of criminal intent. The deceased was killed when a dump truck driven by the defendant ran a red light and struck the decedent's car. The defendant was charged with misdemeanor motor vehicle homicide and violation of a traffic control device. We compared the distinct interpretations of public welfare offense penal statutes with those which were codifications of common-law offenses. We concluded that misdemeanor motor vehicle homicide was a public welfare offense which did not require proof of mens rea.

In discussing the absence of mens rea in penal statutes codifying common-law offenses, we reiterated the rule for statutory interpretation of criminal statutes. "'"[T]he existence of a criminal intent is regarded as essential even though the terms of the statute do not require it, unless it clearly appears that the legislature intended to make the act criminal without regard to the intent with which it was done."'" *Id.* at 470, 804 N.W.2d at 170 (quoting *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). In applying this rule to misdemeanor motor vehicle homicide, we held that misdemeanor motor vehicle homicide was a public welfare offense without common-law origins and that, therefore, the absence of the mens rea element in the statute indicated that the Legislature intended to dispense with the element.

Our reasoning in *Perina* was based on the U.S. Supreme Court's analysis in *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), and its progeny. In *Morissette*, the defendant was convicted of violating 18 U.S.C. § 641 (2012), which provided, then as now, that whoever steals or knowingly converts U.S. government property

may be punished by a fine or imprisonment. In a rural area, the defendant found spent bomb casings and sold them. He explained that he had no intention of stealing anything and thought the casings had been abandoned. He was convicted, because the trial court concluded that the statute required no element of mens rea and that any necessary intent could be presumed from the defendant's act.

In reversing the lower courts' decisions, the U.S. Supreme Court discussed the principle that some crimes, which became known as public welfare offenses, can involve no mental element or criminal intent, but consist only of forbidden acts or omissions. Such offenses did not arise from the common law, but, rather, from changing societal circumstances and did not require any element of intent. Such offenses were not in the nature of positive aggressions or invasions, with which the common law so often dealt, but were in the nature of neglect where the law requires care, or inaction where it imposes a duty. One accused of such offenses usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Thus, the type of legislation whereby penalties serve as effective means of regulation dispenses with the conventional requirement for criminal intent. The Court found that 18 U.S.C. § 641 was essentially a theft offense codified from the common law and, therefore, required proof of criminal intent or mens rea.

The U.S. Supreme Court revisited *Morissette* decades later in *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). In *Staples*, the Court reiterated that a statute's silence on the mens rea of an offense did not suggest legislative intent to dispense with the element. "On the contrary, we must construe the statute in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples v. United States*, 511 U.S. at 605. Furthermore, in noting that offenses requiring no mens rea are disfavored, the Court concluded that

a general characteristic of public welfare offenses is that they do not carry heavy penalties, stating:

> In rehearsing the characteristics of the public welfare offense, we, too, have included in our consideration the punishments imposed and have noted that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." . . .
>
> Our characterization of the public welfare offense in *Morissette* hardly seems apt, however, for a crime that is a felony . . . . After all, "felony" is, as we noted in distinguishing certain common-law crimes from public welfare offenses, "'as bad a word as you can give to man or thing.'" . . . In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

Staples v. United States, 511 U.S. at 617-18 (quoting *Morissette v. United States, supra*).

In *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011), we adopted the Court's rules of statutory interpretation regarding the absence of mens rea in penal statutes. Moreover, we adopted the Court's characterization of public welfare offenses as generally carrying relatively small penalties. We stated:

> [I]f the statute "omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent."

State v. Perina, 282 Neb. at 470, 804 N.W.2d at 170 (quoting *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960)). Thus, we concluded that although motor vehicle homicide

bears some relationship to manslaughter, it was more directly related to the traffic offenses upon which it was based. See *State v. Perina, supra*. Traffic violations were expressly identified in *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), as an example of public welfare offenses not taken from the common law, and, therefore, not requiring mens rea.

Applying our reasoning in *Perina* to the case at bar, we conclude that public welfare offenses such as traffic infractions which do not contain the element of criminal intent cannot support convictions for manslaughter. Section 28-305 is a codification of a common-law offense of manslaughter, and the existence of criminal intent is regarded as essential even though the terms of the statute do not expressly require it. There is no indication that the Legislature intended to dispense with the State's requirement to show mens rea in the predicate unlawful act for involuntary manslaughter.

Unlike misdemeanor motor vehicle homicide, a charge of manslaughter cannot be supported when the predicate unlawful act is a public welfare offense which contains no mens rea. In order to sustain a conviction for involuntary manslaughter or unlawful act manslaughter under § 28-305, the State must prove beyond a reasonable doubt that the defendant acted with the requisite mens rea in committing the unlawful act.

Other courts have reached similar conclusions in the context of their own involuntary manslaughter statutes. Florida appellate courts have held that the commission of traffic infractions is not sufficient, without more, to support a conviction for culpable negligence manslaughter, which depends on the extreme character of the conduct itself, not on its mere illegality. See *Logan v. State*, 592 So. 2d 295 (Fla. App. 1991). See, also, *Behn v. State*, 621 So. 2d 534 (Fla. App. 1993) (holding that operation of motor vehicle with deficient brakes, even when coupled with traffic infraction**,** does not rise to level of criminality required to support conviction of manslaughter).

Similarly, Virginia appellate courts have held that the operation of a motor vehicle in violation of a safety statute, amounting to mere negligence proximately causing accidental death, is not sufficient to support the conviction of involuntary manslaughter. See, *Jenkins v. Commonwealth*, 220 Va. 104, 255 S.E.2d 504 (1979) (defendant driving southbound down middle of unmarked road with lights on low beam saw pedestrian in northbound lane ahead and applied brakes but hit victim); *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977) (inadvertent failure to turn on white headlights, rather than amber running lights, in violation of statute); *Lewis v. Commonwealth*, 211 Va. 684, 179 S.E.2d 506 (1971) (failing to keep proper lookout, but no evidence of speeding, drinking, or recklessness); *Tubman v. Commonwealth*, 3 Va. App. 267, 348 S.E.2d 871 (1986) (failing to keep proper lookout and to yield right of way to motorcycle approaching on public highway which motorist was entering from private road).

North Carolina appellate courts have held that whereas a defendant may be convicted under the state's "Death by Vehicle" statute, see N.C. Gen. Stat. § 20-141.4(a2) (2007), if the death proximately results from the violation of a traffic statute or ordinance, such violations by themselves are not sufficient to convict a person of the common-law offense of involuntary manslaughter. See, *State v. Lackey*, 71 N.C. App. 581, 323 S.E.2d 32 (1984); *State v. Freeman*, 31 N.C. App. 93, 228 S.E.2d 516 (1976) (superseded by statute as stated in *State v. Davis*, 198 N.C. App. 443, 680 S.E.2d 239 (2009)).

The State claims that to convict for involuntary manslaughter, it must establish only that a defendant acted negligently in committing the predicate unlawful act. This proposed interpretation of § 28-305 would make involuntary manslaughter a de facto strict liability crime. And this is demonstrated by the State's attempt to use Carman's traffic infractions—both public welfare offenses—as the underlying unlawful acts.

Even if we accept this argument, Carman's conviction still cannot be upheld. The State must prove each element of the criminal offense beyond a reasonable doubt. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Following a bench trial, Carman was found not guilty of driving "carelessly or without due caution so as to endanger a person or property." See § 60-6,212. The district court found Carman guilty of following too closely, pursuant to § 60-6,140, and driving too fast for the conditions, pursuant to § 60-6,185. We have held that violation of a statute is not negligence as a matter of law, but is only *evidence* of negligence to be considered with all other evidence in the case. *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006). If negligence were the mens rea required to convict for manslaughter, the district court was required to find beyond a reasonable doubt that Carman acted negligently. It did not do so.

Our analysis points us toward the conclusion that momentary inattentiveness and minor traffic violations do not involve the culpability or mens rea required to convict one of felony manslaughter. This rationale was espoused more than 70 years earlier when it was observed that the term "manslaughter" imports a degree of brutality which jurors generally do not care to cast upon a merely negligent driver, and society is often unwilling to condemn as a felon one who is guilty only of some act of negligence, even though that act has resulted in the death of another. See Frank A. Karaba, Note, *Negligent Homicide or Manslaughter: A Dilemma*, 41 J. Crim. L. & Criminology 183 (1950). Moreover, "[t]o inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement." Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56 (1933).

In *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011), we cited to the Oregon Supreme Court's explanation of its negligent homicide statute. The Oregon court found that the statute was essentially a police regulation. It concluded that

> "the [Oregon] legislature did not intend that any form of moral culpability should be an element of the offense," because "[t]he crime created by the act is not one that casts great stigma upon those convicted, nor is the penalty prescribed by the act so great that its imposition upon those who had no evil purposes tends to shock the sense of natural justice."

Id. at 474, 804 N.W.2d at 172 (quoting *State of Oregon v. Wojahn*, 204 Or. 84, 282 P.2d 675 (1955)).

In enacting the motor vehicle homicide statute, § 28-306, the Legislature provided that only certain acts would be treated as felonies and that all other violations of the law which result in the unintended death of another while engaged in the operation of a motor vehicle were Class I misdemeanors. The Legislature described what specific acts under § 28-306 would result in a felony conviction. But this does not mean that the State was relieved of its burden to establish criminal intent if it elected to charge Carman under § 28-305.

Carman's conviction for public welfare offenses which required no mens rea was insufficient to support his conviction for unlawful manslaughter. Unless the Legislature expressly dispenses with the element of criminal intent, or mens rea, from the offense of manslaughter, our rules in construing criminal statutes require the State to prove such intent. See *State v. Perina, supra*. This conclusion does not require us to define precisely what criminal intent is required for involuntary manslaughter. However, sources examining the subject almost invariably agree that more than ordinary negligence in the civil sense is required to support such convictions.

Decades ago, the Kansas Supreme Court carefully reviewed the common-law background of manslaughter and concluded that "it came to be thoroughly understood that the system of thought known as the common law did not sanction conviction of a man of manslaughter resulting from negligent conduct, unless his conduct was accompanied by a wrong mental attitude having the qualities of recklessness." *State*

v. Custer, 129 Kan. 381, 387, 282 P. 1071, 1075 (1929). The court explained:

> We are familiar in civil cases with the kind of conduct which will authorize punitive damages, and will prevent interposition of the defense of contributory negligence. It is supposed to involve fault, just as guilt of crime subjecting the offender to punishment was supposed to involve a certain "wickedness." It is regarded as displaying greater culpability than negligence. The higher degree of culpability was essential to common-law manslaughter resulting from negligence.

Id. at 394, 282 P. at 1078.

Adopting the Kansas court's reasoning, the South Dakota Supreme Court similarly held that ordinary negligence was insufficient to sustain a conviction for manslaughter at common law. In construing South Dakota's manslaughter statute, the court held:

> [T]his statute which we are now considering was enacted originally with the purpose and intent of codifying the common law on the subject, and . . . the common law required that negligence to be sufficient to support a criminal action must be something more than mere inadvertence. There must be some action from which the jury might reasonably infer the mens rea. The statute has described this action as "culpable."

State v. Bates, 65 S.D. 105, 108, 271 N.W. 765, 766 (1937). The court described culpable negligence as an intentional act or omission which the defendant "consciously realized that his conduct would in all probability (as distinguished from possibly) produce the precise result which it did produce." *Id*. at 109, 271 N.W. at 767.

Similarly, in reviewing the mens rea required to convict for involuntary manslaughter, the Michigan Supreme Court held:

> [U]nder the common law, one is not criminally responsible for death from negligence unless the negligence is so great that the law can impute a criminal intent. If

> death ensues from negligence which shows a culpable indifference to the safety of others, the negligence is said to be gross or wanton or wil[l]ful, and is equivalent to criminal intent, a necessary element of every common-law crime. One whose acts cause death under such circumstances is guilty of involuntary manslaughter or common-law negligent homicide.

People v. Campbell, 237 Mich. 424, 428, 212 N.W. 97, 99 (1927).

The New Mexico Supreme Court held that careless driving was insufficient to show criminal negligence required to convict under the state's manslaughter statute, which was a codification of the common-law offense. The court stated: "'Mere negligence is not sufficient. It may be sufficient to compel the driver to respond in damages. However, when it comes to responding to an accusation of involuntary manslaughter, with the possibility of a penitentiary sentence, a different rule is called into play.'" *State v. Yarborough*, 122 N.M. 596, 930 P.2d 131, 135 (1996) (quoting *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274 (1938)). *The court noted a clear majority of jurisdictions require that the predicate offense for involuntary manslaughter involve criminal negligence or recklessness.*

One commentator noted: "Tests of criminal culpability necessary to sustain [manslaughter] convictions are many and varied. But it is generally agreed that slight negligence or even 'ordinary' or 'civil' negligence is not sufficient to sustain manslaughter convictions." Frank A. Karaba, Note, *Negligent Homicide or Manslaughter: A Dilemma*, 41 J. Crim. L. & Criminology 183, 183-84. The courts look for a degree of carelessness which might be labeled "'willful' or 'wanton' or 'gross or culpable.'" *Id.* at 184.

Another commentator observed that courts around the country generally use one or more of six terms to describe the level of negligence required to convict a defendant of involuntary manslaughter by unlawful act: (1) criminal, (2) culpable,

(3) gross, (4) willful, (5) wanton, or (6) reckless. James J. Robinson, *Manslaughter by Motorists*, 22 Minn. L. Rev. 755 (1938). He noted that these terms were generally used and treated synonymously by most courts, but asserted that the most effective term to describe the mens rea for manslaughter is "reckless," or heedless regard for consequences. *Id*.

For more than a century, our case law has used nearly all of these six terms. This court has not been consistent in its language and decisions as to what criminal intent or mens rea is required for an unlawful act to support a conviction for manslaughter. In *Schultz v. State*, 89 Neb. 34, 46, 130 N.W. 972, 977 (1911), when considering what is required to convict for manslaughter, we held:

> "One may be criminally responsible for the negligent operation of an automobile. A person is guilty of *criminal negligence* . . . when the breach of duty is *so flagrant as to warrant an implication that the resulting injury was intended*; that is, when his negligent conduct is incompatible with a proper regard for human life. Negligence is the gist of the offense, and, *in the absence of recklessness or of want of due caution, there is no criminal liability*. Actual intent is not an essential element of the offense. It is enough if there is shown a negligent and reckless indifference of the lives and safety of others."

(Emphasis supplied.) Thus, we used both the legal terms "negligent" and "reckless," but we clearly described a culpability higher than ordinary negligence for civil damages.

Shortly after *Schultz*, in upholding a manslaughter conviction based on child neglect, we considered whether the defendant was "culpably negligent" or "criminally negligent." See *Stehr v. State*, 92 Neb. 755, 759, 761, 139 N.W. 676, 678 (1913). Although we did not define what made an act culpably or criminally negligent, we noted, "It is not a slight failure in duty that would render him criminally negligent, but a great failure of duty undoubtedly would." *Id*. at 759, 139 N.W. at 678. We later held:

> We believe the rule to be that, though the act, made unlawful by statute, is an act merely *malum prohibitum* and is ordinarily insufficient, still, when such an act is accompanied by negligence or further wrong, so as to be, *in its nature, dangerous, or so as to manifest a reckless disregard for the safety of others*, then it . . . may constitute involuntary manslaughter.

Thiede v. State, 106 Neb. 48, 53, 182 N.W. 570, 572 (1921) (emphasis supplied).

Years later, we affirmed a manslaughter conviction upon finding that a jury instruction containing reference to driving an automobile in an unlawful, reckless, careless, and negligent manner, instead of charging in regard to driving on the wrong side of the road, did not constitute reversible error. See *Crawford v. State*, 116 Neb. 125, 216 N.W. 294 (1927). In that case, the defendant was found to have been driving while intoxicated and driving on the wrong side of the road.

In *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942), we affirmed a manslaughter conviction of a defendant who was found to have been driving while intoxicated at a high rate of speed. We stated:

> Our conclusion is that the evidence is sufficient to sustain the finding of the jury that plaintiff in error was guilty of *such gross negligence as to indicate a wanton disregard of human life*. Such negligence is criminal in its character, and where it results in a death will sustain a conviction for manslaughter.

Id. at 843, 2 N.W.2d at 114-15 (emphasis supplied).

To support its argument that § 28-305 is unconcerned with the nature of the unlawful act, the State relies on a series of cases which largely omit the requirement that an act be criminally, culpably, or grossly negligent or that the defendant's conduct is willful, wanton, or reckless. In *Benton v. State*, 124 Neb. 485, 247 N.W. 21 (1933), the defendant was convicted of manslaughter after he was found to have negligently driven an automobile, while intoxicated, into the rear of a car on

the highway, resulting in the death of a passenger of that car. We stated: "When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another is guilty of manslaughter. This rule applies to one driving while intoxicated." *Id.* at 488, 247 N.W. at 23.

In *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950), we upheld the defendant's conviction for manslaughter after causing the death of another while intoxicated, operating his vehicle at a reckless speed, and driving on the wrong side of the highway. In *Hoffman v. State*, 162 Neb. 806, 77 N.W.2d 592 (1956), the defendant's vehicle collided with the rear end of a truck, and a passenger in the defendant's vehicle was killed. The defendant was intoxicated at the time of the collision. We stated that although the jury found the defendant was grossly negligent, the State was not required to show gross negligence to convict him.

But the State's reliance on these cases is misplaced. Each involved more than mere traffic infractions, which have no mens rea. They almost invariably involved driving while intoxicated, driving recklessly, or both. These actions would establish that the unlawful act was done voluntarily and intentionally and was not the result of mistake, accident, or momentary inattention. And we are unaware of any Nebraska cases that involved a conviction for manslaughter where the predicate unlawful acts were mere traffic infractions without any showing of driving while intoxicated or some other reckless act.

State v. Burnett, 254 Neb. 771, 579 N.W.2d 513 (1998), is the exception, but it is distinguishable from the case at bar. In that case, the defendant entered a plea of no contest to the information charging him with manslaughter under § 28-305 for killing the victim while operating a motor vehicle in an unlawful manner. Following an unsuccessful direct appeal and denial of his postconviction action, the case reached this court

on his petition for further review. The defendant claimed that although he pled no contest to manslaughter under § 28-305, a Class III felony, his attorney should have argued for a sentence in accordance with § 28-306. He claimed ineffective assistance of counsel because of his attorney's failure to argue for a sentence in the range prescribed by § 28-306. We denied relief, because he pled to and was convicted of manslaughter under § 28-305 and could not be sentenced for motor vehicle homicide under § 28-306.

Furthermore, with the exception of *Burnett*, at the time of the above-mentioned cases, the statute for motor vehicle homicide did not exist. It was considered an amelioration of the penalty provision of the manslaughter statute. See *Birdsley v. State*, 161 Neb. 581, 74 N.W.2d 377 (1956). Neb. Rev. Stat. § 39-669.20 (Reissue 1984) provided:

> Any person, convicted of manslaughter or mayhem resulting from his operation of a motor vehicle, or of motor vehicle homicide, shall be (1) fined in a sum not exceeding five hundred dollars, (2) imprisoned in the county jail not to exceed six months, or (3) both so fined and imprisoned.

Persons convicted of manslaughter while operating motor vehicles in violation of the law were subject to this ameliorated penalty. In 1978, manslaughter and motor vehicle homicide were made into two separate and distinct offenses under different statutes and with different penalties. See 1977 Neb. Laws, L.B. 38, §§ 20 and 21 (operative July 1, 1978).

Our holding in *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), *disapproved on other grounds, State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001), and *State v. Wright, supra*, that the State has prosecutorial discretion to charge a person for either manslaughter or motor vehicle homicide as the result of an unintentional death arising from an unlawful act during the operation of a motor vehicle remains unaffected by our decision in the case at bar. We noted that "'[i]t is not uncommon for an act to constitute a violation of more than one crime

. . . .'" *State v. Wright*, 261 Neb. at 288, 622 N.W.2d at 683 (quoting *State v. Roth, supra*). Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *State v. Roth, supra*.

But in exercising its discretion to charge under one offense or another, the State must prove each element of that offense beyond a reasonable doubt. See *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). When the State charged Carman with manslaughter, it was required to show mens rea. It failed to do so. The traffic infractions upon which Carman's manslaughter charge were predicated were public welfare offenses. Therefore, they did not establish the required element of mens rea.

Because the State did not prove that Carman acted with the mens rea required to convict him under § 28-305, we need not review the constitutional challenges to his conviction.

CONCLUSION

For the reasons stated above, we reverse the judgment of the district court and remand the cause with directions to vacate Carman's conviction and sentence under § 28-305.

Reversed and remanded with directions.

Stacy, J., not participating.

State of Nebraska, appellee, v. Michael S. Weichman, appellant.

871 N.W.2d 768

Filed December 4, 2015. No. S-15-368.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Self-Incrimination.** The protections of the Fifth Amendment to the U.S. Constitution are generally not self-executing.
3. ____: ____. There are two main exceptions to the general rule that the Fifth Amendment to the U.S. Constitution is not self-executing: where a suspect is in police custody and the so-called penalty exception, where the assertion of the privilege is penalized so that the option to remain silent is foreclosed and the incriminating testimony is effectively compelled.
4. **Self-Incrimination: Termination of Employment.** An implicit threat of termination of employment can be sufficient to support a claim that a statement was coerced.
5. ____: ____. In order to determine whether a statement is coerced for purposes of the penalty exceptions, courts apply a two-pronged approach: (1) that the defendant have a subjective belief that he or she was compelled to give a statement on threat of the loss of his or her job and (2) that the defendant's belief be objectively reasonable.
6. ____: ____. A subjective belief will not be considered objectively reasonable if the state has played no role in creating the impression that the refusal to give a statement will be met with termination of employment.
7. ____: ____. The existence of a statute, rule, regulation, or policy subjecting an employee to termination for the failure to provide a statement is

highly relevant, though not usually dispositive, in determining whether a subjective belief is objectively reasonable. Under this subjective/objective test, a court examines the totality of the circumstances surrounding the statement.

Appeal from the District Court for York County: James C. Stecker, Judge. Affirmed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Heavican, C.J.

INTRODUCTION

Michael S. Weichman, appellant, was convicted of first degree sexual abuse of an inmate and was sentenced to 1 to 2 years' imprisonment. At issue on appeal is whether statements made by Weichman during a polygraph examination were admissible against him at trial. We conclude that the statements were admissible and accordingly affirm.

FACTUAL BACKGROUND

Weichman was employed by the Nebraska Department of Correctional Services as a maintenance supervisor at the Nebraska Correctional Center for Women (NCCW). On April 21, 2014, reports were received that Weichman had engaged in sexual intercourse with an NCCW inmate. Weichman was interviewed regarding the allegation and denied the reports. The inmate was also interviewed and denied the allegations.

On May 5, 2014, Weichman submitted to a polygraph examination. During the course of the examination, Weichman made statements admitting that he had received oral sex from the inmate in question about 2 to 3 weeks prior to the polygraph examination.

On May 15, 2014, the inmate was interviewed again and initially denied the relationship. But after being told that Weichman had admitted to a sexual relationship, she also admitted to the relationship and indicated that she and Weichman had engaged in sexual intercourse four or five times and that she had performed oral sex on Weichman on at least two occasions prior to the sexual intercourse.

On June 20, 2014, Weichman was charged by information with first degree sexual abuse of an inmate. He filed a motion to suppress both the statements he made during the polygraph, under *Garrity v. New Jersey*,[1] and the statements made by the inmate as fruit of the poisonous tree. Weichman's motion to suppress was denied.

At the hearing on the motion to suppress, Benny Noordhoek, an investigator with the Department of Correctional Services, testified. Noordhoek had been tasked with investigating the allegations against Weichman. In the course of that investigation, Noordhoek questioned Weichman about the allegations. Prior to that questioning, Weichman was informed of his *Miranda*[2] rights. Weichman denied the relationship.

Noordhoek asked Weichman if he would be willing to take a polygraph examination. Weichman agreed. Noordhoek testified he explained to Weichman that a polygraph was presented as an option to Weichman, not a requirement, and that Weichman could not be forced to submit to the polygraph. Noordhoek told Weichman he would get back to him with the details of the polygraph examination.

Weichman testified that he initially agreed to take a polygraph examination, but was reconsidering that decision when he received a "written directive" from the NCCW warden regarding the polygraph. After receiving the directive and

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[1] *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d. 562 (1967).

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

speaking with the warden, Weichman believed that taking the polygraph was nonnegotiable and that he would be fired if he refused to do so. He acknowledged that no one, including Noordhoek, the warden, or the polygraph examiner, ever told him that he would be fired for refusing to take the polygraph. Weichman admitted that the polygraph examiner told him that he, the examiner, could not force Weichman to take the examination. The polygraph examiner also informed Weichman that he did not know what the employment ramifications might be if Weichman declined to take the polygraph.

The warden also testified about her delivery of the directive to Weichman regarding the polygraph. She indicated that she provided Weichman with details of the time and place of his examination, and also informed him that he could use a State vehicle and State time to travel to the examination. The warden testified that she was really only complying with Noordhoek's request to inform Weichman of the pertinent details of the examination, a fact confirmed by Noordhoek. But Noordhoek also confirmed that on its face, the directive was to Weichman from the warden.

A bench trial on stipulated facts was held on March 3, 2015, after which Weichman was found guilty of first degree sexual abuse of an inmate. He was sentenced to 1 to 2 years' imprisonment. He appeals.

ASSIGNMENT OF ERROR

Weichman makes three assignments of error that can be consolidated and restated into one: The district court erred in denying his motion to suppress.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review.[3] With regard to historical facts, we review the trial court's findings for clear

[3] *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

error.[4] Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[5]

ANALYSIS

On appeal, Weichman argues that the district court erred in denying his motion to suppress. Weichman contends that the statements he made during his polygraph were not voluntary under the 5th and 14th Amendments to the U.S. Constitution and under *Garrity*[6] and should have been suppressed.

[2,3] The protections of the Fifth Amendment are generally not self-executing. "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the [Fifth Amendment] privilege, the government has not 'compelled' him to incriminate himself."[7] But, "application of this general rule is inappropriate in certain well-defined situations."[8] "In each of those situations . . . some identifiable factor 'was held to deny the individual a "free choice to admit, to deny, or to refuse to answer."'"[9] There are two main exceptions to this general rule: where a suspect is in police custody,[10] commonly referred to as "*Miranda*[11] rights," and where "the assertion of the privilege is penalized so that the option to remain silent is foreclosed and the incriminating testimony is effectively compelled."[12]

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[4] *Id.*

[5] *Id.*

[6] *Garrity, supra* note 1.

[7] *Garner v. United States*, 424 U.S. 648, 654, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976).

[8] *Minnesota v. Murphy*, 465 U.S. 420, 429, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

[9] *Id.* (citing *Garner, supra* note 7).

[10] *Miranda, supra* note 2.

[11] *Id.*

[12] *U.S. v. Camacho*, 739 F. Supp. 1504, 1513 (S.D. Fla. 1990) (citing *Murphy, supra* note 8).

The seminal U.S. Supreme Court case setting forth this so-called penalty exception is *Garrity*.[13] In *Garrity*, the New Jersey Attorney General was investigating the alleged fixing of traffic tickets. During the investigation, the defendant police officers were questioned. Prior to that questioning, each officer was informed that (1) anything the officer said might be used against him in a criminal proceeding; (2) the officer had a privilege to refuse to answer if the disclosure would tend to be incriminating; and (3) if the officer refused to testify, he would be subject to removal from office.

The officers did not invoke the Fifth Amendment and answered the questions asked of them. Over their objections, some of those statements were later offered against them in criminal prosecutions for conspiracy to obstruct the administration of the traffic laws. The defendants appealed, arguing that the statements offered against them were coerced because the officers risked losing their jobs if they failed to answer the questions.

The Supreme Court found that the officers' statements were not voluntary,[14] noting that "[t]he choice given [the defendants] was either to forfeit their jobs or to incriminate themselves"[15] and that "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."[16] The Court also noted that the State's practice was "'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'"[17] The Court concluded that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from

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[13] *Garrity, supra* note 1.

[14] *Id.*

[15] *Id.*, 385 U.S. at 497.

[16] *Id.*

[17] *Id.*

office, and that . . . extends to all, whether they are policemen or other members of our body politic."[18]

Since its decision in *Garrity*, the Supreme Court has noted that the decision was "limited to instances where an interviewee is coerced into waiving his constitutional right against self-incrimination through the threat of dismissal,"[19] and "[did] not prohibit the state from compelling an employee from answering questions directly and narrowly related to his duties, provided that he is not coerced into relinquishing his privilege against self-incrimination."[20]

There are generally two approaches courts take when determining whether a defendant's right against self-incrimination under *Garrity* was violated. The first approach is set forth in *United States v. Indorato*.[21] There, the defendant was not explicitly told that he would be dismissed for the failure to submit to questioning, but he argued that departmental rules required him to obey the lawful order of his superior or be dismissed. The First Circuit rejected this argument, noting that

> [i]n all of the cases flowing from *Garrity*, there are two common features: (1) the person being investigated is explicitly told that failure to waive his constitutional right against self-incrimination will result in his discharge from public employment . . . ; and (2) there is a statute

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[18] *Id.*, 385 U.S. at 500.

[19] *Camacho, supra* note 12, 739 F. Supp. at 1514 (citing *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968)).

[20] *Id.* See, *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977); *Sanitation Men v. Sanitation Comm'r.*, 392 U.S. 280, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968); *Gardner, supra* note 19.

[21] *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980). See, also, *U.S. v. Stein*, 233 F.3d 6 (1st Cir. 2000); *Singer v. State of ME.*, 49 F.3d 837 (1st Cir. 1995); *People v. Bynum*, 159 Ill. App. 3d 713, 512 N.E.2d 826, 111 Ill. Dec. 437 (1987); *Commonwealth v. Harvey*, 397 Mass. 351, 491 N.E.2d 607 (1986); *People v. Coutu*, 235 Mich. App. 695, 599 N.W.2d 556 (1999); *State v. Litvin*, 147 N.H. 606, 794 A.2d 806 (2002).

> or municipal ordinance mandating such procedure. In this case, there was no explicit "or else" choice and no statutorily mandated firing is involved.[22]

Thus, under *Indorato* and subsequent cases following its reasoning, *Garrity* is limited to its facts; a defendant is not entitled to its protections unless the defendant was told that his or her employment would be terminated and there was a statute mandating such discharge.

[4-7] In contrast to the *Indorato* line of cases, other courts have concluded that an implicit threat of termination of employment might be sufficient to support a claim that a statement was coerced under G*arrity.* These courts adopt a two-pronged approach: (1) that the defendant have a subjective belief that he or she was compelled to give a statement on threat of the loss of his or her job and (2) that the defendant's belief be objectively reasonable.[23] A subjective belief that *Garrity* applies will not be considered objectively reasonable if the state has played no role in creating the impression that the refusal to give the statement will be met with termination of employment.[24] The existence of a statute, rule, regulation, or policy subjecting an employee to termination for the failure to provide a statement is highly relevant, though not usually dispositive, in determining whether a subjective belief is objectively reasonable.[25] Under this test, a court examines the totality of the circumstances surrounding the statement.[26]

Both Weichman and the State argue that the subjective/objective test is the appropriate test to utilize; the district court

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[22] *Indorato, supra* note 21, 628 F.2d at 716.

[23] See, e.g., *U.S. v. Friedrick*, 842 F.2d 382 (D. C. Cir. 1988). But see *State v. Aiken*, 282 Ga. 132, 646 S.E.2d 222 (2007).

[24] *Camacho, supra* note 12.

[25] See *id*.

[26] See, *U.S. v. Vangates*, 287 F.3d 1315 (11th Cir. 2002); *Camacho, supra* note 12; *People v. Sapp*, 934 P.2d 1367 (Colo. 1997); *State v. Chavarria*, 131 N.M. 172, 33 P.3d 922 (N.M. App. 2001); *State v. Brockdorf*, 291 Wis. 2d 635, 717 N.W.2d 657 (2006).

also applied this test. We agree. As such, we must first consider whether Weichman held a subjective belief that his employment would be terminated for failing to submit to the polygraph examination. If we conclude that Weichman held such a subjective belief, we must then ask whether that subjective belief was objectively reasonable.

Weichman testified that he believed he would be fired if he refused to take the polygraph examination. The district court accordingly found that Weichman had a subjective belief that his employment would be terminated. There was no error in this finding.

This subjective belief satisfies the first prong of the subjective/objective test. But we cannot conclude the second prong was met, because on these facts, Weichman's subjective belief was not objectively reasonable. In coming to this conclusion, we examine the totality of the circumstances.

Weichman initially agreed to take the polygraph, even though he was told that he did not have to do so. Upon Weichman's agreement, Noordhoek, the investigator, told Weichman he would be in touch regarding details of the test. Prior to the commencement of this questioning and conversation regarding the polygraph, Weichman was read his *Miranda* rights.

Soon thereafter, Weichman was called to see the NCCW warden and was given a document entitled "Written Directive." That document set forth the details of his polygraph examination. The evidence shows that the warden did not tell Weichman that he must submit to the polygraph or be fired. At the time, the warden informed Weichman that he could use a State vehicle and worktime to attend the polygraph.

Upon attending the polygraph, Weichman was again read his *Miranda* rights. The record is clear that the polygraph examiner told Weichman that he did not have to take the examination. The examiner also told Weichman that he, the examiner, did not know what the ramifications of refusing to take the test would be.

We note that there was no express threat made to Weichman regarding termination for failure to submit to the polygraph or to questioning. Nor is there any statute, ordinance, rule, regulation, or policy that would require Weichman's termination for his failure to submit to the polygraph or to otherwise fail to cooperate with an investigation.

Weichman alleges that the warden's "written directive" was a sufficient action which made his belief that he would be fired objectively reasonable. We disagree. We observe that Weichman was expecting to receive information about the polygraph examination from Noordhoek. Particularly, given the totality of all the circumstances as described above, we cannot conclude that the fact that information about the polygraph was received from the warden and not from Noordhoek transforms Weichman's otherwise subjective belief into an objectively reasonable one. We therefore conclude that the district court did not err in denying Weichman's motion to suppress his own statements.

Having concluded that Weichman's statements were admissible, we need not address his contention that the victim's statements were inadmissible as fruit of the poisonous tree. Because there was no tree, there can be no fruit.

CONCLUSION

The district court did not err in denying Weichman's motion to suppress. Accordingly, we affirm Weichman's conviction and sentence.

Affirmed.

In re Estate of Mary Ann Clinger, deceased. Orin M. Clinger et al., appellants, v. Shaun Clinger, Personal Representative of the Estate of Mary Ann Clinger, deceased, et al., appellees.

872 N.W.2d 37

Filed December 11, 2015. No. S-13-769.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. **Trial: Courts: Juries: Appeal and Error.** Whether to answer a question of law posed by a jury which has retired for deliberations is a matter entrusted to the discretion of the trial court, and in the absence of an abuse of that discretion, its action will not be disturbed on appeal.
3. **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.
4. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of admissibility under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), the trial court's decision will not be reversed absent an abuse of discretion.
5. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
6. **Wills: Undue Influence: Proof.** Under Neb. Rev. Stat. § 30-2431 (Reissue 2008), contestants of a will have the burden of establishing undue influence and carry the ultimate burden of persuasion.
7. ____: ____: ____. To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to

exercise such influence, and (4) the result was clearly the effect of such influence.

8. **Wills: Undue Influence.** Undue influence sufficient to defeat a will is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's.
9. **Undue Influence: Proof.** Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor: his or her life, character, and mental condition.
10. ____: ____. Although the burden of going forward on the issue of undue influence may shift to the proponent of the written instrument, the ultimate burden of proof remains at all times on the party asserting the issue.
11. **Rules of Evidence: Presumptions: Proof.** According to Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2008), a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
12. **Rules of Evidence: Presumptions.** The "presumption of undue influence" is not a true presumption within the meaning of Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2008).
13. **Wills: Undue Influence: Presumptions.** If a contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances, the contestant has introduced evidence sufficient to justify an inference of undue influence.
14. **Wills: Undue Influence: Presumptions: Proof.** The inference of undue influence may be rebutted by proof that the testator had competent independent advice and that the will was his or her own voluntary act.
15. **Undue Influence: Proof.** The party seeking to establish undue influence has not met his or her burden of proof if all of the evidence is circumstantial and the inferences to be drawn therefrom are equally consistent with the hypothesis that undue influence was not exercised and the hypothesis that such influence was exercised.
16. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
17. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.

18. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
19. **Trial: Juries.** The trial judge is in the best position to sense whether the jury is able to proceed with its deliberations and has considerable discretion in determining how to respond to communications indicating that the jury is experiencing confusion.
20. **Jury Instructions: Presumptions.** It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.
21. **Wills.** A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property.
22. **Constitutional Law: Trial: Witnesses.** The Sixth Amendment right to confront witnesses and its Nebraska equivalent do not apply to a civil case.
23. **Rules of Evidence: Witnesses: Hearsay.** When a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability.
24. **Rules of Evidence: Hearsay: Presumptions.** Hearsay that falls within a firmly rooted hearsay exception is presumptively reliable and trustworthy.
25. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
26. **Appeal and Error.** Error without prejudice provides no ground for relief on appeal.
27. **Courts: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

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 Custer County, Mark D. Kozisek, Judge. Judgment of Court of Appeals affirmed.

Bradley D. Holbrook and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellants.

Steven P. Vinton, of Bacon & Vinton, L.L.C., for appellee Shaun Clinger.

George G. Vinton for appellees Calvin Clinger and Patricia Clinger.

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

Cassel, J.

I. INTRODUCTION

This appeal arises from an unsuccessful will contest, premised upon undue influence and tried to a jury. The Nebraska Court of Appeals affirmed the district court's judgment.[1] We granted further review primarily to determine whether the jury should have been instructed regarding a "presumption of undue influence." After both sides have sustained their respective burdens of production, an instruction describing a permissible or probable inference of undue influence as a "presumption" would conflict with the statutory burden of proof and likely mislead the jury. The Court of Appeals correctly affirmed the district court's refusal to give the contestants' proposed instructions. And we agree with the Court of Appeals that the district court did not abuse its discretion in responding to a jury question or in admitting, in part, a video of the execution of an earlier will. Even though our reasoning differs somewhat from that of the Court of Appeals, we affirm its decision.

II. BACKGROUND

The facts are set forth in greater detail in the Court of Appeals' published decision.[2] We summarize the relevant

[1] *In re Estate of Clinger*, 22 Neb. App. 692, 860 N.W.2d 198 (2015).

[2] See *id.*

background to the extent necessary to provide context for the errors asserted on further review.

1. Parties

The decedent, Mary Ann Clinger, had six children: Mary E. Chalupa, Sandra A. Goodwater, LeRoy A. Clinger, Orin M. Clinger, Calvin Clinger, and Melvina D. Bundy. Four of her children—Orin, Mary, Melvina, and Sandra—were the will's contestants. The proponents were Calvin; his wife, Patricia Clinger; and their son, Shaun Clinger.

2. Mary Ann and Her Wills

In 2000, the contestants became concerned about Mary Ann's financial situation. They were also uneasy about the influence Calvin had over Mary Ann. The contestants initiated a conservatorship proceeding, and the court appointed a permanent conservator for Mary Ann in January 2001. The conservatorship made Mary Ann upset with the contestants, because she felt that it was not necessary.

In August 2001, Mary Ann executed a will in which she left her 320-acre farm to Calvin. This will directed that Mary Ann's home be sold, with LeRoy and Sandra each receiving one-third of the net proceeds and the other one-third being divided equally between Orin, Mary, and Melvina. Mary Ann devised the remainder of her property equally to Calvin and LeRoy. The execution of this will was videotaped.

Over the next 10 years, Mary Ann's health deteriorated. In January 2011, she was diagnosed with lung cancer. She was prescribed numerous medications, but her doctor described her as "sharp" and did not detect any of the medications' potential side effects.

In January 2011, Mary Ann asked Calvin to draft a new will for her. The disposition of property was similar to that of the 2001 will, but she made some changes in the percentages each child received. Calvin took Mary Ann to see an attorney, who drafted a new will for Mary Ann in February. The February 2011 will also left all of the farmland to Calvin. The proceeds

from the sale of Mary Ann's house and its contents were to be divided among her other five children, and the remainder of the estate was to go to Calvin. The will specified that Mary Ann was aware the devise to Calvin was substantially more valuable than the devises to the other children, but that she was intentionally making those devises to reflect Calvin's dedication and service to her throughout the years.

On March 5, 2011, Mary Ann died at age 89. The contestants objected to the petition to admit to probate either the February 2011 will or the August 2001 will, claiming that the wills were invalid because Mary Ann lacked testamentary capacity and because the devises were the result of undue influence. The will contest was transferred to the district court.

3. Trial

The district court conducted a jury trial regarding the 2011 will on two issues: testamentary capacity and undue influence. There was contradicting evidence regarding whether Calvin improperly influenced Mary Ann or whether she favored him because of his assistance with the farm and his support regarding her feelings about the conservatorship.

During the trial, the parties also adduced evidence regarding the 2001 will. The proponents offered the video of the will signing. The attorney who drafted the will testified that he arranged for the video because he was "fairly certain there was going to be a will contest." The contestants objected to the video on the bases that it was duplicative and hearsay and that it violated "Rule 403."

Although the court first stated that it was inclined to instruct the jury to consider the video only to determine testamentary capacity and not to consider it as to influence, the actual instruction, which followed a colloquy with counsel, was less restrictive. Prior to showing the video, the court limited the jury's use of the video by stating: "There are specific questions asked by [the attorney depicted] regarding influence and whether Calvin . . . influenced Mary Ann . . . . You are to disregard those questions and answers given and they may not

be considered by you as evidence on the issue of undue influence." The video was played for the jury and sent into the jury room during deliberation.

After the contestants rested, the proponents moved for a directed verdict on both issues. The district court granted the motion on the issue of testamentary capacity but denied it as to undue influence.

During the jury instruction conference, the contestants offered proposed instructions regarding a presumption of undue influence. The court declined to give the proposed instructions.

During deliberation, the jury asked a question regarding the burden of proof. The court referred the jury to the instruction on the burden of proof.

The parties later stipulated that the jury would be allowed to return a verdict if seven or more members of the jury agreed to it. The jury ultimately rendered an 8-to-4 verdict, finding that the 2011 will was valid.

4. Court of Appeals' Decision

The contestants appealed, and the Court of Appeals affirmed the district court's judgment. Although in the appellate court the contestants assigned error to the granting of the directed verdict on testamentary capacity, they did not seek further review on that issue.

With regard to the presumption of undue influence, the Court of Appeals determined that the contestants presented evidence that could support a finding of a confidential relationship coupled with suspicious circumstances. The court noted that Mary Ann began living with Calvin and Patricia in January 2009 and that Mary Ann wrote checks to them in 2009 and 2010 totaling over $15,000. But the court reasoned that the proponents then rebutted the presumption. The court noted that Patricia testified that she was a licensed practical nurse and that Mary Ann wrote her checks to reimburse her for the care she provided, because it was less expensive than paying for a nursing home. Mary Ann had her own attorney

when she lived with Calvin and his wife and would speak with him alone. Also, Mary Ann repeatedly explained that she was upset by the conservatorship and that she wished to leave the farm to Calvin because of his assistance to her.

The Court of Appeals reasoned that the presumption of undue influence in a will contest is not an evidentiary presumption, but, rather, is a "bursting bubble" presumption that disappears when evidence to rebut the presumption is introduced. And because the proponents offered rebuttal evidence, the court determined that the presumption disappeared and that thus, there was no basis upon which to instruct the jury regarding the presumption. The court stated, "Since the burden of proof remained on the contestants to prove undue influence, and because the jury instructions given properly placed this burden on the contestants, they were not prejudiced by the court's failure to give the tendered instructions."[3]

The Court of Appeals found no abuse of discretion by the district court in refusing to further instruct the jury in response to its question about the burden of proof.

The Court of Appeals determined that the video regarding the 2001 will was admissible because it pertained to Mary Ann's state of mind and fell under the hearsay exception contained in Neb. Evid. R. 803(2), Neb. Rev. Stat. § 27-803(2) (Reissue 2008). The court stated that Mary Ann's responses to questions regarding undue influence would be hearsay if offered to prove the truth of the matter asserted, but noted that the district court instructed the jury to not consider the video as to whether it showed influence. The court determined that it was not an abuse of discretion to admit the video as evidence of Mary Ann's state of mind, with the limiting instruction given.

The Court of Appeals rejected the assertion that the video was cumulative. The court noted that the jury had not observed or heard from Mary Ann. The court also determined that the

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[3] *Id.* at 708-09, 860 N.W.2d at 213.

video did not violate the contestants' rights to cross-examine witnesses against them. The court stated:

> [W]here guarantees of trustworthiness exist, cross-examination of a declarant in a civil case may not be required if the statement sought to be introduced falls within a statutory exception. As stated above, because the present state-of-mind exception allowed admission of the video, and the court properly gave a limiting instruction as to the purpose for which it could be considered, the contestants were not denied their right to cross-examination.[4]

The Court of Appeals found no error in allowing the video into the jury room during deliberation. The court stated that it would analyze the issue despite the absence of an objection to the video's being taken into the jury room and the absence of any indication that the jury replayed the video. In addressing the merits of the argument, the Court of Appeals noted that courts have broad discretion in allowing the jury unlimited access to exhibits that constitute substantive evidence. Relying upon our decision in *State v. Vandever*,[5] the court concluded that the video was nontestimonial evidence and that the district court did not abuse its discretion in allowing the jury unlimited access to it during deliberations.

We granted the contestants' petition for further review.

III. ASSIGNMENTS OF ERROR

In the contestants' petition for further review, they assign that the Court of Appeals erred in affirming the district court's (1) refusal to instruct the jury on the presumption of undue influence as proposed by the contestants, (2) refusal to further instruct the jury in response to its question about the proper burden of proof, and (3) admission into evidence of the video of the 2001 will signing and allowing the jury access to it during deliberation.

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[4] *Id.* at 703, 860 N.W.2d at 210.

[5] *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014).

IV. STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[6]

[2] Whether to answer a question of law posed by a jury which has retired for deliberations is a matter entrusted to the discretion of the trial court, and in the absence of an abuse of that discretion, its action will not be disturbed on appeal.[7]

[3-5] 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.[8] Because the exercise of judicial discretion is implicit in determinations of admissibility under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), the trial court's decision will not be reversed absent an abuse of discretion.[9] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[10]

V. ANALYSIS

1. Jury Instructions

(a) Proposed Instructions on Undue Influence

The contestants challenge the district court's refusal of their proposed instructions regarding a presumption of undue influence. They offered two instructions, each of which addressed this presumption.

The first instruction sought an addition to the statement of the case. It proposed to instruct the jury that a presumption of undue influence arose if the contestants' evidence showed

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[6] *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014).

[7] *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

[8] *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[9] See *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[10] *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014).

that Calvin and/or Patricia had a confidential relationship with Mary Ann, which was coupled with other suspicious circumstances.

The second proposed instruction described a burden of proof on undue influence. It proposed to instruct as follows:

> In connection with this claim of undue influence, the burden is on contestants to establish facts which show that a confidential relationship existed between Mary Ann . . . and her son, Calvin . . . , and/or his wife, Patricia . . . , and the existence of suspicious circumstances. If such facts are established, a presumption of undue influence arises and the burden of going forward with the evidence to rebut the presumption then shifts to the proponent[s].
>
> The proponent[s] may rebut this presumption by evidence which shows that there was no undue influence or by evidence which shows that Mary Ann . . . had competent independent advice and that [the will] was her own voluntary act.

The district court declined both instructions. The court explained that the burden of proof always remained on the contestants to show undue influence. Without referring to any presumption of undue influence, the court instead instructed the jury that the burden of proving undue influence was on the contestants. The instruction given by the court stated in pertinent part:

> The contestants . . . claim that [the will] is not the valid Will of Mary Ann . . . because Calvin . . . and/or Pat[ricia] . . . exerted undue influence over Mary Ann . . . .
>
> (2) BURDEN OF PROOF: In connection with contestants' claim, the burden is on the contestants to prove by the greater weight of the evidence each of the following:
>
> (a) That Mary Ann . . . was a person who would be subject to undue influence;
>
> (b) That there was an opportunity to exercise undue influence upon Mary Ann . . . ;
>
> (c) That there was a disposition to exercise undue influence upon Mary Ann . . . ; and

> (d) That [the will] was the result of such undue influence.
>
> (3) EFFECT OF FINDINGS:
>
> (a) If the contestants have not met this burden of proof, your verdict must be that [the will] is the valid Will of Mary Ann . . . .
>
> (b) If the contestants have met this burden of proof, then your verdict must be that [the will] is not the valid Will of Mary Ann . . . .

This instruction was consistent with Nebraska's pattern jury instruction explaining the statement of a claim of undue influence.[11] And the court's instructions defined undue influence using another pattern jury instruction.[12]

[6-10] We first recall several well-settled principles of the law of undue influence. By statute, contestants of a will have the burden of establishing undue influence and carry the ultimate burden of persuasion.[13] Because the specific language will become important, we quote it here: "Contestants of a will have the burden of establishing undue influence . . . . Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."[14] To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.[15] Undue influence sufficient to defeat a will is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's.[16]

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[11] See NJI2d Civ. 16.06.

[12] See NJI2d Civ. 16.07.

[13] See Neb. Rev. Stat. § 30-2431 (Reissue 2008).

[14] *Id.*

[15] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

[16] *Id.*

Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor: his or her life, character, and mental condition.[17] Although the burden of going forward on the issue of undue influence may shift to the proponent of the written instrument, the ultimate burden of proof remains at all times on the party asserting the issue.[18]

[11] The contestants rely on a concept referred to as a "presumption of undue influence." According to statute, a presumption "imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[19]

[12] But nearly 40 years ago, we held that the "presumption of undue influence" was not a true presumption within the meaning of § 27-301.[20] We explained that in connection with undue influence, "presumption" appeared to have been intended to mean a permissible or probable inference.[21] And several of our cases thereafter spoke of an "inference" of undue influence.[22] But occasionally, we have reverted to the former

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[17] *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994).

[18] See *id.*

[19] See Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2008).

[20] See *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977). See, also, *Anderson v. Claussen*, 200 Neb. 74, 262 N.W.2d 438 (1978).

[21] See *McGowan v. McGowan, supra* note 20.

[22] See, *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002) (deed); *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996) (elective share of augmented estate); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994) (will); *Goff v. Weeks, supra* note 17 (life insurance proceeds); *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994) (constructive trust); *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991) (installment contract); *Pawnee County Bank v. Droge*, 226 Neb. 314, 411 N.W.2d 324 (1987) (guaranty); *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986) (will); *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985) (conservatorship); *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983) (deed); *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980) (deed).

nomenclature.[23] Most recently, in *In re Estate of Hedke*,[24] we discussed in detail a "presumption of undue influence" and noted tension concerning the proof necessary to rebut a presumption of undue influence.

But none of these later cases referring to a "presumption" of undue influence involved the instructions to be given to a jury in a will contest. In *In re Estate of Hedke*, we determined that in a will contest tried to the bench, the trial court was clearly wrong in rejecting the contestant's claim of undue influence.[25] Thus, we applied the usual standard of review of a probate court's factual findings.[26] In *In re Estate of Novak*,[27] we reviewed a will contest where a verdict was directed at the close of the contestant's evidence. In that situation, the motion for directed verdict admits the truth of all material and relevant evidence submitted by the contestant, and the contestant is to have it and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the court's granting the motion.[28] Each of the other cases involved an action in equity to set aside a deed. And, of course, equitable actions are tried to the bench.[29]

Although a comment in NJI2d seems to suggest that such an instruction might be given, the cited cases do not support giving one. NJI2d Civ. 16.07 provides the pattern instruction defining undue influence. Under this instruction, one of

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[23] See, *In re Estate of Hedke, supra* note 15 (will); *In re Estate of Novak*, 235 Neb. 939, 458 N.W.2d 221 (1990) (will); *Schaneman v. Schaneman*, 206 Neb. 113, 291 N.W.2d 412 (1980) (deed); *Rule v. Roth*, 199 Neb. 746, 261 N.W.2d 370 (1978) (deed).

[24] *In re Estate of Hedke, supra* note 15.

[25] *Id.*

[26] *Id.* (probate court's factual findings have effect of verdict and will not be set aside unless clearly wrong).

[27] *In re Estate of Novak, supra* note 23.

[28] *Id.*

[29] See *Jacobson v. Shresta*, 288 Neb. 615, 849 N.W.2d 515 (2014).

the comments states, "Further instruction may be necessary in a case that involves a confidential or fiduciary relationship." The comment cites to three cases,[30] but these cases shed little light on instructions to be given the jury. In one case,[31] we recited that a confidential relationship between the testator and a beneficiary does not raise a presumption that the beneficiary exercised undue influence, but that the relationship between the two may be considered along with all of the other facts and circumstances in determining whether undue influence existed. In another case,[32] we merely determined that the evidence was insufficient to justify submitting the issue of undue influence to the jury. And in the last case cited in the comment,[33] we upheld a trial court's refusal to give proffered instructions to the effect that a confidential relationship existed between the testatrix and a beneficiary and that undue influence was largely a matter of inference and facts surrounding the testatrix and would rarely be established by direct proof. We stated that the instructions given by the court adequately covered the matters contained in the proposed instructions and that the relationship between the testatrix and beneficiary may be considered along with all of the other facts and circumstances in the case in determining undue influence.

An earlier case discussing instructing the jury on a presumption of undue influence is likewise of little assistance. In that case,[34] the trial court instructed the jury that a presumption of undue influence arose in the case of a confidential adviser who was a beneficiary. We stated that the

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[30] *Cook v. Ketchmark*, 174 Neb. 222, 117 N.W.2d 375 (1962); *In re Estate of Thompson*, 153 Neb. 375, 44 N.W.2d 814 (1950); *In re Estate of Goist*, 146 Neb. 1, 18 N.W.2d 513 (1945).

[31] *Cook v. Ketchmark, supra* note 30.

[32] *In re Estate of Thompson, supra* note 30.

[33] *In re Estate of Goist, supra* note 30.

[34] *In re Estate of Kajewski*, 134 Neb. 485, 279 N.W. 185 (1938).

court correctly instructed the jury that when a beneficiary assisted in the preparation of the will, there was a presumption that undue influence secured the will. But we explained that because "the presumption is the only evidence of undue influence, and the presumption is not evidence, there is no evidence sufficient to submit the question of undue influence to the jury."[35] Thus, we stated that the matter of undue influence as to a particular beneficiary was erroneously submitted to the jury.

And we note that these earlier cases, including the three cases mentioned in the comment to NJI2d Civ. 16.07, predate the probate code. To the extent any of those cases indicate that a presumption of undue influence would remain after the proponent provided sufficient evidence to meet his or her burden of producing evidence, the statute[36] overrules that notion.

At oral argument, the proponents' counsel asserted that he was unable to find any decision of this court sanctioning a jury instruction regarding a presumption of undue influence. The contestants did not cite to any such decision. And we are persuaded that sound reasons dictate against using the language of presumption in charging the jury in a will contest.

Where an appellate court reviews a bench trial or a ruling granting a directed verdict, it makes little difference whether the court speaks of a presumption or a permissible or probable inference. As we said in *In re Estate of Hedke*, one does not exert undue influence in a crowd.[37] It is usually surrounded by all possible secrecy; it is usually difficult to prove by direct evidence; and it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition. In determining whether undue influence existed, a court must also consider whether the evidence

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[35] *Id.* at 493, 279 N.W. at 189.

[36] See § 30-2431.

[37] *In re Estate of Hedke, supra* note 15.

shows that a person inclined to exert improper control over the testator had the opportunity to do so.[38] It was in that context that we referred to a presumption of undue influence arising from a contestant's evidence of a confidential or fiduciary relationship, coupled with other suspicious circumstances. And where a court is considering whether the evidence was sufficient to sustain a contestant's burden of producing evidence, or whether the burden of going forward with evidence has shifted to a proponent, it may be that using the terminology of presumption causes no harm.

But where a contestant has met the burden of going forward and a proponent has met the burden of producing contrary evidence in response, the language of presumption becomes unimportant and potentially misleading. An instruction that a "presumption" of undue influence exists would conflict with the statutory burden of persuasion that must be satisfied by the contestant. And it could easily be seen by a jury as placing the judge's imprimatur on the contestant's claim.

We reaffirm our prior holding from *McGowan v. McGowan*,[39] and declare that the concept referred to as a "presumption of undue influence" in will contests is not a true presumption. We discourage continued use of this terminology, particularly in a matter tried to a jury.

[13,14] A trial court should focus instead on the evidence presented. If a contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances, the contestant has introduced evidence sufficient to justify an inference of undue influence.[40] In other words, that evidence is sufficient to sustain the contestant's prima facie case of undue influence. The inference of undue influence may be rebutted by proof that the testator had competent

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[38] *Id.*

[39] *McGowan v. McGowan, supra* note 20.

[40] See *In re Estate of Novak, supra* note 23.

independent advice and that the will was his or her own voluntary act.[41] Throughout the proceeding, the statute places the ultimate burden of persuasion on the contestant.

[15] And a "tie" is not enough to sustain a contestant's burden of persuasion. The party seeking to establish such influence has not met his or her burden of proof if all of the evidence is circumstantial and the inferences to be drawn therefrom are equally consistent with the hypothesis that undue influence was not exercised and the hypothesis that such influence was exercised.[42]

[16] The district court did not err in refusing the contestants' proposed instructions, because there is no true presumption of undue influence where both the contestant and the proponent have met their respective burdens of production of evidence. The contestants did not assign error to the court's submission of the factual issue to the jury. Rather, they argue that the jury should have been instructed in the language of presumption. We disagree. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[43] At the time of submission of the issue to the jury, the court had determined that each side had produced sufficient evidence, if believed, to sustain its respective burden of going forward. Because the contestants' proposed instructions referred to a "presumption of undue influence" and at that stage, there was no such presumption, their tendered instructions were not a correct statement of the law and could mislead the jury.

[17] The jury instructions as a whole correctly charged the jury regarding undue influence. Jury instructions do not

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[41] *Id.*

[42] See *Goff v. Weeks, supra* note 17.

[43] *Hike v. State, supra* note 8.

constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[44] In instructing the jury as to direct and circumstantial evidence, the district court informed the jury that "[c]ircumstantial evidence is evidence of one or more facts from which another fact can logically be inferred" and that "[a] fact may be proved by either direct evidence or circumstantial evidence or both." As part of the instruction on the burden of proof, the court advised the jury that "[w]here two inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, a party having the burden of proof on an issue may not meet that burden by relying solely on the inference favoring that party." And with regard to undue influence, the court provided the jury with the correct definition and with the correct elements that the contestants had the ultimate burden to prove. The court did not err in instructing the jury.

Our opinion should not be interpreted to mean that it would never be appropriate to include an instruction regarding a permissible inference in a will contest involving undue influence. But no such instruction was requested in this case, and we decline to expound on a hypothetical situation.

Although our reasoning differs somewhat from that of the Court of Appeals, we affirm its determination that the district court did not err in refusing to give the contestants' tendered jury instructions.

(b) Jury Question on Burden of Proof

The contestants also argue that the district court erred by refusing to further instruct the jury on the burden of proof. During deliberation, the jury asked the court to explain the difference between "[g]reater weight of the evidence" and

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[44] *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

"shadow of doubt." The court merely referred the jury to instruction No. 7, which defined the burden of proof primarily using the pattern instruction.[45]

[18] The Court of Appeals determined that this instruction was a correct statement of the law. On further review, the contestants do not quarrel with this assessment. And the general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.[46]

The contestants do not dispute that the district court's action is reviewed for abuse of discretion. They argue that the jury's question showed its confusion with regard to the meaning of the instruction and that the court should have "responded with a simple 'no' or with some explanation of the difference between civil and criminal burdens of proof."[47]

[19] The trial judge is in the best position to sense whether the jury is able to proceed with its deliberations and has considerable discretion in determining how to respond to communications indicating that the jury is experiencing confusion.[48] None of the instructions referred to "shadow of doubt." By directing the jury back to the correct burden of proof, the district court declined to inject law that did not pertain to the case. And the Court of Appeals correctly held that in so doing, the district court did not abuse its discretion.

2. Video

The district court received into evidence the video of Mary Ann's execution of her 2001 will but instructed the jury to disregard the specific questions asked by Mary Ann's attorney regarding influence and whether Calvin influenced Mary Ann. The court further instructed the jury that those questions and answers could not be considered as evidence on the

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[45] See NJI2d 2.12A (defining "greater weight of the evidence").

[46] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[47] Brief for appellants on petition for further review at 50.

[48] See *U.S. v. Parker*, 903 F.2d 91 (2d Cir. 1990).

issue of undue influence. The jury viewed the video during the trial, and the video was sent into the jury room during deliberation.

(a) Admission of Video

The contestants argue that the video should not have been admitted into evidence for three reasons. First, they contend that it was inadmissible hearsay. Second, they argue that the district court abused its discretion in failing to exclude the video under § 27-403, which, they claim, provided two bases for its exclusion: that the video's probative value was substantially outweighed by the danger of unfair prejudice and that it was cumulative. Finally, they argue that admission of the video violated their right of cross-examination.

(i) Hearsay

We find no merit to the contestants' hearsay objection. The district court excluded the questions and answers regarding undue influence. As a result, the video's content largely fell outside the definition of hearsay.[49] Proof of Mary Ann's conduct, demeanor, and statements not admitted for the truth of what she said, was not hearsay. And contrary to the contestants' argument, the "state of mind" exception applied to her statements regarding her intentions for the disposition of her property.[50] Because the portions of the video admitted by the district court communicated Mary Ann's state of mind at the time, the Court of Appeals correctly rejected the contestants' hearsay argument.

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[49] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008) (hearsay is statement, other than one made by declarant while testifying at trial or hearing, offered in evidence to prove truth of matter asserted).

[50] § 27-803(2) (excluding from hearsay rule "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . , but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will").

(ii) § 27-403

We agree with the Court of Appeals that the district court did not abuse its discretion under § 27-403.[51] The contestants raise the same two arguments here.

[20] In an effort to establish unfair prejudice, the contestants argue that the district court could not "'unring the bell'" regarding the questions and Mary Ann's answers on undue influence.[52] But the court directed the jury to disregard those questions and answers. It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.[53] The contestants have failed to point to anything in the record showing that the instructions were disregarded. They also argue that Mary Ann's attorney's questions were leading, but they fail to explain how the questions were unfairly prejudicial.

The contestants also argue that the video was cumulative. At the time the video was offered into evidence, the 2001 will had already been received into evidence and Mary Ann's attorney at the time of its execution had testified regarding her testamentary capacity and reasoning. We digress to observe that the admission of a video recording showing the execution of a will is not novel in Nebraska[54] or elsewhere.[55]

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[51] § 27-403 ("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").

[52] Brief for appellants on petition for further review at 47.

[53] *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004).

[54] See *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989).

[55] See, e.g., *Patterson-Fowlkes v. Chancey*, 291 Ga. 601, 732 S.E.2d 252 (2012); *Corley v. Munro*, 631 So. 2d 708 (La. App. 1994); *Geduldig v. Posner*, 129 Md. App. 490, 743 A.2d 247 (1999); *Matter of Burack*, 201 A.D.2d 561, 607 N.Y.S.2d 711 (1994); *Matter of Estate of Seegers*, 733 P.2d 418 (Okla. App. 1986).

[21] Although the action focused on the 2011 will, the proponents offered evidence of the 2001 will in order to establish a consistent estate plan. We have stated that a prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property.[56] Here, both the 2001 will and the 2011 will left the entire farm to Calvin. If the contestants were not challenging the validity of the 2001 will, their argument regarding the cumulative nature of the video might have merit. But when the video was offered and received, both wills were under attack based upon lack of testamentary capacity and undue influence. As the Court of Appeals observed, "the jury had not observed nor heard, firsthand, from Mary Ann."[57] The video provided the jury with a direct opportunity to assess Mary Ann's testamentary capacity. And after the directed verdict on testamentary capacity, the record shows no attempt to have the video stricken.

(iii) Cross-Examination

[22] Finally, the contestants argue that they had no opportunity to cross-examine Mary Ann. This is a civil case, and the Sixth Amendment right to confront witnesses and its Nebraska equivalent do not apply.[58] But the contestants appear to assert a broad entitlement to cross-examination rather than a constitutional right. The principles underlying

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[56] See *In re Estate of Flider*, 213 Neb. 153, 328 N.W.2d 197 (1982).

[57] *In re Estate of Clinger, supra* note 1, 22 Neb. App. at 703, 860 N.W.2d at 209.

[58] See *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

the right to confront witnesses as part of the factfinding process are also applicable in civil cases. We recognize that Nebraska's evidentiary rules contemplate cross-examination of witnesses in all cases.[59]

[23,24] Closely related to the right of confrontation or cross-examination is the hearsay rule. "[I]t may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values . . . ."[60] The idea behind both concepts is that the witness should be made available at trial so that he or she may be subjected to cross-examination under oath. When a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability.[61] Hearsay that falls within a firmly rooted hearsay exception is presumptively reliable and trustworthy.[62] We recognize that this principle cannot be applied in a criminal case, because it would violate the current understanding of the Confrontation Clause.[63] But the principle remains valid in the context of a civil case.

Here, there was no infringement of the contestants' broad right to cross-examination. The contestants were able to cross-examine the individual who supervised the 2001 will execution—and who was the person responsible for making and preserving the video. And while neither the video itself nor Mary Ann could be cross-examined at trial, our rules of evidence recognize such impossibilities and provide numerous

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[59] See Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 2008).

[60] *California v. Green*, 399 U.S. 149, 155, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

[61] *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007), citing *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *overruled, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[62] See *State v. Sheets, supra* note 61.

[63] See *Crawford v. Washington, supra* note 61.

exceptions to the hearsay rule.[64] As we determined above, the video's content was admissible because it either was not hearsay or fell within an exception to the hearsay rule. To the extent it fell within a firmly rooted hearsay exception, there was sufficient indicia of reliability such that the contestants' right to cross-examination was not violated.

(b) Use of Video in Jury Deliberations

Finally, the contestants argue that the Court of Appeals erred in affirming the district court's decision to allow the jury access to the video during its deliberations. The Court of Appeals ultimately founded its decision on our opinion in *State v. Vandever*.[65]

In *Vandever*, we interpreted the meaning of the word "testimony" used in the statute[66] permitting a court to allow a jury to rehear testimony during deliberation. We determined that it encompassed evidence authorized as "testimony" under another statute,[67] which enumerated the four modes of taking the "testimony of witnesses."[68] Thus, we held that a jury's request to rehear an 8-minute investigator interview recording was not a request relating to "testimony" as used in the first statute.

But the Court of Appeals first acknowledged that there was no indication in the record that the jury had the necessary equipment to replay the video and that the record did not show that the contestants ever objected to the delivery of the video to the jury room with the other exhibits. Neither the

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[64] See § 27-803 and Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 2008).

[65] *State v. Vandever, supra* note 5.

[66] See Neb. Rev. Stat. § 25-1116 (Reissue 2008).

[67] Neb. Rev. Stat. § 25-1240 (Reissue 2008).

[68] *Id.* (affidavit, deposition, oral examination, and "videotape of an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law").

contestants nor the proponents dispute the state of the record. Thus, the record does not establish either that the contestants objected or that the jury replayed the video.

[25-27] Two principles of appellate review preclude us from reaching this assignment. We have often stated that a litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.[69] And an equally fundamental principle is that error without prejudice provides no ground for relief on appeal.[70] On the state of the record, we cannot reach this issue without indulging in pure speculation beyond the record. Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.[71]

VI. CONCLUSION

On further review, we conclude that the Court of Appeals did not err in affirming the district court's

- refusal of the contestants' proposed instructions regarding a "presumption of undue influence";
- refusal, in response to a jury question, to further instruct the jury regarding the burden of proof; and
- admission into evidence of the video of the 2001 will execution subject to an instruction to disregard a portion of the exhibit.

We also determine that the contestants did not preserve an objection to, or show prejudicial error from, the district court's decision to allow the jury access to the video during its deliberations. We therefore affirm the decision of the Court of Appeals.

Affirmed.

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[69] *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013).

[70] See *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015).

[71] *Id.*

State of Nebraska, appellee, v. Donald L. Sidzyik, appellant.

871 N.W.2d 803

Filed December 11, 2015. No. S-14-1130.

1. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of counsel in a postconviction proceeding usually presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** For "mixed question" ineffective assistance claims, an appellate court reviews the lower court's factual findings for clear error but independently determines whether those facts show counsel's performance was deficient and prejudiced the defendant.
3. **Plea Bargains: Sentences.** If the State breaches its promise to remain silent at a sentencing hearing, the defendant has two options: (1) withdraw the plea or (2) demand specific performance of the plea agreement by way of sentencing before a different judge.
4. **Effectiveness of Counsel: Proof.** 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.
5. ____: ____. To demonstrate 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.
6. **Effectiveness of Counsel.** A court judges the challenged conduct of counsel on the facts of the particular case, viewed at the time of counsel's conduct.
7. ____. A court will not second-guess reasonable strategic decisions made by counsel.
8. **Effectiveness of Counsel: Proof.** To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

9. **Words and Phrases.** A reasonable probability is one sufficient to undermine confidence in the outcome.
10. **Plea Bargains: Sentences: Effectiveness of Counsel.** To show prejudice from counsel's failure to object to the State's breach of a promise to remain silent at a sentencing hearing, the defendant must show that counsel's failure to object prevented the defendant from protecting the bargain the defendant struck with the State, thereby making the proceedings fundamentally unfair.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Reversed and remanded with directions.

Jason E. Troia, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Connolly, J.

SUMMARY

Donald L. Sidzyik pleaded no contest to second degree sexual assault under a plea agreement. On direct appeal, he argued that his trial counsel was ineffective for failing to object to statements made by the prosecutor at the sentencing hearing. We concluded that the State had materially breached the plea agreement, but we could not resolve Sidzyik's ineffectiveness claim on direct appeal because the record did not show if his trial counsel had a strategic reason for remaining silent.[1] Sidzyik later moved for postconviction relief. The postconviction court overruled the motion after an evidentiary hearing because it did not think that the State's breach of the plea agreement was significant. Sidzyik appeals. We conclude that Sidzyik received ineffective assistance of counsel when his trial counsel failed to object to the State's material

[1] See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

breach of the plea agreement. We reverse, and remand with directions.

BACKGROUND

The State charged Sidzyik with first degree sexual assault, a Class II felony. Under a plea agreement, the State amended the charge to second degree sexual assault, a Class III felony. The prosecutor agreed to "stand silent" as part of the agreement. Sidzyik pleaded no contest to the amended charge.

At the sentencing hearing, a different prosecutor endorsed the recommendation in the presentence investigation report. The report "in no uncertain terms recommended that Sidzyik receive a substantial period of incarceration."[2] Sidzyik's trial counsel did not object to the prosecutor's comments. The court sentenced him to 18 to 20 years' imprisonment.

Represented by new counsel, Sidzyik appealed. He assigned that his trial counsel was ineffective for failing to object to the State's breach of the plea agreement. We concluded that the State had materially breached the plea agreement by not remaining silent at the sentencing hearing.[3] Even though Sidzyik's trial counsel had not objected, we held out "the possibility, albeit rare," that counsel said nothing in order to gain a tactical advantage.[4] The record did not show if Sidzyik's trial counsel had a strategic reason for not objecting. So, we could not resolve the ineffectiveness claim on direct appeal.

In 2011, Sidzyik moved for postconviction relief. He alleged that his trial counsel was ineffective for failing to object to the State's breach of the plea agreement. Sidzyik asked the court to allow him to withdraw his plea or have a court sentence him in a proceeding not tainted by the State's breach.

The postconviction court held an evidentiary hearing and received the deposition of Sidzyik's trial counsel. Counsel testified that he did not object because (1) he did not think

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[2] *Id.* at 313, 795 N.W.2d at 288.

[3] *Id.*

[4] *Id.* at 314, 795 N.W.2d at 288.

the State had breached the plea agreement and (2) he thought Sidzyik's only option was to withdraw his plea:

> I didn't object for a couple of reasons. One, all [the prosecutor] said was they would rely on the presentence investigation, and I didn't feel that was a breach of the — of our plea agreement. The second one was probably — well, not probably. Was a strategy decision that had I objected and moved to withdraw the plea, then we would have been stuck then going to bat and going to trial on a Class II felony as opposed to the negotiated plea agreement that I was able to achieve for . . . Sidzyik which was an admission to a Class III felony which potentially saved him a much more lengthy sentence.

Counsel stated that he did not know Sidzyik could also demand specific performance of the agreement. He testified that it was "very common" for the prosecutor to submit on the presentence investigation report.

The court also received a joint stipulation. The parties agreed that Sidzyik had relied on the State's promise to stand silent and that Sidzyik's trial counsel had not discussed his options after the State breached the agreement. They further stipulated that "[h]ad Sidzyik known of his option of choosing to withdraw his plea or ask for specific performance of a sentencing with a different judge, Sidzyik would have requested specific performance with a different judge."

The court overruled Sidzyik's motion for postconviction relief. It emphasized that Sidzyik's trial counsel did not think the State had breached the plea agreement and that Sidzyik himself had not told his counsel the State had breached the agreement. The court concluded that the prosecutor's comments had not made the proceeding "'fundamentally unfair'" and that an objection would have had "no merit."

Sidzyik appeals.

ASSIGNMENT OF ERROR

Sidzyik assigns that the court erred by overruling his motion for postconviction relief.

STANDARD OF REVIEW

[1,2] A claim of ineffective assistance of counsel in a postconviction proceeding usually presents a mixed question of law and fact.[5] For "mixed question" ineffective assistance claims, we review the lower court's factual findings for clear error but independently determine whether those facts show counsel's performance was deficient and prejudiced the defendant.[6]

ANALYSIS

[3] Because the postconviction court's comment that a timely objection by Sidzyik's trial counsel would have had "no merit," we start by restating the underlying rules. The State's failure to remain silent in violation of a plea agreement is a material breach of the agreement.[7] If the State breaches the agreement, the defendant has two options: (1) withdraw the plea or (2) demand specific performance of the plea agreement by way of sentencing before a different judge.[8] Relief is mandatory on a timely objection.[9]

[4] The question here is not if the State materially breached its plea agreement with Sidzyik. It did. Nor is the question whether Sidzyik could have withdrawn his plea or obtained specific performance on a timely objection. He could have. We answered these questions on Sidzyik's direct appeal. The issue now is whether his trial counsel was ineffective for failing to object to the State's breach. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[10] the defendant must show that his or her counsel's performance

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[5] See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[6] *Id.*

[7] *State v. Sidzyik, supra* note 1.

[8] *Id.*

[9] See *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

[10] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

was deficient and that this deficient performance actually prejudiced the defendant's defense.[11] We will address the two prongs of this test, deficient performance and prejudice, in that order.

Deficient Performance

[5-7] To demonstrate 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.[12] A court judges the challenged conduct of counsel on the facts of the particular case, viewed at the time of counsel's conduct.[13] The function of counsel is to make the adversarial testing process work in the defendant's case, but we will not second-guess reasonable strategic decisions.[14]

We have said that it would be a rare circumstance if a lawyer with ordinary training and skill in criminal law would not inform the court of the State's material breach of a plea agreement.[15] We afford counsel due deference to form trial strategy and tactics, but it is hard to imagine what possible advantage a defendant could gain from silence.[16] Only by pointing out the breach can counsel protect the benefits the defendant bargained for in exchange for his or her plea.[17]

We conclude that this is not one of those rare cases in which not objecting to the State's material breach was a sound strategic choice. The State argues that trial counsel's silence was a reasonable trial strategy, because counsel thought that (1) the State had not breached the plea agreement and (2) Sidzyik's only option upon a breach would be to withdraw his plea.

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[11] *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

[12] *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015).

[13] See *id.*

[14] *Id.*

[15] *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

[16] *Id.*

[17] *Id.*

Counsel was mistaken on both counts. We realize that even seasoned criminal attorneys, like Sidzyik's trial counsel, are not walking repositories of the entire body of the criminal law. But trial strategy based on a misunderstanding of the law is not reasonable. So, the performance of Sidzyik's trial counsel was deficient.

Prejudice

[8,9] To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[18] A reasonable probability is one sufficient to undermine confidence in the outcome.[19] In addressing the prejudice requirement in *Strickland*, we ask whether counsel's deficient performance made the result of the trial unreliable or the proceeding fundamentally unfair.[20]

[10] The State argues that Sidzyik was not prejudiced, because "the main focus of the plea negotiation was on the reduction of the charge" and the State's promise to stand silent was not an "integral part of the plea agreement."[21] To the extent the State argues that the breach was not material, we note again that we held on Sidzyik's direct appeal that it was. Furthermore, Sidzyik does not have to show that he would have received a lesser punishment to show prejudice.[22] Instead, the focus is whether counsel's silence sacrificed Sidzyik's ability to protect the bargain he struck with the State, thereby making the proceedings fundamentally unfair.[23]

We conclude that trial counsel's failure to object to the State's breach of the plea agreement prejudiced Sidzyik. Had

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[18] See *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[19] See *id.*

[20] *Id.*

[21] Brief for appellee at 9.

[22] See *State v. Gonzalez-Faguaga, supra* note 15.

[23] *Id.*

trial counsel timely objected, the outcome would have been different, because Sidzyik would have had the option to withdraw his plea or seek resentencing before a different judge.[24] The loss of this choice made the proceeding fundamentally unfair.[25]

CONCLUSION

Sidzyik received ineffective assistance of counsel because his attorney failed to object to the State's material breach of the plea agreement. Had his counsel objected, Sidzyik would have had the choice to withdraw his plea or demand that the court sentence him in a proceeding not tainted by the breach. We reverse, and remand with directions to give Sidzyik the choice to either (1) withdraw his no contest plea or (2) be resentenced for his second degree sexual assault conviction by a judge other than the judge who imposed the original sentence and the judge who overruled his motion for postconviction relief.

Reversed and remanded with directions.

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[24] See *State v. Sidzyik, supra* note 1.

[25] See *State v. Gonzalez-Faguaga, supra* note 15.

Cassel, J., concurring.

This court has never considered, and this case does not present, a situation where a trial court, upon the occurrence of a prosecutor's breach of a plea-bargained promise to remain silent at sentencing, promptly and decisively strikes the prosecutor's offending comments from the record, admonishes the prosecutor, expressly states that the comments will be entirely disregarded, and affirmatively offers the defendant with a choice of (1) withdrawing his or her plea, (2) requesting sentencing before a different judge, or (3) going forward with sentencing before the current judge.

Stacy, J., joins in this concurrence.

Eric M. Zornes, as Trustee of the Eric M. Zornes Revocable Trust, appellant and cross-appellee, v. Julia A. Zornes, as Trustee of the Julia A. Zornes Revocable Trust, appellee and cross-appellant.

872 N.W.2d 571

Filed December 18, 2015. No. S-14-775.

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. **Summary Judgment.** When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.
3. **Summary Judgment: Appeal and Error.** 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.
4. **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.
5. **Uniform Commercial Code: Negotiable Instruments.** Under the Uniform Commercial Code, when a note is payable to two or more persons not alternatively, i.e., joined by "and" rather than "or," they may only enforce or receive payment jointly.
6. **Accord and Satisfaction.** To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
7. **Partition: Estates.** 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.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded for further proceedings.

James B. Luers and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Jane F. Langan Mach and Sheila A. Bentzen, of Rembolt Ludtke, L.L.P., for appellee.

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

Heavican, C.J.

INTRODUCTION

In this conversion suit, Eric M. Zornes, as trustee for his revocable trust, appeals the district court's summary judgment in favor of his ex-wife, Julia A. Zornes, as trustee of her revocable trust. We also review the district court's partition of two promissory notes. We reverse, and remand for further proceedings.

BACKGROUND

In 2006, Eric won a lottery with a group of coworkers who had pooled their money. With their new wealth, Eric and his wife, Julia, commenced a gifting plan to three family members: Julia's brothers, Andy Wolfe and Jason Wolfe, and Jason Reed, the husband of Eric's niece. To avoid taxes, these gifts were structured as loans with annual payment forgiveness. Each borrower made a promissory note for his loan, payable to Julia's and Eric's trusts jointly.

Andy's note was secured by a deed of trust for real property in Lincoln, Nebraska. Deciding to make a change, Andy sold his Lincoln property in July 2009 and purchased a new home with the sale proceeds. Julia had discussed the prospect of the sale with Eric and told him the new home would not cost Julia and Eric "any more or less money." In response, Eric told Julia she was "going to do what she was going to do."

Later that month, after the sale, Andy wired full payment on the note to Julia's individual savings account. Without informing Eric, Julia re-lent all but $22,154.66 of the proceeds to Andy's wife, Sara Whitney, for the purchase of the new home. Whitney made two notes for the loan, payable only to Julia's trust. Julia retained the surplus proceeds. There is some dispute as to whether Eric had knowledge of these transactions at that time.

A couple of weeks after Andy and Whitney paid the old note and made the new notes, Eric and Julia legally separated. In October 2009, Eric filed for divorce. During divorce settlement negotiations, Eric's attorney made reference several times to the promissory notes for Andy, Jason Wolfe, and Jason Reed. However, the final settlement agreement reached in August 2011 did not mention the promissory notes or the proceeds. Nothing in the record indicates the parties ever discussed the Whitney notes.

A year later, in August 2012, Julia's attorney sent a letter to Eric's attorney referencing "recent discussions" between them. The letter stated that Andy's note had been paid in full to Julia and that the proceeds were loaned to Whitney. In response, on October 19, one of Eric's attorneys sent a letter to Julia's attorney, demanding Eric's alleged share of the note proceeds.

Eric claims that he did not learn that Andy's house had been sold until March 2010. He further alleges he discovered sometime later, presumably around the time of the August 2012 letter, that Julia had retained the proceeds of the sale and lent money to Whitney. But Julia argues that Eric consented to her handling of the proceeds. Julia also asserts several affirmative defenses, including, as relevant to this appeal, accord and satisfaction.

Eric filed his complaint in this action on October 30, 2012, alleging Julia had converted the proceeds of Andy's note. Julia counterclaimed for partition of the Jason Wolfe and Jason Reed notes. The parties each filed motions for summary

judgment and motions for expenses, costs, and attorney fees. The district court granted Julia's motion for summary judgment. It found that even if Julia had converted the proceeds, the settlement agreement operated as an accord and satisfaction. The district court also ordered partition of the promissory notes for Jason Wolfe's and Jason Reed's loans by granting each party a one-half divided interest in proceeds from each. The district court denied both Julia's and Eric's motions for expenses, costs, and attorney fees.

Eric appeals, and Julia cross-appeals.

ASSIGNMENTS OF ERROR

Eric assigns, consolidated and reordered, that the lower court erred by (1) denying his motion for summary judgment on his conversion claim and (2) granting Julia's motion for summary judgment on the ground of accord and satisfaction.

In her cross-appeal, Julia assigns the lower court erred in (1) the method by which it partitioned the Jason Wolfe and Jason Reed notes and (2) denying her motion for expenses, costs, and attorney fees.

STANDARD OF REVIEW

[1-3] 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] When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.[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

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[1] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[2] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

party the benefit of all reasonable inferences deducible from the evidence.[3]

[4] A partition action is an action in equity and is reviewable by an appellate court de novo on the record.[4]

ANALYSIS

This case presents four primary issues. The first two issues are interrelated: whether the undisputed facts establish that Julia committed conversion and whether they also establish accord and satisfaction. We must next determine the proper method to partition two promissory notes. Finally, Julia asks us to review the district court's denial of expenses, costs, and fees. Because we find that there exist genuine issues of material fact as to both motions, as well as to the value of the notes, we reverse, and remand.

Eric's Claim for Conversion.

In his first assignment of error, Eric argues the undisputed facts show that Julia committed conversion. We disagree.

Section 3-420 of the Uniform Commercial Code (UCC) states that the common law of conversion applies to negotiable instruments and also creates a statutory cause of action when, in part, "a bank makes or obtains payment [on an] instrument for a person not entitled to enforce the instrument or receive payment."[5] When a provision of the UCC applies, a litigant cannot rely on common-law causes of action.[6]

[5] The parties assume that the common law applies to suits between copayees; however, we note that § 3-420 could be construed to apply here. Under the UCC, when a note is payable to two or more persons not alternatively, i.e., joined by "and" rather than "or," they may only enforce or receive

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[3] *Rent-A-Roofer v. Farm Bureau Prop. & Cas. Ins. Co.*, 291 Neb. 786, 869 N.W.2d 99 (2015).

[4] *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

[5] Neb. U.C.C. § 3-420(a) (Reissue 2001).

[6] *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

payment jointly.[7] Andy's note was payable to both trusts not alternatively. Therefore, Julia, alone, was not entitled to enforce the note, potentially bringing this case into the ambit of § 3-420.

But we note that the factual disputes discussed below would be material to a claim under either the UCC or common law. Therefore, our selection of conversion law in this case would not affect our decision and we need not determine which rule applies.

Julia argues she did not commit conversion because she had Eric's consent to collect and relend the proceeds. Reviewing the denial of Eric's motion for summary judgment, if a reasonable jury could find that Julia acted with Eric's consent, then the district court did not err.[8]

To prove consent, Julia argued three central facts. First, Julia presented evidence that starting in July 2009, Eric knew Andy was planning to sell his house, and that the proceeds would be used to purchase a new home. Next, Julia relies upon a conversation in which she informed Eric of these plans and told him the new home would not cost "any more or less money" than was already owed on Andy's note. Eric responded that Julia was "going to do what she was going to do." Finally, Julia presented e-mail messages between bank and title company representatives that could infer Eric knew about and consented to the wire transfer of proceeds to Julia's individual savings account.

Eric denies he was aware of the wire transfer and claims the conversation Julia relies upon is highly ambiguous. Eric argues that his apparent consent to Andy and Whitney's purchase of a new home for "any more or less money" hardly proves he consented to giving Julia his entire interest in the proceeds from Andy's note. Further, Julia admits that she never asked Eric's permission for the wire transfer and never informed him of the new notes to Whitney.

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[7] Neb. U.C.C. § 3-110(d) and comment 4 (Reissue 2001).

[8] See *Hughes v. School Dist. of Aurora, supra* note 2.

Despite the weaknesses in Julia's defense as illustrated by Eric, a reasonable jury could find that Julia acted with Eric's consent. Thus, a genuine issue of material fact precludes Eric's motion for summary judgment and his first assignment of error is without merit.

Julia's Defenses.

In his second assignment of error, Eric argues Julia was not entitled to summary judgment on the theory that the settlement agreement constituted an accord and satisfaction. We agree.

[6] To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.[9] Whether Eric should have known that Julia made concessions in the divorce settlement, intending them to satisfy Eric's claim for proceeds, is a question of fact.[10] A meeting of the minds is essential, and therefore, there is no accord and satisfaction if one party is not yet aware of the later-disputed matter.[11]

The district court found, first, that the parties had a bona fide dispute at the time of settlement concerning the disposition of Eric's half of the note proceeds. Second, the district court found that Julia had made concessions in settlement negotiations in order to reach an agreement and that the parties had done so in satisfaction of Eric's claim of right to the proceeds. Finally, the district court found that Eric had accepted the settlement agreement as substitute performance, which was evidenced by his hearing testimony.

Each of the district court's findings relies upon an inference that Eric knew about the proceeds. This inference would have been permissible had there been no reasonably credible evidence to the contrary. However, summary judgment

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[9] *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001).

[10] See *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994).

[11] See *Mahler v. Bellis*, 231 Neb. 161, 435 N.W.2d 661 (1989).

proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[12]

In this case, there was a genuine issue of material fact as to whether Eric knew about the proceeds. There was evidence to support a conclusion that Eric was unaware of Julia's actions until after the settlement agreement was executed. For example, letters from Eric's divorce attorney during negotiations consistently listed the original loan to Andy as marital property, suggesting that Eric believed his trust still had an interest in the note to Andy and that the note had not yet been satisfied. There could be no meeting of the minds, and no agreement for substitute performance in satisfaction of that dispute, if Eric did not yet know that the note had been paid off.

Julia alternatively claims that the dispute was over whether the notes were marital property as opposed to gifts to the loan recipients. However, the record shows that while she considered the loans to be gifts, Julia also knew the parties could cease the gifting plan at any time. Thus, a finder of fact could reasonably determine there was no bona fide dispute as to the proper classification of the notes as marital property.

For these reasons, summary judgment on the ground of accord and satisfaction was improper.

Julia pleaded several additional defense theories before the district court. These included: failure to state a claim upon which relief can be granted, laches, estoppel, res judicata, collateral estoppel, waiver, and ratification. The district court did not pass upon any of these defenses. Julia raised the defenses of waiver and ratification in the argument section of her appellate brief. We find that summary judgment on these theories is precluded by the same genuine issues of material fact as pertain to accord and satisfaction. Further, we do not find that any of the other defenses Julia pleaded below warrant summary judgment in her favor.

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[12] *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014).

Therefore, Julia was not entitled to summary judgment and Eric's second assignment of error has merit. We reverse, and remand for further proceedings.

Partition of Remaining Notes.

In Julia's first assignment of error on cross-appeal, she asserts the district court erred by partitioning the Jason Wolfe and Jason Reed notes in one-half interests of each to the parties.

[7] 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.[13] This court has twice applied the law of partition to personal property, including one case involving promissory notes.[14]

Julia requests that this court grant her the entire Jason Wolfe note and grant the Jason Reed note to Eric. She argues that splitting each note as the district court did is legally ineffective, because the notes still require Julia and Eric to act jointly as holder under § 3-110.

Eric contends that the district court partitioned the notes properly. He claims that although the Jason Reed note has a greater face value, other factors render the Jason Wolfe note more valuable.

We find merit in both arguments. Because the district court did not order any assignments of interest when it partitioned the notes, it actually preserved joint management under § 3-110. However, if there truly are significant differences in value between the two notes, Julia's proposal might not be equitable.

Thus, upon remand, the parties shall assign their interests in the notes so that Julia retains complete interest in the Jason Wolfe note and Eric retains complete interest in the

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[13] *Channer v. Cumming, supra* note 4.

[14] *Hoover v. Haller*, 146 Neb. 697, 21 N.W.2d 450 (1946); *Riley v. Whittier*, 100 Neb. 107, 158 N.W. 446 (1916).

Jason Reed note so that the parties can independently manage the notes made by their respective family members. We also direct the trial court to determine the values of each note, taking into consideration any relevant factors such as collateral and financing terms. The district court shall order partition with an equalization payment as necessary.

Attorney Fees and Costs.

In Julia's second assignment of error, she argues the district court should have granted her motion for expenses, costs, and attorney fees. The district court denied Julia's motion without explanation.

Julia claims that a provision of the Uniform Trust Code authorizes the court to award costs and fees, because this is "a judicial proceeding involving the administration of a trust."[15] Eric denies that the Uniform Trust Code applies. We note, however, that the applicability of this section is irrelevant, because the code merely grants courts discretion to award costs and fees. The record does not indicate the district court abused its discretion, particularly in light of our decision to remand the cause for further proceedings. Therefore, Julia's second assignment of error is without merit.

CONCLUSION

We reverse the summary judgment and remand the cause for further proceedings not inconsistent with this opinion.

Reversed and remanded for further proceedings.

Stacy, J., not participating.

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[15] See Neb. Rev. Stat. § 30-3893 (Reissue 2008).

Manuela Domingo Gaspar Gonzalez, Personal Representative of the Estate of Efrain Ramos-Domingo, deceased, appellant, v. Union Pacific Railroad Company, appellee.

872 N.W.2d 579

Filed December 18, 2015. No. S-14-986.

1. **Summary Judgment: Appeal and Error.** 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 such party the benefit of all reasonable inferences deducible from the evidence.
2. **Negligence: Proof.** To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought.
3. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show 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.
4. ____. On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists.
5. **Negligence: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.
6. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his

or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.

7. **Actions: Negligence.** Nebraska's comparative negligence law, Neb. Rev. Stat. §§ 25-21,185 to 25-21,185.12 (Reissue 2008), applies only to civil actions in which contributory negligence is a defense.
8. **Negligence: Liability.** An important factor to be considered in apportioning fault is the extent to which each person's risk-creating conduct failed to meet the applicable legal standard.
9. **Negligence: Minors.** A child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances; the degree of care required increases when an actor is dealing with a dangerous activity.
10. **Trial: Negligence: Evidence.** Where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. Only where the evidence and the reasonable inferences therefrom are such that a reasonable person could reach only one conclusion, that the plaintiff's negligence equaled or exceeded the defendant's, does the apportionment of negligence become a question of law for the court.

Appeal from the District Court for Colfax County: Mary C. Gilbride, Judge. Reversed and remanded for further proceedings.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., and Horacio J. Wheelock, of Law Office of Horacio Wheelock, for appellant.

Mark E. Novotny and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, and Cassel, JJ.

Wright, J.

NATURE OF CASE

On July 27, 2005, 13-year-old Efrain Ramos-Domingo (Efrain) was struck and killed by a Union Pacific Railroad

Company (Union Pacific) train in Schuyler, Nebraska. Manuela Domingo Gaspar Gonzalez (Plaintiff), Efrain's mother, as personal representative of Efrain's estate, filed a wrongful death action against Union Pacific. Union Pacific moved for summary judgment on the wrongful death claim, which motion the district court sustained. The court concluded that as a matter of law, Union Pacific had not violated its standard of care, and that Efrain had violated his duty to look and listen for the oncoming train. We reverse, and remand for further proceedings.

SCOPE OF REVIEW

[1] 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 such party the benefit of all reasonable inferences deducible from the evidence. *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015); *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011).

[2] To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on denial of rehearing* 274 Neb. 267, 759 N.W.2d 113.

[3] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show 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. *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009).

FACTS

At the railroad crossing in Schuyler, there are two sets of tracks, one for eastbound trains and one for westbound

trains. On the date of the accident, an eastbound train was on the south track and a westbound train was on the north track. They passed each other just east of the railroad crossing. At approximately 1 p.m., Efrain proceeded to cross from the south set of railroad tracks after the eastbound train had passed. Efrain was struck and killed by the westbound train as he tried to cross the north set of tracks.

In Plaintiff's initial complaint, she alleged claims for wrongful death and breach of fiduciary duty. The district court granted a motion to dismiss filed by Union Pacific with respect to the wrongful death claim and granted Union Pacific's motion for summary judgment on the breach of fiduciary duty claim. Plaintiff appealed. We affirmed the district court's order in the breach of fiduciary duty claim, but reversed the court's order regarding Plaintiff's wrongful death claim. See *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

In the operative complaint filed after remand, Plaintiff alleged that Efrain's death was caused by Union Pacific's negligence. It was alleged that the noise of one train was loud enough to prevent a pedestrian from determining whether there was one train or two at the crossing.

Both parties offered evidence at a summary judgment hearing. The district court took judicial notice of all the exhibits that had been offered by the parties in prior hearings. Included in the evidence was a summation of data collected by Union Pacific from an event recorder on the eastbound train. According to that summation, the last car of the eastbound train cleared the crossing 7.1 seconds prior to the time the westbound train struck Efrain. The lead locomotive on the westbound train became even with the last car of the eastbound train approximately 250 feet east of the crossing. The westbound train was traveling at 59 m.p.h., and there was evidence that the view of the westbound train would have been obscured to one waiting at the south side of the crossing until approximately 2.9 seconds prior to the time the train entered the crossing.

Union Pacific offered the deposition testimony of the conductor and the engineer of the westbound train. The conductor did not recall seeing the eastbound train. He stated that 5 or 6 seconds before the westbound train entered the crossing, he could see cars stopped on both sides of the railroad tracks and see the crossing gates were down. A second or two before the westbound train entered the crossing, he saw Efrain maneuver his bicycle around the driver's side of a car that was stopped in the first position south of the closed gate and then enter the crossing. Efrain was not on the sidewalk but, instead, was in the middle of the street as he entered the crossing.

The conductor believed the train's horn was blowing, and when he stood up, he saw Efrain and made eye contact with him. The conductor testified that Efrain "got off the seat of his bicycle with both feet on the pedals" and that he thought the boy was going to stop. He stated that Efrain pedaled a few more times and, at the last second, he took his eyes off the train and tried to make it across. The conductor thought for a split second that Efrain might make it, and then he heard the collision.

The westbound train's engineer testified he did not recall seeing an eastbound train. He did not see Efrain, but he did see two boys cross safely as the train approached. He recalled those boys crossing either before the gates went down or as the gates were going down. He then heard the conductor yell that he saw a boy on the tracks, and he immediately applied the emergency brake. The engineer reviewed the data from the train's event recorder and stated that it appeared the train horn stopped sounding 2 or 3 seconds before the accident.

A claims representative for Union Pacific stated in an affidavit that based upon his investigation, the westbound train's horn was blowing "at the appropriate time as it approached the crossing." He averred that the gates, lights, and other signals at the crossing were actively and properly working. Union Pacific's manager of signal maintenance also testified

that all the lights and signals at the crossing were working properly on the day of the accident.

At the time of the accident, one witness was stopped in a vehicle at the south side of the crossing. In his affidavit, he stated that he saw several boys try to cross the tracks after the eastbound train passed and that, at that time, it was hard to see the approaching westbound train because the eastbound train was blocking the view of the tracks looking eastward.

Plaintiff's expert, Charles Culver, was a locomotive engineer with 44 years of railroad industry experience and a railroad safety instructor. He explained how train crews warn vehicular and pedestrian traffic of a train's approach. Culver opined that based on the configuration of the tracks at the crossing, the view of the approaching westbound train would have been obstructed "until the eastbound train had cleared the leading locomotive of the westbound train."

Culver stated that Efrain was not provided with the required warnings of the westbound train's approach to the crossing. He stated that applicable federal regulations and Union Pacific's general operating rules in effect in 2005 required a train horn to sound for at least 15 seconds prior to entering a crossing and to sound the horn all the way through the crossing. Culver reviewed the horn activation records from the westbound train and concluded that its horn sounded for 12 seconds prior to entering the intersection, but did not sound for the 3 seconds prior to the collision. He opined that the westbound train approached the crossing at a rate of 86.7 feet per second and that a proper audible warning was "crucial for safe railroad operation." He further opined that Union Pacific's failure to comply with the rules and regulations relative to audible warnings was a matter of negligence on the part of Union Pacific.

The district court entered summary judgment in favor of Union Pacific. The court concluded that Union Pacific did not breach its standard of care. It also concluded that Plaintiff's assertions about the sounding of the train's horn and the

reduced visibility at the crossing were "speculative [at] best and . . . not sufficient to create a material issue of fact on the issue of breach of the standard of care." It concluded that as a matter of law, Efrain violated his duty to look and listen for the approaching train and to obey the crossing gate by maneuvering around the closed gate and attempting to cross the intersection. Plaintiff filed this timely appeal.

ASSIGNMENTS OF ERROR

Plaintiff assigns as error, summarized and restated, that the district court erred in finding there was no genuine issue of material fact as to whether Union Pacific breached its duty of care and erred in finding as a matter of law that Efrain's failure to follow the safety rules was contributory negligence that barred his recovery.

ANALYSIS

[4] On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists. *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[5,6] The issue is whether Efrain was, as a matter of law, contributorily negligent to such a degree as to bar his recovery. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her

injuries as a proximate cause. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[7] Nebraska's comparative negligence law, Neb. Rev. Stat. §§ 25-21,185 to 25-21,185.12 (Reissue 2008), applies only to civil actions in which contributory negligence is a defense. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on denial of rehearing* 274 Neb. 267, 759 N.W.2d 113.

Therefore, in order for Union Pacific to be entitled to summary judgment, it had the burden of proving under the facts viewed most favorably to Efrain that Efrain's negligence was equal to or greater than the negligence of Union Pacific.

[8,9] An important factor to be considered in apportioning fault is the extent to which each person's risk-creating conduct failed to meet the applicable legal standard. *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005). A child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances; the degree of care required increases when an actor is dealing with a dangerous activity. *Humphrey v. Burlington Northern RR. Co.*, 251 Neb. 736, 559 N.W.2d 749 (1997). Union Pacific was required to exercise that degree of care imposed upon a railroad by federal regulations and its own code of operating instructions to provide proper and adequate warnings of its trains' approach to railroad crossings.

In considering the negligence of the parties, we compare the duty of care imposed upon a 13-year-old boy on a bicycle to the duty required of a railroad company whose train is approaching a pedestrian and automobile crossing. We view the evidence in a light most favorable and give the benefit of all

reasonable inferences deducible from the evidence to the party against whom the judgment was granted.

The evidence offered at the summary judgment hearing showed that just moments before Efrain was struck by the train, two other children crossed with their bicycles after the eastbound train had passed. Efrain also crossed the south tracks but was killed as he attempted to cross the north set of tracks upon which the westbound train was approaching.

Generally, it is the duty of a traveler on a highway, or a pedestrian in this case, when approaching a railroad crossing, to look and listen for the approach of trains. He or she must look where by looking, he or she could see, and listen where by listening, he or she could hear. See, *Kloewer v. Burlington Northern, Inc.*, 512 F.2d 300 (8th Cir. 1975); *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

Efrain had a duty to look and listen for the oncoming train and to stop at the crossing gate. It can reasonably be inferred that a 13-year-old boy knows that railroad crossings are dangerous. And such individual has a duty not to proceed to cross the railroad tracks until it is safe to do so.

On the other hand, it is undisputed that Union Pacific knew the dangers associated with a railroad crossing and that it must sound its horn prior to and through the crossing. Plaintiff offered evidence that applicable federal regulations, combined with Union Pacific's general operating rules in effect in 2005, required the train horn to sound for at least 15 seconds prior to entering the crossing and to sound all the way through the crossing. Plaintiff's expert testified that the horn activation records from the westbound train showed the horn sounded for 12 seconds prior to entering the intersection, but did not sound for the 3 seconds prior to the accident. Plaintiff's expert opined that a proper audible warning was *crucial for safe railroad operation*.

Plaintiff offered evidence that two other children crossed the tracks just before Efrain. There was evidence that when

Efrain attempted to cross the tracks, his view was blocked by the departing eastbound train on the tracks until the last car of the eastbound train passed the first locomotive of the westbound train. A motor vehicle operator who was stopped at the south side of the crossing said it was hard to see the westbound train because the eastbound train blocked the view of the westbound train.

The district court erred in concluding as a matter of law that Union Pacific did not violate its standard of care. There was evidence that the view of the westbound train was obscured and that the train failed to sound its horn for 3 seconds prior to the collision. Union Pacific had a duty to properly sound its horn as the train approached the railroad crossing in order to warn of its approach. The failure to properly sound the horn through the crossing was evidence that Union Pacific was negligent.

Efrain had a duty to look before he crossed the tracks. But there was evidence that his view of the westbound train was obstructed. He had 7.1 seconds in which to safely cross both tracks. It can reasonably be inferred that Efrain's view of the westbound train was obstructed for 4 seconds, until the last car of the eastbound train cleared the crossing and passed the first engine on the westbound train. At this point, the westbound train was 250 feet east of the crossing. The train was traveling at 86.7 feet per second. It can reasonably be inferred that after the eastbound train passed the crossing, Efrain had less than 3 seconds in which to see and react to the westbound train before he was killed.

Efrain had a duty to listen for the train's approach. But there was evidence that the horn was not blown for 3 seconds prior to entry of the intersection. It can reasonably be inferred that Efrain did not hear the train as it approached because its horn was not sounded. There was sufficient evidence to establish a reasonable inference that Union Pacific was negligent in failing to properly sound its horn and that its negligence was a proximate cause of Efrain's death.

In apportioning fault, we examine the extent to which Efrain's and Union Pacific's conduct failed to meet the applicable standards of care. See *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005). Efrain's conduct is to be compared to that of a 13-year-old boy, and Union Pacific's conduct is to be compared to the experience of a railroad with over a century of operation and its knowledge of the dangers of railroad crossings. It can reasonably be inferred that Efrain's duty to see was hindered by the eastbound train and his duty to hear was hindered by the westbound train's failure to warn of its approach by properly sounding its horn. It can also be inferred that Union Pacific was negligent in failing to sound its horn continuously for 15 seconds prior to the railroad crossing.

The district court's conclusion that Union Pacific did not breach its standard of care was in effect a determination that Efrain's negligence was the sole proximate cause of his death. This determination failed to consider that there was a reasonable inference that Union Pacific failed to properly warn of the westbound train's approach to the crossing.

[10] Where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996). Only where the evidence and the reasonable inferences therefrom are such that a reasonable person could reach only one conclusion, that the plaintiff's negligence equaled or exceeded the defendant's, does the apportionment of negligence become a question of law for the court. *Id.*

There are cases in which this court has considered the comparative negligence of a minor. But it is clear that each case must be considered on the facts presented. In *Humphrey*

v. Burlington Northern RR. Co., 251 Neb. 736, 559 N.W.2d 749 (1997), a child almost 11 years old was injured when she tried to jump onto a moving train. There, we concluded as a matter of law that the plaintiff was guilty of contributory negligence sufficient to bar recovery from the railroad company. She had repeatedly been warned that trains were dangerous, and she admitted to knowing she could get hurt by jumping onto a train. She had made an earlier attempt to jump onto a train and let go of the ladder because it felt like her arm was "'ripped off.'" *Id*. at 738, 559 N.W.2d at 752. But most significantly, there was no evidence that the defendant was negligent.

Thus, *Humphrey* is readily distinguishable. We did not address the comparative negligence between the minor and the railroad company because the railroad was not negligent. It was uncontradicted that the minor's persistence in trying to climb on the ladder of a railroad car while it was moving required the district court to declare, as a matter of law, the minor guilty of contributory negligence sufficient to bar recovery. Her negligence was the sole proximate cause of her injury.

But this case is different. Plaintiff was entitled to the reasonable inference that the intersection was obscured by the eastbound train and that the westbound train became visible only 2.9 seconds before the collision. Plaintiff was entitled to the inference that Union Pacific did not properly blow its horn for 3 seconds before the collision. Reasonable minds could draw different inferences and conclusions from the evidence as to the degree of negligence of Union Pacific and the negligence of Efrain.

It was for the trier of fact to determine whether Efrain's negligence when compared to the negligence of Union Pacific equaled or exceeded that of Union Pacific. Plaintiff was entitled to all reasonable inferences from the evidence presented. And since reasonable minds could draw different inferences and conclusions from this evidence, the issue of the comparative

negligence of the parties must be submitted to the jury. See *Traphagan v. Mid-America Traffic Marking, supra*.

CONCLUSION

Reasonable minds could draw different conclusions and inferences when comparing the negligence of Efrain and the negligence of Union Pacific. The district court erred in deciding as a matter of law that Union Pacific was not negligent and that Efrain was contributorily negligent sufficient to bar his recovery. For the above reasons, we reverse the judgment and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

Miller-Lerman, J., not participating.

Heavican, C.J., dissenting.

I agree that the record, viewed in the light most favorable to Manuela Domingo Gaspar Gonzalez, demonstrates there is a genuine issue of material fact as to whether Union Pacific breached its duty to sound the train horn in accord with its own policies and applicable federal regulations. Specifically, there is an issue of fact as to whether Union Pacific sounded the horn in the proper sequence for the entire 15 seconds before the train entered the crossing, or whether the horn sounded only for 12 seconds, with the last 3 seconds' being silent. That, however, is the only possible duty Union Pacific breached on the record before us. In comparison, it is undisputed that Efrain, a 13-year-old boy, maneuvered around a closed railroad crossing gate and entered the path of an oncoming train that was clearly visible to him for at least 3 seconds. In my opinion, no reasonable fact finder could conclude that Efrain's negligence in completely disregarding the railroad safety features at the crossing and riding his bicycle into the path of an oncoming train did not equal or exceed Union Pacific's alleged negligence in failing to sound the horn in the proper sequence for the entire 15 seconds. I therefore dissent.

The majority opinion immediately states that the issue is whether Efrain was, as a matter of law, contributorily negligent to such a degree as to bar his recovery. I agree that this is the ultimate issue, but I disagree with how the majority analyzes it. A key component of the comparative negligence analysis is the extent to which each party's risk-creating conduct failed to meet the applicable legal standard.[1] It is therefore necessary to first analyze the respective allegations of negligence made by Gonzalez in the complaint in order to determine the precise risk-creating conduct of Union Pacific that is at issue here. Once that conduct is determined, it can then be measured against Efrain's conduct.

Visual Obstruction

Gonzalez alleged that Union Pacific was negligent in "structuring" the crossing in a manner that allowed trains traveling through the crossing in opposite directions to create visual obstructions for travelers. This court has never held that a railroad violates its standard of care by structuring a crossing in such a manner. Gonzalez cites to no case or federal regulation, and I have found none, finding that a railroad has a duty to prevent two trains from passing in opposite directions on parallel tracks.

Gonzalez relies on *Case v. Norfolk & Western Ry. Co.*,[2] decided by an Ohio appellate court. In *Case*, a driver crossed a double train track after one train had passed and while electric flashers were still operating. The vehicle was then struck by a train traveling on the other track in the opposite direction. The court found that summary judgment in favor of the railroad was improper for a number of reasons, including that there was a fact question as to whether the oncoming

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[1] *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

[2] *Case v. Norfolk & Western Ry. Co.*, 59 Ohio App. 3d 11, 570 N.E.2d 1132 (1988).

train was "visible" just prior to collision.[3] *Case* did not hold, however, that the railroad had any duty to prevent trains from passing through a crossing in opposite directions on parallel tracks. Rather, the visibility issue was simply part of the larger question of whether the railroad breached the standard of care by failing to place additional safety features or mechanisms, such as a crossing gate, at the crossing.[4] That is not the issue here, as there is no allegation that Union Pacific failed to place proper safety features at the crossing. And it is undisputed that all the safety features in place were properly functioning.

Simply allowing trains to pass in opposite directions on parallel tracks at a railroad crossing does not violate a railroad's duty to use reasonable care under the circumstances.[5] Thus, in my opinion, Union Pacific was entitled to summary judgment on the claim that it was negligent for structuring the crossing in such a manner that trains could simultaneously cross on parallel tracks. And the majority opinion is incorrect to the extent it considers any visual obstruction created by the passing trains to be negligent conduct of Union Pacific.

Sounding of Train's Horn

Gonzalez relies heavily, as does the majority, on the alleged failure of Union Pacific to comply with federal and internal regulations regarding how and when a train horn should sound at a crossing. I am somewhat reluctant to analyze this allegation of negligence at all, as it was not specifically raised in her complaint. The complaint did, however, allege both that Union Pacific failed to use reasonable care to eliminate the

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[3] *Id.* at 13, 570 N.E.2d at 1135.

[4] *Case, supra* note 2.

[5] See, generally, *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

danger caused by the visual obstruction and that "the noise of one train was loud enough to prevent a pedestrian from determining whether one train or two was crossing before him." Under our liberal notice pleading rules, this likely was sufficient to raise the issue. The district court clearly agreed, because it addressed the horn issue in its order. This convinces me that we should address the issue as well.

I agree that the record shows a genuine issue of material fact on this issue. Union Pacific's conductor testified that the horn was sounding through the intersection. And a Union Pacific claims representative testified the horn was "blowing at the appropriate time" as it approached the crossing. But Gonzalez' expert opined the horn sounded for only 12 seconds prior to entering the crossing, instead of the 15 seconds required by federal regulations. Her expert's affidavit can reasonably be interpreted to opine that the horn failed to sound in the 3 seconds prior to the accident, but was sounding for the 12 seconds prior to that time. Gonzalez' expert also testified that the horn failed to sound in the sequence required by federal regulations. There is thus a genuine issue of material fact in the record as to whether Union Pacific breached the standard of care with respect to the timing and manner in which it blew the train horn.

Comparative Negligence

But, as the majority implicitly finds, the mere existence of an issue of material fact as to whether Union Pacific breached its standard of care with respect to the horn does not automatically bar Union Pacific from an award of summary judgment in this action. Here, the district court found Efrain was contributorily negligent as a matter of law to such a degree as to bar his recovery because he maneuvered around the closed crossing gate and violated his duty to look and listen for oncoming trains. Even assuming that the horn failed to blow in the proper sequence and for the final 3 seconds before the accident, I agree with the district court's conclusion.

Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.[6] A plaintiff is contributorily negligent if (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause.[7]

Nebraska's comparative negligence law, Neb. Rev. Stat. §§ 25-21,185 to 25-21,185.12 (Reissue 2008), applies to civil actions in which contributory negligence is a defense.[8] To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought.[9] An important factor to be considered in apportioning fault is the extent to which each person's risk-creating conduct failed to meet the applicable legal standard.[10] Where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. Only where the evidence and the reasonable inferences therefrom are such that a reasonable person could reach only one conclusion, that the plaintiff's negligence equaled or exceeded the

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[6] *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

[7] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[8] *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

[9] § 25-21,185.09; *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on denial of rehearing* 274 Neb. 267, 759 N.W.2d 113.

[10] *Tadros, supra* note 1.

defendant's, does the apportionment of negligence become a question of law for the court.[11]

Here, the extent to which each party's conduct failed to meet the applicable legal standard must be evaluated. Union Pacific failed to meet its standard of care in only one respect—failing to properly blow the horn in a specific sequence and for the 3 seconds prior to the accident. How, then, did Efrain fail to meet the applicable legal standard?

A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and the failure to do so without a reasonable excuse constitutes negligence.[12] He or she must look whereby looking, he or she could see, and listen whereby listening, he or she could hear.[13] In addition, § 60-6,170 specifically provides that when a railroad crossing gate is lowered, any person approaching the crossing in a vehicle must stop within 50 feet but not less than 15 feet from the nearest rail and shall not proceed until it is safe to do so. Section 60-6,170 also provides that no person shall drive a vehicle through, around, or under any crossing gate or barrier while it is closed or being closed.[14]

The ordinary rules of the road which are applicable to motor vehicles that cross at highway intersections have no application to railroad trains that approach grade crossings.[15]

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[11] *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996).

[12] *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011).

[13] *Kloewer v. Burlington Northern, Inc.*, 512 F.2d 300 (8th Cir. 1975); *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988); *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 306 N.W.2d 902 (1981). See, also, Neb. Rev. Stat. §§ 60-6,170 and 60-6,314 (Reissue 2010).

[14] See, also, Neb. Rev. Stat. § 60-6,314 (Reissue 2010) (operator of bicycle is subject to all duties applicable to drivers of motor vehicles).

[15] *Wyatt, supra* note 13.

Instead, presumably because it is incredibly difficult to stop a moving train, there is no duty on the part of an engineer who is operating a train to yield the right of way until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision.[16] The rules impose such a heightened duty on a traveler crossing an intersection that we have held that "even if the train fails to give warning signals of its approach to the crossing, [a traveler] can not recover if he recklessly fails and neglects to" look and listen "at the proper time [so that] he could have seen the approaching train in time to stop before reaching the crossing."[17] In a similar vein, although in a case involving the issue of comparative negligence under the prior "more than slight" standard, we have held:

> [W]here it is undisputed that a traveler on a highway failed to exercise reasonable precautions by looking and listening at a reasonable point where he could have seen an approaching train in time to stop before reaching the tracks, his negligence, as a matter of law, will defeat a recovery for damages resulting from a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given as required by law.
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> Failure of [a] locomotive[']s engineer to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for damages . . . in a collision at the crossing, if the driver of the motor vehicle recklessly failed and neglected to have his motor vehicle under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but

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[16] *Dresser, supra* note 12; *Wyatt, supra* note 13.

[17] *Wyatt, supra* note 13, 209 Neb. at 216, 306 N.W.2d at 905.

recklessly failed and neglected to do so, whereby there was a collision.[18]

Here, it is undisputed that Efrain maneuvered his bicycle under the crossing gate as it was either closed or closing. Had Efrain obeyed this traffic signal, which he had every reasonable opportunity to do, he easily would have stopped in a place of safety and avoided the oncoming train. Once he chose to maneuver around the crossing gate, it is also undisputed that the oncoming train was clearly visible to him for at least 3 seconds; yet, he chose to proceed onto the tracks. In my opinion, no reasonable fact finder could conclude that Efrain's negligence in disregarding the closed crossing gate and entering into the path of an oncoming train was not greater than or equal to Union Pacific's failure to blow the horn in the proper sequence and for the 3 seconds prior to the collision.

Gonzalez' brief and the majority opinion generally seek to minimize the degree of Efrain's negligence for two reasons. First, that his ability to see the oncoming train was partially obstructed by the passing train. And second, that he was only 13 years old.

The record does show that Efrain's view of the oncoming train was partially obstructed by the passing train. But, as noted, this visual obstruction cannot be imputed to Union Pacific as negligence. At most, then, it can be considered as a "reasonable excuse" for Efrain's failure to comply with his duty to look for oncoming trains.[19] But even this is unclear. In several cases, we have held that when an obstruction prevents a traveler from seeing an approaching train or a distraction averts a traveler's attention, a railroad is not entitled to rely upon the traveler's duty to stop (presumably because the traveler has a reasonable excuse for not complying with this duty),

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[18] *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.*, 161 Neb. 451, 465, 73 N.W.2d 679, 687 (1955).

[19] See *Dresser, supra* note 12, 282 Neb. at 542, 809 N.W.2d at 718.

and that the question of whether the traveler's conduct in traversing was reasonable is a matter of fact for the jury.[20]

But none of our prior cases invoking this rule involved a "reasonable excuse" that was not negligently created by the railroad. In *Anderson v. Union Pacific RR. Co.*,[21] a railroad created a visual obstruction by parking 17 empty railcars just east of the crossing on one of three sets of tracks. In *Crewdson v. Burlington Northern RR. Co.*,[22] a railroad created a visual obstruction by parking a coal train west of the crossing on the second of four sets of parallel tracks. And in *Kulhanek v. Union Pacific RR.*,[23] a railroad created a visual obstruction by parking a bus adjacent to the tracks. In each of those cases, we considered the traveler's reduced visibility in analyzing the extent to which he or she breached the duty to look for oncoming trains.

But here, as noted, Union Pacific did not negligently create the visual obstruction, because it had no duty to prevent trains traveling on parallel tracks from simply crossing at an intersection. It thus appears to me that these cases are inapplicable to the instant case. But even assuming the visual obstruction created by the passing trains can be considered in weighing the degree of Efrain's negligent conduct, I would still hold that his negligence was greater than or equal to that of Union Pacific's as a matter of law. It is undisputed that Efrain willfully passed under the crossing gate and was able to see the oncoming train for at least 3 seconds, and yet still chose to enter its path. His complete disregard for the crossing gate safety feature imposed by the railroad at the crossing

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[20] *Crewdson, supra* note 13 (per curiam of three judges, with two judges concurring); *Anderson, supra* note 13. See, also, *Kulhanek v. Union Pacific RR.*, 8 Neb. App. 564, 598 N.W.2d 67 (1999).

[21] *Anderson, supra* note 13.

[22] *Crewdson, supra* note 13.

[23] *Kulhanek, supra* note 20.

is significant negligence, and I do not see how any visual obstruction created by the passing train could constitute a reasonable excuse for ignoring this safety feature. Moreover, it is undisputed that there was no visual obstruction for at least 3 seconds, and there is nothing in the record to suggest that had he looked during those 3 seconds, he would not or could not have seen the approaching train. To the contrary, the only evidence is that he actually did look and did make eye contact with the conductor, and nevertheless chose to attempt to cross the tracks. In these circumstances, any negligence on Union Pacific's part in failing to blow the horn to alert Efrain of the oncoming train is minimal; for had Efrain looked, he would have seen the train in time to return to a place of safety. And had he not disregarded the closed crossing gate, he never would have been in a place of danger at all.

I also do not find it significant that Efrain was only 13 years old. A minor child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation and under the same circumstances.[24] In *Humphrey v. Burlington Northern RR. Co.*,[25] we held that although it is difficult to find a child contributorily negligent as a matter of law, the contributory negligence of a child is not always a question of fact resting within the purview of a jury. Instead, the issue is whether the child had sufficient knowledge, discretion, and appreciation of the danger that it can be said as a matter of law that the child was contributorily negligent and, if so, whether that contributory negligence is sufficient to bar recovery as a matter of law.[26]

And we have so found in other cases involving children similar in age to Efrain and with similar open and obvious

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[24] *Humphrey v. Burlington Northern RR. Co.*, 251 Neb. 736, 559 N.W.2d 749 (1997).

[25] *Id.*

[26] *Id.*

dangers. In *Suarez v. Omaha P.P. Dist.*,[27] a 12-year-old boy was shocked and burned when he climbed a 27-foot tree and touched a high-voltage wire. The boy possessed average intelligence and testified that he knew he could be shocked if he touched the wire. We concluded that a 12-year-old should possess sufficient knowledge that a wire carrying electric current is capable of causing shock or injury to one contacting it, and ruled the boy was guilty of contributory negligence to a degree sufficient to bar him from recovery.

In *Garreans v. City of Omaha*,[28] two 12-year-old boys were injured when they dropped a lighted firecracker into a 55-gallon drum labeled "flammable." We held the trial court was clearly wrong when it failed to find them contributorily negligent as a matter of law, reasoning the boys knew what the word "flammable" meant and knew fireworks were dangerous.

I would reach a similar conclusion in this case. A reasonable 13-year-old knows train crossings are dangerous and knows he or she has a duty to stop, look, and listen for oncoming trains. He or she also knows that he or she has a duty not to go under a closed gate at a railroad crossing and enter the path of a train that is approaching him or her. Under the facts of this case, considering the obvious and inherent dangers present at a railroad crossing, there is no reasonable argument that Efrain's age makes any difference in the contributory negligence analysis.[29]

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[27] *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984).

[28] *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984), *overruled on other grounds, Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[29] See, generally, *Egan v. Erie R. Co.*, 29 N.J. 243, 148 A.2d 830 (1959) (7-year-old negligent in attempting to board moving freight train); *Olson v. Payne*, 116 Wash. 381, 199 P. 757 (1921) (12-year-old walking beside railroad track negligent); *Kyle v. Boston Elevated Railway*, 215 Mass. 260, 102 N.E. 310 (1913) (6-year-old who ran into street into path of approaching car negligent); *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 P. 942 (1898) (12-year-old who attempted to cross between railcars of nonmoving train negligent).

Union Pacific was entitled to summary judgment if the evidence and the reasonable inferences therefrom were such that a reasonable person could reach only one conclusion—that Efrain's negligence equaled or exceeded Union Pacific's. Union Pacific was negligent, at most, by not sounding the horn in the proper sequence and for failing to sound it during the 3 seconds immediately preceding the accident. Efrain, in contrast, was negligent in failing to look for an approaching train and in maneuvering under the closed crossing gate. Although his visibility was somewhat impaired by the crossing trains, the record shows that Efrain had approximately 3 seconds in which to view the oncoming westbound train. In addition, Efrain had at least 12 seconds of audible warning of the approaching train. Further, nothing in this record contradicts the conductor's testimony that Efrain made eye contact with him, saw the approaching train, and nevertheless decided to attempt to cross. On the record before us, no reasonable fact finder could find that Efrain's negligence was not equal to or greater than Union Pacific's negligence. Although this accident was tragic, subjecting Union Pacific to liability under these circumstances is legally inappropriate, and I therefore dissent.

Cassel, J., joins in this dissent.

State of Nebraska, appellee, v. Susan M. DeJong, appellant.

872 N.W.2d 275

Filed December 18, 2015. No. S-15-028.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
3. ____: ____. 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.
4. **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.
5. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
7. **Postconviction: Constitutional Law: Proof.** 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, causing the judgment against the defendant to be void or voidable.
8. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual

allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.

9. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
10. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
11. **Effectiveness of Counsel: Proof: 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.
12. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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.
13. **Effectiveness of Counsel.** A court may address the two prongs of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, deficient performance and prejudice, in either order.
14. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
15. **Postconviction: Appeal and Error.** It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
16. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
17. **Postconviction: Due Process.** A postconviction motion asserting a persuasive claim of actual innocence might allege a constitutional violation, in that such a claim could arguably amount to a violation of a movant's procedural or substantive due process rights.
18. **Postconviction: Constitutional Law: Presumptions: Proof.** In order to trigger a court's consideration of whether continued incarceration could

give rise to a constitutional claim that can be raised in a postconviction motion, there must be a strong demonstration of actual innocence, because after a fair trial and conviction, a defendant's presumption of innocence disappears.

Appeal from the District Court for Jefferson County: Paul W. Korslund, Judge. Affirmed.

Susan M. DeJong, pro se.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Susan M. DeJong was convicted after a jury trial of first degree murder and use of a deadly weapon to commit a felony for the death of her husband, Thomas DeJong (Tom). She was sentenced to a term of life imprisonment for the first degree murder conviction and a term of 50 to 50 years' imprisonment for the use of a deadly weapon to commit a felony conviction, to be served consecutively. On direct appeal, we affirmed Susan's convictions and sentences. See *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). On September 26, 2014, Susan filed a pro se motion for postconviction relief in the district court for Jefferson County. On December 18, the district court filed an order in which it denied the motion without holding an evidentiary hearing. Susan appeals. Upon our review, including Susan's motion, her brief, and the files and records of this case, we determine that there is no merit to Susan's assignments of error, and we therefore affirm the decision of the district court in which it denied Susan's motion for postconviction relief without holding an evidentiary hearing.

STATEMENT OF FACTS

The events underlying Susan's convictions and sentences involve the death of her husband, Tom. In our opinion regarding Susan's direct appeal, we set forth the facts as follows:

BACKGROUND

On March 11, 2011, Susan called the 911 emergency dispatch service at approximately 4 p.m. Susan told the operator that her husband, Tom, was not breathing and was cold to the touch. Susan stated that Tom had gone to South Dakota to be with his "whore" and came home "all . . . beat up." The operator had Susan perform cardiopulmonary resuscitation on Tom until the emergency units arrived.

When emergency personnel arrived at the DeJong home, Susan was hysterical and she repeatedly stated that the "whore" had done this to Tom. Emergency personnel immediately began resuscitation efforts. Tom was not breathing, and there was no heartbeat. Dried blood was around his nostrils and the top of his mouth. His hands, arms, feet, legs, torso, and head were visibly scratched, cut, and deeply bruised. Emergency personnel were able to help Tom regain a heartbeat.

Tom was taken to the Jefferson Community Health Center and was later transported by ambulance to Bryan Health, west campus trauma center, in Lincoln, Nebraska (Bryan hospital). Laboratory reports and blood tests indicated a threat of imminent heart and renal failure. A chest x ray indicated multiple rib-sided fractures and a partially collapsed lung. A CAT scan revealed the following injuries: a swollen brain; a tremendous amount of fractures within the chest cavity, including the spine, the ribs, and the scapula; a comminuted fracture of the nose; and a possible fracture of the hyoid bone in the neck.

The treating physicians concluded that Tom would not be able to recover from the injuries. The physicians

asked Susan for permission to remove Tom from life support, and she granted the request. Tom passed away shortly thereafter.

Susan's Statements at Hospitals

At the Jefferson Community Health Center, Rebecca McClure, a nurse, stayed with Susan while waiting for Tom's prognosis. The two of them waited in a small quiet room located outside of the emergency room.

Susan told McClure that she had not seen Tom since Wednesday and that he came home that Friday morning. She stated that Tom was "stumbling around in the house" and that the noise woke her up. Tom had been beaten, was cold, and quickly became unresponsive. Susan told McClure that Tom had spent the past days visiting the "whore" in South Dakota. According to Susan, the "whore" would beat Tom with tie-down straps from Tom's semi-truck. Susan also stated that the "whore" and Tom were trying to kill her by giving her a sexually transmitted disease (STD). McClure personally drove Susan home after Tom was transported to Lincoln, and Susan then drove herself to Bryan hospital in Lincoln.

Investigator Wendy Ground from the Lincoln Police Department arrived at Bryan hospital at approximately 10:20 p.m. Ground questioned Susan about Tom's injuries. Susan told Ground that Tom had returned home that morning. He looked pale, and he had stated that he did not feel well. Susan told Ground that Tom was apologetic and that he had told her he had made a mistake. According to Susan, Tom said his alleged mistress did not love him and that the mistress went "psycho" and wanted to kill him. Susan told Ground that the mistress had previously tried to kill Susan by cutting her vehicle's brake lines.

Ground asked Susan about Tom's medical history. Susan stated that Tom had been feeling weak and clumsy

for the past 2½ years. Susan stated that he was diagnosed with an STD 1½ years ago. Susan also explained that the current cut on Tom's lip was caused by a pipe when Tom was working with a cow.

After Tom had been declared dead, Ground asked Susan if she was willing to go to the police headquarters for an interview. Susan agreed.

Interrogation of Susan at Police Headquarters

After arriving at the police headquarters at approximately 1 a.m., Ground placed Susan in an interview room. Ground left the room, and Susan began working on her written statement. Susan was left alone in the interview room from 1:12 to 3:04 a.m.

At approximately 3:04 a.m., Ground reentered the interview room. At 3:08 a.m., Ground read Susan her *Miranda* rights and Susan told Ground that she understood her rights. Susan proceeded to sign the *Miranda* waiver.

Ground began the interrogation by asking general questions about Tom's injuries and his whereabouts for the week. Susan repeated the facts as she had stated at Bryan hospital.

Susan stated Tom went to Seward, Nebraska, on Monday, March 7, 2011, for a job application and from there he went directly to South Dakota. Susan told Ground that she had talked to him on her cell phone on Monday, March 7, for approximately 44 minutes. According to Susan, Tom indicated that he wanted to be with "that thing." On March 8, Susan and Tom talked for 5 minutes, and Susan told Ground that she likely screamed at him because she was not happy.

At approximately 3:22 a.m., Susan told Ground that she was exhausted. But she continued to talk. Susan explained that the next time she heard from Tom was on Friday morning. She again repeated the same story of what had occurred that day. At approximately 3:34 a.m.,

Susan stated that she needed some sleep because she was exhausted.

The questioning continued, and Susan stated that she had confronted Tom when he came home on Friday morning because she was angry. Susan told Ground that she cannot say for sure that Tom drove home and that she does not know how he could have driven in his condition.

At approximately 3:41 a.m., Investigator Robert Farber entered the room and silently sat at the table. At 3:42 a.m., Susan began crying, and at 3:43 a.m., she stated, "I'm tired. I wanna go to bed, please. I'm done, I wanna go to sleep. I'm tired." Farber immediately interrupted her and introduced himself. Farber then told Susan that he had "a couple questions."

Farber began questioning. He asked Susan when Tom and she were married and whether they have common children. Farber questioned Susan about her relationship with Tom and about Tom's alleged relationship with his mistress. The questions became more directed and intense as Farber continued the interrogation.

In response to the questioning, Susan stated that everybody called Tom a "wheeney" and that he took the beatings from his alleged mistress. Susan also stated that Tom had slapped her in Minnesota. Susan explained that she was arrested for that incident because she decided to not tell the police that Tom had slapped her.

At approximately 4 a.m., Susan again stated, "I'm getting tired, I'm done, I'm tired." Farber interjected again before Susan completed the statement. Farber asked Susan if she had anything to do with the injuries. Susan answered no; Farber continued to ask questions, and Susan continued to answer. For the next 18 minutes, the questions from Farber became more pointed and directed.

At 4:18 a.m., Susan exclaimed, "I want a lawyer, please. I'm tired of this." "I will talk [to] them and they, I want some sleep, please." "I didn't, I will, I just wanted

to live and I loved him so much, and I just wanted to live and he wanted a divorce, and I just wanted to live with him. . . . I loved him." Farber said "okay" and left the room almost immediately. Ground followed.

Susan laid her head down at the table for approximately 30 seconds, stood, and grabbed her keys to leave. Susan opened the door to the interview room and asked to have a cigarette. Ground told her to take a seat. Susan turned around and mumbled, "So sorry. I'm sorry." Ground apparently paused to hear what Susan said and then reentered. Ground silently took a seat at the table in the same spot she sat during the entire interrogation.

Susan talked uninterrupted for nearly 8 minutes with a slow delivery, while Ground sat and listened. Susan stated: "So sorry. I'm sorry. (inaudible) beat by that whore. He used to come home, bruises, bloody nose, black eyes. He's got scars on his back that are not from me. He's got marks on him that are not from me. He'd come home and, well, he'd tell his boss (inaudible) on the trip. He'd tell me he did it on the truck going to (inaudible). Then he'd turn around, go to Sioux Falls and that Gloria. Oren called me today and asked if I'd seen your face. It's all bruised up. I told him that fuckin' cunt you're married to did it. (inaudible) I didn't ever touch him. Didn't ever touch him. When I slapped him in Fairbury, not Fairbury, in (inaudible), what the name of that town? I can't think of it, Burger King, God. The car pulls in there, parked, to get a burger but on the way in is when he finally admitted he'd been sleeping with that thing. Finally admitted it. He got our money, went into Burger King. I got out of the truck and proceeded to walk across the highway to the other little truck stop across the road and he followed me over there. Came up to me, grabbed one of the dogs and I picked my leg up. Leave it alone. And then I proceeded, I walked, was walking, trying to call my son to come get me but he

wouldn't answer his stupid phone. Standing there at the back, I'm like I'm going home. I'm going home. Well, fine, I'll take you home. I don't know. I'm going home. That's when he shoved me into the wall and cracked me in the jaw. And I slapped him. Some kid walked out of Burger King. So I'm yowling so he called the cops. Next thing I know they're showing up. He said I'll take you home, I'll take you home. Fine, I'll take you home. Fine, I'll take you home. Then we got in the truck. Next thing I know there's the cops. Everybody thinks Tom is such an innocent man. He used to be. He used to be the most loving, gentle, sweet man you could meet. Till he met that (inaudible). Then they started molesting children. I still say I think he was on drugs. Cuz you don't drive 14, 16 hours with nothing. My Blazer for one hasn't ever had a problem with the brakes. I hit a deer. Well, come to find out my front brakes are disconnected. Huh. Excuse me. I don't know. I just know that (inaudible) no more getting shoved. (inaudible) I didn't poison him. He is what he is from what he plays with. (inaudible) He told me he was going to kill me. (inaudible) kill me. (inaudible) Am I under arrest?"

Ground told Susan that the decision for arrest was up to the police department in Fairbury, Nebraska. Ground answered some questions from Susan, but did not ask Susan any questions.

Susan continued: "Self-defense, because I don't bruise and he does. That's pretty much the way that goes. (inaudible) she did (inaudible) to him. For what she did to him. He wasn't the man I married. What I told you about it is all true. It does deal drugs, (inaudible) drugs, go psycho. And it went psycho on him more than once. Does molest children. Little boy's name's Chris. . . . I have to be arraigned within 24 hours. I know that, why not. Just like the deal in Minnesota. And he'll walk away scott free. And there's a lot of the injuries he had [that were]

not from me. The worse one he get that I can remember is falling off the ladder. That one scared me. Why didn't I just leave. Why didn't I just run. Because he always showed up. He always showed up. (inaudible) I need some sleep. (inaudible) so tired. I just, I just need somebody to talk for me right now, I'm so tired. I'm too tried. I haven't (inaudible) for two days. Could you? I want a cigarette."

Ground responded: "Okay, just be patient with us." Susan continued: "No, I want a cigarette. I want a cigarette. Then He did take off and go back to S.D. (inaudible) either. It's all partly true. The whole story is partly true. I don't know. He came back beaten up from S.D. too. I didn't hit him in the head. (inaudible) when he fell on it. I stepped on it. That was after he threw it at me is how it ended up there. I'm not under arrest. I can go outside and have a cigarette if I want."

After a back and forth conversation between Susan and Ground, Susan stated, without being questioned: "(inaudible) you'll arrest me because that's the way it always goes. Let's (inaudible) her and she's the one that always gets in trouble. (inaudible) self defense, self preservation. They made sure of it. It takes a heck of a hit for me to bruise but . . . make sure that and Tom knew it."

Shortly thereafter, an unidentified female officer entered the room. Ground and the female officer took pictures of Susan's bruised hands and forearms. The interrogation video ends. Susan was subsequently arrested and charged with first degree murder and use of a deadly weapon to commit a felony.

Hearing on Motion to Suppress Interrogation

On June 13, 2011, Susan filed a motion to suppress her statements given on March 12, which she argued were obtained in violation of her constitutional rights. Susan

argued that there were three different statements made by her that invoked her constitutional right to end the interrogation. At 3:43 a.m., Susan stated, "I'm done, I wanna go to sleep. I'm tired." At 4 a.m., Susan stated, "I'm getting tired, I'm done, I'm tired." And the last relevant statement was made at 4:18 a.m., when Susan stated, "I want a lawyer, please. I'm tired of this."

At the hearing, the district court accepted a joint stipulation that Susan was in custody at the time of the interrogation.

In its order, the district court found Susan's first two statements were not unequivocal and unambiguous statements that she wanted to cut off the questioning. Additionally, the court found that all of the statements made by Susan after exercising her right to counsel were voluntarily made and were not the result of the functional equivalent of interrogation.

Susan filed a motion to reconsider. Upon reconsideration, the district court suppressed the statements made from 4 to 4:18 a.m., because her statement that she was "done" was unequivocal and unambiguous. However, statements made before 4 a.m. were admissible, because Susan had not yet invoked her right to end questioning. The district court found that statements made after 4:18 a.m. were admissible, because they were not the result of questioning or the functional equivalent.

Rule 404 Hearing

On January 26, 2012, the State filed an "Amended Motion to Conduct Hearing Pursuant to Neb. Rev. Stat. § 27-104 Regarding the Admissibility of § 27-404(2) Evidence." A hearing was held on the same date (rule 404 hearing), and evidence was accepted. There are three prior "bad acts" that the State wanted admitted for limited purposes.

For the first prior "bad act," the State offered the testimony of then-police officer Nicholas Schwalbe of

Jackson, Minnesota. Schwalbe testified that on May 31, 2010, he received a call of a fight in progress at a truckstop. He identified the driver as Tom and the passenger as Susan. Schwalbe observed that Tom had a black eye, a fresh wound under that eye, and scabbing on his face, ear, and neck, as well as spots of fresh blood rolling down his neck. Susan was placed under arrest. Susan told Schwalbe that they were fighting because Tom was cheating on her.

The second event occurred in August 2010. James Platt, Susan's son, and Sharon Platt, James' wife, testified that Susan and Tom unexpectedly came to live with them that August. Susan told them that she and Tom needed to get away from their home, which was in South Dakota at the time. Both James and Sharon testified that Tom was "in bad shape." Tom's face was beaten and swollen, and he had bloody ears. When asked, Susan told James that the injuries were caused by a truckstop robbery. James testified that Susan had for years believed Tom was unfaithful with someone from work. Shortly thereafter, James testified that Susan and Tom moved to Jefferson County, Nebraska.

The third event occurred in late 2010. James and Sharon visited Susan and Tom at their new home in Jefferson County. Both testified that Tom looked "'terrible.'" He had cuts on his face and a split lip. Sharon asked Tom about his facial injuries, and Susan replied for Tom that the injuries happened at work when "the pigs got him."

At the hearing, the State also offered the testimony of McClure, Brian Bauer, and Ground. McClure testified about Susan's story that Tom had gone to South Dakota "probably up visiting his girlfriend." She testified about what Susan had told her at the hospital.

Bauer, who had employed Tom on his farm in Jefferson County, testified that Tom would come to work every 2 to

3 weeks visibly sore with bruises on his face, black eyes, split lips, and marks on his hands. According to Bauer, these injuries did not occur at work.

Ground testified that at the hospital, Susan stated that Tom's facial injuries and split lip were caused by working on the farm. Susan told her that the split lip was caused by a pipe when Tom was working with a cow.

Based on the evidence presented, the district court found that the May 31, 2010, incident in Minnesota was admissible as it pertains to the injuries observed on Tom and to Susan's statements as to the reason for their altercation, for the specific and limited purposes of demonstrating the existence of motive and intent. The district court further ordered that all three incidents were admissible for the specific and limited purposes of negating, or demonstrating the existence of, intent, identity of the perpetrator, and absence of mistake or accident.

Trial

A jury trial was held on February 21, 2012. The State offered the testimony of the 911 dispatcher, the responding emergency personnel, the investigating officers, Farber, Ground, McClure, Bauer, Schwalbe, and James and Sharon. The State offered the video interrogation of Susan at the police headquarters, with the footage from 4 to 4:18 a.m. redacted. The three prior bad acts that were the subject of the rule 404 hearing were also presented to the jury. In addition, the following evidence was presented.

Evidence Found at Home

The DeJong home was searched on March 12, 2011. Tom's Chevrolet Blazer was parked in the detached garage. No evidence was found in the garage or either in or on the Blazer. Susan's white pickup truck was processed on March 15. Tom's blood was found on the hood and fender of the truck. Inside the pickup truck, there was a red duffelbag and a blue denim bag.

In the red bag, investigators found women's clothing, a yellow hammer, a blue hammer, toiletry items, men's pajamas, and Tom's wallet. The blue bag contained a computer, a lug wrench, and a cell phone.

DNA tests were conducted on this evidence, and results showed that the blue hammer had a mixture of Tom's and Susan's DNA. Susan's DNA was found on the handle of the yellow hammer, and a mixture of DNA was found in a blood sample on the claw area of the yellow hammer. Tom was the major contributor of that DNA. Tom's DNA was found in the bloodstains on the men's pajamas.

In the house, at least 70 blood drops were found throughout. No large pools of blood were found. Blood was found in the living room, kitchen, bathroom, dining room, and the master bedroom. Blood was also found on clothing items seized from the laundry room. A forensic scientist testified to which stains were left by Tom, by Susan, or by a mixture of the two. Tom's DNA was found repeatedly in the bloodstains throughout the house.

Medical Testimony

Dr. Craig Shumard was working in the emergency room when Tom was brought by ambulance to the Jefferson Community Health Center. Shumard described Tom's injuries to the jury and testified that the injuries did not arise from natural causes or accidents. He testified that Tom's injuries were inconsistent with typical farmwork injuries.

Dr. Stanley Okosun, a trauma surgeon at Bryan hospital, testified to his treatment and care of Tom. Okosun testified that Tom's high levels of myoglobin indicated that the trauma inflicted on Tom occurred 12 to 24 hours prior to his arrival at Bryan hospital. Okosun testified that Susan told him that Tom's bruising was caused by working on a pig farm. Okosun testified that the explanation was highly unlikely. He further testified that with the injuries suffered, Tom could not have driven home on the

Friday morning before his death. According to Okosun, Tom's injuries could not have been caused by natural causes or a car accident. He attributed Tom's injuries to blunt force trauma caused by an assault.

Dr. Juris Purins was the radiologist who reviewed the CAT scan performed on Tom at Bryan hospital. The CAT scan revealed unusually severe head and brain injuries which are typically associated with a patient's not breathing. Tom's nose had a comminuted fracture, which means it was fractured in multiple places. Tom had a dislocation of the lens in his right eye, which was another unusual injury. Purins described a tremendous number of fractures within the chest cavity, including the spine, ribs, and scapula. One of the fractures was an old injury but the rest were recent. Purins also identified a fracture of the hyoid bone in the neck. Purins testified that the fractured hyoid bone, along with subcutaneous emphysema, indicated a potential choking injury. Purins opined that the injuries were the result of a "pretty severe beating," maybe from a hammer, and that the injuries would have prevented Tom from driving or walking.

Dr. Jean Thomsen was the pathologist who performed Tom's autopsy. Thomsen stated that she had "never seen someone so extensively injured." After the autopsy, Thomsen found the cause of death to be "[b]lunt force trauma to the head, neck, chest and extremities." In her opinion, Tom's death was a homicide.

In her autopsy report, Thomsen found defects on Tom's hands and arms that she described as defensive wounds. Thomsen found that the injuries were caused by some type of instrument. Thomsen testified that the injuries were C-shaped and semicircular and may have been caused by a hammer. The autopsy also confirmed a fracture of the hyoid bone in the neck, but she did not find other signs usually associated with manual strangulation beyond neck bruising.

Defense counsel offered the expert testimony of Dr. Robert Bux, a forensic pathologist. Bux agrees that this case was a homicide caused by multiple instances of blunt force trauma. He stated that he has "never personally seen a case like this with so much soft tissue contusion." Tom was "really beaten." Bux opined that the injuries occurred at least 24 hours prior to death, and maybe as many as 36 hours prior. He agrees that the wounds on Tom's hands and arms indicate that Tom was attempting to ward off an attack.

Bux disagreed that a clawhammer was used, because there were no circle bruises from the hammerhead, no raking marks from the claw, and no pattern of contusions consistent with the side of a hammer. He opined that based on a lack of hemorrhaging around the hyoid bone, the bone had been fractured during the autopsy. He argued that the brain injuries were caused not by the blunt force trauma but by Tom's not breathing while still at home. Bux also testified that Tom would have been able to walk and talk immediately after the beating he suffered, but that his condition would have continued to deteriorate. Bux also opined that because of the relatively small amounts of blood found in the home, the assaults that caused Tom's facial injuries likely did not occur in the home.

Instant Messenger Chats

An investigator seized Susan's computer and found relevant Internet instant messenger chats. James, Susan's son, confirmed the messages were sent to him from Susan under her handle "the_piglady." On September 24, 2010, "the_piglady" wrote in reference to Tom, "i can't do this . . . staying here anymore," "i've come to realize i literally hate him." She continued, "now i wish he was dead . . . i really hate him more than i have ever hated ANYONE." On February 14, "the_piglady" wrote that "i'm looking at getting rid of tom" and "i can't take or do this anymore."

Tom's Whereabouts Week of His Death

Beyond testifying about Tom's injuries while working at the farm, Bauer testified that on the Tuesday before his death, Tom worked a full day. Tom was bruised and had trouble getting around. On Wednesday and Thursday, Tom called in sick. On Thursday, Bauer drove by the house and noticed that both vehicles owned by the DeJongs were at the house, including Tom's Blazer.

James testified that he had a telephone conversation with Susan on the Thursday morning before Tom's death. James asked Susan what size tires were on Susan's white pickup truck. James testified that Susan asked someone else in the house. James assumed that the person was Tom and was surprised that Tom was not working. James testified that Susan did not mention in that telephone call that Tom was in South Dakota.

Cell phone records were also introduced into evidence. On March 8, 2011, the Tuesday before Tom's death, there were four calls from Susan's cell phone to Tom's cell phone and the calls "hit" or "pinged" off the nearby cell towers in the Fairbury and Hebron, Nebraska, areas. On Wednesday and Thursday, there were calls from Tom's cell phone to Bauer's cell phone. Both calls "hit" off cell towers in the Fairbury and Hebron areas.

Alleged Mistress

The woman who Susan alleged was Tom's mistress also testified at trial. The woman worked as a dispatcher for a small trucking company in South Dakota. Tom had been a truckdriver for that company. The woman testified that she and Tom had a working relationship only. She never spent time with Tom socially. She never had any type of sexual contact with Tom. She testified that she had no reason to want to hurt Tom or Susan. The woman testified that from March 8 to 11, 2011, she was on a trip to Minnesota and had no contact with Tom. She testified that she did not inflict Tom's injuries.

Convictions and Sentences

> After deliberation, the jury found Susan guilty on count I, murder in the first degree, and guilty on count II, use of a deadly weapon to commit a felony. Susan was sentenced to life imprisonment for count I and 50 to 50 years' imprisonment on count II, to be served consecutively.

State v. DeJong, 287 Neb. 864, 867-80, 845 N.W.2d 858, 863-71 (2014).

Susan was represented both at trial and on direct appeal by lawyers from the same office, the Nebraska Commission on Public Advocacy. In our opinion on direct appeal, we restated and summarized Susan's assignments of error as follows:

> [T]he district court erred by (1) admitting at trial the statements she made to investigators between 3:43 to 4 a.m.; (2) admitting at trial the statements she made to investigators after 4:18 a.m.; (3) admitting at trial evidence of Tom's injuries on prior occasions and her related statements concerning the injuries, because there was no clear and convincing evidence that she had committed a crime, wrong, or act with respect to those injuries; and (4) admitting at trial evidence of Tom's injuries on prior occasions and her related statements concerning the injuries, because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Id. at 880, 845 N.W.2d at 871-72.

With respect to Susan's assignments of error on direct appeal, we determined that her statements made from 3:43 to 4 a.m. should have been suppressed, but we concluded that the error was harmless. We further determined that her statements made after 4:18 a.m. were not required to be suppressed. With respect to the evidence admitted regarding the prior bad acts, for purposes of the direct appeal, we assumed without deciding that the admission of the evidence was error; however, we found the admission of the evidence to be

harmless. Based on these determinations, we affirmed Susan's convictions and sentences on direct appeal.

On September 26, 2014, Susan, acting pro se, filed a motion for postconviction relief. As we read her motion, Susan alleged that she received ineffective assistance of counsel because counsel failed to "investigate further" and question more extensively numerous witnesses who testified at trial and failed to argue on direct appeal that there was insufficient evidence to support her convictions and sentences. Susan also alleged, as we read her motion, that the district court erred when it admitted evidence related to prior bad acts and other evidence. Susan also alleged in her motion that she is actually innocent.

On December 18, 2014, the district court denied Susan's motion for postconviction relief without holding an evidentiary hearing.

Susan appeals.

ASSIGNMENTS OF ERROR

Susan assigns, restated and consolidated, that the district court erred when it denied her motion for postconviction relief without holding an evidentiary hearing on her claims that (1) she received ineffective assistance of counsel when counsel failed to further investigate and ask questions of the witnesses and failed to argue on direct appeal that the evidence presented at trial was insufficient; (2) the district court improperly admitted evidence generally and, in particular, evidence of prior bad acts; (3) she is actually innocent; and (4) the district court improperly denied her motion for new trial.

STANDARDS OF REVIEW

[1-3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* 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. *State v. Thorpe, supra*.

[4] 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. *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015).

[5,6] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Thorpe, supra*. When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion. *Id*.

ANALYSIS

Relevant Postconviction Law.

We begin by reviewing general propositions relating to postconviction relief and ineffective assistance of counsel claims before applying those propositions to the claims alleged and argued by Susan in this appeal. We note that because Susan was represented both at trial and on direct appeal by lawyers from the same office, the Nebraska Commission on Public Advocacy, this postconviction proceeding is effectively her first opportunity to claim that her trial counsel provided ineffective assistance of counsel. See *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013).

[7] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015). Thus, 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, causing the judgment against the defendant to be void or voidable. *State v. Crawford, supra*.

[8,9] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Huston, supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

[10-13] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Crawford, supra*. 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. *State v. Crawford, supra*. 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. *State v. Huston, supra*. 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. *Id*. A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

Further Investigation and Questioning of Witnesses.

Susan alleges that her counsel was ineffective at trial for failing to further investigate and ask more questions of certain

witnesses at trial, including Rebecca McClure, the nurse who gave Susan a ride home; Dr. Craig Shumard, an emergency room physician; Wendy Ground, a police investigator who interviewed Susan; James Platt and Sharon Platt, Susan's son and daughter-in-law; and Brian Bauer, Tom's employer. We determine that the district court correctly rejected this claim without an evidentiary hearing.

As we read Susan's motion for postconviction relief and her appellate brief, Susan argues that if trial counsel had done further investigation or had asked more questions of these and other witnesses on cross-examination, it would have been shown that on the night Tom was hospitalized, Susan did not make statements that she had injured Tom and that there was an effort by others to keep Susan from seeing Tom. Susan also contends that further questioning would have highlighted inconsistencies in the witnesses' testimony. Susan further argues that more intensive questioning of the witnesses would have revealed to the jury that she cared for and was concerned for Tom and that she had a good relationship with Tom. Thus, Susan contends that further questioning would have portrayed her in a more sympathetic light or, in any event, cast doubt on the degree of credibility to be accorded to the witnesses.

Susan makes no specific allegations of what further investigation would have uncovered or how such investigation and further questioning would, with reasonable probability, have resulted in her acquittal. Her allegations are speculative and, in many cases, pose rhetorical "what if" questions as to how the trial might have unfolded if the examinations had been phrased differently or, in some cases, proposed lines of questioning. Speculative allegations are an insufficient basis for postconviction relief. See *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013). Susan did not allege facts which, if proved, would constitute a violation of her constitutional rights.

Accordingly, we determine that Susan's counsel was not deficient for allegedly failing to further investigate or ask more questions on cross-examination of the witnesses identified in

Susan's motion. Susan is entitled to no relief on this claim. The district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

Arguing Insufficient Evidence on Direct Appeal.

Susan alleges that her counsel was ineffective for failing to explicitly argue on direct appeal that the evidence presented at trial was insufficient to support her convictions for first degree murder and use of a deadly weapon to commit a felony. As we read her motion for postconviction relief and appellate briefs, Susan argues that there was a lack of sufficient evidence, because no one witnessed her kill Tom and little DNA evidence was recovered from various items, including items found in the search of the DeJong home. The district court correctly rejected this claim without an evidentiary hearing.

The records and files in this case refute Susan's contention that there was not sufficient evidence to sustain her convictions. Contrary to Susan's argument, this court necessarily considered the sufficiency of the evidence in our analysis of the errors asserted on direct appeal. There was extensive evidence presented at trial that demonstrated Susan's guilt, and we set forth the evidence against Susan in our opinion on direct appeal by stating:

> The State's evidence demonstrated that Susan's story that Tom was beaten by his alleged mistress was completely fabricated. The evidence presented at trial showed that Tom was home that week and never left for South Dakota.
>
> Bauer, Tom's boss, testified that Susan's and Tom's vehicles were at the DeJong home the day before Tom allegedly returned from South Dakota. Bauer testified that Tom had called in sick to work on that Wednesday and Thursday. Cell phone records confirm that those calls "pinged" off cell towers near the DeJong home and not in South Dakota. Susan's son, James, testified that

he believed Tom was at the DeJong home on Thursday because of a telephone conversation he had with Susan that day. At trial, Susan presented no evidence that Tom had actually gone to South Dakota. Additionally, the alleged mistress testified that she and Tom never had an extramarital relationship, that Tom did not visit her that week, and that she did not cause his injuries.

Other evidence demonstrates Susan's motive for killing Tom. During her hospital interview, Susan ranted about Tom and his "whore." Susan alleged that Tom and that "whore" used drugs and molested children. Susan blamed the "whore" for ruining her relationship with Tom. Additionally, the State introduced Susan's Internet instant messages in which Susan stated that she "hate[d]" Tom, that she wished he were dead, and that she was "looking at getting rid of" him.

The evidence at trial also showed that Susan may have been the only person with the opportunity to inflict Tom's injuries. The medical testimony offered at trial established that many of Tom's injuries were inflicted well within 72 hours of his death. That indicates that Tom's injuries may have occurred any time after Tuesday. The evidence indicates that during those periods of time, Tom was at home with Susan. There was no evidence presented, other than Susan's fabricated statements about South Dakota, that Tom left the home on Wednesday, Thursday, or Friday. There was no evidence presented that someone other than Susan had spent time with Tom after Tuesday.

The physical evidence also supported Susan's guilt. All of the medical experts testified that Tom was severely assaulted and that his injuries were not caused naturally or by accident. His death was caused by blunt force trauma. Tom had defensive wounds on his hands and arms. Droplets of blood were found throughout the house, including on Susan's clothes. A red bag containing

> women's clothes, men's pajamas, Tom's wallet, and two hammers and a blue bag containing a computer, a lug wrench, and a cell phone were found in Susan's truck. Thomsen, the pathologist who performed Tom's autopsy, testified that the injuries to Tom's body were caused by some type of instrument and that the instrument could have been a hammer. After the interrogation, photographs and testimony established that Susan had bruises and sores on her palms that would be consistent with swinging a hammer. The bloodstained blue hammer recovered in Susan's truck had a mixture of Tom's and Susan's DNA. Susan's DNA was found on the handle. Tom's DNA was found on the head of the hammer.

State v. DeJong, 287 Neb. 864, 885-86, 845 N.W.2d 858, 875-76 (2014).

We have reviewed the record in this case, and given the extensive evidence presented at trial against Susan, we determine that the records and files in this case affirmatively show that Susan was entitled to no relief on her claim that there was insufficient evidence to support her convictions and that counsel's appellate argument failed to present the issue for our consideration. In connection with this contention, Susan has failed to suggest any facts which, if proved, constitute an infringement on her constitutional rights. The record shows that Susan was not prejudiced by counsel's conduct on direct appeal, and therefore, the district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

Admission of Evidence Related to Prior Bad Acts.

Susan alleges that the district court erred at trial when it admitted evidence of prior bad acts, including evidence of Tom's injuries on prior occasions and Susan's statements related to those injuries. As we read her motion for postconviction relief and her appellate briefs, Susan contends that

this error resulted in a violation of her constitutional rights of due process, the presumption of innocence, her right to a fair trial, and her right to privacy. The district court correctly rejected her claim without an evidentiary hearing.

[14-16] To the extent Susan alleges that her constitutional rights of due process, the presumption of innocence, her right to a fair trial, and her right to privacy were violated when the evidence related to the prior bad acts was admitted at trial, this claim is procedurally barred. We have stated that the need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012). It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *Id*. And in this case, the prior bad acts issues were both known to and litigated by Susan on direct appeal. We have recently stated: "A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased." *State v. Thorpe*, 290 Neb. 149, 156, 858 N.W.2d 880, 887 (2015).

The issue of the admission at trial of evidence related to the prior bad acts was specifically addressed on direct appeal, where Susan argued that the district court erred when it admitted evidence of Tom's injuries on prior occasions and her statements related to those injuries. For the purposes of the direct appeal, we assumed, without deciding, that the admission of this evidence was error. However, we determined that the erroneous admission of the evidence was harmless.

In the direct appeal, we began our harmless error analysis by "noting that the untainted, relevant evidence strongly supports Susan's guilt." *State v. DeJong*, 287 Neb. 864, 895, 845 N.W.2d 858, 882 (2014). We further stated that "the untainted evidence not only provided evidence of guilt but also established Susan's motive, her intent, her identity as the killer,

and the absence of mistake in Tom's death." *Id*. at 896, 845 N.W.2d at 882. We also stated that "there is cumulative evidence establishing that Tom was often injured prior to his death and that the likely perpetrator was Susan." *Id*. at 895-96, 845 N.W.2d at 882. Accordingly, in determining that the admission of the evidence regarding the prior bad acts was harmless, we stated:

> When viewed in relation to the whole record, the evidence erroneously admitted at the rule 404 hearing was insignificant. This evidence did not provide a crucial link to allow the State to make its case. In that sense, the evidence admitted at the rule 404 hearing was largely unnecessary. Thus, we hold that the erroneously admitted evidence was insignificant and did not materially influence the jury's verdicts. Any error was harmless.

State v. DeJong, 287 Neb. at 897, 845 N.W.2d at 882-83.

Because the issue of the admission at trial of evidence related to the prior bad acts was raised and addressed on direct appeal, this claim is now procedurally barred. Therefore, although Susan rephrases her claim for postconviction purposes, we determine that the district court did not err when it denied postconviction relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

Actual Innocence.

Susan alleges that the district court erred when it denied her motion for postconviction relief without an evidentiary hearing, because she is actually innocent. The district court correctly rejected her claim without an evidentiary hearing.

[17,18] We have previously acknowledged the possibility that a postconviction motion asserting a persuasive claim of actual innocence might allege a constitutional violation, in that such a claim could arguably amount to a violation of a movant's procedural or substantive due process rights. *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). However, in order to trigger a court's consideration of whether continued

incarceration could give rise to a constitutional claim that can be raised in a postconviction motion, there must be "'[a] strong demonstration of actual innocence'" "'because after a fair trial and conviction, a defendant's presumption of innocence disappears.'" *Id.* at 94, 834 N.W.2d at 791, quoting *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). Indeed, the U.S. Supreme Court has held that the threshold is "'extraordinarily high.'" *Id.* at 94, 834 N.W.2d at 791-92, quoting *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

In support of her claim that she is actually innocent, Susan relies heavily on the assertion that there were no direct witnesses to Tom's murder. She states that "[n]o one ever witnessed anything, verbally or physically, to prove absolutely without a doubt" that she murdered Tom. Brief for appellant at 6. Susan also argues that there was insufficient DNA or other physical evidence found in various locations, including the DeJong home, to link her to Tom's murder.

Although there were no direct witnesses to Tom's murder, when viewed in the light of the extensive evidence adduced at trial as summarized in our opinion on direct appeal and quoted above, Susan's allegations fall well short of the "extraordinarily high" threshold showing of actual innocence which she would be required to make before a court could consider whether her continued incarceration would give rise to a constitutional claim. Susan did not allege facts sufficient to necessitate an evidentiary hearing. Therefore, we determine that the district court did not err when it denied relief without an evidentiary hearing on this claim. We affirm this portion of the district court's order.

Denial of Motion for New Trial.

Susan assigns as error that the district court erred when it denied her motion for new trial. We determine that the district court correctly denied this claim without an evidentiary hearing.

The record belies Susan's allegation. The record establishes that Susan withdrew her motion for new trial at the time of sentencing. Accordingly, the district court did not deny her motion for new trial. We determine that the district court did not err when it denied relief on this claim without an evidentiary hearing. We affirm this portion of the district court's order.

Admission of Other Evidence and Other Claims of Postconviction Relief.

Susan argues on appeal that certain evidence should not have been admitted at trial, such as items located during searches, including the search of the vehicle and home. She also makes allegations in her postconviction motion regarding other evidence she asserts is objectionable, but, other than listing a catalog of constitutional provisions, she does not necessarily direct our attention to specific constitutional errors regarding these claims on appeal. Her allegations of conclusions do not require an evidentiary hearing. See *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015). We have reviewed her motion and have determined that her claims either are speculative and fail to affirmatively show that she is entitled to relief or are refuted by the record and files in this case. See *id*. Accordingly, we determine that Susan did not allege facts sufficient to necessitate an evidentiary hearing, and the district court did not err when it denied postconviction relief without an evidentiary hearing.

CONCLUSION

We find no merit to Susan's assignments of error. Therefore, we determine that the district court did not err when it denied her motion for postconviction relief without an evidentiary hearing.

Affirmed.

State of Nebraska, appellee, v. Maxiliamo Cano Samayoa, appellant.

873 N.W.2d 449

Filed December 31, 2015. No. S-14-762.

1. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question 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. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
3. **Rules of Evidence: Appeal and Error.** When 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. When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
4. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
5. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes be strictly construed.
6. **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.
7. **Trial: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection than was offered at trial.
8. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden

to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

9. **Criminal Law: Statutes: Time.** The exact time when a criminal offense is committed is not an essential element of a crime unless the statute defining the offense makes a date or time an indispensable element of the crime charged.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed as modified.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

Wright, J.

I. NATURE OF CASE

Maxiliamo Cano Samayoa (Cano) appeals his convictions on one count of third degree sexual assault of a child and three counts of first degree sexual assault of a child at least 12 years of age but less than 16 years of age. He argues that the evidence was insufficient to support his convictions. He also assigns that the district court erred in admitting certain testimony and in advising the jury that with respect to count I, "[t]he exact time when a criminal offense is committed is not an essential element of the crime." We affirm as modified.

II. SCOPE OF REVIEW

[1] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d

732 (2015). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

[2] An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Plain error may be found 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. *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012).

[3] When 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. *State v. Dominguez, supra*. When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review. *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

[4] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *State v. Merheb*, 290 Neb. 83, 858 N.W.2d 226 (2015).

III. FACTS

1. Background

The victim in this case, P.L., is Cano's niece. P.L.'s mother and Cano's wife are sisters. Cano was born in May 1981. P.L. was born in December 1997.

In February 2014, P.L. told her parents that Cano had been sexually assaulting her for some time. Her parents reported the allegations to the police and took P.L. to be interviewed at a child advocacy center in Scottsbluff, Nebraska. The contents of the interview are not contained in our record.

2. Charges

After P.L.'s interview, the police arrested Cano. He was charged with one count of third degree sexual assault of a child (count I) for subjecting P.L. "to sexual contact, not causing serious personal injury" during "the year 2008." He was also charged with three counts of first degree sexual assault of a child at least 12 years of age but less than 16 years of age. Count II alleged that "on or about October, 2012 through November, 2012," Cano committed first degree sexual assault of a child by subjecting P.L. "to sexual penetration." Counts III and IV were identical to count II, except that they alleged the sexual penetration occurred "on or about December, 2012," and "during the years 2010 or 2011," respectively. Cano pleaded not guilty to all four counts, and a jury trial was scheduled.

3. Trial

(a) P.L.'s Testimony

The State's principal witness at trial was P.L. She described in detail four incidents between her and Cano. Each incident corresponded to a count in the information.

P.L. testified that the first incident (count I) occurred in the living room of Cano's house while her mother and aunt were out picking up pizza. P.L. stated that Cano approached her while she was lying on the couch watching television, sat down next to her, and started "[r]ubbing" her "butt" with his hands. He also exposed his penis to her, grabbed her hand, and made her hand touch his penis. Although P.L. could not identify the exact date when this happened, she testified that it occurred sometime after she started seventh grade in August 2010 but before the birth of Cano's youngest daughter in July 2012.

The second incident between P.L. and Cano (count IV) occurred while she was painting the trim in her bedroom. P.L. testified that Cano entered her bedroom and forced her to perform oral sex on him. P.L. could not identify the exact date when this second incident happened. However, she testified

that it occurred after she and her family moved into their house on 12th Avenue in Scottsbluff but before 2012. She further stated that they moved into the 12th Avenue house while she was in eighth grade and that she started eighth grade in August 2011.

P.L. testified that the third incident (count II) happened in the kitchen at Cano's house. She said that he followed her into the kitchen when she went to get a drink, "pushe[d] [her] toward the seat," and "pull[ed] [her] down." P.L. "told him no." But he "told [her] to suck it again" and positioned her head to perform oral sex, which she did. At various times, P.L. testified that this occurred in "the year 2012," before her youngest cousin was born in July 2012 and before the final incident in February 2012.

P.L. testified that the fourth and final incident (count III) occurred in February 2012 while she was "putting lights up in [her] room." She described how Cano "pushe[d] [her] on the bed," "pull[ed] down his pants again," and told her to perform oral sex. On this occasion, Cano also pulled P.L.'s pants down and attempted to insert his penis into her vagina. P.L. testified that his penis "didn't go all the way" but "just touched" her vagina.

In addition to these four incidents, P.L. also briefly testified, over Cano's objection, to a fifth encounter. Because the admissibility of this testimony is raised on appeal, we reproduce the relevant exchange in full:

> [Prosecutor:] Can you estimate when this happened, this incident that you're talking about on 12th Avenue in the kitchen?
>
> [P.L.:] Like, close to two years now.
>
> [Prosecutor:] Okay. Was there another time when this happened?
>
> [P.L.:] Before that when [Cano] lived on 12th and I was in [his oldest daughter's] room and I was picking up the toys and they were on the —
>
> [Cano's attorney]: I'm going to object to materiality on one of the charges.

THE COURT: Overruled.
[Prosecutor:] Go ahead.
[P.L.:] Then I was in there and he just comes in and he just rubs me again from the back, then he just leaves.

(b) Cano's Testimony

Cano testified in his own behalf. He denied the allegations against him, and he specifically testified that he had never been alone with P.L. Cano also stated that in 2008, when the information alleged count I occurred, he was living in Texas.

(c) Motions for Directed Verdict

At the conclusion of the State's evidence and again at the end of the evidence portion of the trial, Cano moved for a directed verdict on counts I through III. He argued that the dates alleged in those counts were inconsistent with the State's evidence. Specifically, he argued that (1) the information alleged count I happened in 2008 but that the evidence showed Cano was living in Texas in 2008 and (2) the information alleged counts II and III occurred between October and December 2012 but that P.L. testified all of the incidents with Cano occurred while she was in seventh or eighth grade—that is, between August 2010 and May 2012. On both occasions, the district court overruled Cano's motion for a directed verdict.

(d) Jury Instructions

The district court instructed the jury on the elements of each crime charged and on the State's duty to prove these elements beyond a reasonable doubt. In the case of each count, one of the elements listed was that Cano engaged the underlying conduct at the time alleged in the information.

(e) Question From Jury

During deliberations, the jury submitted the following question to the judge: "Is the date of 2008 and [sic] exact stipulation to the account [sic], and if so can we convict on this account [sic] if we believe the event happened but not on that date on account [sic?]" The parties argue, and we agree, that

this question related only to count I of the information, which alleged that Cano committed third degree sexual assault of a child "[d]uring the year 2008 . . . ."

After consulting with counsel, the district court advised the jury that "[t]he exact time when a criminal offense is committed is not an essential element of the crime." The court did so over Cano's objection.

4. Verdicts and Sentencing

The jury returned verdicts of guilty on all counts, and the district court entered judgment accordingly. The court sentenced Cano to 1 to 3 years' imprisonment on the third degree sexual assault of a child conviction and concurrent terms of 35 to 40 years' imprisonment for each first degree sexual assault of a child conviction. At the sentencing hearing, the court stated that first degree sexual assault of a child carried a mandatory minimum of 25 years' imprisonment. But in the sentencing order, the court stated that the mandatory minimum was 15 years' imprisonment.

Cano timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

IV. ASSIGNMENTS OF ERROR

Cano argues that the evidence was insufficient to support his convictions. He also assigns that the district court erred in admitting evidence of other bad acts or uncharged conduct, in violation of Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), and in advising the jury that the exact time of the commission of the offense alleged in count I was not an essential element of the crime of third degree sexual assault of a child.

V. ANALYSIS

1. Sufficiency of Evidence

Cano argues that there was insufficient evidence to sustain his convictions. In reviewing a sufficiency of the evidence

claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

(a) Essential Elements

[5,6] Cano was charged with three counts of first degree sexual assault of a child at least 12 years of age but less than 16 years of age and one count of third degree sexual assault of a child. The essential elements of these crimes are established by statute. It is a fundamental principle of statutory construction that penal statutes be strictly construed. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). 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. *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013).

The crime of first degree sexual assault of a child at least 12 years of age but less than 16 years of age is defined by Neb. Rev. Stat. § 28-319.01(1) (Cum. Supp. 2014), which provides:

> A person commits sexual assault of a child in the first degree:
>
> . . . .
>
> (b) When he or she subjects another person who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older.

For purposes of this statute,

> [s]exual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or

> any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

Neb. Rev. Stat. § 28-318(6) (Cum. Supp. 2014). Fellatio is "oral stimulation of the penis." See *State v. Bruna*, 12 Neb. App. 798, 830, 686 N.W.2d 590, 615 (2004).

Pursuant to Neb. Rev. Stat. § 28-320.01(1) (Reissue 2008), "[a] person commits sexual assault of a child in the second or third degree if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." Section 28-318(5) defines the term "sexual contact" as follows:

> Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under sections 28-319.01 and 28-320.01.

The distinguishing factor between second and third degree sexual assault of a child is "serious personal injury to the victim." See § 28-320.01(2) and (3). Third degree sexual assault, the specific crime with which Cano was charged in count I, occurs when "the actor does not cause serious personal injury to the victim." See § 28-320.01(3).

Given the statutory definitions of first and third degree sexual assault of a child, we reject Cano's argument that the exact date of offense is an essential element of those crimes. Neither under federal law nor under Nebraska law is the exact time of the commission of an offense regarded as a substantive element in the charge or proof thereof, unless the statute involved makes it so or is clearly intended to have that effect. *Huffman v. Sigler*, 352 F.2d 370 (8th Cir. 1965). See, also, *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986); *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974). In the case of sexual assault of a child, the statutes involved do not make the time or date of the offense an element of the crime. Sections 28-319.01(1) and 28-320.01 require proof that the sexual penetration or sexual contact occurred when the defendant and victim were certain ages. But they do not require proof that such event occurred on a specific date. We therefore conclude that the exact date of commission is not a substantive element of first, second, or third degree sexual assault of a child.

This holding is consistent with our previous determination in *State v. Wehrle, supra*, that the date of commission is not an essential element of first degree sexual assault, which can also require proof of the defendant's and victim's ages. See Neb. Rev. Stat. § 28-319(1) (Reissue 2008). It also recognizes and accommodates the unique circumstances surrounding young victims, who "are often unsure of the date on which the assault or assaults occurred" and "may have no meaningful reference point of time or detail by which to distinguish one specific act from another." See *State v. Martinez*, 250 Neb. 597, 600, 550 N.W.2d 665, 658 (1996). See, also, *Sledge v. State*, 903 S.W.2d 105 (Tex. App. 1995).

In summary, the essential elements of first degree sexual assault of a child at least 12 years of age but less than 16 years of age are (1) that the defendant subjected the victim to sexual penetration, (2) that the defendant was 25 years of age or older when the sexual penetration occurred, and (3) that the victim

was at least 12 years of age but less than 16 years of age when the sexual penetration occurred. See § 28-319.01(1)(b).

The essential elements of third degree sexual assault of a child are (1) that the defendant subjected the victim to sexual contact without causing serious personal injury to the victim, (2) that the defendant was at least 19 years of age or older when the sexual contact occurred, (3) and that the victim was 14 years of age or younger when the sexual contact occurred. See § 28-320.01(1) and (3).

(b) Evidence Against Cano

We now review the State's evidence against Cano to determine whether any rational trier of fact could have found the essential elements of first and third degree sexual assault of a child beyond a reasonable doubt. See *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015). We conclude that based on the testimony of P.L., the State's principal witness, a rational trier of fact could have found that Cano committed third degree sexual assault of a child on one occasion and first degree sexual assault of a child on three distinct occasions.

(i) Third Degree Sexual Assault of Child

P.L. testified to an incident when Cano rubbed her "butt" over her clothing and forced her hand to touch his exposed penis. She did not testify that this contact caused her physical injury, and the State did not allege that it did.

P.L. stated that this incident occurred in the living room of Cano's house after she started seventh grade in August 2010 but before the birth of Cano's youngest daughter in July 2012. It is undisputed that Cano was born in May 1981 and that P.L. was born in December 1997. Consequently, between August 2010 and July 2012, Cano was 29 to 31 years of age and P.L. was 12 to 14 years of age. She did not turn 15 until December 2012, several months after the latest date in the timeframe established by her testimony.

From this evidence, a rational trier of fact could have found that Cano subjected P.L. to sexual contact in two separate

ways: (1) by intentionally touching the "clothing covering the immediate area of [P.L.'s] sexual or intimate parts," which includes the buttocks, or (2) by intentionally causing P.L. to touch his "sexual or intimate parts." See § 28-318(2) and (5). A rational trier of fact also could have found that this contact occurred at a time when Cano was over the age of 19 years and P.L. was 14 years of age or younger. We therefore conclude that there was sufficient evidence to convict Cano of third degree sexual assault of a child.

(ii) First Degree Sexual Assault of Child

P.L. testified to three separate incidents when Cano forced her to perform oral sex on him—one in the kitchen at Cano's house, another while she was "putting lights up in [her] room," and a third while she was painting the trim in her bedroom. During closing argument, the State explained that these incidents corresponded to the allegations in counts II, III, and IV, respectively.

P.L. testified that two of the incidents of oral sex occurred close together. She unequivocally identified the date of the incident involving lights as February 2012. She testified that the incident in the kitchen occurred prior to that time but still in the year 2012. As such, from P.L.'s testimony it could be ascertained that the incident in the kitchen occurred in January or February 2012, followed by the incident with the lights later in February. In both January and February 2012, Cano was 30 years of age and P.L. was 14 years of age.

As to the incident of oral sex connected to painting the trim in her bedroom, P.L. could not identify the exact date when it happened. However, she testified that it occurred after she and her family moved into their house on 12th Avenue but before the year 2012. Elsewhere in her testimony, she stated that they moved into the 12th Avenue house while she was in eighth grade and that she started eighth grade in August 2011. Taking all of this testimony together, the timeframe of the incident involving the trim in the bedroom, as established by P.L.'s testimony, was sometime between August and

December 2011. At any point during that timeframe, Cano would have been 30 years of age. P.L. would have been 13 or 14 years of age.

Cano argues that P.L.'s testimony as to these incidents contained too many inconsistencies to support his convictions. But this argument goes to the credibility of P.L. as a witness, which we do not consider. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

If the trier of fact believed P.L.'s testimony, it could have found that on three separate occasions, Cano subjected P.L. to oral sex, which constitutes sexual penetration under § 28-318(6). The trier of fact also could have concluded that each of these incidents of oral sex occurred at a time when Cano was 25 years of age or older and P.L. was at least 12 years of age but less than 16 years of age. Accordingly, there was sufficient evidence to convict Cano of three distinct counts of first degree sexual assault of a child.

2. Admission of Other Bad Acts

[7] Cano claims the district court erred by admitting evidence of other bad acts/uncharged misconduct, in violation of § 27-404(2). Cano objects to P.L.'s testimony about a fifth possible incident, because it was "prior bad acts evidence that was admitted without the protection and safeguards of [§] 27-404(2)." See brief for appellant at 18. Although Cano objected to this testimony at trial, he did not state § 27-404(2) as the ground for his objection. He objected on materiality grounds. Therefore, we agree with the State that Cano failed to preserve his § 27-404 objection for review by failing to object on this basis during the trial. On appeal, a defendant may not assert a different ground for his objection than was offered at trial. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

3. Answer to Jury's Question About Time of Assault

Cano next claims that the district court committed error when it advised the jury that the exact time of the commission of the offense alleged in count I was not an essential element of the crime of third degree sexual assault.

[8] Whether jury instructions given by a trial court are correct is a question of law. 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. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

During the course of its deliberations, the jury submitted a question to the court: "Is the date of 2008 and [sic] exact stipulation to the account [sic], and if so can we convict on this account [sic] if we believe the event happened but not on that date on account [sic?]" The trial court responded: "The exact time when a criminal offense is committed is not an essential element of the crime." In essence, Cano concedes that there was no argument regarding the sufficiency of the charges contained in the information or concerns about double jeopardy. The question raised by Cano was whether the State established all the elements of the offense beyond a reasonable doubt. The allegation was that the abuse occurred within the broad timeframe of the year 2008. In the instructions to the jurors, they were provided with the elements of the offense, along with the State's burden to prove each of the elements of each offense by proof beyond a reasonable doubt.

The district court instructed the jury as follows:

> The elements of third degree sexual assault of a child as charged in count I are:
>
> 1. That [Cano] subjected [P.L.] to sexual contact without causing serious personal injury to her; and

> 2. That [Cano] was nineteen years of age or older at the time; and
>
> 3. That [P.L.] was fourteen years of age or younger at the time; and
>
> 4. That [Cano] did so during the year 2008 in Scotts Bluff County, Nebraska.

Cano asserts that the district court's response to the jury's question was in conflict with its instructions to the jury and allowed the jury to ignore its instructions and convict Cano of an offense that had been alleged to have occurred when he was living in the State of Texas. Cano asserts that the trial court should have instructed the jury to continue to deliberate and base its decision on the facts it found and the law contained in the jury instructions.

We have previously determined that based on P.L.'s testimony on the incident in Cano's living room, a rational trier of fact could have found that Cano committed third degree sexual assault of a child. Neb. Rev. Stat. § 29-1501 (Reissue 2008) provides in relevant part:

> No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense; nor for stating the time imperfectly . . . .

[9] In *State v. Wehrle*, 223 Neb. 928, 931, 395 N.W.2d 142, 145 (1986), we held that "the exact time when a criminal offense is committed is not an essential element of a crime unless the statute defining the offense makes a date or time an indispensable element of the crime charged." Cano does not appear to be complaining that he was deprived of notice of the allegations. He only alleges that the instruction was incorrect and somehow conflicted with the rest of the instructions and that the district court should have told the jury to continue to deliberate, apparently without any supplemental instructions from the court.

The instruction given by the district court was not incorrect. The exact time is not an essential element of third degree sexual assault. The supplemental instruction given by the district court was a correct statement of the law, and Cano has not proved that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of Cano.

4. Sentences

The State has pointed out, and we agree, that there was plain error in the sentences given by the district court. Plain error may be found 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. *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). As noted by the State, the district court sentenced Cano to 1 to 3 years' imprisonment for third degree sexual assault of a child and 35 to 40 years' imprisonment for each of the three first degree sexual assault of a child convictions, all of which were to run concurrently. The district court then said that "25 of those [years] will be a mandatory minimum before the good time statutes are applicable." Section 28-319.01 provides:

> (2) Sexual assault of a child in the first degree is a Class IB felony with a mandatory minimum sentence of fifteen years in prison for the first offense.
>
> (3) Any person who is found guilty of sexual assault of a child in the first degree under this section and who has previously been convicted (a) under this section . . . shall be guilty of a Class IB felony with a mandatory minimum sentence of twenty-five years in prison.

There was no allegation in the information that Cano had a prior conviction for sexual assault or attempted sexual assault of a child. All his convictions for that offense occurred in this trial, which resulted from the same information filed by the State. The plain language of the statute requires that

Cano had been previously convicted of a sexual assault or attempted sexual assault as provided in § 28-319.01(3). Since Cano was convicted of the three felonies of first degree sexual assault of a child arising out of a single information, he was not previously convicted as required by § 28-319.01(3) of sexual assault or attempted sexual assault of a child. Statutory interpretation is a question of law, which this court decides independently of the lower courts. See *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014). The district court erred in pronouncing that Cano will have a mandatory 25-year minimum sentence before the good time statutes will apply. Since this is Cano's first offense for sexual assault of a child, he must serve a mandatory minimum of 15 years before the good time statutes apply.

We therefore amend Cano's sentences by reducing the mandatory minimum sentence that Cano must serve before he is eligible for good time from 25 years imposed by the district court to 15 years as provided by § 28-319.01(2). With that amendment, we affirm the sentences of Cano to 1 to 3 years' imprisonment for third degree sexual assault of a child and 35 to 40 years' imprisonment for each of the three first degree sexual assault of a child convictions, all of which are to run concurrently.

VI. CONCLUSION

We affirm the judgments of conviction, and we affirm the sentences as modified.

Affirmed as modified.

State of Nebraska, appellee, v. Shawn R. Erpelding, appellant.

874 N.W.2d 265

Filed December 31, 2015. No. S-14-813.

1. **Statutes: Jury Instructions: Appeal and Error.** Statutory interpretation and whether jury instructions are correct are questions of law, which an appellate court reviews independently of the lower court's determination.
2. **Convictions: Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.
3. ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question 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. **Sentences: Appeal and Error.** When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.
5. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute such as Neb. Rev. Stat. § 28-706 (Reissue 2008), "intentionally" means willfully or purposely, and not accidentally or involuntarily.
6. **Criminal Law: Child Support: Proof.** Generally, the burden of proving an exemption to criminal nonsupport is on the party claiming it.
7. **Criminal Law: Child Support: Proof: Intent.** The State is not required to prove that a defendant was able to pay in order to show that he or she intentionally failed to provide support.
8. **Criminal Law: Child Support: Evidence: Intent.** Evidence of ability to pay support, coupled with evidence of nonpayment, is key circumstantial evidence of an intent not to pay.

9. ____: ____: ____: ____. A defendant may present evidence to establish an "inability to pay" support in order to disprove intent.
10. **Criminal Law: Intent.** Intent may be inferred from the words or acts of a defendant and from the circumstances surrounding the incident.
11. **Child Support.** An obligation to support a minor child is not affected by the assignment of child support to the Department of Health and Human Services, which occurs pursuant to Neb. Rev. Stat. § 43-512.07 (Cum. Supp. 2014).
12. **Judgments: Collateral Attack.** A collateral attack occurs when the validity of a judgment is attacked in a way other than in a proceeding in the original action.
13. **Collateral Attack: Jurisdiction.** Unless grounded upon the court's lack of jurisdiction over the parties or subject matter, collateral attacks are impermissible.
14. **Collateral Attack.** The rule against collateral attacks applies equally to interlocutory orders and final judgments.
15. **Collateral Attack: Jurisdiction.** The policy of the collateral bar rule is to respect the jurisdiction of the court rendering the order and to encourage obedience of courts' orders.
16. **Child Support: Judgments: Appeal and Error.** A temporary child support order is appealable from a final judgment on the issue of support.
17. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
18. **Appeal and Error.** Plain error may be found 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.
19. **Jury Instructions.** As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
20. **Jury Instructions: Statutes.** The law does not require that a jury instruction track the exact language of the statute.
21. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct a jury on a lesser-included offense if (1) the elements of the lesser offense 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.
22. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to raise an argument that has no merit or for

failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.

23. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
24. **Habitual Criminals: Notice: Time.** Neb. Rev. Stat. § 29-2221 (Reissue 2008) requires 3 days' notice of an enhancement hearing and not merely notice of the sentencing hearing.
25. **Statutes: Legislature: Intent.** When interpreting a statute, a court's objective is to determine and give effect to the legislative intent of the enactment.
26. **Habitual Criminals: Notice.** The purpose of the notice requirement in Neb. Rev. Stat. § 29-2221 (Reissue 2008) is to ensure that the defendant has reasonable time to prepare a defense.
27. **Constitutional Law: Sentences.** The Eighth Amendment's proscription of cruel and unusual punishment prohibits not only barbaric punishments, but also sentences that are grossly disproportionate to the crime committed.
28. **Constitutional Law: Habitual Criminals: Legislature: Intent.** When a court is faced with a habitual criminal enhancement, its Eighth Amendment proportionality review must take into account the Legislature's goals in enacting such statute.
29. **Constitutional Law: Sentences.** With regard to whether the length of a sentence constitutes cruel and unusual punishment, the Nebraska Constitution does not require more than does the Eighth Amendment to the U.S. Constitution.
30. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Affirmed.

Jonathan R. Brandt, of Anderson, Klein, Swan & Brewster, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

McCormack, J.

I. NATURE OF CASE

Shawn R. Erpelding was convicted in a jury trial in the district court for Buffalo County, Nebraska, of four counts of criminal nonsupport under Neb. Rev. Stat. § 28-706 (Reissue 2008) for failure to pay 4 months of child support totaling $900. After his sentences were enhanced by the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 2008), he was sentenced to concurrent terms of 10 to 15 years on each count. Erpelding appeals both his convictions and his sentences.

II. BACKGROUND

On May 14, 2012, Erpelding filed a complaint with the district court to establish paternity, custody, visitation, and child support of his 4-year-old daughter, Grace Erpelding, who was born out of wedlock. In July 2012, the court entered a temporary parenting plan granting primary physical and legal custody of Grace to her mother, Diane Southall. On August 20, the court ordered Erpelding to pay temporary child support in the amount of $225 per month.

The district court later held a final hearing on the pleadings to establish paternity, custody, parenting time, and child support. Despite adequate notice of the hearing, Erpelding did not appear. Pursuant to an order filed July 15, 2013, custody was awarded to Southall. Erpelding was then ordered to pay child support in the amount of $379 per month. The July 15 order did not mention the temporary child support obligation or any arrearages.

Erpelding failed to make any payments on the temporary support order for over a year. He also did not make any payments on the July 15, 2013, child support order during that time. On August 5, he was charged with criminal nonsupport pursuant to § 28-706 based on his failure to pay the first 4 months of the temporary child support obligation. He was also

charged with being a habitual criminal per § 29-2221 in the information filed September 9.

1. Temporary Child Support Order

The journal entry filed August 20, 2012—the temporary child support order—was entered into evidence at trial. It reflects that Erpelding failed to provide adequate evidence of his income for the district court to determine the amount of temporary child support he was to pay:

> [Erpelding] has provided the court with an affidavit which is essentially, unenlightening. . . . Erpelding states that he is and has been engaged in a carpentry business for a number of years. He has not, apparently, filed income tax returns since tax year 2008. He states that his books reflect that he essentially breaks even in his business, though he admits he has had the ability to withdraw adequate funds to support his family prior to the departure of . . . Southall from his home. Essentially, the court is unable to determine the actual extent of any income being earned by . . . Erpelding and has been advised that . . . Southall has no current earning capacity. Absent a better showing of actual income, profit, and the nature to which business income has been utilized for personal expenses, the court has no real alternative but to pluck a number out of the air.

Erpelding did not attempt to appeal that temporary child support order or the July 15, 2013, judgment.

2. Efforts to Collect

Southall began to receive Aid to Dependent Children (ADC) assistance for Grace through the Department of Health and Human Services (DHHS) in August 2012. By operation of law, child support was assigned to DHHS.[1] DHHS automatically referred Erpelding's case to Jann Davidson, a support enforcement officer with the Buffalo County Attorney's office.

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[1] See Neb. Rev. Stat. § 43-512.07 (Cum. Supp. 2014).

As an enforcement officer, Davidson has the authority to take a number of enforcement actions, including suspending delinquent parties' operator's licenses, as well as professional and recreational licenses. She apparently took such action against Erpelding. On December 13, 2012, Erpelding received a notice of intent to suspend his operator's and recreational licenses due to his delinquent child support payments. This notice was in addition to the regular notices that Erpelding received monthly.

In March 2013, Erpelding's operator's and recreational licenses were both suspended. Despite Davidson's efforts, she received no payments and no communication from Erpelding. She eventually referred his case for criminal prosecution.

On October 8, 2013, 2 months after Erpelding was charged with criminal nonsupport, Erpelding paid $857 in child support. About a week after his payment, he contacted Davidson to find out how to get his operator's license back. Davidson testified that her office usually requires 3 months' worth of payments, a withholding, and at least one payment from that withholding before it will certify compliance with the Department of Motor Vehicles. But, in this case, Davidson agreed to give Erpelding credit for the $857 in payments he had already made and to allow his license to be reinstated if he let her put into place a withholding from his employment. Erpelding disclosed to Davidson the identity of one of his employers, and Davidson was able to initiate the withholding. In addition to the $857 payment, Davidson was able to collect $644.95 less than a month later.

At Erpelding's trial on nonsupport, Erpelding adduced evidence suggesting that he had provided some undocumented support to Grace. Southall testified that Erpelding paid half of Grace's daycare expenses directly to Southall and provided things for Grace during visitations. But, on cross-examination, Southall admitted she had previously testified at the hearing on custody and support that she had not received any support from Erpelding.

3. Ability to Pay Child Support

The State called three witnesses who testified about Erpelding's financial status in the 3 months preceding the months that he was charged with nonpayment (May, June, and July 2012), as well as during those months he was charged with nonpayment (August, September, October, and November 2012).

Vikki Stamm, an attorney in Buffalo County, testified that she hired Erpelding to construct a building for her in May 2012. Stamm agreed to pay Erpelding $8,500 total for labor, half to be paid up front and half to be paid upon completion by the end of July. On May 7, Stamm paid Erpelding $4,250. Stamm testified that Erpelding began work and had a crew of four or five men working with him. After Erpelding failed to show up consistently and Stamm saw his business vehicle at other farms and businesses, she fired him mid-July before he completed the project. Stamm testified that at the time she terminated Erpelding, about 40 percent of the project was completed, and that she did not pay Erpelding any additional money. She also did not get back any part of the $4,250 already paid.

Collin Nabity, a Buffalo County business owner, testified that he hired Erpelding to do multiple jobs over the years, including building a shed in the summer of 2012. Nabity testified that between June 29 and July 21, 2012, he paid Erpelding $2,000 for labor to build the shed. Nabity said Erpelding had a crew working with him, but did not know how much the crew was paid.

Wade Regier, a former branch manager of the Pinnacle Bank in Palmer, Nebraska, also testified to Erpelding's financial situation. Regier testified that by June or July 2012, Erpelding had fallen behind on payments for prior loans made to him by Pinnacle Bank. In October 2012, Erpelding's Pinnacle Bank debt was consolidated into a single loan of $17,951.90. Under this "new" loan, Erpelding was required to make monthly payments of $586.31 to begin on November 24, 2012.

Pinnacle Bank took as security for the loan a motorcycle, three pickup trucks, a "Bobcat," and a camper trailer (Erpelding's home), which Erpelding estimated to be valued at $31,500 total. Regier testified that at the time of Erpelding's October 2012 loan application, Erpelding represented that he had work lined up and had listed a few references.

Erpelding's loan application with Pinnacle Bank showed additional assets, monthly obligations, and outstanding judgments against him. Additional assets included tools and an enclosed trailer, which Erpelding valued at $25,000 at the time of his loan. The loan application showed monthly expenses of $1,136 for housing and a vehicle. No value was given for the outstanding judgments, but he listed "Care Credit - teeth," "Frontier," and "Verizon - cellphone." It also appears Erpelding filed bankruptcy in 2007.

Regier testified that Erpelding attempted to make at least partial payments on the loan. Based on Regier's testimony that the bank attempted to recover the debt in 2013 and seized all available assets, it appears Erpelding must have eventually stopped making payments.

4. Jury Instructions on Criminal Nonsupport

Under § 28-706, a person commits criminal nonsupport if he or she "intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a . . . minor child." That crime is a misdemeanor unless "it is in violation of any order of any court." If in violation of a court order, the crime is a felony.

The jury was instructed that the elements of the crime charged were as follows:

> (1) The defendant, . . . Erpelding, intentionally failed, refused, or neglected to provide proper support for his minor child, Grace . . . , born in 2008;
>
> (2) That [Erpelding] knew he was legally obliged to provide support to that child by an order of the District

Court of Buffalo County, Nebraska, entered on August 20, 2012, in Case CI 12-291;

(3) That these events occurred [in August, September, October, and November 2012]; and

(4) These events occurred in Buffalo County, Nebraska.

Erpelding's trial counsel did not object to these instructions and did not offer additional instructions. The jury found Erpelding guilty on all four counts of criminal nonsupport.

5. Habitual Criminal Enhancement Hearing

On June 12, 2014, about a week after his conviction, Erpelding was ordered to appear for the sentencing hearing to be held on August 22. The order did not contain a separate notice that the habitual criminal enhancement hearing required by § 29-2221 was to occur the same day.

Habitual criminal enhancement is governed by § 29-2221, which provides:

> (2) . . . If the accused is convicted of a felony, before sentence is imposed a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused *at least three days prior thereto*. At the hearing, if the court finds from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state or by the United States, the court shall sentence such person so convicted as a habitual criminal.

(Emphasis supplied.)

At the sentencing hearing, Erpelding objected to proceeding on the habitual criminal count. He asked that the count be dismissed on the grounds that he did not receive the 3 days' notice required by § 29-2221.

The State argued it was not required to give separate notice of the enhancement hearing, because Erpelding should have

known that such hearing would occur immediately before the sentencing hearing by virtue of the fact that § 29-2221 requires the enhancement hearing to take place before sentencing. The State cited *State v. Poe*,[2] a Nebraska Court of Appeals case not designated for publication in the permanent law reports, for the proposition that the purpose of the notice requirement in § 29-2221 is to ensure that the defendant has a reasonable time to prepare a defense. Based on *Poe*, the State argued that Erpelding had been given notice of the district court's setting of the sentencing date and was aware of the habitual criminal allegations in the information, which were filed almost a year before the enhancement hearing. Thus, the State argued, there was no lack of notice and no prejudice to Erpelding. The sentencing judge reviewed *Poe*, agreed with the State, and allowed the hearing to proceed.

Erpelding's criminal history includes two prior felonies. In 1995, he was convicted of aggravated assault with a deadly weapon; he was sentenced to 7½ years' imprisonment and served less than 7 years. In 2004, Erpelding pled no contest to his charge of felon in possession of a deadly weapon; he was sentenced to 18 months to 3 years' imprisonment and served only 11 months 7 days.

Besides those felonies on which his habitual criminal enhancement was based, Erpelding has been convicted of a number of other crimes. In December 2004, Erpelding was convicted of "Criminal Mischief, $500 to $1,500" and "Avoid[ing] Arrest." He was sentenced to 1 year of imprisonment for each of those crimes. In 2005, he was convicted of "Deliver/Intent to Deliver Controlled Substances" and was sentenced to 5 years' probation. In 2011, he was convicted of "Driving Under the Influence." In 2012, he was found guilty of "Steal[ing] Money o[r] Goods, less than $300," and in June 2014, he was convicted of "Attempted Unlawful Possession of a Deadly

[2] *State v. Poe*, No. A-91-102, 1992 WL 90034 (Neb. App. May 5, 1992) (not designated for permanent publication).

Weapon." These crimes are in addition to a number of traffic violations, including six speeding tickets, four instances of driving without a valid operator's license, and three incidents of driving under suspension.

After both parties were heard, the district court stated:

> I don't think the Legislature clearly intended that the habitual criminal enhancement would be attached to a criminal non-support conviction. It was clearly the purpose of the Legislature to punish people who were habitual criminal[s], particularly in the sense of either violent crimes or crimes that create substantial hazard to society and the community. Nonetheless they didn't make an exception. I think it is unusual and probably not within the intent of our Legislature that an enhancement be attached to this type of a Class IV felony. But nonetheless I don't have a choice. That's what the Legislature requires me to do.

The court sentenced Erpelding to concurrent terms of 10 to 15 years' imprisonment on each count. Erpelding appeals and is no longer represented by trial counsel.

III. ASSIGNMENTS OF ERROR

Erpelding asserts, renumbered and restated, that (1) there was insufficient evidence to support a finding of felony nonsupport, (2) the district court violated the Sixth Amendment of the federal Constitution when it failed to submit to the jury the issue of whether Erpelding's nonsupport was in violation of any order of any court, (3) the district court erred for failing to require a jury instruction on a lesser-included offense of misdemeanor criminal nonsupport and that his counsel was ineffective for not requesting one, (4) the district court erred in finding Erpelding was a habitual criminal and enhancing his sentences, and (5) Erpelding received excessive and illegal sentences contrary to the Eighth Amendment of the federal Constitution, as well as the state Constitution.

IV. STANDARD OF REVIEW

[1] Statutory interpretation and whether jury instructions are correct are questions of law, which an appellate court reviews independently of the lower court's determination.[3]

[2,3] When reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.[4] The relevant question 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]

[4] When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.[6]

V. ANALYSIS

A person commits the misdemeanor of criminal nonsupport when he or she "*intentionally* fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse [or] minor child."[7] "[I]f it is in violation of any order of any court," the crime is a Class IV felony.[8]

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[3] See *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015).

[4] See, *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

[5] *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

[6] *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

[7] § 28-706(1) (emphasis supplied).

[8] § 28-706(7).

1. Insufficient Evidence

Erpelding attacks the sufficiency of the evidence on almost every element of felony nonsupport. Erpelding argues that the State failed to prove Erpelding's ability to pay and that, as a result, there was insufficient evidence to demonstrate Erpelding *intentionally* withheld support. Erpelding also argues that any nonsupport was really to DHHS and not to his minor child. Finally, Erpelding attacks the validity of the underlying order and argues that his failure to pay could not have been "in violation of any order of any court."[9]

(a) Intent

Erpelding contends that the State failed to demonstrate he had the requisite intent to commit the crime of nonsupport.

Both parties argue under the assumption that the State must, and has the burden to, prove that Erpelding was able to pay in order to show that he intentionally failed to provide support. Erpelding argues that the State failed to produce evidence of his income sufficient to demonstrate he was able to pay. The State, in contrast, asserts that Erpelding owned his own business and was not out of work during the months he was charged with nonsupport. The State argues that "[i]f Erpelding was not earning enough to pay his support obligation with his business, then he should have taken a second job to make ends meet . . . ."[10] The State also lists Erpelding's assets and contends that he could have sold them to pay his obligation. Some other states' nonsupport statutes explicitly make sufficient ability to provide support an element of the crime,[11] and other states' nonsupport statutes provide for an affirmative "inability

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[9] Brief for appellant at 23.

[10] Brief for appellee at 16.

[11] 23 Am. Jur. 2d *Desertion and Nonsupport* § 42 (2013) (citing *Streater v. Cox*, 336 Fed. Appx. 470 (6th Cir. 2009); *Brooke v. State*, 99 Fla. 1275, 128 So. 814 (1930)).

to pay" defense.[12] Nebraska's nonsupport statute does neither; instead, § 28-706 merely requires proof that the defendant *intentionally* failed to support his minor child.

[5] We have said that in the context of a criminal statute such as § 28-706, "intentionally" means willfully or purposely, and not accidentally or involuntarily.[13] But it does not follow that the State must prove beyond a reasonable doubt, as part of its prima facie case, both that the defendant's nonpayment was intentional *and* that the defendant's nonpayment was not accidental and not involuntary, e.g., that the defendant had the ability to pay.

[6] Requiring the State to prove that the defendant's failure to provide support was not accidental and not involuntary would force the State to try to prove a negative with information not in its control. Generally, the burden of proving an exemption rests on the party claiming it.[14]

[7] We thus conclude that the State is not required to prove that the defendant was able to pay in order to show that he or she intentionally failed to provide support.

[8] Nevertheless, evidence of ability to pay is not irrelevant to the question of whether the defendant intentionally failed to provide support. Often, evidence of ability to pay, coupled with evidence of nonpayment, is key circumstantial evidence of an intent not to pay.[15]

[9] And, of course, a defendant may present evidence to establish an "inability to pay" in order to disprove intent.

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[12] See, Ind. Code Ann. § 35-46-1-5 (LexisNexis 2009); Tex. Penal Code Ann. § 25.05 (West 2011).

[13] *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988).

[14] See *Hamilton Cty. EMS Assn. v. Hamilton Cty.*, 291 Neb. 495, 866 N.W.2d 523 (2015).

[15] See, *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991); *State v. Bright, supra* note 13; *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990); *State v. Eichelberger, supra* note 13.

Indeed, Erpelding's trial counsel argued during his closing statement that Erpelding did not have the financial ability to pay his child support obligation and thus could not have intended not to pay. Erpelding brought up evidence that he had fallen behind on his loan payments and had various expenses. But the trier of fact implicitly rejected these arguments. And we view the evidence in the light most favorable to the State.

Although Erpelding's precise income is not clear, viewing the evidence most favorable to the State, we conclude that an ability to pay could be inferred from the totality of the evidence and that the jury could have considered such ability to pay in evaluating whether Erpelding intentionally failed to provide for his minor child.

The evidence shows Erpelding was not without work during or in the 3 months preceding those months he was charged with nonsupport. He had at least two construction jobs in May, June, and July 2012. From Stamm's testimony that Erpelding's business trailer was seen at other farms and businesses, and from Regier's testimony that Erpelding represented he had work lined up, a jury could infer that Erpelding was also engaged in other jobs during that time.

The fact that Erpelding made partial payments on his bank loan and was able to pay over 5 months' worth of child support payments, or $1,252.95, during the 1-month period from October 8 to November 8, 2013, in order to have his license reinstated, also suggests that Erpelding had the ability to pay before that time, but simply chose not to.

Because we conclude that an ability to pay could be inferred without requiring Erpelding to sell the tools and vehicle used in his business, we do not respond to the State's argument that Erpelding should have sold them to pay his child support obligation.

[10] Evidence of ability to pay is not the only circumstantial evidence that may be used to prove intent to commit the crime

of nonsupport. We have said that intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident.[16]

Assuming a defendant has notice of the support obligation at issue, intent not to pay can be inferred from a continuous failure to make even partial payments and from a failure to communicate with child support services until after his or her licenses were suspended and he or she was charged with criminal nonsupport.[17]

Although Erpelding received monthly notices of his child support obligation, he did not make even a partial payment for over a year. He did not dispute the amount, contact child support services, or appear to make any effort to satisfy his child support obligations during that time. It was only after Erpelding's operator's license was suspended and after he was charged with felony nonsupport that Erpelding made any payments or reached out to child support services.

In evaluating whether Erpelding intentionally failed to pay support, the jury was free to reject Southall's testimony that Erpelding paid half of Grace's daycare directly to Southall and supported Grace during his visitations. After all, Southall admitted she had previously testified at a custody hearing that she had never received any child support from him.

Viewing the evidence in a light most favorable to the State, we conclude that a reasonable trier of fact could find, beyond a reasonable doubt, that Erpelding intentionally failed, refused, or neglected to pay the child support for the months of August, September, October, and November 2012.

(b) Nonsupport to His Minor Child

[11] We quickly dispose of Erpelding's meritless argument that his nonsupport was really to DHHS and not to his minor

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[16] See, *State v. Bright, supra* note 13; *State v. Eichelberger, supra* note 13.

[17] See *In re Interest of Gabriella H.*, 289 Neb. 323, 855 N.W.2d 368 (2014).

child. An obligation to support a minor child is not affected by the assignment of child support to DHHS, which occurred here by operation of law upon Southall's receipt of ADC support for Grace.[18]

(c) Validity of Temporary Child Support Order

Erpelding next contends that any failure to support his minor child could not have been "a violation of any order of any court," because the underlying temporary child support order was "invalid," and he claims that his trial counsel was ineffective for failing to challenge it at his criminal nonsupport trial.[19] The State responds that his trial counsel could not be ineffective for failing to launch an impermissible collateral attack. We agree with the State.

[12,13] A collateral attack occurs when the validity of a judgment is attacked in a way other than in a proceeding in the original action.[20] Unless grounded upon the court's lack of jurisdiction over the parties or subject matter, collateral attacks are impermissible.[21]

Erpelding does not attack the underlying temporary child support order on a jurisdictional basis; rather, he argues that the order was invalid because no child support calculation was attached and because "the district court . . . 'pluck[ed] a number out of the air.'"[22] Nonjurisdictional defects, such as the one Erpelding alleges, render a judgment voidable, not void, and may only be attacked directly.[23] Thus, any challenge

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[18] See § 43-512.07.

[19] Brief for appellant at 12, 13.

[20] See *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[21] *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009); *State v. Smith, supra* note 20.

[22] Brief for appellant at 12.

[23] *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985); *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975).

to the temporary support order at his criminal nonsupport trial would have been an impermissible collateral attack. As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.[24]

Erpelding takes the position that a challenge of the underlying order at his nonsupport trial would not have been a collateral attack on a judgment, because, he argues, the temporary child support order was not a final, appealable order. This argument assumes that an interlocutory order can be collaterally attacked for reasons other than the court's lack of jurisdiction over the parties or the subject matter.

[14,15] It is well established that the rule against collateral attacks applies equally to interlocutory orders and final judgments.[25] The broad application of the rule comports with the rule's policy, which is to respect the jurisdiction of the court rendering the order and to encourage obedience of courts' orders.[26]

[16] We recognize an exception to the collateral bar rule may exist where a defendant's constitutional rights are at risk, e.g., where a defendant is charged with a crime based on an interlocutory order not yet appealable.[27] But we need not consider such circumstance here, because the temporary child support order at issue was followed by a final resolution of custody and support—the July 15, 2013, judgment—from which

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[24] *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[25] 50 C.J.S. *Judgments* § 713 (2009). See, also, *State, ex rel. C., B. & Q. R. Co., v. N. Lincoln St. Ry. Co.*, 34 Neb. 634, 52 N.W. 369 (1892); Annot., 12 A.L.R. 1165 (1921); John R.B. Palmer, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying It*, 88 Cornell L. Rev. 215 (2002).

[26] *Penny v. Alliance Trust Co.*, 259 F. 558 (8th Cir. 1919); Palmer, *supra* note 25; Doug Rendleman, *Toward Due Process in Injunction Procedure*, 1973 Ill. Law Forum 221. See, also, *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975).

[27] See, *Maness v. Meyers, supra* note 26; Palmer, *supra* note 25.

Erpelding could have appealed the temporary child support order.[28] He did not.

Because Erpelding could have appealed the temporary child support order at the time of the July 15, 2013, judgment, he was precluded from collaterally attacking the temporary child support order at his criminal nonsupport trial. And he is precluded from collaterally attacking it now on appeal. Likewise, for these reasons, trial counsel was not ineffective for failing to collaterally attack the temporary child support order.

2. Jury Instructions

Erpelding makes two arguments with respect to the jury instructions. First, he argues that the district court violated the Sixth Amendment and the U.S. Supreme Court's decision in *Apprendi v. New Jersey*,[29] when it allegedly failed to provide for a jury determination of an essential element of the crime, i.e., whether Erpelding's nonsupport was "in violation of any order of any court." Second, Erpelding argues that the district court erred in, and his counsel was ineffective for, failing to require a jury instruction on the lesser-included offense of misdemeanor child support.

(a) Sixth Amendment Claim

[17] Erpelding did not object at trial to the jury instructions he now assigns as error. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of

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[28] See, *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000); *Gainsforth v. Peterson*, 113 Neb. 1, 201 N.W. 645 (1924); *Dartmann v. Dartmann*, 14 Neb. App. 864, 717 N.W.2d 519 (2006). See, also, *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

[29] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

a probable miscarriage of justice.[30] Erpelding does not argue that trial counsel was ineffective for failing to object to the jury instructions at trial.

[18] Plain error may be found 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.[31]

We find no error in the jury instruction that is plainly evident, nor do we find prejudice that affected any substantial right of Erpelding.

A person commits criminal nonsupport when he or she "intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a . . . minor child."[32] The crime is a felony if "it is in violation of any order of any court."[33]

The district court instructed the jury that Erpelding was guilty of felony nonsupport if the jury found that Erpelding "(1) . . . intentionally failed, refused, or neglected to provide proper support for his minor child" and "(2) . . . knew he was legally obliged to provide support to that child by an order of the District Court of Buffalo County, Nebraska, entered on August 20, 2012, in Case CI 12-291." The court also instructed the jury that it must find that the events occurred in Buffalo County during August, September, October, and November 2012.

[19,20] As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language

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[30] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[31] *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012); *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[32] § 28-706(1).

[33] § 28-706(7).

of the statute.[34] But the law does not require that a jury instruction track the exact language of the statute.[35] Thus, we do not find that the district court's failure to include the exact phrase "in violation of any order of any court," if error at all, is error which is plainly evident from the record.

Furthermore, no evidence suggests that the instructions given to the jury prejudicially affected a substantial right of Erpelding. In fact, Erpelding does not contest that he violated the temporary child support order. Instead, he takes the position that the order was "invalid" and that its validity should have been submitted to the jury. As we already explained, the validity of the order was not subject to attack.

We find that the jury instructions were not plain error and that there was no indication of a miscarriage of justice.

(b) Lesser-Included Offense

Erpelding also argues that the district court erred for failing to require a jury instruction on a lesser-included offense of misdemeanor criminal nonsupport and that his counsel was ineffective for not requesting one. Erpelding's argument fails because it is premised on the incorrect assumption that the temporary child support order was subject to attack at his criminal nonsupport trial.

[21,22] A court must instruct a jury on a lesser-included offense if (1) the elements of the lesser offense 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

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[34] *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995); *State v. Friend*, 230 Neb. 765, 433 N.W.2d 512 (1988), *disapproved on other grounds, State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991).

[35] 89 C.J.S. *Trial* § 730 (2012). See, *State v. Loyuk, supra* note 3; *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010); *State v. Glantz, supra* note 34.

offense and convicting the defendant of the lesser offense.[36] Defense counsel is not ineffective for failing to raise an argument that has no merit or for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.[37]

Although felony nonsupport cannot be committed without simultaneously committing the lesser offense of misdemeanor nonsupport, no evidence was or could have been produced at Erpelding's criminal nonsupport trial that would provide a rational basis for acquitting him of felony nonsupport. The only difference between misdemeanor and felony nonsupport is that felony nonsupport is in violation of any order of any court. Erpelding's counsel did not and could not have challenged the validity of the underlying support order at his criminal nonsupport trial for the reasons discussed above.

We conclude that the court was not required to instruct the jury on the lesser-included offense, and Erpelding's counsel could not have been ineffective for failing to request the court to do so. Erpelding's argument is without merit.

3. Habitual Criminal Enhancement

Habitual criminal enhancement is governed by § 29-2221, which provides:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

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[36] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

[37] *State v. Young, supra* note 35.

> . . . .
>
> (2) . . . If the accused is convicted of a felony, before sentence is imposed a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused *at least three days prior thereto*. At the hearing, if the court finds from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state or by the United States, the court shall sentence such person so convicted as a habitual criminal.

(Emphasis supplied.)

Erpelding argues that his sentences should not have been enhanced, because he did not receive notice of the enhancement hearing as required by § 29-2221. The State's position appears to be that it is not required to provide the defendant with a separate notice of the enhancement hearing, but, rather, that it is sufficient that "[Erpelding] have three days' notice supplied in a manner calculated to give him notice that there will be such a hearing."[38]

The State argues that because Erpelding was aware of the habitual criminal charge and because § 29-2221 requires that the enhancement hearing occur before sentencing, Erpelding should have known that the enhancement hearing would occur immediately before the sentencing hearing. Under the State's theory, notice of the sentencing hearing constitutes notice of the enhancement hearing, so long as the defendant is aware of his or her habitual criminal charge.

[23,24] It is a fundamental principle of statutory construction that penal statutes be strictly construed, and it is not for the courts to supply missing words or sentences to make clear

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[38] Brief for appellee at 19.

that which is indefinite, or to supply that which is not there.[39] Section 29-2221 clearly requires 3 days' notice of the enhancement hearing and not merely notice of the sentencing hearing. The problem is that the statute does not specify the consequence of inadequate notice of the enhancement hearing.

[25,26] When interpreting a statute, a court's objective is to determine and give effect to the legislative intent of the enactment.[40] The purpose of the notice requirement in § 29-2221 is to ensure that the defendant has reasonable time to prepare a defense.[41] Thus, we conclude that the effect of inadequate notice of the enhancement hearing depends on whether the defendant was prejudiced by the lack of notice.

Even if Erpelding had received 3 days' notice of the enhancement hearing, the result would not be different. On appeal, Erpelding raises only one substantive issue with respect to the enhancement, and it is without merit.

Erpelding argues that his nonsupport conviction is not a felony as required for enhancement, because his failure to provide support was not "in violation of any order of any court." We already explained that Erpelding could not have attacked the validity of the temporary child support order at his nonsupport trial. Under the same reasoning, he could not have attacked the validity of the order at his criminal enhancement or sentencing hearing. Because this argument is without merit, we conclude that the lack of notice of the enhancement hearing was harmless and that no prejudice occurred.

We realize this result is essentially in line with the State's position that notice of the sentencing hearing constitutes notice of the enhancement hearing. But we cannot endorse the State's approach. It is our duty to uphold the law, and § 29-2221 requires notice of the enhancement hearing. The defendant

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[39] *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013); *State v. McCarthy*, 284 Neb. 572, 822 N.W.2d 386 (2012).

[40] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[41] See *State v. Cole*, 192 Neb. 466, 222 N.W.2d 560 (1974).

should be given the notice that the statute requires. We determine that the State violated § 29-2221, but that such violation does not result in reversal under the facts of this case. We admonish the State to follow the 3-day notice requirement of § 29-2221.

4. Sentencing

Erpelding argues that his sentences are excessive and violate the Eighth Amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of cruel and unusual punishment. Erpelding complains that his concurrent sentences of 10 to 15 years' imprisonment are grossly disproportionate to his crime of nonsupport, i.e., his failure to pay 4 months of child support, totaling $900.

(a) Eighth Amendment

[27] Erpelding is correct that the Eighth Amendment's proscription of cruel and unusual punishment prohibits not only barbaric punishments, but also sentences that are grossly disproportionate to the crime committed. But when weighing the punishment and the crime, Erpelding fails to place all relevant items on the scale.

[28] In weighing the gravity of his offense, we must place on the scale, not only Erpelding's crime of nonsupport, but also his history of felony recidivism. The U.S. Supreme Court, in *Ewing v. California*,[42] made clear that when a court is faced with a habitual criminal enhancement, its Eighth Amendment proportionality review must take into account the Legislature's goals in enacting such statute, i.e., to deter repeat offenders and to separate from society those who are "'incapable of conforming to the norms of society as established by its criminal law.'"[43]

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[42] *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003).

[43] *Id.*, 538 U.S. at 29.

In *Ewing*, the defendant was convicted of felony grand theft for stealing three golf clubs after two other felony convictions. California's habitual criminal statute allowed Ewing to be sentenced to 25 years' to life imprisonment. The Court explained that the Constitution "'does not mandate adoption of any one penological theory,'" but that instead, "[a] sentence can have a variety of justifications . . . ."[44] In *Ewing*, the Court explained that the defendant's sentence was justified by the State's public safety interest in deterring repeat felons and was sufficiently supported by his criminal record, which involved numerous misdemeanor and felony offenses.

[29] With regard to whether the length of a sentence constitutes cruel and unusual punishment, the Nebraska Constitution does not require more than does the Eighth Amendment to the U.S. Constitution.[45] That is why we followed the reasoning of *Ewing* in *State v. Hurbenca*.[46]

In *Hurbenca*, the defendant's sentence for attempted escape was enhanced per § 29-2221, to 10 to 15 years' imprisonment, based on his prior felony convictions. He had previously been convicted of possession of a forged certificate of title, theft by receiving stolen property, attempting to procure a fraudulent title, and possession of a firearm by a felon. We concluded that the defendant's sentence was not grossly disproportionate and did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

In the present case, Erpelding was convicted of two prior felonies, aggravated assault with a deadly weapon and felon in possession of a deadly weapon. Those crimes form the basis for the habitual criminal enhancement on Erpelding's felony nonsupport conviction. Additionally, Erpelding's presentencing report shows he has been convicted of several

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[44] *Id.*, 538 U.S. at 25.

[45] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[46] *State v. Hurbenca, supra* note 45.

other crimes. In 2004, Erpelding was convicted of "Criminal Mischief, $500 to $1,500" and "Avoid[ing] Arrest." In 2005, he was convicted of "Deliver/Intent to Deliver Controlled Substances." In 2011, he was convicted of "Driving Under the Influence." In 2012, he was found to have "St[olen] Money o[r] Goods," and in 2014, he was convicted of "Attempted Unlawful Possession of a Deadly Weapon." He has also committed a number of traffic violations throughout the years, including six speeding incidents, four incidents of driving without a valid operator's license, and three incidents of driving under suspension.

Though we think 10 to 15 years' imprisonment may be the maximum end of the spectrum, it is not unconstitutional. It is justified by the State's public safety interest in deterring repeat felons and sufficiently supported by his criminal record.

(b) Excessiveness

[30] Erpelding also claims his sentences are excessive. When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.[47] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[48]

We find no abuse of discretion on the part of the district court in imposing Erpelding's sentences. The Legislature made the intentional failure to pay child support a felony if it is "in violation of any order of any court."[49] Erpelding

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[47] *State v. Parminter, supra* note 6.

[48] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[49] See § 28-706(7).

clearly had a court order directing him to pay support, and the jury found that Erpelding failed to pay that support. Under the law, Erpelding committed a felony. Because nonsupport was Erpelding's third felony, the prosecutor had the discretion to, and ultimately chose to, charge Erpelding with being a habitual criminal. When a defendant is charged with being a habitual criminal under § 29-2221, upon proof that the latest felony conviction is, at least, the defendant's third felony conviction, the statute *requires* the court to impose a mandatory minimum term of 10 years in prison. The maximum term is 60 years. Erpelding was sentenced to 10 to 15 years' imprisonment. Given Erpelding's criminal history already discussed, we conclude that the district court did not abuse its discretion in sentencing Erpelding to 10 to 15 years' imprisonment.

VI. CONCLUSION

For the reasons set forth herein, the judgment of the district court is affirmed.

Affirmed.

Miller-Lerman, J., concurring.

I concur and write separately only to address the habitual criminal charge. By focusing on the triggering offenses of nonpayment of child support, the imposition of a habitual criminal charge may seem out of line; however, in view of the purpose of the habitual criminal statute and Erpelding's long history of criminal conduct, I believe the decision to pursue the habitual criminal charge in this case makes more sense.

At the enhancement hearing, the evidence showed that Erpelding had been convicted of two prior felonies: aggravated assault with a deadly weapon, for which he received a 7½-year sentence, and felon in possession of a deadly weapon, for which he received an 18-month sentence. These felony convictions formed the basis for enhancement pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 2008).

The record also showed that Erpelding had been convicted of numerous other crimes and violations as outlined in the majority opinion:

> In 2004, Erpelding was convicted of "Criminal Mischief, $500 to $1,500" and "Avoid[ing] Arrest." In 2005, he was convicted of "Deliver/Intent to Deliver Controlled Substances." In 2011, he was convicted of "Driving Under the Influence." In 2012, he was found to have "St[olen] Money o[r] Goods," and in 2014, he was convicted of "Attempted Unlawful Possession of a Deadly Weapon." He has also committed a number of traffic violations throughout the years, including six speeding incidents, four incidents of driving without a valid operator's license, and three incidents of driving under suspension.

Erpelding's crimes resulted variously in fines, probation, and 1-year sentences. Taken together, Erpelding's crimes occurred in the State of Arizona and in the following Nebraska counties: Buffalo, Nance, Kearney, Harlan, Dawson, Lancaster, Seward, and Gage. According to the presentence investigation, there were charges pending: in Buffalo County for assault in the third degree and in Jefferson County for manufacturing or delivery of methamphetamine, felon in possession of a deadly weapon, and habitual criminal. During the pendency of this case, an additional action in Buffalo County, in which Erpelding was charged with escape from custody and being a habitual criminal, was dismissed. At the time of the enhancement hearing, Erpelding was serving a sentence for a Seward County conviction for attempted unlawful possession of a deadly weapon.

Claims that the habitual criminal sentence is disproportionate to the offense are not uncommon. In fact, this court has rejected such a challenge. See *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). In *Hurbenca*, we gave deference to the Legislature's choice of sanctions and cited the U.S. Supreme Court decision in *Ewing v. California*, 538 U.S.

11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003). In *Ewing*, the Court stated:

> [T]he State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." . . . To give full effect to the State's choice of this legitimate penological goal, our proportionality review of [the defendant's] sentence must take that goal into account.
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> [The defendant's] sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by [the defendant's] own long, serious criminal record.

538 U.S. at 29-30.

The "sentence-related" characteristics considered in the context of a proportionality analysis commonly include the length of prison term the defendant is likely to actually serve, the sentence-triggering conduct, and the defendant's criminal history. See *id.*, 538 U.S. at 37 (Breyer, J., dissenting; Stevens, Souter, and Ginsburg, JJ., join). See, also, *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). Focusing on the triggering crimes in this case does not initially seem to warrant enhancement to habitual criminal status, and the actual cost of incarceration to the public and to Erpelding initially may appear disproportionate. However, when viewed in the context demonstrated in the record, the prosecutorial decision to go forward with the habitual criminal charge in this particular case has a rational, if not particularly economical, basis.

Omaha Police Union Local 101, IUPA, AFL-CIO, also known as Omaha Police Officers Association, appellee and cross-appellant, v. City of Omaha, a municipal corporation, appellant and cross-appellee.

872 N.W.2d 765

Filed December 31, 2015. No. S-14-1153.

1. **Contracts: Appeal and Error.** The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Trial: Witnesses: Judgments: Appeal and Error.** A trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. The trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony.
3. **Equity: Appeal and Error.** In an appeal in equity, the reviewing court tries factual questions de novo on the record.
4. ____: ____. On appeal from an equity action, when credible evidence is in conflict on material issues of fact, an 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. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.
6. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.

7. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
8. **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.
9. **Contracts: Waiver: Proof.** A party may prove the waiver of a contract by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.
10. **Waiver: Proof.** The party asserting a waiver defense bears the burden of establishing that a clear and unmistakable waiver has occurred.
11. **Judgments: Equity: Proof.** To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her fault, neglect, or carelessness.

Appeal from the District Court for Douglas County: Joseph S. Troia, Judge. Affirmed.

Christopher R. Hedican, of Baird Holm, L.L.P., for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

The appellee and cross-appellant, the Omaha Police Union Local 101, IUPA, AFL-CIO, also known as the Omaha Police Officers Association (Union), filed a declaratory judgment action against the appellant and cross-appellee, City of Omaha (City). The Union requested the district court declare that the collective bargaining agreement between the Union and the City had rolled over to the 2014 calendar year. The Union claimed that the City did not timely provide written notice of its intent to negotiate or modify the terms of the contract for 2014. The City argued that the Union's action was barred by the doctrines of waiver and equitable estoppel. It claimed

written notice was waived by the Union or the Union was estopped from asserting that the City was required to give written notice of its intent to negotiate changes to the contract. We affirm the order of the district court granting declaratory judgment to the Union and denying its request for attorney fees.

SCOPE OF REVIEW

[1,2] The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Gaver v. Schneider's O.K. Tire Co.*, 289 Neb. 491, 856 N.W.2d 121 (2014). A trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. The trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. See *Stauffer v. Benson*, 288 Neb. 683, 850 N.W.2d 759 (2014). This case hinges on the applicability of the City's equitable defenses, and we consider the facts de novo on the record. See *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003).

FACTS

The parties entered into an agreement which was to remain in effect from December 14, 2008, until December 21, 2013 (Contract). The Contract contained an "evergreen clause" (Article 47), which provided for an automatic extension of the Contract if neither party notified the other of a desire to modify or renegotiate any portion thereof. Article 47 provided:

> This Agreement shall be and shall remain in full force and effect from and after . . . December 14, 2008, until . . . December 21, 2013, and thereafter for successive one (1) calendar year periods, unless one of the parties hereto on or before April 1st of any such year shall notify the other party hereto in writing of its desire to modify the same, or any part thereof.

Neither party disputes that Article 47 required written notice of intent to negotiate changes by April 1, 2014, and that notice was not provided by either party by that date. Consequently, whether the district court erred in granting declaratory relief depends upon whether it erred in rejecting the City's equitable defenses.

The City's argument concerns a series of exchanges between the lead negotiators of the parties which occurred before and after April 1, 2014. The first exchange between the parties was a meeting on February 27. Attorney Mark McQueen, the chief negotiator for the City, contacted Sgt. John Wells, the president and lead negotiator of the Union, to set up a meeting. The purpose of the meeting was to discuss negotiation style and topics for negotiation. During the meeting, McQueen discussed the City's objectives for negotiating the Contract and identified three specific topics which required discussion.

At this meeting, Wells expressed the Union's desire to allow the Contract to roll over in its entirety. The City characterizes this as an "offer" on behalf of the Union to allow the Contract to roll over. McQueen said that he would relay the "offer" to decisionmakers and get back to Wells. McQueen conveyed the Union's desire to allow the Contract to roll over to the City's mayor and the city council's law committee at its next meeting.

In contrast to McQueen's explanation of the February 27, 2014, exchange, Wells described the meeting as an informal meeting to develop a working relationship for future negotiations. Neither party mentioned written notice at the meeting.

The next contact was a brief telephone call on March 19, 2014. McQueen informed Wells that the City wanted to discuss three items: (1) the deferred option retirement plan, which the parties refer to as "DROP"; (2) police cruisers' being taken home; and (3) a pension contribution by the Union of $400,000. Wells indicated that he would relay the information to the Union's executive board and get back to McQueen. McQueen testified that he understood his statements to Wells

during this telephone call to be a counteroffer to an initial offer by the Union to allow the Contract to roll over. Wells did not mention written notice in this call. There was no further contact between the Union and the City before April 1.

The next exchange was a breakfast meeting on April 11, 2014, to discuss rules and procedures for future negotiations. The three items from the March 19 telephone call were discussed. The City claimed that it understood this discussion to pertain to the 2014 calendar year, whereas the Union claimed these discussions were to create a workable atmosphere for negotiations for the 2015 calendar year. At this meeting, Wells requested written notice to open negotiations, but did not specify the year to which those negotiations pertained.

The next contact was a telephone call on April 16, 2014, wherein McQueen informed Wells that he had heard from a fire union official that Wells had made comments regarding the City's failure to provide written notice. The parties did not agree as to what statements were made during this conversation. McQueen testified that Wells reassured him that there must have been a misunderstanding and that the Union was not going to take the position that a rollover had occurred. Wells testified that he never gave McQueen such assurances, but also did not expressly state to McQueen that the Union did, in fact, intend to invoke Article 47 to impose a rollover of the Contract in its entirety for 2014.

On April 17, 2014, the City sent written notice via e-mail to open negotiations. Wells informed McQueen that this language was acceptable. This communication did not identify 2014 as the year for which the Contract was being negotiated. The following day, the parties met to discuss rules for negotiation. No mention of negotiations for 2015 was made in the record of this meeting. The Union did not express its position that the Contract had rolled over.

On May 6, 2014, McQueen attended as an observer of a meeting between Wells, certain Union officers, and the chief and deputy chief of police. At some point during the meeting, the issue of taking police cruisers home arose.

McQueen interjected that the City could implement that change unilaterally.

Following this meeting, on May 15, 2014, the Union sent the City a letter that the Contract had rolled over for the 2014 calendar year. This was the first time that the Union conveyed its position definitively to the City. The Union claimed that all negotiations were for 2015 and that any changes to the Contract for 2014 would require a memorandum of understanding agreed to by both parties. The City claimed that the exchanges beginning on February 27 were negotiations for changes to the Contract and that both parties understood these negotiations to be in regard to the 2014 calendar year. It claimed that in the past, the City had conducted such negotiations without written notice.

The Union filed a complaint against the City pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008). It requested that the district court construe Article 47 to extend the Contract through the 2014 calendar year and declare the rights and duties of the parties. The Union claimed that the language of the Contract provided a binding date for exchange of written notice to commence negotiations. The Union also claimed that the City had engaged in bad faith and requested attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2008).

In its answer, the City asserted the defenses of equitable estoppel and waiver. It claimed that the Union was estopped to assert that the City did not provide written notice because of statements made by Wells which led the City to believe such written notice was not required. Additionally, the City claimed that the Union had waived any such written notice requirements by engaging in negotiations both before and after April 1, 2014.

The City filed a counterclaim asserting that if the district court agreed with the Union's position, then the Contract had also rolled forward to the end of 2015. It claimed that the language of Article 47 required written notice by April 1 of

the year prior to whichever year was being modified. Thus, it claimed that written notice was required by April 1, 2013, to negotiate for 2014, and by April 1, 2014, to negotiate for 2015. It claimed that if the court found that the Contract rolled over for the 2014 calendar year, it must also find that it rolled forward for the 2015 calendar year.

The district court rejected the City's equitable defenses. It also rejected the City's interpretation regarding Article 47 that would require written notice to be provided by April 1 of the year prior to the year being negotiated. It found that in order to negotiate for the 2014 calendar year, written notice was required by April 1, 2014.

In rejecting the City's estoppel defense, the court reasoned that the City could not have detrimentally relied upon the Union's conduct in failing to provide written notice of intent to negotiate. In the City's pleadings and in the testimony of McQueen, the mayor, and the City's labor relations director, the City showed its understanding of Article 47 was that written notice was required by April 1, 2013—not April 1, 2014—to prevent a rollover through 2014. Thus, at all operative times, the City believed that the Contract had already rolled over in its entirety pursuant to Article 47. Moreover, the court found that the Union did not make a clear and unmistakable waiver of Article 47.

The district court denied the Union's request for attorney fees. The parties timely appealed.

ASSIGNMENTS OF ERROR

The City assigns, consolidated and restated, that the district court erred in granting declaratory relief to the Union and in denying the City's equitable defenses. In its cross-appeal, the Union claims that the district court erred in denying its request for attorney fees.

ANALYSIS

We consider whether the district court erred in granting judgment to the Union and in rejecting the City's equitable

defenses of waiver and estoppel. The parties do not dispute that Article 47 required written notice of intent to open negotiations by April 1, 2014, to prevent an automatic rollover and that neither party provided such written notice by that date. The issue is whether the Union was estopped to assert the provision of Article 47 or whether the Union waived the requirement of Article 47.

[3,4] In an appeal in equity, the reviewing court tries factual questions de novo on the record. See *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). On appeal from an equity action, when credible evidence is in conflict on material issues of fact, an 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. *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015).

The City argues that because the district court did not make specific findings regarding the credibility of the witnesses, there is no factual determination to which this court may give weight. This argument mischaracterizes the district court's ruling. In determining whether the Union's conduct constituted a waiver of Article 47 or whether the doctrine of equitable estoppel applied, the court necessarily relied upon the testimony of the witnesses. The exchanges between the parties were either face-to-face or via telephone conversations, and the court considered testimony from the witnesses to discern what transpired during those conversations. Moreover, the witnesses typically gave differing characterizations of the exchanges. Therefore, in reaching its conclusions, the court determined the credibility of the witnesses and accepted one version of the facts over another.

The City claims that declaratory judgment should have been denied, because the Union participated in negotiations both before and after April 1, 2014, and was therefore estopped to claim the City failed to provide written notice or the Union waived the requirements of Article 47.

Equitable Estoppel

[5,6] Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations. *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009). The doctrine applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed. *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Id*.

The City argues that the Union is estopped from asserting the City's noncompliance with Article 47, because the Union engaged in negotiations to modify the Contract for 2014 both before and after April 1, 2014, and asked for written notice only after the deadline had passed. It claims the Union's conduct induced the City into believing that the Union would engage in negotiations without written notice and that, therefore, the City did not provide written notice as a result.

The evidence showed that Wells told the City that the Union intended to "stand by" the Contract and that it desired the Contract to roll over. Moreover, the City understood Article 47 to require written notice by April 1, 2013, to prevent a roll-over for the 2014 calendar year. Therefore, the City could not have relied to its detriment on the Union's actions beginning in February 2014, in which it stated that it wanted the Contract to extend through 2014.

There was considerable disagreement between the parties concerning the exchanges between Wells and McQueen. Both parties characterize the conversations differently. However, even accepting the City's characterization of the facts, it has not shown that it reasonably relied to its detriment on the Union's conduct in allowing the April 1, 2014, deadline to pass.

The City asserted in its counterclaim that Article 47 required that either party must give written notice of intent to modify the contract on or before April 1 of the year during which the contract expires. According to this interpretation, to open negotiations for the 2014 calendar year, a party was obligated to notify the other in writing of the desire to modify the Contract prior to April 1, 2013. McQueen, the mayor, and the City's labor relations director all interpreted Article 47 in this manner. Consequently, the City believed that the time to provide written notice to open negotiations for 2014 had expired 11 months before the initial exchange at the meeting on February 27, 2014, and more than a year before the City provided written notice on April 17, 2014.

The district court rejected the City's interpretation and held that the deadline to provide written notice to negotiate for the 2014 calendar year was April 1, 2014. Because the City, as shown by its pleadings and witness testimony, believed that written notice for the 2014 calendar year had to be given by April 1, 2013, the trial court did not err in concluding that the City could not have detrimentally relied on Wells' statements during the meeting on February 27, 2014, or in the March 19 telephone call.

The City claims that Wells did not inform McQueen prior to April 1, 2014, that the Union desired written notice to prevent the operative effect of Article 47. It suggests that this inaction was deceptive in that it led the City to believe such requirement had been waived. We reject this argument. Wells was not under a duty to disclose the requirements of Article 47. Declining to expressly request that the City follow the terms of Article 47 did not amount to a misrepresentation. At the February 27 meeting, the Union informed the City that it wanted the Contract to extend for another year. And at that time, the City believed the time to provide written notice to negotiate for 2014 had expired. We conclude that the City has failed to establish the required elements of equitable estoppel.

Waiver of Article 47

We next consider whether the Union waived Article 47. The City argues that the Union, through its conduct, waived the requirement of written notice to open negotiations. It claims that the parties engaged in negotiations before and after April 1, 2014, and that each party understood the negotiations to be in regard to the 2014 calendar year. The Union asserts that it did not clearly and unmistakably waive Article 47.

[7-10] A waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010). 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. *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 280 Neb. 729, 790 N.W.2d 866 (2010). A party may prove the waiver of a contract by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive. *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010). The party asserting a waiver defense bears the

burden of establishing that a clear and unmistakable waiver has occurred. See *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

The City argues that the parties were negotiating despite neither having provided the other with written notice and that, therefore, the Union had waived Article 47. To support this position, it cites to various points in the testimony of Wells and McQueen to suggest that they both understood the exchanges to be negotiations for 2014.

The Union argues that once the deadline passed, Wells and its negotiators understood the subsequent exchanges to be on a voluntary basis and would require a memorandum of understanding to implement any changes, or pertained to the 2015 calendar year. It claims that it never led the City to believe written notice was not required. The district court found that the Union did not wish to renegotiate the Contract for 2014, but would agree to a memorandum of understanding with respect to the "take home car" issue.

Although the parties focus much on the events after April 1, 2014, our decision hinges on the two exchanges prior to April 1. These exchanges occurred in a face-to-face meeting on February 27 and in a brief telephone conversation on March 19. The City inferred that these exchanges negated the written notice requirement of Article 47. We consider the subsequent exchanges between the parties only to the extent that they demonstrate whether Article 47 was clearly and unmistakably waived in either of the meetings prior to April 1.

The parties agree that during the February meeting, Wells conveyed to McQueen the Union's desire to allow the Contract to roll over in its entirety by neither party sending notice. The City claims that this was an "offer" which commenced negotiations. However, in a meeting between the parties on May 18, 2014, McQueen refers to this as a "suggestion" to roll the Contract over, which surprised McQueen.

Whether the City refers to this communication as an "offer" or an expression of the Union's desire, it did not have the effect of clearly and unmistakably waiving the requirements

of Article 47. A waiver would be against the interest of the Union, which wanted the Contract to extend through 2014. Moreover, Wells informed McQueen that he was unable to agree to anything without review from his executive board. Thus, beyond his communication of the Union's position that it desired the contract to extend through 2014, Wells did not suggest at the February meeting that the Union had waived Article 47. It would be absurd to hold that the Union's expression of its desire to allow the Contract to roll over was, in fact, a waiver of Article 47's operative effect. Nor does the record support that such "offer" was intended to lull the City into inaction.

The only other contact between the parties prior to April 1, 2014, was on March 19. This was a brief telephone conversation between Wells and McQueen. Wells and McQueen testified this conversation was in response to the February discussion. The conversation occurred while Wells was at an airport and picking up his luggage. Wells stated that McQueen informed him that the City would allow a rollover if they could discuss the three issues (take-home cars, the interest rate of the DROP program, and additional pension contribution).

Although McQueen testified that this was a "counteroffer" and that its conditions must be met for the City to otherwise allow the remainder of the Contract to roll over, the City did not memorialize or confirm this communication in a subsequent writing. For the sake of recordkeeping, this is inexplicable. McQueen testified he understood the exchanges to this point to be that the Union offered to allow a rollover and that the City counteroffered for the three conditions.

Wells testified he understood McQueen's statements to mean that the City desired some changes to allow a rollover. He again stated to McQueen that he could not agree unilaterally to anything and that any change would need to be approved through the executive board. He did not expressly state that the Union had waived or intended to waive Article 47.

Beyond McQueen's testimony regarding this brief telephone conversation, we find no indication in the record that the

Union clearly and unmistakably waived Article 47. On the contrary, it appears that such unilateral waiver would have exceeded Wells' negotiating authority and been detrimental to the Union's intent to allow the Contract to roll over in its entirety. The record including the telephone call does not establish that the Union waived the required written notice.

The next meeting between the parties was on April 11, 2014, 10 days after the deadline to provide written notice had passed. The parties discussed the three issues which McQueen brought to Wells' attention in the March 19 telephone conversation. The parties also discussed rules and protocol for negotiations. Wells provided McQueen a copy of what had been used in prior negotiations. Neither party stated to what year these rules and protocols would apply.

Later that day, McQueen had a conversation with a fire union official who informed him that Wells told the fire union official that the City had made a serious mistake by not sending written notice. In an April 16, 2014, conversation between Wells and McQueen, Wells did not specifically tell McQueen that the Union intended to take the position that the Contract had rolled over.

On April 17, 2014, written notice was sent by McQueen and accepted by Wells. Inexplicably, neither party specified the year to which the notice applied. The parties met the following day. The minutes of that meeting do not state which year the parties were discussing, nor do they discuss the Contract rollover or Article 47. The minutes indicate that the parties discussed only the three issues McQueen raised on March 19. Both Wells and McQueen signed off on the minutes. In an April 18 e-mail, Wells stated: "We are getting underway on our negotiations with the City. . . . We are discussing some unresolved issues before we get started on overall negotiations." Again, there is no reference to a year for which the parties were negotiating.

On May 6, 2014, the parties met to discuss the issues, but again did not specify the year. The Union did not expressly

communicate that the Contract had rolled over, nor did it expressly waive Article 47. Nor did the City state its position that the Union had waived Article 47 and that the parties were negotiating for the 2014 calendar year.

We conclude that the City did not meet its burden to show the Union waived Article 47 regarding the 2014 calendar year. Undoubtedly, the exchanges between Wells and McQueen led to ambiguity and misunderstanding between the parties, but ambiguity is not the standard for waiver of a contractual right. The purported waiver must be clear and unmistakable. The record does not show that the Union's conduct rose to the level of a waiver of Article 47.

Nor did the Union's conduct in tacitly allowing the City to fail to meet the deadline to provide written notice amount to a waiver of such written notice. Wells had no duty to inform McQueen that the Union required written notice to open negotiations. The plain language of Article 47 served that purpose. And we find no indication that the Union's conduct induced the City into believing that the Union had waived the written notice requirement.

Further foreclosing on the City's argument that the Union's conduct waived Article 47 was the City's belief, nearly a year prior to the initial meeting between Wells and McQueen, that the Contract was extended through 2014. Based on the City's understanding of Article 47, the City should have believed that the Union was negotiating for 2015. If the City interpreted Article 47 to require written notice by April 1, 2013, to open negotiations for 2014, by the time it issued its "counteroffer" to the Union on March 19, 2014, the supposed deadline had been expired for nearly a year. It would be unreasonable for the City to believe that the Union waived Article 47 nearly a year after April 1, 2013, despite the Union's express statement that it wanted the Contract to roll over to 2014.

In support of its waiver defense, the City relied upon *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000). In that case, we affirmed a district court's order vacating the

dismissal of an action and reinstating it under the court's inherent equitable authority. The action had been dismissed on April 1, 1997. In January 1998, the appellants refused to stipulate to a reinstatement. The appellants argued that the appellees failed to exercise due diligence in seeking reinstatement and, therefore, were not entitled to reinstatement. However, we noted the appellees had continued to participate in discovery, including participating in depositions and sending substantial amounts of materials to the appellees. Moreover, it rescheduled the deposition of its own expert numerous times. In January 1998, the appellants' counsel took advantage of the situation which he helped create by refusing to stipulate to reinstatement.

We concluded that although the appellees' counsel perhaps should have been more zealous, we could not condone the appellants' apparent strategy of "I gotcha." We held: "When the equities are balanced in this case, it is clear that appellants' 'I go[t]cha' tactic entitled the [appellees] to equitable relief. To conclude otherwise would be to reward appellants for taking advantage of a situation which they helped create." *Id.* at 775, 606 N.W.2d at 772. Given the appellants' conduct, we found that it was reasonable for the appellees to believe the appellants would stipulate to a reinstatement. Thus, we concluded that the appellants' conduct prevented them from benefiting under the maxim that "equity aids the diligent, not those who sleep on their rights." *Id.* at 771, 606 N.W.2d at 770.

We do not find the case at bar to be analogous to *Hornig*. Whereas in *Hornig*, the appellants' sustained participation in extensive discovery was unequivocally inconsistent with a position that it would not stipulate to a reinstatement of the case, we find no such conduct here. The clear and unmistakable conduct in *Hornig* clearly lulled the appellees into repose on diligently and timely seeking such reinstatement. Here, the City could not have been reasonably lulled into repose by the Union's expression on February 27, 2014, that it intended to allow the Contract to roll over. Nor do we find that McQueen's

oral "counteroffer" during the telephone call on March 19 could have reasonably led the City to believe the Union was waiving Article 47. The record shows none of the unequivocal and documented conduct that existed in *Hornig*.

[11] To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her fault, neglect, or carelessness. *State on behalf of L.L.B. v. Hill*, 268 Neb. 355, 682 N.W.2d 709 (2004). In this case, neither party clearly expressed its statements in the meetings and communications prior to May 15, 2014. By including Article 47 in the Contract, the parties intended to prevent ambiguity concerning one party's intentions by requiring written notice. As the party desiring to modify the Contract, the City had the duty to provide such written notice. The record does not show that the conversations between Wells and McQueen prior to April 1 justified the City's belief that it did not need to comply with Article 47. The Union's stated intention was to allow the Contract to extend for another year.

Attorney Fees

Finally, we conclude that the district court did not abuse its discretion in ordering the parties to pay their own attorney fees. The City failed to meet its burden of showing its equitable defenses. But the City's interpretation of the Union's conduct was not so wholly without merit as to be frivolous or in bad faith.

CONCLUSION

For the reasons stated above, we affirm the order of the district court granting declaratory judgment to the Union and ordering the parties to pay their own attorney fees.

Affirmed.

Miller-Lerman, J., not participating.

State of Nebraska, appellee, v. Tyler C. Bain, appellant.

872 N.W.2d 777

Filed January 8, 2016. No. S-14-638.

1. **Constitutional Law: Attorney and Client: Appeal and Error.** Whether a state intrusion into the attorney-client relationship should constitute a per se violation of the Sixth Amendment and the action that a court should take when it becomes aware of such an intrusion present questions of law that an appellate court reviews de novo.
2. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel. The right to counsel exists to protect the fundamental right to a fair trial.
3. **Constitutional Law: Attorney and Client: Effectiveness of Counsel.** A defendant's ability to keep privileged communications with counsel insulated from the prosecution also protects the defendant's Sixth Amendment right to effective assistance of counsel.
4. **Constitutional Law: Attorney and Client.** The essence of the Sixth Amendment right is privacy of communication with counsel.
5. **Constitutional Law: Attorney and Client: Right to Counsel.** Although the attorney-client privilege has not been recognized as a right guaranteed by the Sixth Amendment, government interference in the confidential relationship between a defendant and his or her attorney can implicate the Sixth Amendment right to counsel.
6. **Attorneys at Law: Conflict of Interest: Appeal and Error.** The principles governing appellate review for a defense attorney's potential conflicts of interest also apply to potential disclosures of a defendant's privileged communications to the State.
7. **Constitutional Law: Trial: Appeal and Error.** When a trial court learns of facts that make a potential Sixth Amendment violation apparent, the issue is properly presented to an appellate court on appeal, even if it was not raised at trial.

8. **Trial: Attorney and Client: Presumptions.** A presumption of prejudice arises when the State becomes privy to a defendant's confidential trial strategy.
9. ____: ____: ____. The presumption of prejudice that arises when the State becomes privy to a defendant's confidential trial strategy is rebuttable—at least when the State did not deliberately intrude into the attorney-client relationship.
10. **Actions: Proof.** The standard of proof functions to instruct fact finders about the degree of confidence our society believes they should have in the correctness of their factual conclusions for a particular type of adjudication. It serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
11. **Constitutional Law: Proof.** In cases involving individual rights, whether criminal or civil, the principle consideration in determining the proper standard of proof is whether the standard minimally reflects the value society places on individual liberty, because the function of legal process is to minimize the risk of erroneous decisions.
12. **Trial: Presumptions: Proof.** When a presumption of prejudice arises because the State has obtained a defendant's confidential trial strategy, the State must prove by clear and convincing evidence that the defendant was not prejudiced by the disclosure.
13. **Trial: Evidence: Proof.** When a court is presented with evidence that the State has become privy to a defendant's confidential trial strategy, it must sua sponte conduct an evidentiary hearing that requires the State to prove the defendant was not prejudiced by the disclosure and that provides the defendant with an opportunity to challenge the State's proof.

Appeal from the District Court for Custer County: Karin L. Noakes, Judge. Reversed and vacated.

James Martin Davis, of Davis Law Office, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

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

Connolly, J.

I. SUMMARY

A jury found the appellant, Tyler C. Bain, guilty of four felonies stemming from his assaults of his former wife

with whom he was living: kidnapping, first degree sexual assault, second degree assault, and making terroristic threats. Regarding the kidnapping conviction, the court found that statutory mitigating circumstances did not exist. It convicted Bain of a Class IA felony for kidnapping and sentenced him to life imprisonment.

Bain contends that the State violated his Sixth Amendment right to counsel because at least five prosecutors had possession of his confidential trial strategy before his trial. We conclude that when Bain's confidential trial strategy was disclosed to prosecuting attorneys, a rebuttable presumption arose that Bain's trial was tainted by a Sixth Amendment violation. Because the court's remedy was insufficient to rebut this presumption and ensure that Bain received a fair trial, we reverse the judgment and vacate Bain's convictions. And because we vacate Bain's convictions, we do not consider his other assignments of error.

II. BACKGROUND

Bain's Sixth Amendment claim stems from a series of prosecutors who saw confidential communications between Bain and his originally retained counsel. The disclosure disqualified them from prosecuting because the communications discussed Bain's trial strategy. The actual communications are not in the record because the court failed to conduct an evidentiary hearing or receive the communications as evidence.

In January 2012, Bain appeared in district court for an arraignment on the State's amended charges. Rodney Palmer, his retained counsel, appeared with him. In March, Bain moved the court to appoint Palmer as his counsel because Palmer was familiar with his case and Bain had depleted his assets. At the hearing, the deputy county attorney, Glenn Clark, objected that Palmer's appointment would force the county to pay Palmer's travel time and expenses. The court overruled the motion because Palmer was currently representing Bain.

About a month later, at an April 2012 hearing on Palmer's motion to withdraw, Clark stated, in response to the court's

question, that his office had no objection to Palmer's withdrawal. The court then asked Steven Bowers, an attorney who was present in the courtroom, whether he had any conflict in representing Bain. When Bowers said no, the court appointed him because "[h]e is a local attorney and you [Bain] can meet with him today."

Later, in September 2012, after representing Bain for 5 months, Bowers moved to withdraw as Bain's counsel because he had been hired by the Custer County Attorney's office. At the hearing, Clark informed the court that someone from the Attorney General's office would prosecute the charges. Later that month, the court appointed P. Stephen Potter from Gothenburg, Nebraska, to represent Bain.

About 2 months after Bowers moved to withdraw, in November 2012, the court allowed the county attorney and deputy attorneys to withdraw because of the conflict created by the county attorney's hiring of Bowers. Clark reported that he had given the county attorney's case files to the Attorney General's office. The court appointed attorneys from the Attorney General's office to prosecute.

Eight months later, in August 2013, the court heard a motion from Matt Lierman, an assistant attorney general, to allow that office's attorneys to withdraw as prosecutors because of a conflict of interest. Lierman informed the court that while going through the discovery materials that he had received from the county attorney's office, he saw confidential communications between Bain and Palmer, Bain's original attorney. Lierman reported that he had sealed the confidential documents in a tamper-proof envelope so that no one else could access them, and he asked the court to keep them sealed. The court sustained his motion to withdraw. As stated, the confidential communications are not part of this record.

On August 29, 2013, the court appointed Shawn Eatherton as special prosecutor. But on September 6, the court entered an order stating that it had conducted a telephonic hearing with Eatherton and found that Eatherton had a conflict of interest. It appointed Lynelle Homolka as special prosecutor.

About a month later, the court conducted a recorded telephonic hearing with Homolka, Bain, and Potter after Homolka notified the court that she might also have a conflict. Homolka said that while reviewing the materials provided by the Custer County Attorney, she had found "what I suspected to be confidential statements and general communications that could reveal among other things that I believe would be the defendant's trial strategy." Potter said he had seen the materials and agreed that Homolka had seen confidential information and had a duty to withdraw.

The court sustained Homolka's motion to withdraw, but it appointed her as an expert and directed her to separate the privileged information in her possession so that "this doesn't occur again." The court further directed that after sorting the materials, Homolka should give them to Potter so that he and Bain could "make sure that nothing gets into the State's hands this time that shouldn't be." The court directed Potter to consult with Homolka and to ask for an in camera hearing if any further disputes arose over the State's materials. After reviewing the State's materials, the court directed Potter to forward the case file to the new prosecutor, minus any confidential or privileged information. On September 27, 2013, the court appointed John Marsh as special prosecutor.

In October 2013, the court heard Marsh's motion for a continuance. At the hearing, Potter told the court that he had received a box of materials from Homolka and had gone through the box and the packet of "excluded evidence." He had removed the excluded packet and intended to deliver the remaining materials to Marsh that day.

About 4 months later, with Marsh representing the State and Potter representing Bain, the court impaneled a jury. The State tried Bain on the following charges: kidnapping, first degree sexual assault, second degree assault, terroristic threats, and use of a deadly weapon to commit a felony. The jury found Bain guilty of kidnapping, first degree sexual assault, second degree assault, and making terroristic threats. It acquitted him of using a deadly weapon to commit a felony.

After accepting these verdicts, the court found that no mitigating circumstances existed to reduce a kidnapping conviction from a Class IA felony to a Class II felony. It sentenced Bain to life imprisonment for kidnapping. Consecutive to his life sentence, the court sentenced Bain to aggregate concurrent sentences of 20 to 25 years' imprisonment for first degree sexual assault, second degree assault, and making terroristic threats.

III. ASSIGNMENTS OF ERROR

Bain assigns that the State violated his Sixth Amendment right to effective assistance of counsel—including his right to confidential communications with his counsel and the right to have appointment of trial counsel without the interference of the prosecutor. He also assigns that the court erred in failing to find the presence of mitigating factors under the kidnapping statute, Neb. Rev. Stat. § 28-313(3) (Reissue 2008), and convicting him of a Class IA felony under § 28-313(2). He contends the evidence was insufficient to support that conviction.

IV. STANDARD OF REVIEW

[1] We are asked to decide whether a prosecutor's undisputed possession of a defendant's confidential trial strategy should constitute a per se violation of the Sixth Amendment—even if the court later appointed a different attorney to prosecute. Whether a state intrusion into the attorney-client relationship should constitute a per se violation of the Sixth Amendment and the action that a court should take when it becomes aware of such an intrusion present questions of law that we review de novo.

V. ANALSYIS

1. Parties' Contentions

Bain contends that the State's intrusion into his confidential communications with his defense counsel is a Sixth Amendment violation that is presumptively prejudicial and

requires dismissal of the charges. He argues that the court's order that required a disqualified prosecutor to sort through the case file to identify and remove privileged communications did not cure the presumed prejudice. He argues that the State has the burden to prove the absence of prejudice from this type of violation and that it would be impossible for a court to determine whether prosecutors had planned their strategies, gathered evidence, and prepped witnesses from their knowledge of Bain's defense strategies.

The State argues that Bain's Sixth Amendment claims fail because (1) he never raised a Sixth Amendment violation to the trial court; (2) the prosecution did not intentionally obtain Bain's confidential information; (3) Marsh, the special prosecutor who tried the case, never received any communication of Bain's defense strategy; and (4) the State used no tainted evidence in the trial.

2. An Apparent Sixth Amendment Violation Based on the State's Intrusion Into the Attorney-Client Relationship Can Be Properly Raised on Appeal

[2] Initially, we reject the State's argument that Bain's Sixth Amendment claim fails because he did not raise it to the trial court. The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel.[1] The right to counsel exists to protect the fundamental right to a fair trial.[2]

Courts have recognized that two unrelated Sixth Amendment violations have a significant potential to deprive a defendant of effective assistance of counsel: (1) a defense counsel's conflict of interest in representing a defendant and (2) a government intrusion into a defendant's confidential communications

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[1] *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

[2] See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

with his counsel about trial strategy. Courts have more often discussed when an appellate court will review a claim that a defense counsel was operating under a conflict of interest for the first time on appeal. Because we conclude that the same appellate review principles should apply to claims of state intrusions into privileged communications, we first discuss the principles that courts have applied in conflict of interest cases.

As implied, the Sixth Amendment guarantees the right to representation that is free from conflicts of interest.[3] To protect this right, a trial court must hold a hearing and inquire into a defense counsel's potential conflict of interest when the court knows or reasonably should know that a particular conflict exists, even in the absence of an objection.[4] And if a trial court had a duty to inquire because a potential conflict was apparent, an appellate court has discretion to consider the issue and remand a cause for a hearing into the matter. This is true even if the defendant did not raise the issue.[5] Also, a defendant can raise his or her attorney's conflict of interest for the first time on appeal if the defendant shows that an actual conflict existed and that it adversely affected the attorney's performance.[6]

[3-6] In an adversarial system of justice, a defendant's ability to keep privileged communications with counsel insulated from the prosecution also protects the defendant's Sixth Amendment right to effective assistance of counsel. Many federal and state courts have recognized that "the essence of

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[3] See, e.g., *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

[4] See, *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Hudson*, 208 Neb. 649, 305 N.W.2d 359 (1981).

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

[6] See, e.g., *Edwards, supra* note 3, citing *Cuyler, supra* note 4.

the Sixth Amendment right is, indeed, privacy of communication with counsel."[7] We agree. It is true that courts have not recognized the attorney-client privilege as a right guaranteed by the Sixth Amendment. But government interference in the confidential relationship between a defendant and his or her attorney can implicate the Sixth Amendment right to counsel.[8] So we conclude that the principles governing appellate review for a defense attorney's potential conflicts of interest also apply to potential disclosures of a defendant's privileged communications to the State.

[7] Here, the court knew that the disqualified prosecutors had reviewed Bain's confidential trial strategy. As we will explain more fully, the State's knowledge of that strategy was sufficient to require an evidentiary hearing into whether the State had violated Bain's right to counsel and, if so, the appropriate remedy. Because the court had learned of facts that made a potential Sixth Amendment violation apparent, the issue is properly presented to us on appeal, even if it was not raised at trial.

3. Federal and State Decisions Recognize an Inherent Unfairness in the Government's Possession of a Defendant's Trial Strategy

(a) U.S. Supreme Court Precedent

Our starting point is *Weatherford v. Bursey*.[9] There, the U.S. Supreme Court considered a civil rights action in which the

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[7] *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973), citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). Accord, e.g., *U.S. v. Dyer*, 821 F.2d 35 (1st Cir. 1987); *United States v. Brugman*, 655 F.2d 540 (4th Cir. 1981); *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978); *People v. Knippenberg*, 66 Ill. 2d 276, 362 N.E.2d 681, 6 Ill. Dec. 46 (1977). See, also, *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

[8] See, e.g., *Howell v. Trammell*, 728 F.3d 1202 (10th Cir. 2013); *Clutchette v. Rushen*, 770 F.2d 1469 (9th Cir. 1985).

[9] *Weatherford, supra* note 7.

plaintiff, Bursey, alleged that a state undercover agent had violated his Sixth Amendment right to counsel by participating in discussions between Bursey and his attorney. The agent had ostensibly participated in a crime with Bursey and was arrested with him. Later, posing as a codefendant to maintain his cover, he agreed to meet with Bursey and his attorney before trial. The agent said that he would ask for a separate trial and would not testify against Bursey. Although the agent had not planned to testify, after he was seen with the police, the prosecutor decided to call him. The agent testified about his undercover work but not about any information that he had learned from the attorney-client discussions. No evidence showed that the agent had provided Bursey's trial strategy to his superiors or to the prosecution.

The majority rejected the Fourth Circuit's per se rule that an undercover agent cannot meet with a defendant's counsel without violating the Sixth Amendment. Under that per se rule, whenever the prosecution knowingly arranged or permitted an intrusion into the attorney-client relationship, the right to counsel would have been sufficiently threatened to require reversal and a new trial. And the per se rule would have applied regardless of the government's purpose and without a showing of prejudice to the defense. In reversing, the U.S. Supreme Court was concerned that the Fourth Circuit's per se rule would effectively expose undercover agents because they would always have to refuse requests to attend meetings with defense counsel.[10]

Instead, the Court emphasized two facts. First, the agent had been placed in an awkward position by the request to meet with defense counsel and had not purposefully obtained Bursey's trial strategy. Second, he had not communicated it to the prosecutor or his staff.[11] It concluded its previous cases at most showed that when a conversation with counsel has been overheard,

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[10] See *id.*

[11] *Id.*

> the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the *per se* rule announced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant.[12]

But the U.S. Supreme Court suggested four factual circumstances that strongly indicate a Sixth Amendment violation:

> [1] Had [the agent] testified at Bursey's trial as to the conversation between Bursey and [his attorney]; [2] had any of the State's evidence originated in these conversations; [3] had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even [4] had the prosecution learned from [the agent] the details of the [attorney-client] conversations about trial preparations, Bursey would have a much stronger case.[13]

In *Weatherford*, the government did not violate the defendant's right to counsel because "[n]one of these elements [were] present . . . ."[14] "[U]nless [the agent] communicated the substance of the [attorney-client] conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to the State, there can be no Sixth Amendment violation."[15] This realistic threat of injury means that actual prejudice need not be shown; a substantial threat of prejudice is sufficient. Specifically, because the district court found that the information the agent obtained had not been communicated,

> he posed no substantial threat to Bursey's Sixth Amendment rights. Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume

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[12] *Id.*, 429 U.S. at 552.

[13] *Id.*, 429 U.S. at 554.

[14] *Id.*, 429 U.S. at 555.

[15] *Id.*, 429 U.S. at 558.

> not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case.[16]

But *Weatherford* left open significant questions regarding the contours of the right to counsel free from government intrusions. The Court did not decide whether a per se violation could be appropriate for some government conduct.

Later, the U.S. Supreme Court considered the appropriate remedy for the government's deliberate intrusion into the attorney-client relationship when the intrusion did not prejudice the defendant's representation. In *United States v. Morrison*,[17] federal drug agents met with the defendant twice without her attorney's knowledge even though they knew she had retained counsel. They sought her cooperation, disparaged her attorney, and suggested that she would face stiffer penalties if she did not cooperate. But she did not cooperate or provide them with any incriminating information about herself or her case, and she kept the same attorney.

The Third Circuit had concluded that this conduct violated the defendant's right to counsel, even if the violation had not tangibly affected her representation. It dismissed the indictment with prejudice. The U.S. Supreme Court unanimously reversed, but it declined to address the government's argument that no Sixth Amendment violation occurs unless its conduct prejudices the defendant. Instead, it assumed that the government had violated the Sixth Amendment but held that the Third Circuit had erred in dismissing the indictment: "[A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."[18]

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[16] *Id.*, 429 U.S. at 556-57.

[17] *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).

[18] *Id.*, 449 U.S. at 365.

The Court stated that the remedies for Sixth Amendment violations should be tailored to the injury suffered. So unless "the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense . . . there is no basis for imposing a remedy in that proceeding."[19] As with violations of the Fourth and Fifth Amendments, the "remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."[20] Because the defendant had not demonstrated any "transitory or permanent" prejudice, the government's violation did not justify interfering in the proceedings.[21]

So *Morrison* clarified that dismissing a charge is a drastic remedy for a Sixth Amendment violation absent a showing of actual prejudice or a substantial threat of prejudice to the defendant's representation. As noted, however, the Court declined to reach the government's contention that a showing of prejudice would be needed to establish a Sixth Amendment violation. So *Morrison* "left open the possibility that the Court might adopt a per se standard for those state invasions of the lawyer-client relationship that are not supported by any legitimate state motivation."[22] After the Court decided *Weatherford* and *Morrison*, other federal and state courts carved out a court's duty if the facts showed that investigators or a prosecutor obtained a defendant's privileged attorney-client communications.

(b) Federal Courts of Appeals Decisions

The Sixth Circuit has held that if a prosecutor obtains privileged communications and uses that information at trial to the defendant's detriment, the prosecutor's conduct violates the

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[19] *Id.*

[20] *Id.*, 449 U.S. at 366.

[21] *Id.*

[22] 3 Wayne R. LaFave et al., Criminal Procedure § 11.8(b) at 848-49 (3d ed. 2007).

Sixth Amendment.[23] Even though the prosecutor had not purposely obtained the information, he had used it to impeach the defendant at trial. The court reasoned that the use of tainted evidence—"*i.e.,* evidence obtained as a result of the intrusion"—is sufficient to demonstrate prejudice and require a new trial.[24] Because the government used the information to the defendant's detriment, the court did not consider whether state intrusions are a Sixth Amendment violation even without a showing of prejudice.

Later, the Tenth Circuit went further in a case in which the prosecutor intentionally learned about a defendant's trial preparations and used the information at trial. It held that a state's purposeful intrusion into privileged communications is a per se Sixth Amendment violation, for which prejudice is presumed: "[W]e hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed."[25]

It is true that statements from other federal appellate courts similarly suggest that a court would treat a state's intentional intrusion differently than an unintentional one.[26] But these courts also emphasized that neither the investigating officers nor the prosecutor received information relevant to the defendant's trial strategy.[27] Either of those facts should alert a trial court to the threat that the State could have used confidential information to the defendant's detriment. As the U.S. Supreme Court stated in *Weatherford*, a Sixth Amendment violation is strongly indicated when a prosecutor

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[23] See *Bishop v. Rose*, 701 F.2d 1150 (6th Cir. 1983).

[24] *Id.* at 1156.

[25] See *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995).

[26] See, *U.S. v. Davis*, 226 F.3d 346 (5th Cir. 2000); *United States v. Ginsberg*, 758 F.2d 823 (2d Cir. 1985); *United States v. Costanzo*, 740 F.2d 251 (3d Cir. 1984).

[27] See *id.*

knows the details of a defendant's trial strategy or the State uses a defendant's confidential information in any way to the defendant's detriment.[28]

So if an investigating officer or a prosecutor receives a defendant's confidential trial strategy, the probability of prejudice from a Sixth Amendment violation is much higher than with other types of state intrusions into the attorney-client relationship. Accordingly, the District of Columbia Circuit presumed prejudice where the evidence showed that the government's intrusion into a client-attorney relationship resulted in the defendants' trial strategy's being disclosed to the prosecutor.[29] The court explained that the right to counsel protects a broader range of interests than the outcome of a trial: "for example, the possibilities of a lesser charge, a lighter sentence, or the alleviation of 'the practical burdens of a trial.'"[30] It concluded that because the prosecution makes a "host of discretionary and judgmental decisions," neither an appellant nor a court could ever sort out how a prosecutor had made use of a defendant's confidential trial strategy.[31] Thus, a defendant need not prove that the prosecution actually used such confidential information in its possession:

> Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is "inherently detrimental, . . . unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of justice." Further, once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution. Such a presumption

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[28] See *Weatherford, supra* note 7.

[29] See *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983), *vacated on other grounds* 712 F.2d 1444.

[30] *Id.* at 494.

[31] *Id.*

> merely reflects the normal high level of formal and informal cooperation which exists between the two arms of the executive.[32]

The Third Circuit agreed that a trial was presumptively tainted in a case in which investigating officers and the prosecutor received a defendant's confidential trial strategy:

> We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.[33]

Because the trial had already taken place, the court concluded that the "disclosed information" was already in the public domain and that a dismissal of the indictment was the only appropriate remedy.[34]

And the First and Ninth Circuits agree that it would be "'virtually impossible'" for a defendant to show prejudice from disclosures of privileged trial strategy to the government because the defendant can only guess at whether and how the information had been used to gain an advantage.[35] But they do not presume that the trial is tainted. Instead, the First Circuit holds that if a defendant presents a prima facie case by showing that investigating officers or the prosecutors received confidential defense strategy through an informant, then the government bears the burden to show that there has been and will be no prejudice to the defendant because of disclosure. "The burden on the government is high because to require anything less

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[32] *Id.* at 494-95, quoting *Weatherford, supra* note 7.

[33] See *Levy, supra* note 7, 577 F.2d at 209.

[34] See *id.* at 210.

[35] See *U.S. v. Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003). Accord *United States v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984).

would be to condone intrusions into a defendant's protected attorney-client communications."[36]

The Ninth Circuit agrees with this burden-shifting scheme but holds that a defendant must show that an informant "acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information."[37] The court compared the required hearing to the one required under *Kastigar v. United States*[38] to ensure that the government has not used evidence tainted by a Fifth Amendment violation in a later prosecution against a former witness whom it compelled to give self-incriminating testimony under a grant of use immunity. It explained that in a *Kastigar* proceeding, the prosecution must show that it derived its evidence from legitimate, independent sources. It applied the same burden when the government acquires a defendant's confidential communications:

> [T]he government must present evidence, and must show by a preponderance of that evidence, that "all of the evidence it proposes to use," and all of its trial strategy, were "derived from legitimate independent sources." . . . In the absence of such an evidentiary showing by the government, the defendant has suffered prejudice.[39]

Relying on its analysis of *Kastigar*, the Ninth Circuit clarified that the government's trial strategy includes the following decisions: "decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), about what questions to ask (an in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal."[40]

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[36] *Mastroianni, supra* note 35, 749 F.2d at 908.

[37] *Danielson, supra* note 35, 325 F.3d at 1071.

[38] See *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

[39] *Danielson, supra* note 35, 325 F.3d at 1072.

[40] *Id.* at 1074.

(c) State Appellate Court Decisions

State courts have required similar procedures under a rebuttable presumption of prejudice. In *State v. Lenarz*,[41] state investigators obtained the defendant's detailed trial strategy from a forensic search of his computer. The privileged communications, which the trial court had specifically protected in an order, included facts relevant to the complaining witness' credibility and the adequacy of the police investigation. Investigators provided the confidential information to the prosecutor, who read it more than a year before the trial. The Connecticut Supreme Court held that a rebuttable presumption of prejudice arose from these circumstances, "regardless of whether the invasion into the attorney-client privilege was intentional."[42] The court further held that the State can only rebut the presumption of prejudice by clear and convincing evidence that no person with knowledge of the communication was involved in the investigation or the prosecution.[43] Alternatively, the State could show that the communications contained minimal privileged information or that it had access to all the information from independent sources.[44] But if the State fails to rebut the presumption, the trial court must, sua sponte, provide immediate relief to prevent prejudice to the defendant.[45]

In *Lenarz*, the prosecutor could not rebut the presumption of prejudice because he had read the information more than a year before the trial. The court reasoned that even if the prosecutor did not use the information to develop new evidence, the State could not show by clear and convincing evidence that he did not use the information for trial preparations. Those preparations included his "discussions with witnesses and

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[41] *State v. Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011).

[42] *Id.* at 437, 22 A.3d at 549.

[43] *Lenarz, supra* note 41.

[44] *Id.*

[45] *Id.*

investigators, or his decisions on jury selection, witness selection, examination of witnesses, or any of the other innumerable decisions that he was required to make . . . for and during trial."[46] Because the prosecutor tried the case to conclusion, the taint would be irremediable on remand and the charges had to be dismissed.[47]

The court recognized that dismissal was a drastic remedy. But it reasoned that even if a new prosecutor did not see the defendant's trial strategy, the first prosecutor could have already revealed it to witnesses and investigators. And the public record of the first trial would show the first prosecutor's selection and examination of witnesses to anticipate and neutralize any cross-examination of them.[48] So the court concluded that even a new trial with a different prosecutor would be tainted by the constitutional violation in the first trial.[49] In sum, because the prosecutor reviewed a "detailed, explicit road map of the defendant's trial strategy," even if the trial court had considered the issue before trial, it was unlikely that the appointment of a new prosecutor would have been an adequate remedy.[50]

More recently, the Washington Supreme Court held that the State could rebut the presumption of prejudice arising from a detective's eavesdropping on a defendant's conversations with the defendant's attorney.[51] After the defendant's conviction, he moved for a new trial based on a witness' purported recantation of her testimony. But the witness later told the prosecutor that she was lying in the videotaped recantation. The prosecutor asked a detective to listen to the defendant's telephone calls from jail, and the detective also listened to calls made to the

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[46] *Id.* at 440 n.17, 22 A.3d at 551 n.17.

[47] *Lenarz, supra* note 41.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 451, 22 A.3d at 558.

[51] See *State v. Fuentes*, 179 Wash. 2d 808, 318 P.3d 257 (2014).

defendant's attorney. The prosecutor claimed that the detective did not disclose the contents of these conversations to him, but it was unclear whether the witness had contacted the prosecutor because of the detective's eavesdropping.

The court had previously presumed prejudice arising from eavesdropping during trial but had not decided whether the State could rebut the presumption. Relying on *Weatherford*, it concluded that the extreme remedy of dismissing the charges was unwarranted in the rare case when there was no possibility of prejudice. But because the constitutional right to privately communicate with an attorney was foundational and because only the State knew how it had used the information, it held that the State must prove beyond a reasonable doubt that the intrusion did not prejudice the defendant. The court rejected the State's reliance on the prosecutor's statement that he had not received the information: "[R]egardless of whether the prosecutor himself knew of the content of the conversations, he may have relied on evidence gathered by [the detective] as part of an investigation aided by the eavesdropping."[52] The court remanded the cause for further proceedings with the right to discovery.

4. The Prosecution's Possession of Bain's Confidential Trial Strategy Presumptively Violated Bain's Sixth Amendment Right to Counsel and Required an Evidentiary Hearing

The above cases contain common threads that apply here. For the majority of courts, a defendant's confidential trial strategy in the possession of a prosecutor or investigating officer is presumptively prejudicial. A minority of federal courts do not presume prejudice, but they require the government to prove the absence of prejudice. In either circumstance, courts agree that a defendant cannot know how the prosecution might have used his or her confidential attorney-client information to the defendant's detriment. The courts that presume

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[52] *Id.* at 822, 318 P.3d at 263.

prejudice are split on whether the presumption is rebuttable. Some courts hold that this type of government intrusion is a per se Sixth Amendment violation that requires a reversal of the defendant's convictions—and dismissal of the charges if a trial has already been completed. Other courts hold that the State can rebut the presumption of prejudice. Those that do not presume prejudice hold that the burden of proof shifts to the government when the defendant presents a prima facie case of a Sixth Amendment violation. But the standard for showing that the defendant was not prejudiced is high. The State must prove that it did not use the information for any purpose to the defendant's detriment.

(a) Presumption of Prejudice Applies but Is Rebuttable

[8] We agree with courts that hold a presumption of prejudice arises when the State becomes privy to a defendant's confidential trial strategy. Federal courts are consistent on two points: (1) *any* use of the confidential information to the defendant's detriment is a Sixth Amendment violation that taints the trial and requires a reversal of the conviction; *and* (2) a defendant cannot know how the prosecution could have used confidential information in its possession. We believe these holdings cannot be reconciled except through a presumption of prejudice.

[9] But we hold that the presumption is rebuttable—at least when the State did not deliberately intrude into the attorney-client relationship. As other courts have suggested, some disclosures of confidential information to the State might be insignificant. Or the State could prove that it did not use the confidential information in any way to the defendant's detriment. For example, the State could prove that it did not derive its evidence and trial strategy from the disclosure of a defendant's trial strategy by showing that it had legitimate, independent sources for them.[53]

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[53] See *Kastigar, supra* note 38.

Regarding the State's burden of production, we are persuaded by the Ninth Circuit's adoption of its *Kastigar* requirements for potential Sixth Amendment violations. Those requirements ensure that the prosecution does not violate a defendant's Fifth Amendment rights when the defendant has no way of knowing how the government could have used his or her previously compelled self-incriminating testimony. The *Kastigar* requirements are clearly relevant to potential Sixth Amendment violations of this type. So we clarify that the State's trial strategy includes its decisions about witness selection and examinations and about the type of defenses that it should anticipate.

(b) Standard of Proof Is Clear and Convincing Evidence

Because we conclude that a disclosure of a defendant's trial strategy to the prosecution is presumptively prejudicial, we do not agree with the Ninth Circuit's preponderance of the evidence standard of proof.

[10] The standard of proof functions to instruct fact finders about the degree of confidence our society believes they should have in the correctness of their factual conclusions for a particular type of adjudication.[54] It "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[55]

The standards of proof applied across the legal spectrum generally fall into three categories.[56] The preponderance of the evidence standard is most often applied in civil disputes between private parties. Because the public has minimal interest in the outcome, a preponderance standard appropriately

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[54] See *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved in part on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[55] *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

[56] See *id.*

requires the parties to roughly share the risk of error.[57] But when a party's interests in a civil proceeding are substantial and involve more than the mere loss of money, but do not involve a criminal conviction, due process is satisfied by an intermediate standard of proof like "clear and convincing" evidence.[58] Finally, in a criminal case, due process requires the prosecution to prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged.[59]

[11] In cases involving individual rights, whether criminal or civil, the principle consideration in determining the proper standard of proof is whether the standard minimally reflects the value society places on individual liberty, because the "function of legal process is to minimize the risk of erroneous decisions."[60] "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[61]

Applying these principles, we conclude that a mere preponderance standard is inappropriate. Both the State and the public have a substantial interest in the fair administration of criminal justice and protecting a defendant's constitutional rights. More particularly, our society necessarily places a high value on ensuring that criminal trials are not tainted by disclosures that unfairly advantage the prosecution and threaten to subvert the adversary system of criminal justice. And requiring a defendant to share a roughly equal risk of error in determining whether the State used his confidential information to his detriment does not reflect those values.

Conversely, the "beyond a reasonable doubt" standard is a criminal trial protection that should not apply because the State

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[57] See *id.*

[58] See, *Addington, supra* note 55; *Smeal Fire Apparatus Co., supra* note 54.

[59] *Smeal Fire Apparatus Co., supra* note 54.

[60] *Addington, supra* note 55, 441 U.S. at 425.

[61] *Id.*, 441 U.S. at 427.

is not proving the elements of a charged offense. And we recognized that this strictest criminal standard does not apply to the "admissibility of evidence or . . . the prosecution's burden of proof at a suppression hearing when evidence is challenged on constitutional grounds."[62]

[12] But unlike the evidentiary issues presented in a suppression hearing, we have determined that the State's possession of a defendant's confidential trial strategy is presumptively prejudicial. And that presumed prejudice would infect more than the admission of disputed evidence. So we hold that when a presumption of prejudice arises because the State has obtained a defendant's confidential trial strategy, the State must prove by clear and convincing evidence that the defendant was not prejudiced by the disclosure.

Finally, we recognize other courts' concerns that after a completed trial, the prosecution's tainted trial strategy will be available in any new prosecution simply by examining the public record. But absent evidence showing that the attorney who prosecuted the State's charges possessed a defendant's confidential trial strategy,[63] we conclude that dismissal of the charges is not necessary if the State satisfies the burden of proof that we have set out. Because the State must prove that the disclosure did not prejudice the defendant in the first prosecution, a later prosecution will not be tainted by the record of the first trial.

(c) Court Must Sua Sponte Conduct an Evidentiary Hearing to Ensure Trial Is Not Tainted

As our analysis implies, an evidentiary hearing is required if the State is to have an opportunity to rebut a presumption of prejudice. We additionally conclude that this case illustrates the

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[62] *Lego v. Twomey*, 404 U.S. 477, 486, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

[63] See *Lenarz, supra* note 41.

necessity of a trial court independently conducting an evidentiary hearing when it learns that a defendant's confidential trial strategy has been disclosed to the State—even if the defendant has not raised a Sixth Amendment violation. A trial court must ensure that a defendant's right to effective representation is not infected by disclosures of confidential communications that threaten that right.

Here, the court's sorting procedures were inadequate for that task. It is true that the court intended to ensure that Marsh, the special prosecutor who ultimately tried the case, did not receive Bain's confidential trial strategy. But the sorting procedures could not ensure that before the court appointed Marsh, the State had not used the information to develop evidence or witnesses or to otherwise gain an advantage or make decisions detrimental to Bain. Notably, the county attorney's office had possession of Bain's confidential trial strategy for 2 months, followed by the Attorney General's possession of the information for 8 months.

Nor did the court's sorting procedure ensure that none of the preceding prosecutors had communicated Bain's confidential trial strategies to Marsh. Additionally, we are concerned by statements in the record showing that Bain's confidential trial strategy was available to Homolka, despite Lierman's statement to the court that he had sealed the documents so that no one else could obtain them. Finally, we have been hampered in our review by the absence of the most significant evidence: the documents containing Bain's confidential information.

[13] So we hold that when a court is presented with evidence that the State has become privy to a defendant's confidential trial strategy, it must sua sponte conduct an evidentiary hearing that requires the State to prove that the disclosure did not prejudice the defendant, and it must also give the defendant an opportunity to challenge the State's proof. Because the court's procedures failed to ensure that Bain received a fair trial, we vacate his convictions. Our decision does not necessarily

preclude the State from seeking to try Bain again on these charges. But before the district court permits a retrial, it must conduct an evidentiary hearing, as set out above, to ensure that the trial will not be tainted.

VI. CONCLUSION

We conclude that if a trial court is presented with evidence that the State has learned of a defendant's confidential trial strategy, a presumption of prejudice from a Sixth Amendment violation arises. This presumption requires the court to independently conduct an evidentiary hearing even if the defendant has not raised the issue. The presumption is rebuttable, at least when the State did not deliberately intrude into the attorney-client relationship. At the evidentiary hearing, the State must prove by clear and convincing evidence that the disclosure did not prejudice the defendant and the court must give the defendant an opportunity to challenge the State's proof. Because the court's procedures were inadequate to ensure that Bain received a fair trial, we vacate his convictions. Because we vacate Bain's convictions and do not know whether the State can prove that a new trial would not be tainted, we do not address his remaining assignments of error.

Reversed and vacated.

State of Nebraska, appellee, v. Curtis H. Lavalleur, appellant.

873 N.W.2d 155

Filed January 8, 2016. No. S-15-481.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Collateral Estoppel: Words and Phrases.** Collateral estoppel means simply that 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.
5. **Criminal Law: Collateral Estoppel.** Although first developed in civil litigation, collateral estoppel is also an established rule of criminal law.
6. ____: ____. Where a previous judgment of acquittal was based upon a general verdict, a court must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded for further proceedings.

Joseph D. Nigro, Lancaster County Public Defender, Webb E. Bancroft, and Amy J. Peters, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Heavican, C.J.

INTRODUCTION

Curtis H. Lavalleur was previously acquitted of one count of first degree sexual assault and convicted of one count of attempted first degree sexual assault. This court reversed his conviction and remanded the cause for a new trial. The State then sought to file an amended information. Lavalleur's plea in bar on double jeopardy grounds was denied. He appeals. We reverse.

FACTUAL BACKGROUND

A more complete recitation of facts is found in our 2014 opinion in this case, *State v. Lavalleur* (*Lavalleur I*).[1] Other facts will be referenced as relevant to the issues presented by this appeal.

Lavalleur was originally charged with one count of first degree sexual assault (digital penetration) and one count of attempted first degree sexual assault (penile penetration). Following a jury trial, he was acquitted of first degree sexual assault and convicted of attempted first degree sexual assault.[2]

Lavalleur appealed. We reversed, concluding that evidence that the victim was involved in an intimate relationship was not inadmissible under Nebraska's rape shield statute, Neb. Rev.

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[1] *State v. Lavalleur*, 289 Neb. 102, 853 N.W.2d 203 (2014).

[2] *Id.*

Stat. § 27-412(1) (Cum. Supp. 2014), so long as the evidence sought to be admitted did not touch upon the victim's "'sexual behavior'" or "'sexual predisposition.'"[3] We concluded that the evidence Lavalleur sought to admit was relevant and that its exclusion was not harmless. We also held that the jury was not properly instructed as to the charge of attempted first degree sexual assault.

We issued our opinion on September 19, 2014, and the cause was remanded to the district court. On remand, discovery proceeded and the case was set for retrial during the April 6, 2015, jury term.

A hearing on the State's motion to amend the information was held on March 25, 2015. At that hearing, Lavalleur's counsel objected to the amendment of the information on double jeopardy grounds. The State's response was that "we don't know the reason why the jury found . . . Lavalleur not guilty, whether it was consent or diminished capacity or a combination or whatever." At the conclusion of that hearing, the district court sustained Lavalleur's objection to the motion to amend.

But on April 8, 2015, several things happened, per the district court's journal entry:

> [Lavalleur] asks leave to withdraw plea, leave is granted. [Lavalleur] asks leave to file plea in bar. Leave is granted. Case set for jury trial 4-9-15 at 2:00. [Lavalleur] requests 10 days to prepare for hearing on plea in bar. Request is granted. Hearing on plea in bar set for 4-20-15 at 2:30. [Lavalleur] is ordered to appear. State orally moves to amend count 2 of the information. State directed to file written motion. Motion for leave to file amended information set for 4-20-15 at 2:30. Trial continued.

On April 15, 2015, a hearing was held on the State's motion to reconsider the court's denial of the motion to amend. At this hearing, Lavalleur again objected to the State's

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[3] *Id.* at 114, 853 N.W.2d at 214.

amendment of the information on double jeopardy grounds and noted that leave to both withdraw Lavalleur's not guilty plea and file a plea in bar had been granted on April 8, apparently based upon the assumption that the court had decided it would grant the State's motion to amend after all. And indeed, the court did so. The court's journal entry for April 15 noted that the State's

> [m]otion to reconsider motion to amend information is sustained. State given leave to file amended information. [Lavalleur] was arraigned and stood mute. Court entered plea of not guilty. After subsequent telephonic conference with . . . counsel the plea entered by the court is vacated and withdrawn pending a preliminary hearing which is set for 4-20-15 at 2:30 . . . . [Lavalleur] given leave to file amended plea in bar which will be reset after the arraignment.

At this hearing, the district court also gave an indication as to how it would rule on the not-yet-heard plea in bar:

> I'm not sure on what basis [the jurors] found him guilty [sic]. Maybe they didn't think that she was subjected to sexual penetration. Maybe they thought she didn't consent. Maybe they thought she was mentally or physically incapable. But the jury verdict doesn't set forth the specific grounds for the reasons that they acquitted him on that charge.

Count I of the original information charged Lavalleur with first degree sexual assault. The information alleged that he "subject[ed] M.J. to sexual penetration when he knew or should have known that M.J. was mentally or physically incapable of resisting or appraising the nature of his or her conduct or without her consent." But count II, attempted first degree sexual assault in the original information, did not allege that M.J. was "mentally or physically incapable of resisting or appraising the nature of his or her conduct." That charge alleged only that Lavalleur "did attempt to subject M.J. to sexual penetration without her consent." Note

that these counts are not particularly specific with respect to what penetration was alleged. However, the parties agree that count I, first degree sexual assault, dealt with digital penetration, while count II, the attempt charge, dealt with penile penetration. This court implicitly acknowledged this in its opinion below.

The amended information charged Lavalleur with attempted first degree sexual assault. The allegation in the amended information was that Lavalleur "did attempt to subject M.J. to sexual penetration, to wit: penile/vaginal intercourse, *when he knew or should have known that M.J. was mentally or physically incapable of resisting or appraising the nature of his or her conduct* or without M.J.'s consent." (Emphasis supplied.)

Lavalleur's plea in bar was heard on May 13, 2015. In that filing, Lavalleur alleged that "he has before had a judgment of acquittal of the same offense." At the hearings on the State's motion to reconsider and Lavalleur's plea in bar, Lavalleur argued that "[a] jury has already found that the alleged victim was not incapacitated to the extent that she could neither consent or know whether consent was given or not." The district court denied the plea in bar on May 14.

Lavalleur appeals.

ASSIGNMENT OF ERROR

Lavalleur assigns that the district court erred in denying his plea in bar.

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law.[4] On a question of law, an appellate court reaches a conclusion independent of the court below.[5]

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[4] *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015).

[5] *Id.*

ANALYSIS

[3] The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[6] This case falls within the first category—a second prosecution after acquittal. But it is factually distinct from our usual double jeopardy case law, because the State does not seek to retry Lavalleur for first degree sexual assault. Instead, the State seeks to amend the attempted first degree sexual assault charge against Lavalleur to include an element of which Lavalleur has arguably already been acquitted when he was acquitted of first degree sexual assault.

[4-6] This case, then, raises the basic principles of collateral estoppel, which are embodied within the protections of the Double Jeopardy Clause, and as discussed by the U.S. Supreme Court in *Asche v. Swenson*[7]:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that 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. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since [1916]. As Mr. Justice Holmes put the matter . . . "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." . . . As a rule of federal law, therefore, "[i]t is much too late to

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[6] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[7] *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) (citation omitted). See, also, *State v. Bruckner*, 287 Neb. 280, 842 N.W.2d 597 (2014).

> suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain."

The Court continued:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." . . . Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.[8]

The specific issue in this case regards the State's amended information. The State originally charged Lavalleur with two different counts: (1) first degree sexual assault, where Lavalleur "knew or should have known that M.J. was mentally or physically incapable of resisting or appraising the nature of his or her conduct or without M.J.'s consent," and (2) attempted first degree sexual assault, where Lavalleur

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[8] *Id.*, 397 U.S. at 444 (citation omitted).

allegedly "did attempt to subject M.J. to sexual penetration without her consent."

In order to convict Lavalleur of first degree sexual assault, the jury had to find that Lavalleur subjected the victim to penetration, and that when he did so, he knew or should have known that she "was mentally or physically incapable of resisting or appraising the nature of his or her conduct," or that she did not consent. Thus, a jury had to find penetration and consent, or inability to consent. Put another way, if a jury found penetration and the lack of consent or the inability to consent, it had to convict Lavalleur.

The district court and the State both indicated that it was unknown why the jury returned a verdict of acquittal on the first degree sexual assault charge. The district court even noted that it was possible that the jury found there was no penetration. But while the verdict of the jury was a general one, it is possible to determine the basis of the jury's acquittal.

Ashe explains that because the prior judgment was based upon a general verdict, a court may "'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'"[9]

So we examine that record. In this case, M.J. testified that she did not remember anything that happened after she lay down to go to sleep, and suggested that Lavalleur might have drugged her. As such, M.J. had no testimony regarding digital penetration.

But Lavalleur testified that he did digitally penetrate M.J. The prosecutor noted in closing arguments that Lavalleur admitted that he digitally penetrated M.J., that the State had proved penetration, and as such, that "the only issue is did . . . Lavalleur know or should he have known that [M.J.] was not

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[9] *Id.*

in any condition to give consent to hi[s] digitally penetrating her, or by her conduct, did she not consent to this."

By examining the trial record, we can safely conclude that the jury found that Lavalleur penetrated M.J.; a rational jury could not find otherwise where Lavalleur admitted to the contact and the State argued that penetration was not at issue. As such, the jury was left only with the issue of whether M.J. consented or was unable to consent. Because a jury would have been forced to convict if it concluded that M.J. was unable to consent or did not consent, the jury must have concluded that M.J. consented. Where penetration was proved, only a conclusion that M.J. consented could support Lavalleur's acquittal.

We must therefore conclude that the jury found that M.J. was able to consent, and did in fact consent, to the penetration. Because the jury found that M.J. did consent, the jury clearly also had to find that M.J. was capable of consenting.

The attempted first degree sexual assault charge in count II was based on the same basic factual situation as the charge in count I. Thus, any conclusion as to count I that M.J. was capable of consenting would be equally applicable to count II; on these facts it is not possible for M.J. to be capable of consenting to digital penetration but incapable of consenting to penile penetration.

This issue—whether M.J. consented or was incapable of consenting—is one of ultimate fact, which the jury decided in Lavalleur's favor. This issue cannot again be litigated between the same parties. Although we may not have jurisdiction to opine that the district court erred in allowing the amendment, we clearly have jurisdiction to review the amendment's effect upon Lavalleur's right to not be subject to double jeopardy. And the operative information, after the amendment, violates that right.

The district court erred in denying Lavalleur's plea in bar. We reverse the district court's denial and remand the cause for further proceedings which may, at the State's option, include

Lavalleur's retrial on the attempted first degree sexual assault charge, so long as that retrial is not inconsistent with either this opinion or this court's opinion in *Lavalleur I*.

We observe, however, that in connection with our conclusion that the jury instructions relating to the attempt charge were incorrect in *Lavalleur I*, this court stated that the State was required to prove that Lavalleur "intended to subject M.J. to [sexual] penetration either without her consent *or when she was incapable of resisting or appraising the nature of her conduct*."[10] This was an incorrect statement, because, as we have noted in our opinion today, the attempt charge in the original information did not allege that M.J. was "incapable of resisting or appraising the nature of her conduct." As such, we disapprove of that portion of *Lavalleur I*.

CONCLUSION

The decision of the district court denying Lavalleur's plea in bar is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for
further proceedings.

McCormack and Stacy, JJ., not participating.

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[10] *State v. Lavalleur, supra* note 1, 289 Neb. at 118, 853 N.W.2d at 216 (emphasis supplied).

State of Nebraska, appellee, v. Kelvin L. Smith, appellant.

873 N.W.2d 169

Filed January 15, 2016. No. S-14-769.

1. **Trial: Evidence: Appeal and Error.** An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
2. **Trial: Witnesses: Testimony: Appeal and Error.** An appellate court reviews a trial court's allowance of leading questions for an abuse of discretion.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **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.
5. ____: ____. When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
6. **Convictions: Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact. The relevant question 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. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

8. **Constitutional Law: Criminal Law: Jury Trials.** Whether cumulative error deprived a criminal defendant of his or her Sixth Amendment right to a trial by an impartial jury presents a question of law to be reviewed de novo.
9. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the court below.
10. **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 the 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.
11. **Appeal and Error.** Appellate review is limited to those errors specifically assigned as error in an appeal to a higher appellate court.
12. **Trial: Evidence: Appeal and Error.** An objection on the basis of insufficient foundation is a general objection, which requires the court to engage in interpretation on appeal, rather than be apprised of the real basis for the objection.
13. ____: ____: ____. A party may not normally complain on appeal for an overruled foundation objection unless the grounds for the exclusion are obvious without stating it.
14. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined by the trial court on a case-by-case basis.
15. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
16. **Criminal Law: Trial: Witnesses.** A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question.
17. **Trial: Witnesses: Testimony: Appeal and Error.** An appellate court reviews a trial court's allowance of leading questions for an abuse of discretion.
18. **Trial: Witnesses: Testimony.** The concern with the use of leading questions during direct examination is that a witness already giving favorable testimony to a party may testify to facts suggested to the witness, rather than those personally known by the witness.
19. **Evidence: Proof.** A document is properly authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims.
20. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather,

whether the guilty verdict rendered in the trial was surely unattributable to the error.

21. **Rules of Evidence: Witnesses: Testimony.** To constitute a prior consistent statement for purposes of Neb. Evid. R. 801(4)(a)(ii), Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 2008), the out-of-court statement must be consistent with the in-court testimony recently charged with being fabricated.
22. ____: ____: ____. That witnesses' memories conflict as to when, where, or how statements were made may be relevant to the credibility of the witnesses' testimony, but it is not relevant for purposes of analyzing whether an out-of-court statement is a prior consistent statement under Neb. Evid. R. 801(4)(a)(ii), Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 2008).
23. **Appeal and Error.** For an alleged error to be considered by an appellate court, an appellant must both assign and specifically argue an alleged error.
24. ____. An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.
25. **Criminal Law: Minors: Sexual Misconduct: Proof: Words and Phrases.** In order to show "erotic nudity" as defined in Neb. Rev. Stat. § 28-1463.02 (Reissue 2008), the State must prove, first, that the depiction at issue displays a human's genitals or human's pubic area or female's breast area, and second, that the depiction was created for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved.
26. **Criminal Law: Minors: Sexual Misconduct: Photographs.** Determination of whether a defendant took pictures for purposes of real or simulated overt sexual gratification or sexual stimulation should include consideration of whether (1) the focal point of the visual depiction is on a child's genitalia or pubic area; (2) the setting of the visual depiction is sexually suggestive; (3) the child is depicted in an unnatural pose or in an inappropriate attire, considering the age of the child; (4) the child is clothed; (5) the visual depiction suggests sexual coyness or willingness to engage in sexual activity; and (6) the visual depiction is intended or designed to elicit sexual response in the viewer.
27. ____: ____: ____: ____. In prosecutions under the Child Pornography Prevention Act, the sexual nature of a photograph is not determined solely from the subject of the photograph, but from the motives of the persons generating it.
28. ____: ____: ____: ____. A defendant can be found guilty of creating or possessing child pornography beyond a reasonable doubt even when the actual depiction at issue is unavailable at trial.

29. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
30. **Criminal Law: Sexual Misconduct: Photographs.** Whether a photograph was created for the purpose of sexual gratification or stimulation must be determined, not only from the depiction, but from the motive of the persons generating it.
31. **Criminal Law: Sexual Misconduct: Circumstantial Evidence: Photographs: Intent.** A trier of fact may consider circumstantial evidence of a defendant's intent in determining whether a depiction was created for overt sexual gratification or sexual stimulation.
32. **Trial: Evidence: Prosecuting Attorneys: Due Process.** The nondisclosure by the prosecution of material evidence favorable to the defendant, requested by the defendant, violates due process, irrespective of the good faith or bad faith of the prosecution. But due process is not violated where the evidence is disclosed during trial.
33. **Criminal Law: Motions for Continuance: Evidence: Waiver.** If a continuance would have been a sufficient remedy for a belated disclosure in violation of Neb. Rev. Stat. § 29-1912 (Reissue 2008), a defendant who fails to request a continuance waives any rights he or she may have had pursuant to § 29-1912.
34. **Criminal Law: Prosecuting Attorneys: Witnesses: Indictments and Informations: Time.** Neb. Rev. Stat. § 29-1602 (Reissue 2008) generally requires the prosecution to endorse the names of all known witnesses in the information at the time it is filed, but permits the endorsement of additional witnesses up to and including 30 days prior to trial.
35. **Trial: Witnesses: Indictments and Informations: Time.** A trial court, in the exercise of its discretion, may permit additional witnesses to be endorsed within the 30 days before trial and even after the trial has begun, provided doing so does not prejudice the rights of the defendant.
36. **Trial: Expert Witnesses.** The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
37. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
38. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
39. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the

purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

40. **Criminal Law: Sexual Assault: Minors: Records: Proof.** For purposes of Neb. Rev. Stat. §§ 28-319.01 (Cum. Supp. 2014) and 28-320.01 (Reissue 2008), a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

41. **Rules of Evidence: Records: Proof.** Copies of judicial records that are certified by a deputy clerk for the clerk of the district court and impressed with the court's seal do not require extrinsic evidence of authenticity for admission under Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 2008).

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed and remanded for resentencing.

Thomas P. Strigenz, Sarpy County Public Defender, and April L. O'Loughlin for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

McCormack, J.

I. NATURE OF CASE

Kelvin L. Smith was convicted in a jury trial of two counts of first degree sexual assault of a child; three counts of third degree sexual assault of a child; three counts of incest; three counts of visual depiction of sexually explicit conduct; and one count of child abuse. Three of the sexual assault charges were charged as second offenses, which, pursuant to Neb. Rev. Stat. § 28-319.01(3) (Cum. Supp. 2014), enhanced Smith's penalty to a mandatory minimum sentence of 25 years in prison. In total, Smith was sentenced to 41 to 110 years of imprisonment,

35 of those years being "hard" years, for which there is no possibility of parole. Smith appeals both his convictions and sentences, assigning 12 errors.

II. BACKGROUND

Smith and Jennifer Smith met and began dating in April 2004. In late April or May, Smith moved into Jennifer's apartment in Council Bluffs, Iowa, with Jennifer and her two daughters, S.D. and A.L., who were 9 and 6 years old at the time. Smith and Jennifer were married in June 2004. They conceived a son, who was born in September 2010.

On August 6, 2013, Child Protective Services received a child sexual abuse report with regard to S.D., A.L., and the Smiths' son. As a result of the report, a caseworker went to the Smiths' apartment to interview each family member. Based on disclosures made by A.L., the case was turned over to a detective. On August 12, the detective questioned Smith, and then placed him under arrest. On October 22, Smith was formally charged with offenses of which he was later convicted.

S.D. and A.L. both testified at Smith's trial that Smith sexually assaulted them. Although they could not testify to the exact dates for each of the alleged incidents, the girls described their experiences in terms of where they were living at the time. Thus, it becomes relevant that the family moved to La Vista, Nebraska, in 2005 and to Bellevue, Nebraska, in 2007.

1. S.D.

At trial, S.D., then 19 years old, testified that Smith began sexually assaulting her when she was 10 years old and the family was living in La Vista. She testified that the first incident occurred one day while her mother and sister were gone. Smith called S.D. into his bedroom, grabbed her by the wrist and took her clothes off despite her asking him to stop. S.D. testified that Smith pulled her down to the bed, pulled down his pants, got on top of her, spread her legs open, and put his penis inside her. S.D. testified that incidents like the one she

described occurred multiple times a month while they lived in La Vista. S.D. said she never told her mother because Smith told her not to and told her that it would upset her mother.

S.D. testified that the sexual assaults began to occur more frequently after the family moved to Bellevue in 2007. She testified that a couple of times a week, Smith would touch her inappropriately or force her to have oral sex or intercourse with him.

When S.D. was 12 or 13 years old, she began to go through puberty and began to grow pubic hair. At trial, S.D. testified that Smith told her she needed to start shaving because he did not like her having hair on her pubic area. She said Smith showed her how to shave; he used a razor on her legs and pubic area without soap or other lubricant and cut her. Although S.D. admitted she sometimes cut her wrists on purpose, S.D. testified that on another occasion, Smith had cut her on the inside of her thighs with a box cutter blade because she did not shave and was "disgusting and ugly." At trial, Dr. Suzanne Haney discussed photographs of S.D.'s thighs, which show scarring consistent with small lacerations that have healed.

(a) Photographs

At trial, S.D. testified that Smith took nude photographs of her on multiple occasions. At trial, S.D. was able to recall specific details about an incident that occurred when she was 13 years old. When asked to describe that incident, S.D. said:

> He took off my clothes and put me on the bed . . . .
>
> . . . .
>
> [He] grabbed hold of my knees and put them in the air and took a picture [of my vaginal area].
>
> . . . .
>
> . . . There was another one where I was — I was on my hands and knees, and I remember he put his hand on the — on my back and pushed my butt up in the air and took a picture like that.
>
> . . . .

> . . . There was two more. The other one was — I was on my back, and it was from my neck down.
>
> . . . .
>
> . . . I can't remember the fourth one.

S.D. testified that she saw the pictures after they were taken. She said that the photograph Smith took of her buttocks showed her vaginal area. S.D. testified that Smith placed the photographs into his photograph album (photo album), where there were also nude photographs of S.D.'s mother.

A detective, Sarah Spizzirri, obtained Smith's photo album from Jennifer after Smith's arrest. At the time Spizzirri obtained the album, it did not contain any photographs of S.D. Instead, there was an empty page where the photographs in question were alleged to have been placed.

Smith's photo album was the kind with peel-back-and-stick contact sheets. At trial, Spizzirri testified about those types of photo albums, and Smith objected on form and foundation grounds throughout that testimony. Spizzirri said she was old enough to remember those types of photo albums and described how to insert a photograph into them. Spizzirri was allowed to testify that a contact sheet that has never been lifted is smooth and one that has been lifted is "all bubbled." When the State asked Spizzirri whether a blank page of Smith's photo album, where explicit photographs of S.D. had allegedly been, was bubbled and appeared to have been used, Smith objected again, and the court, believing the testimony had already been adduced, sustained Smith's objection on the grounds that the question had been asked and answered.

(b) Prior Consistent Statements

S.D. testified that Smith had stopped sexually assaulting her in 2008 when she started dating her first boyfriend, Collin Ryan, whom she dated on and off for 4 years. S.D. testified that one day, while she was babysitting with Ryan, she told Ryan that Smith had touched her.

S.D. also testified that she had expressed to her best friend, Kendra Dick, that she was being sexually assaulted. S.D.

testified that she wrote a poem about it in a notebook that she shared with Dick, sometime around their sophomore year of high school. Without any hearsay objections from Smith, S.D. explained that the poem "was about [her] being afraid to be alone; and [she] was afraid that if [she] was alone, then he would do it again to [her]," and that the poem "talked about [her] hurting because someone kept hurting [her]."

S.D.'s testimony was partly corroborated by Ryan's and Dick's statements at trial. Ryan testified that in December 2008, he drove S.D. home after a date, and that as he was backing up to leave, S.D. came running back outside. Ryan said that he went up to her to see what was wrong and that S.D. started crying. Over Smith's hearsay objections, Ryan testified that S.D. told him that she could not be there anymore, because "he" touches her. Ryan said he understood it to be Smith who was touching S.D., since no other males lived in the house.

Dick testified that in junior high, she and S.D. had a secret notebook in which they would write notes to each other and pass back and forth between classes. Dick testified that S.D. wrote a poem in the notebook, but Smith's hearsay objections were sustained, and Dick was not allowed to testify to the specific contents of the poem. Rather, Dick was allowed to testify that the poem was significant to her and caused her to feel scared for S.D. because "something wasn't right." When asked if Dick's understanding was that the poem was about Smith's raping S.D., Dick answered yes. Smith then objected on hearsay grounds, and that objection was overruled.

2. A.L.

A.L., who was 16 years old at the time of trial, testified that Smith began sexually assaulting her when she was 11 years old. She testified that the first time such an incident occurred, Smith came to her room at night and lay on her bed. A.L. testified that Smith took her pants and his clothes off, opened her legs, and put his penis inside her for what "felt like a long time." A.L. testified that about a month

later, Smith came to her room again, put his fingers inside her, and performed oral sex on her. She testified that Smith penetrated her with his penis only that one time, but that Smith continued to penetrate her with his fingers every other night for about a year. A.L. testified that Smith stopped sexually assaulting her sometime after she started her period and Jennifer became pregnant.

(a) Prior Consistent Statement

Although A.L. did not tell her mother about Smith's sexually assaulting her, A.L. testified that she wrote a letter she hoped her mother would find and kept it in a box in her closet. When asked at trial what the letter was about, A.L. said she wrote about the time Smith penetrated her with his penis and how scared she was. A.L. said that at the end of the letter, she wrote, "[I]f this is my mom finding this, I'm sorry I didn't tell you."

A.L. testified that sometime after Smith stopped sexually assaulting her, she showed the letter to her friend, Natalie James. A.L. said that James came over on a day when A.L. was home by herself, and that A.L. went to her room, got the note, and gave it to James. She testified that James read it and cried. Smith did not object to any of A.L.'s statements about the letter or what she told James.

To corroborate A.L.'s testimony, the State called James to testify regarding the letter. James testified that rather than A.L.'s giving the letter to James, A.L. read the letter to James. Over Smith's hearsay objections, James said the letter told the story of how "one night [Smith] came into [A.L.'s] room, laid in her bed, and then he raped her." James did not remember any message at the bottom of the letter.

(b) Medical Examination and Expert Testimony

On the third day of trial, it came to light, through Smith's cross-examination of Spizzirri and Det. Steve Miller, that a medical examination had been performed on A.L. Prior to

that testimony, neither Smith nor the State was aware of the medical examination. Miller, who was assigned to investigate Smith's case, received documentation of the examination from a child advocacy center and placed it in his personal file; he testified that he mistakenly failed to submit the documentation to the records division, where it would have become part of the official case file.

The parties stipulated that documentation of A.L.'s medical examination would be received into evidence without objection. The documentation, entered into evidence as exhibit 25, reflected that A.L.'s hymen had "a continuous hymenal border with a redundant hymenal surface," meaning there was no disruption in the border or evidence of trauma on A.L.'s hymen. Neither party requested a continuance based on the surprise caused by the exhibit.

Prior to trial, the State was unaware of A.L.'s medical examination, and thus did not disclose to Smith that it intended to elicit expert testimony from Haney about the examination or about the hymen's ability to heal. Before trial, the State expected that Haney would testify only about the photographs she took of the scars on S.D.'s thighs. At trial, however, Haney testified, not only about the scars on S.D.'s thighs, but also that the hymen is able to heal after penile or digital penetration. She testified that a physician cannot tell whether a woman or female child is a virgin based on the presence or absence of a hymen and that the fact exhibit 25 showed A.L. had a normal genital examination did not discount her sexual abuse disclosure.

Smith allegedly "had to scramble within 12 hours to find an expert of his own to counter . . . Haney's surprise opinion."[1] Smith called Dr. Sean McFadden, a medical doctor certified in obstetrics and gynecology who did not have any recent experience treating victims of sexual abuse. At trial, McFadden often provided lengthy and highly technical answers not necessarily responsive to questions asked.

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[1] Brief for appellant at 33.

From what can be gleaned from McFadden's testimony, his position appears to be that an 11-year-old girl has not yet had an increase in the production of estrogen and that as a result, her hymen is thinner and less elastic than it will be after she goes through puberty. He testified that if an adult male penetrated an 11-year-old girl's vagina, there would likely be some laceration of the hymen, that the damage would be increased if the penetration was forced, and that A.L.'s medical examination was inconsistent with allegations that she was once penetrated by Smith's penis and digitally penetrated every other night for a year.

McFadden testified that he disagreed with Haney's testimony that there would be no medical evidence of tearing of the hymen. He said that, if injured, the hymen's tissue will heal, but it will not go back to its original state; instead, there will be a "transection" where the tissue healed.

3. Conviction and Sentencing

At the conclusion of the trial, the jury found Smith guilty on the charges described above. An enhancement hearing was held, and the State offered, and the court accepted, exhibit 37 into evidence. Exhibit 37 was purported to be a prior conviction of attempted first degree sexual assault. Three of the sexual assault of a child charges were found to be second offenses for purposes of § 28-319.01(3) and Neb. Rev. Stat. § 28-320.01(4) (Reissue 2008), which requires a defendant convicted of sexual assault of a child, who has previously been convicted of a similar sexual offense, to serve a mandatory minimum of 25 years in prison. Prior to announcing the sentences, the trial judge said:

> As I read the case law, with respect to the three charges that carry mandatory minimums, the Court must impose consecutive sentences as to those three charges.
>
> It would seem to the Court, even if that was not required, that that would be appropriate given the time frames.

> The Court has chosen to make some of the sentences imposed concurrent to each other and some of the sentences consecutive to each other.
>
> Nothing can be concurrent with the mandatory minimum sentences, . . . but based upon victim, time frame of the offense and nature of the offense, the Court finds that certain sentences should be imposed on a consecutive basis and not a concurrent basis, in addition to the consecutive basis for the sentences on the mandatory minimums.

Smith was ultimately sentenced to 41 to 110 years in prison, 35 of those years being "hard" years, for which there is no good time and no possibility of parole.

Additional facts relevant to our analysis of Smith's assignments of error will be set forth herein.

III. ASSIGNMENTS OF ERROR

Smith filed a lengthy brief containing many assignments of error which have been consolidated, restated, and renumbered as follows: (1) The trial court erred in allowing exhibits 4 and 6 to be admitted into evidence; (2) the trial court erred in allowing exhibit 9 to be admitted into evidence; (3) the trial court erred in allowing Spizzirri to testify about exhibit 7; (4) the trial court erred in allowing the hearsay testimony of Ryan, Dick, and James; (5) there was insufficient evidence for Smith's convictions; (6) the trial court erred in failing to order a new trial after the medical report on A.L. was not timely disclosed, in violation of *Brady v. Maryland*[2] and the Nebraska discovery rules; (7) the trial court erred in endorsing Haney as a witness and allowing her to testify about exhibit 25; (8) the trial court violated the cumulative error doctrine; (9) the trial court erred in finding Smith's prior conviction was properly authenticated and certified; (10) the trial court erred in sentencing Smith to serve the mandatory minimum sentences

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[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

consecutively; and (11) the trial court erred in imposing excessive sentences.

IV. STANDARD OF REVIEW

[1] An appellate court reviews a trial court's ruling on authentication for abuse of discretion.[3]

[2] An appellate court reviews a trial court's allowance of leading questions for an abuse of discretion.[4]

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[5] 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.[6] When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.[7]

[6] When reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.[8] The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier

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[3] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[4] *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010).

[5] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[6] *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015); *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015); *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013); *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013); *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

[7] *State v. Draganescu, supra* note 5.

[8] See, *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012); *State v. Epp, supra* note 3; *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

of fact could have found the essential elements of the crime beyond a reasonable doubt.[9]

[7] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[10]

[8] Whether cumulative error deprived a criminal defendant of his or her Sixth Amendment right to a trial by an impartial jury presents a question of law to be reviewed de novo.[11]

[9] Statutory interpretation is a question of law that an appellate court resolves independently of the court below.[12]

[10] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the 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.[13]

V. ANALYSIS

We affirm all of Smith's convictions as listed above. We remand for resentencing in accordance with this opinion.

1. Exhibits 4 and 6

We first address Smith's contention that the trial court erred in allowing exhibits 4 and 6 to be admitted into

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[9] *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

[10] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012); *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010); *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[11] See, *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009); *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007).

[12] *State v. Becker*, 282 Neb. 449, 804 N.W.2d 27 (2011).

[13] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

evidence. His argument adds exhibit 5, though it was not assigned as error.

Exhibits 4 through 6 are purported to be photographs of the scars on S.D.'s thighs. The process of authentication for each of the exhibits was similar. The State would start by asking S.D. if she recognized the exhibit, to which S.D. would respond, "[t]hat's me" or "[m]y leg." The State would then ask a leading question to more specifically identify what the photograph portrayed. For example, the State asked S.D., "Is that, particularly, your right leg . . . ?" and "[I]s that a picture of your inner part of your leg?" S.D. affirmed each time. The State then asked whether the exhibit "fairly and accurately reflect the scars from the cutting that [Smith] inflicted on you?" S.D. indicated that each exhibit did. Each time the State offered one of those three exhibits into evidence, Smith objected on form and foundation grounds. Smith's objections were overruled.

[11-13] We need not consider whether the trial court erred in admitting exhibit 5, because appellate review is limited to those errors specifically assigned as error in an appeal to a higher appellate court.[14] With regard to exhibits 4 and 6, Smith offers three reasons why he believes there was not sufficient foundation evidence for the exhibits' admission. But Smith objected to the exhibits' admission only on form and foundation grounds. A foundation objection is a general objection, which requires the court to engage in interpretation on appeal, rather than be apprised of the real basis for the objection.[15] Thus, a party may not normally complain on appeal for an overruled foundation objection unless the grounds for the exclusion are obvious without stating it.[16] Smith acknowledges

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[14] *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997).

[15] See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[16] *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994).

this, but argues that the grounds for the exclusion are obvious from the record.

We acknowledge that in authenticating the exhibits, some of the State's questions were leading questions, which suggested to S.D. the answer desired of her. Thus, we entertain Smith's argument that exhibits 4 and 6 were improperly identified through leading questions and that as a result, there was not sufficient foundation evidence for their admission.

[14,15] Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined by the trial court on a case-by-case basis.[17] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.[18]

[16,17] Our law is well settled that a trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question.[19] We also review a trial court's allowance of leading questions for an abuse of discretion.[20]

[18] We find no abuse of discretion here. The concern with the use of leading questions during direct examination is that a witness already giving favorable testimony to a party may testify to facts suggested to her, rather than those personally known by her.[21] Here, at the time the State first showed S.D. exhibits 4 and 6, S.D. had already testified that Smith had cut her legs. When asked to identify the exhibits, S.D.

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[17] *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007); *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005); *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002); *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998).

[18] *State v. Jacobson, supra* note 17.

[19] *State v. Hoffmeyer*, 187 Neb. 701, 193 N.W.2d 760 (1972).

[20] *State v. Fleming, supra* note 4.

[21] Charles W. Ehrhardt & Stephanie J. Young, *Using Leading Questions During Direct Examination*, 23 Fla. St. U. L. Rev. 401 (1995).

immediately responded, "[t]hat's me" or "[m]y leg." The State followed up with leading questions only to more specifically identify the exhibits as photographs of S.D.'s legs showing "the injuries or the scars, from the cutting" that S.D. had just testified Smith had inflicted upon her. We therefore conclude that the trial court did not abuse its discretion in permitting the leading questions used during the State's authentication of exhibits 4 and 6.

[19] A document is properly authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims.[22] In this case, the State claimed that the exhibits were photographs of S.D.'s legs, and even if we ignore the testimony adduced through the State's leading questions, S.D.'s testimony established that they were in fact photographs of S.D.'s legs. Smith's assignment of error with regard to exhibits 4 and 6 is without merit.

2. Exhibit 9

We next address Smith's argument that the court erred in admitting exhibit 9 into evidence. Exhibit 9 is purported to be a copy of Smith's birth certificate issued by the State of Mississippi. The document is signed by a state health officer and certified to be a true and correct copy of the certificate on file with the State of Mississippi. It contains a warning: "A REPRODUCTION OF THIS DOCUMENT RENDERS IT VOID AND INVALID. DO NOT ACCEPT UNLESS EMBOSSED SEAL OF THE MISSISSIPPI STATE BOARD OF HEALTH IS PRESENT." The document contains the seal of Mississippi, as well as a seal of the Mississippi Board of Health. The parties disagree about whether the seal of the Mississippi Board of Health is embossed. In addition to exhibit 9, the State established Smith's birth date and age through two other witnesses.

At trial, Smith objected to exhibit 9's admission on authentication and certification grounds. On appeal, Smith argues that

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[22] *State v. Jacobson, supra* note 17.

the trial court erred in allowing exhibit 9 into evidence, claiming that the requirements of rule 902[23] were not met.

Rule 901,[24] not cited by Smith, states the general rule that authentication or identification is a condition precedent to admissibility, and that such requirement is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 902 is the "self-authentication" statute; it dictates that documents meeting certain requirements do not require extrinsic evidence of authenticity.

Rule 902(1) provides in relevant part that "[a] document bearing a seal purporting to be that of the United States, or of any state . . . and a signature purporting to be an attestation or execution" does not require extrinsic evidence of authenticity. Exhibit 9 bears a seal purporting to be that of the State of Mississippi and a signature certifying that the information contained in the certificate of live birth is a true and correct copy of the certificate on file with the State of Mississippi.

Smith argues that exhibit 9 does not meet rule 902(1), because the document itself says that it should not be accepted "unless embossed seal of the Mississippi State Board of Health is present," and he claims that the Board of Health seal is not embossed. The State argues that the seal does not need to be embossed, but claims that "a cursory tactile examination of the document shows the [seal is] indeed embossed."[25] We do not make a finding of fact as to whether the seal is embossed, and we do not decide whether the lack of an embossed seal would render the document noncompliant with rule 902(1).

[20] Even if we found that the document was admitted in error, it would be harmless error. In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that

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[23] Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 2008).

[24] Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008).

[25] Brief for appellee at 23.

occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.[26] The certificate of live birth serves only as proof of the defendant's age. Smith's age, along with the victims' ages, were pertinent to the severity and punishment of Smith's crimes of sexual assault of a child.[27] Evidence of Smith's date of birth was also offered in the form of testimony from at least two witnesses, including Smith's wife. Smith did not object to that testimony and did not present any contradicting testimony. Thus, the jury could have found Smith's age even without exhibit 9. We therefore conclude that any error in admitting exhibit 9 would be harmless error.

3. Spizzirri's Testimony on Photo Albums

Smith also argues that Spizzirri's testimony on the photo albums should not have been admitted. First, Smith argues that Spizzirri should not have been allowed to give "opinion testimony" about whether or not a contact sheet on the photo album was "all bubbled" or had been lifted up, because the State did not establish that she was an expert on contact sheets. Second, Smith claims that Spizzirri's testimony was improper bolstering of S.D.'s credibility. Both of these arguments are without merit.

(a) Opinion Testimony

Rule 701[28] allows a witness not testifying as an expert to provide "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear

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[26] *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011); *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009); *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009); *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[27] See Neb. Rev. Stat. § 28-319 (Reissue 2008).

[28] Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2008).

understanding of his testimony or the determination of a fact in issue."

Spizzirri testified that she had "personal experience with [that] type of a photo album," with "peeling away the clear sheet" and "putting a photo onto the sticky backing." She testified that in the past, when she "peeled back the clear paper and tried to . . . rearrange or arrange photographs," the clear sheet "never goes down quite right. It's bubbled."

We note that Spizzirri was not actually permitted to testify on direct examination that she believed photographs had been removed from the photo album, though the State's questions certainly created that inference. Even so, such inference was rationally based on Spizzirri's experiences with peel-back-and-stick photo albums, and Spizzirri's testimony was helpful to the jury, who may not have had experience with peel-back-and-stick photo albums. We conclude that Spizzirri's testimony was proper lay witness testimony under rule 701.

(b) Bolstering

Smith also claims that Spizzirri's testimony regarding the photo album vouched for the character of S.D., in violation of Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2008). We do not see, and Smith does not explain, how this statute applies to Spizzirri's testimony.

Rule 608 provides:

> (1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to [certain] limitations . . . .
>
> (2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence.

Subsection (1) does not apply, because the credibility of S.D. was neither attacked nor supported by Spizzirri's testimony in the form of reputation or opinion testimony. Subsection (2) does not apply, because Spizzirri's testimony

about the photo album was not extrinsic evidence of specific instances of S.D.'s conduct.

It seems Smith is construing rule 608 as prohibiting a party from eliciting testimony from one witness to corroborate the testimony of another. There is no such rule. Smith's argument is without merit. We conclude that Spizzirri's testimony about the photo album was properly admitted.

4. Statements by Ryan, Dick, and James

Smith argues that the trial court erred in allowing the hearsay testimony of Ryan, Dick, and James as prior consistent statements.

We first note that this issue was properly preserved for appeal by Smith's hearsay objections. The State argues that Smith waived this issue because he did not object on the specific basis that the statements were not prior consistent statements. The State claims that "there are so many components to the hearsay rule, and so many exceptions to it that a generic objection of 'hearsay' does not fit the 'specific grounds' requirement."[29] The State has cherry-picked cases *State v. Cave*[30] and *State v. Duncan*[31] for statements in support of its argument. But those cases did not involve hearsay objections and are easily distinguished.

We have never held that an objecting party must anticipate and specify every hearsay exclusion or exception potentially applicable in order to preserve his or her objection. We conclude that Smith's hearsay objection at trial properly preserved the issue for appeal; thus, we address the merits of Smith's arguments.

First, we review the general hearsay rule and "prior consistent statement" exclusion. Hearsay is "a statement, other

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[29] Brief for appellee at 8.

[30] *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992).

[31] *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003).

than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[.]"[32] Hearsay is not admissible at trial except as provided by the Nebraska Evidence Rules.[33]

Rule 801(4)(a)(ii), often referred to as the "prior consistent statement" exclusion, provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive."

The court explicitly allowed Ryan's testimony of S.D.'s out-of-court statement and James' testimony of A.L.'s out-of-court statement into evidence as prior consistent statements. Dick's statement that she understood the poem to be about rape was not included in that finding. The record does not show under which hearsay exclusion or exception Dick's testimony was allowed, but Smith's hearsay objections were nevertheless overruled.

Smith concedes that S.D. and A.L. were at trial and subject to cross-examination. Smith also concedes that he recently charged S.D. and A.L. with fabricating their allegations against him. Nevertheless, he argues that certain testimony of Ryan, Dick, and James should not have been admissible per rule 801(4)(a)(ii) because it was not consistent with the testimony of S.D. and A.L. at trial.

[21] The main problem with Smith's prior-consistent-statement analysis is that he compares for consistency the testimony of Ryan, Dick, and James with the testimony of S.D. and A.L. regarding the context in which the out-of-court statements were made. Smith should instead compare the out-of-court statements made by S.D. and A.L. with the

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[32] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

[33] Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008).

in-court statements that Smith charged S.D. and A.L. with recently fabricating.[34]

For example, with regard to Ryan's testimony, Smith is distracted by the witnesses' inconsistent testimony about the location and timing of the conversation at issue. Ryan testified that S.D. made the statement "he touches me" after Ryan dropped S.D. off after a date. In contrast, S.D. testified that the conversation occurred while she was babysitting with Ryan. Smith contends this discrepancy makes Ryan's testimony inadmissible.

But applying rule 801(4)(a)(ii), S.D.'s statement to Ryan was not hearsay. S.D. testified at trial and was subject to cross-examination concerning her statement to Ryan, "he touches me." That statement was consistent with S.D.'s testimony at trial and was offered to rebut Smith's charge that S.D. recently fabricated her sexual assault allegations against Smith.

With respect to James' testimony, Smith focuses on James' and A.L.'s conflicting accounts of who read A.L.'s letter. James testified that A.L. read the letter to her, and A.L. testified that James read the letter to herself. But we must compare A.L.'s out-of-court statement contained within the letter with the in-court statement that Smith claims A.L. fabricated. The out-of-court statement was that Smith came into A.L.'s room and raped her, and that statement was consistent with A.L.'s in-court testimony of the same.

[22] The fact that the witnesses' memories conflict as to when, where, or how statements were made may be relevant to the credibility of the witnesses' testimony, but it is not relevant for purposes of analyzing whether an out-of-court statement is a prior consistent statement under rule 801(4)(a)(ii). We conclude that the statements of S.D. and A.L., testified to by

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[34] See, *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996); *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), *abrogated, State v. Morris, supra* note 34; *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985), *abrogated, State v. Morris, supra* note 34.

Ryan and James respectively, were prior consistent statements properly admitted at trial.

As for Dick's statement that she understood S.D.'s poem to be about Smith's raping S.D., we first acknowledge that such testimony would be hearsay if not for rule 801(4)(a)(ii). In essence, Dick testified to S.D.'s out-of-court written assertion that Smith raped her.

Smith argues that this assertion was not a prior consistent statement, because, he claims, the poem was the declarant, was not produced at trial, and thus was not subject to cross-examination. Smith also makes this argument with respect to A.L.'s letter. Both arguments are without merit.

Rule 801(2) states that a "declarant is a person who makes a statement," and rule 801(1) says that a "statement is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion." Dick's challenged testimony involves statements contained within the poem. S.D. wrote the poem. As the poem's author, S.D. is clearly the declarant. Likewise, A.L. was clearly the declarant of the statements contained within the letter she wrote. Both S.D. and A.L. were indisputably at trial and subject to cross-examination. Smith's arguments that rule 801(4)(a)(ii) does not apply because the documents were the declarants and not available for cross-examination is without merit.

Smith also argues that Dick's testimony about the poem (that Dick understood it to be about Smith's raping S.D.) was inconsistent with S.D.'s in-court testimony, because S.D. did not use the word "rape" when S.D. described her poem. Instead, S.D. said the poem was very general and was about S.D.'s "hurting because someone kept hurting [her]." Although we think S.D.'s statement to Dick that Smith raped her *is* consistent with S.D.'s statement that someone hurt her, these two statements are not the ones rule 801(4)(a)(ii) requires us to compare.

To comport with rule 801(4)(a)(ii), the out-of-court statement must be consistent with the in-court testimony recently charged with being fabricated. Smith charged S.D. with fabricating

her testimony that Smith sexually assaulted her. S.D.'s out-of-court statement that Smith raped her is consistent with her in-court testimony.

5. Sufficiency of Evidence

[23,24] We turn to Smith's next assignment of error that there was insufficient evidence to sustain the verdict. Smith assigns as error and briefly mentions in his argument that there was insufficient evidence as to all counts. But to be considered by an appellate court, an appellant must both assign and specifically argue an alleged error.[35] An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.[36] Because Smith's argument addresses only the sufficiency of the evidence with respect to counts 10 through 12, we need only consider the evidence with regard to those charges.

(a) Counts 10 Through 12

Counts 10 through 12 are charges based on the three photographs that Smith allegedly took of S.D., which S.D. described at trial—one count per photograph. Since the photographs were not available at trial and do not have corresponding exhibit numbers, we will refer to the photographs as photographs "1," "2," and "3" for purposes of our analysis.

[25] All three counts involve charges that Smith violated Neb. Rev. Stat. § 28-1463.03(1) (Reissue 2008), which makes it "unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." Neb. Rev. Stat. § 28-1463.02(5)(e) (Reissue 2008) defines "[s]exually explicit conduct," in relevant part, as "erotic nudity," which means "the

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[35] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[36] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014); *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013); *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved."[37] This means that in order to show "erotic nudity" as defined in § 28-1463.02, the State must prove, first, that the depiction displayed a human's genitals or a human's pubic area or female's breast area, and second, that the depiction was created for the purpose of real or simulated overt sexual gratification or sexual stimulation.

[26,27] To determine whether photographs were taken for the purpose of real or simulated overt sexual gratification or sexual stimulation, we consider the following factors from *United States v. Dost*[38]:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

A visual depiction need not involve all these factors to be considered "erotic nudity."[39] Nor are the factors exclusive. We have said that the sexual nature of a photograph is not

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[37] § 28-1463.02(3).

[38] *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *affirmed sub nom. U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), and *affirmed* 813 F.2d 1231 (9th Cir. 1987). See, also, *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993).

[39] See, § 28-1463.02; *United States v. Dost, supra* note 38.

determined solely from the subject of the photograph, but also from the motives of the persons generating it.[40]

(b) Prosecuting Child Pornography Cases Without Depiction at Issue in Evidence

Smith claims it was impossible for the jury to find beyond a reasonable doubt that the photographs Smith allegedly took of S.D. depicted erotic nudity, because the photographs were "not in existence" at trial.[41] Smith's argument appears to be that, without actual photographs, the jury could not determine whether a minor's private parts were displayed in the photographs and could not apply the *Dost* factors to determine whether they were taken for the purpose of real or simulated overt sexual gratification or sexual simulation.

The State argues in contrast that a defendant can be found guilty of creating or possessing child pornography beyond a reasonable doubt even without the actual depictions in evidence. In support of its position, the State cites three federal cases, all of which rely on *U.S. v. Villard*.[42]

In *Villard*, the defendant filed a motion for judgment of acquittal after a jury convicted him of violating the federal exploitation of children statute, see 18 U.S.C. § 2251 (2012). In the lower court's order granting the motion, it indicated that it may be possible to prove beyond a reasonable doubt that the defendant violated § 2251, even without the actual depiction at issue.[43] Nevertheless, the lower court found that the evidence against the defendant was insufficient to prove that the unavailable photographs at issue were illegal child pornography in violation of § 2251.

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[40] See *State v. Saulsbury, supra* note 38.

[41] Brief for appellant at 53.

[42] *U.S. v. Villard*, 885 F.2d 117 (3d Cir. 1989).

[43] See *U.S. v. Villard*, 700 F. Supp. 803 (D. N.J. 1988), *affirmed U.S. v. Villard, supra* note 42.

The circumstantial evidence in *Villard* included a surveillance tape, which showed the defendant and another man looking at the depiction at issue and commenting on it. At one point, the other man said to the defendant, "'I wonder if he's asleep. He's three quarters hard. Maybe he sleeps in the buff like that. He's pretty hairy, though, God but not just much under the arm.'"[44] The other man also testified at trial that the pictures were all closeups of a boy who was approximately 14 or 15 years old, which showed the boy from his head to his knees. The man said that the boy's knees were bent slightly upward and that he was "'semi erect.'"[45]

After the jury in *Villard* convicted the defendant based on the evidence above, the lower court granted the defendant's motion for judgment of acquittal. On appeal, the Third Circuit was able to find only two of the *Dost* factors with any certainty.[46] It concluded that the evidence was insufficient and affirmed the district court's grant of judgment of acquittal. One judge dissented, because she felt that more deference should have been given to the jury's determination and that the majority was not viewing the evidence in the light most favorable to the government.

[28,29] We find it clear from the reasoning in *Villard* and similar cases that a defendant can be found guilty of creating or possessing child pornography beyond a reasonable doubt even when the actual depiction at issue is unavailable at trial. After all, we have often said that circumstantial evidence is not inherently less probative than direct evidence.[47] And, although courts have recognized that proving a child

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[44] *Id*. at 806.

[45] *Id.* at 807.

[46] *U.S. v. Villard, supra* note 42.

[47] *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003); *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001).

pornography case may be considerably more difficult without the actual depiction,[48] we find no case in which the court says it is impossible. Smith does not cite to any.

(c) Merits of Smith's Assignment

The question we must answer is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found that Smith created a depiction of "erotic nudity" involving a child, in violation of § 28-1463.02. This requires a two-step analysis.[49] First, we must determine whether any rational trier of fact could have found that the photographs at issue displayed "human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child."[50] If so, we proceed to the second step, which is to determine whether a rational trier of fact could have found that the depictions were created "for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved."[51] To answer this second question, we refer to the factors from *Dost*.

S.D. testified that when she was 13 years old, Smith took off her clothes, put her on the bed, and took photographs of her. For one photograph, Smith grabbed S.D.'s knees, put them in the air, and took a picture of her vaginal area (photograph 1). Another photograph was of S.D. on her hands and knees with her "butt up in the air" (photograph 2). S.D. testified that her vaginal area was visible in photograph 2. S.D. said a third photograph was taken of her from her neck down while she was on her back (photograph 3). S.D. did not say that photograph 3 displayed her vaginal area. S.D. testified that Smith showed

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[48] See, *U.S. v. Villard, supra* note 42; *People v. Wayman*, 379 Ill. App. 3d 1043, 885 N.E.2d 416, 319 Ill. Dec. 145 (2008).

[49] See *State v. Saulsbury, supra* note 38; § 28-1463.02.

[50] § 28-1463.02(3).

[51] *Id.*

her the photographs and that the photographs reflected what she had described Smith took of her.

(i) Display of Private Area

Based on S.D.'s testimony, we conclude that a rational trier of fact could find that the photographs displayed S.D.'s genital area. S.D. testified as to the contents of the photographs. With respect to photographs 1 and 2, S.D. testified that they displayed her vaginal area.

Although S.D. did not specifically describe the individual body parts depicted in photograph 3 the way she did with respect to photographs 1 and 2, we conclude that a rational jury could infer from S.D.'s testimony that at least her breasts, and possibly her genitals or pubic area, were depicted in photograph 3. This reasonable inference is supported by S.D.'s testimony that Smith took off her clothes and took a photograph of her from her neck down; that at the time Smith took the photographs of S.D., he had a history of sexually assaulting her and continued to do so after the photographs were taken; and that Smith placed the photograph into his photo album alongside sexually explicit photographs of S.D.'s mother.

(ii) Purpose of Sexual Stimulation or Gratification

We also conclude that a rational trier of fact could find that the photographs were created for the purpose of sexual gratification or sexual stimulation.

[30,31] We consider the *Dost* factors outlined above, which are primarily helpful in determining from the depiction whether it was created for sexual gratification or sexual stimulation. But we have also held that whether the photograph was created for the purpose of sexual gratification or stimulation must be determined, not only from the depiction, but from the motive of the persons generating it.[52] Thus, a trier of fact may consider circumstantial evidence of a defendant's intent in determining

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[52] See *State v. Saulsbury, supra* note 38.

whether a depiction was created for overt sexual gratification or sexual stimulation.[53]

For example, the jury could consider the context in which the photographs were alleged to have been taken.[54] Here, Smith took the photographs during the time he was forcing S.D. to have sexual intercourse and oral sex with him. The jury may have also considered S.D.'s testimony that Smith placed S.D.'s photographs in the photo album along with nude photographs of Jennifer, which Smith described as "adult-oriented pictures."

Additionally, the photographs meet many of the *Dost* factors. Photographs 1 and 2 meet, at least, factors 2 through 4 and 6. Both photographs were taken while S.D. was lying on the bed, a place generally associated with sexual activity.[55] S.D.'s attire and poses in those photographs were unnatural for a 13-year-old girl and suggest a willingness to engage in sexual activity. S.D. was nude and on her hands and knees with her "butt up in the air" in one photograph, and on her back with her knees up in the air in the other. And, based on the context of Smith's repeated sexual assaults, the photograph was clearly designed to elicit a sexual response in the viewer, Smith. Photograph 3 meets, at least, *Dost* factors 4 and 6. The photograph depicted S.D. nude and was intended to elicit a sexual response in Smith.

Viewing the evidence in the light most favorable to the State, we conclude that a rational jury could find beyond a reasonable doubt that Smith took the photographs for the purpose of his own overt sexual gratification or sexual stimulation in violation of § 28-1463.03. Finding both parts of the "erotic nudity" analysis met, we affirm Smith's convictions on counts 10 through 12.

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[53] *Id.*

[54] See *id.* See, also, *U.S. v. Rivera*, 546 F.3d 245 (2d Cir. 2008); *U.S. v. Vanderwal*, 533 Fed. Appx. 498 (6th Cir. 2013).

[55] See *United States v. Dost, supra* note 38.

6. *Brady v. Maryland* and Neb. Rev. Stat. § 29-1912 (Cum. Supp. 2014)

Next, Smith asserts that the trial court erred in failing to order a new trial, as to all counts, after the medical report on A.L. was not timely disclosed, which Smith alleges was in violation of *Brady v. Maryland*[56] and the Nebraska discovery rules.

[32] Under *Brady*, the nondisclosure by the prosecution of material evidence favorable to the defendant, requested by the defendant, violates due process, irrespective of the good faith or bad faith of the prosecution.[57] But *Brady* is not violated where the evidence is disclosed during trial.[58] Here, the parties became aware of the medical examination on the third day of trial. Because the medical examination was disclosed during the trial, we conclude that Smith's right to due process was not violated by the timing of the disclosure.

[33] However, our review is not complete. In Nebraska, discovery in criminal cases is also governed by statute, and we have said that § 29-1912 exacts more than the constitutional minimum.[59] Nevertheless, if a continuance would have been a sufficient remedy for a belated disclosure in violation of § 29-1912, a defendant who fails to request a continuance waives any rights he or she may have had pursuant to § 29-1912.[60]

We do not determine whether the timing of the disclosure here violated § 29-1912, because we find that Smith waived his rights under that statute when he failed to request a

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[56] *Brady v. Maryland, supra* note 2.

[57] *Id.*

[58] *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) (citing *U.S. v. Gonzales*, 90 F.3d 1363 (8th Cir. 1996)).

[59] *State v. Lotter, supra* note 58; *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

[60] See *State v. Lotter, supra* note 58.

continuance. Smith's main complaint is that, had exhibit 25 been disclosed sooner, Smith "would have been able to better prepare for the cross examinations of both [A.L.] and . . . Haney as well as aid in the preparation of . . . McFadden."[61] Because a continuance would have cured the prejudice Smith alleges and Smith failed to request a continuance, we conclude that he waived any rights he may have had pursuant to § 29-1912.

7. Haney's Testimony Regarding Exhibit 25

Smith makes several arguments that Haney's testimony about exhibit 25 should not have been admitted. But his arguments overlap and are scattered. Thus, in this section, we address Smith's complaints about Haney as we understand them, to the extent such issue has not already been addressed.

(a) Haney's Endorsement

One of Smith's complaints is that the trial court erred in endorsing Haney as a witness 3 months before the trial began. On February 24, 2014, the State moved to endorse additional witnesses, including Haney. On March 3, a hearing was held, and Smith's counsel objected to the State's motion on the grounds that it was the State's sixth change to the complaint, trial was scheduled to occur on March 18, and Smith's counsel did not know in what capacity Haney would be testifying. The court granted the State's motion, requiring the State to submit an affidavit documenting discovery materials provided to Smith related to Haney. In its order, the court stated, "[I]f [Smith] needs additional time to conduct further discovery, a continuance may be requested." Smith availed himself of that option and waived his right to a speedy trial. Trial began June 3.

[34,35] Neb. Rev. Stat. § 29-1602 (Reissue 2008) generally requires the prosecution to endorse the names of all known

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[61] Brief for appellant at 37.

witnesses in the information at the time it is filed, but permits the endorsement of additional witnesses up to and including 30 days prior to trial. Additionally, we have said that a trial court, in the exercise of its discretion, may permit additional witnesses to be endorsed within the 30 days before trial and even after the trial has begun, provided doing so does not prejudice the rights of the defendant.[62]

The trial court offered and granted Smith a continuance. The trial began on June 3, 2014, which made the State's motion to endorse additional witnesses more than 90 days prior to trial. We conclude that Smith was not prejudiced as a result of the endorsement, and accordingly, the trial court did not err in endorsing Haney.

Smith seems to think that the trial court's endorsement of Haney was somehow related to the sudden emergence of exhibit 25 at trial and somehow caused Haney's unanticipated testimony that exhibit 25 did not exonerate Smith. However, it is clear from the record that exhibit 25 did not come to surface until the third day of trial, because Miller inadvertently kept it in his personal file. Thus, at the time of Haney's endorsement, neither the court nor the State anticipated that Haney would testify about exhibit 25. Smith's argument is without merit.

(b) *Daubert v. Merrell Dow Pharamaceuticals, Inc.*

Smith also claims that the trial court erred in allowing Haney to provide an expert opinion about exhibit 25, because it did not require the articles on which Haney based her opinion to be vetted under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[63]

[36] Under *Daubert* and *Schafersman v. Agland Coop*,[64] the trial court acts as a gatekeeper to ensure the evidentiary

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[62] *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987).

[63] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[64] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[65]

But to sufficiently call specialized knowledge into question under *Daubert* and *Schafersman* is to object with enough specificity so that the court understands what is being challenged.[66] The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony.[67]

Normally, a challenge to the admissibility of evidence under *Daubert* and *Schafersman* should take the form of a concise pretrial motion.[68] But we recognize this was not an option for Smith, because he was not aware prior to trial that Haney would testify about exhibit 25. Nevertheless, we have said that the pretrial motion should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence.[69]

Smith, in his brief on appeal, does not identify any particular factor he deems to be lacking, but asserts only that the trial court did not "determine if the studies were tested [or] if they were valid or if they had general acceptance within the relevant scientific community."[70]

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[65] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009); *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[66] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[67] *Id.*

[68] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[69] *Id.*

[70] Brief for appellant at 39.

[37] Moreover, although Smith claims the articles that Haney relied on in forming her opinion should have been subjected to *Daubert* standards, his true grievance concerns Haney's opinion that a normal anal/genital examination neither confirms nor excludes the possibility of sexual abuse. When Haney testified to that opinion at trial, Smith did not object. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[71] We conclude that Smith did not properly preserve this issue for appeal.

8. Cumulative Error Doctrine

In *Wamsley v. State*,[72] we recognized the doctrine of cumulative error in the context of a criminal jury trial. We explained that although one or more trial errors might not, standing alone, constitute prejudicial error, their cumulative effect may be to deprive the defendant of his constitutional right to a public trial by an impartial jury.

Smith claims the trial court committed "copious errors including those aforementioned."[73] We have already determined that the errors assigned by Smith are either meritless or inconsequential. Smith did not assign, but adds to his cumulative-error allegations, only that the prosecution improperly gave S.D. "gas money" and improperly met with S.D. two or three times without providing Smith with reports.

[38] But a party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.[74] Smith did not make a timely motion for mistrial based on prosecutorial misconduct.

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[71] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013); *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012); *State v. Kibbe, supra* note 6.

[72] *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960).

[73] Brief for appellant at 59.

[74] *State v. Stricklin, supra* note 6; *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Lotter, supra* note 58; *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

We therefore conclude that Smith waived his right to assert that issue on appeal.

Smith's argument that cumulative error deprived him of his right to a fair trial is without merit. Although we avoided the question of whether Smith's birth certificate was properly authenticated, we determined that, regardless of error, its admission would be harmless. We determined that all of Smith's other arguments concerning trial errors are without merit. Thus, there are not multiple trial errors to aggregate.

9. Enhancement

We turn lastly to sentencing issues, beginning with Smith's assignment of error that the trial court erred in finding Smith's prior conviction was properly authenticated and certified for purposes of enhancing his sentences.

Smith's sexual assault of a child crimes were charged in the information as enhancements, to the effect that, if a prior similar conviction was proved, Smith would receive enhanced sentences for the sexual assault crimes of which he was convicted. Smith was convicted of three counts of third degree and two counts of first degree sexual assault of a child. At Smith's enhancement hearing, the State offered exhibit 37, which was purported to be Smith's prior conviction for attempted first degree assault. Exhibit 37 contains a signature and certification on the last page.

Smith argues that the trial court erred in finding that exhibit 37 was properly authenticated and certified for purposes of enhancement, taking the position that a seal of authenticity should be on every page of the document.

Smith is correct that neither § 28-319.01 nor § 28-320.01 provides any guidance as to what is required to prove a prior conviction. In contrast, for purposes of the habitual criminal statute, Neb. Rev. Stat. § 29-2222 (Reissue 2008) provides that "a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed

by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment."

[39] In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.[75] We see no reason why the proof required of prior conviction for purposes of §§ 28-319.01 or 28-320.01 should be any different than the proof required under § 29-2222 for the habitual criminal statute.

[40] Accordingly, we hold that for purposes of §§ 28-319.01 and 28-320.01, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

[41] Exhibit 37 is a self-authenticating document. Copies of judicial records that are certified by a deputy clerk for the clerk of the district court and impressed with the court's seal do not require extrinsic evidence of authenticity for admission under rule 902.[76] Exhibit 37 is a copy of Smith's record concerning his attempted first degree sexual assault conviction. It is certified by a deputy clerk for the Douglas County District Court and bears the court's seal. Page 10, which is the order sentencing Smith for his conviction of attempted first degree sexual assault, is file stamped and separately authenticated by the clerk of the court. We conclude that exhibit 37 was a self-authenticating document, which was prima facie evidence of Smith's previous attempted first degree assault conviction. Therefore, Smith's argument is without merit.

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[75] *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003).

[76] § 27-902; *State v. Hall, supra* note 16.

10. Sentences

Smith argues that his case should be remanded for new sentencing because the trial court abused its discretion in imposing Smith's sentences, which were based on the court's erroneous impression that the counts with mandatory minimum sentences needed to be consecutive to all other counts.

Smith is correct that his sentencing was imposed by the trial court under a mistake of law. In imposing Smith's sentences, the trial judge said that he understood the case law to require him to impose the sentences carrying mandatory minimum sentences consecutively to the sentences for the other counts. It appears the trial court relied on a statement in *State v. Castillas*[77]: "Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively." We clarified this statement in *State v. Berney*,[78] when we said:

> We were not speaking of enhancements under the habitual criminal statute, but of those specific crimes that required a mandatory minimum sentence to be served consecutively to other sentences imposed.
>
> There is a distinction between a conviction for a crime that requires both a mandatory minimum sentence and mandates consecutive sentences, and the enhancement of the penalty for a crime because the defendant is found to be a habitual criminal. In the former, the mandatory minimum sentence must be served consecutively to any other sentence imposed, because the statute for that crime requires it. In the latter, the law does not require the enhanced penalty to be served consecutively to any other sentence imposed. The sentence is left to the discretion of the court.

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[77] *State v. Castillas*, 285 Neb. 174, 191, 826 N.W.2d 255, 268 (2013), *disapproved, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[78] *State v. Berney*, 288 Neb. 377, 382-83, 847 N.W.2d 732, 736 (2014).

The question is whether the trial court's mistake of law amounted to an abuse of discretion in imposing Smith's sentences when the judge expressly stated that "even if [consecutive imposition of mandatory minimum sentences] was not required, . . . that would be appropriate given the time frames." The issue is unique, and we are unaware of any case law on point.

Nevertheless, we are concerned that the court's imposition of Smith's sentences on the convictions carrying mandatory minimum sentences may have *seemed* appropriate to the court because such sentences were ones thought to be required. This is not to say that the exact same sentences imposed with a full understanding of the law would be an abuse of discretion. Rather, we want to ensure that the court actually *exercised* its discretion and did not simply impose sentences that it thought were required. We therefore remand the cause for resentencing and do not reach Smith's argument that his sentences were excessive.

VI. CONCLUSION

For the foregoing reasons, we affirm Smith's convictions. We remand the cause for resentencing in accordance with this opinion.

Affirmed and remanded for resentencing.

Joleen Grammer and Terry Grammer, appellants, v. Darren Lucking and Cory Lucking, appellees.

873 N.W.2d 387

Filed January 15, 2016. No. S-14-1080.

1. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
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. **Words and Phrases.** The word "or," when used properly, is disjunctive.

Appeal from the District Court for Jefferson County: Paul W. Korslund, Judge. Reversed and remanded for further proceedings.

Rodney J. Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellants.

Susan K. Sapp and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and, on brief, Robert M. Kinney-Walker, for appellees.

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

Heavican, C.J.

INTRODUCTION

This is a strict liability suit for damages sustained when two dogs belonging to Darren Lucking and Cory Lucking ran toward Joleen Grammer and Terry Grammer. The district court granted summary judgment in favor of the Luckings, and the Grammers appeal. We reverse, and remand for further proceedings.

BACKGROUND

On July 16, 2013, the Grammers went for a walk that led them in the direction of the Luckings' home. Two of the Luckings' dogs were in the unfenced yard, without supervision. One dog was on a chain, and the other was unrestrained.

When the Grammers were fewer than 20 feet away from the Luckings' yard, the dogs ran in their direction, barking and growling. Terry stepped in front of Joleen and attempted to stop the dogs from approaching. The restrained dog reached the end of its chain, but the unrestrained dog ran past Terry and toward Joleen.

As Joleen backed away from the dogs, she stumbled and fell, hurting her elbow. Neither of the dogs ever bit, scratched, or otherwise touched the Grammers. After a few seconds, Darren came out of his house and called the dogs back inside.

The Grammers filed this action under Neb. Rev. Stat. § 54-601(1) (Reissue 2010), which imposes liability upon dog owners for damages caused by their dogs "killing, wounding, injuring, worrying, or chasing any person or persons." The Luckings moved for summary judgment. Reciting one of the three alternative definitions we have previously given to "chase," the district court stated that to survive the motion for summary judgment, "the evidence must show that the dogs were chasing Jole[en] in order to catch or harm her." The district court hypothesized no other facts that would defeat the motion, nor did it consider whether the dogs had

"injured" Joleen. The district court found that the Luckings' dogs did not intend to catch Joleen, and therefore granted summary judgment.

The Grammers appealed and filed a petition to bypass the Nebraska Court of Appeals, which we granted.

ASSIGNMENTS OF ERROR

The Grammers argue, restated and reordered, (1) that our previous case law interpreting § 54-601 should be overturned. Additionally, the Grammers assign that the district court erred by (2) applying only one of the three definitions of "chase," (3) finding the dogs were not chasing the Grammers, (4) failing to consider whether the dogs injured Joleen, and (5) entering summary judgment for the Luckings.

STANDARD OF REVIEW

[1] The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.[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]

ANALYSIS

Rule Exempting Playful or Mischievous Acts.

We do not reach the first assignment of error concerning the soundness of *Donner v. Plymate*[3] and its progeny. In *Donner*, we interpreted § 54-601 to preclude liability for damages

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[1] See *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[2] *Id.*

[3] *Donner v. Plymate*, 193 Neb. 647, 228 N.W.2d 612 (1975).

caused by a dog's playful or mischievous behavior.[4] We upheld this interpretation again in *Underhill v. Hobelman*.[5] Although the Grammers contend that the Luckings' dogs were not merely playful or mischievous, they alternatively argue that a 1992 amendment, adding "injuring" to § 54-601, abrogated our interpretation in *Donner*.[6]

The true issue in this appeal, though, is whether no reasonable juror could find that, as the Grammers alleged, the dogs "caused injury to . . . Joleen . . . by charging at and chasing her." In other words, we consider whether a reasonable mind could differ from the district court's findings and conclude that the dogs injured or chased the Grammers.[7] The district court did not reach the issue of whether the dogs were merely playful or mischievous; therefore, the integrity of *Donner* and *Underhill* are not dispositive of this appeal.

District Court's Narrow Focus on One Definition of "Chase."

The Grammers' second through fifth assignments of error all relate to the district court's choice to apply only one definition of "chase" in its judgment. In *Donner*, we defined "chase" as "'to follow quickly or persistently in order to catch or harm' and 'to make run away; drive' or 'to go in pursuit.'"[8] We have not yet defined "injure" in the context of § 54-601. Generally, though, "injure" means "to inflict bodily hurt on [someone or something]."[9]

The district court, citing *Donner*, considered only whether the Luckings' dogs had "'follow[ed] quickly or persistently in

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[4] *Id.*

[5] *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

[6] See 1992 Neb. Laws, L.B. 1011.

[7] See *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[8] *Donner, supra* note 3, 193 Neb. at 650, 228 N.W.2d at 614.

[9] Merriam-Webster's Collegiate Dictionary 601 (10th ed. 2001).

order to catch'" Joleen—the first of three definitions we have given to "chase."[10] We agree with the district court that the dogs did not follow Joleen in order to catch her. We note that this finding is separate from the *Donner* question of whether the dogs acted playfully or mischievously. According to the Grammers' testimony, the dogs ceased their approach after Joleen fell. Although there were only a few seconds from when Joleen fell until Darren called the dogs inside, this would have been enough time for the unrestrained dog to catch Joleen if that had been its intent. There is no indication the chained dog made any further attempts to approach Joleen.

[3] But the district court did not apply the alternative definitions of "chase," nor did it consider whether the dogs "injured" Jolene. The terms in § 54-601 are connected by "or." The word "or," when used properly, is disjunctive.[11] Further, each of the definitions of "chase" from *Donner* are also disjunctive. Thus, § 54-601 applies when a dog kills or wounds or injures or worries or chases a person, under any relevant definitions of those terms.

The district court rejected just one potential avenue by which the Grammers might recover, without considering the several statutory alternatives raised by the pleadings and the evidence. In effect, the district court applied the three definitions of "chase" conjunctively, requiring that a claimant prove each one in order to recover when chased by a dog. Instead, the district court should have considered each of the definitions of "chase," as well as "injure," disjunctively.

Therefore the Grammers' second through fifth assignments of error are correct to the extent that the district court should not have granted summary judgment without considering every relevant definition of "chase" and "injure."

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[10] See *Donner, supra* note 3, 193 Neb. at 650, 228 N.W.2d at 614.

[11] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008).

CONCLUSION

We reverse the summary judgment and remand the cause for further proceedings not inconsistent with this opinion.

Reversed and remanded for
further proceedings.

Wright and McCormack, JJ., not participating.

Miller-Lerman, J., concurring.

I concur in the result but write separately to note that I joined the dissent in *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009), and continue to believe that the reasoning in that dissent has merit. However, I agree with the majority in this case that the continued viability of *Donner v. Plymate*, 193 Neb. 647, 228 N.W.2d 612 (1975), after the 1992 amendment to § 54-601, is not dispositive of this appeal. I therefore concur in the majority's disposition of this appeal, and I agree that the summary judgment should be reversed and the cause remanded to the district court for further consideration of every relevant definition of "chase" and "injure."

State of Nebraska, appellee, v.
Victor L. Carter, appellant.

877 N.W.2d 211

Filed January 15, 2016. No. S-14-1089.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Steve Lefler, of Lefler, Kuehl & Burns, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Victor L. Carter, pro se.

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

Per Curiam.

We held case No. S-14-1089 under submission pending payment of the statutory docket fee pursuant to our decision in *State v. Carter*.[1] The docket fee was timely paid, and we now consider the merits of the appeal. As was foreshadowed in *Carter*, we find Victor L. Carter's motion for postconviction relief to be meritless. Accordingly, we affirm the order of the district court.

Affirmed.

McCormack, J., not participating in the decision.

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[1] *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

State of Nebraska, appellee, v. De'Aris R. Trice, appellant.

874 N.W.2d 286

Filed January 15, 2016. No. S-14-1139.

1. **Rules of Evidence: Hearsay: Witnesses: Proof: Appeal and Error.** For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness has been shown. Where the rules of evidence commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **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 whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
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. An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
5. **Witnesses: Evidence: Proof.** The burden to establish a declarant's unavailability is on the party seeking to introduce the evidence.
6. **Criminal Law: Trial: Witnesses: Evidence.** In a criminal case, a witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial. There must be evidence of diligence on the part of the prosecution to locate the witness and evidence of the unavailability of the witness to testify.

7. **Rules of Evidence: Witnesses.** When considering whether a good faith effort to procure a witness has been made under Neb. Rev. Stat. § 27-804(1)(e) (Reissue 2008), the proper inquiry is whether the means utilized by the proponent prior to trial were reasonable, not whether other means remain available at the time of trial or whether additional steps might have been undertaken.
8. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.
9. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
10. ____. In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
11. **Convictions: Evidence.** Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.
12. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
13. **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 the 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.
14. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Patrick P. Carney, of Carney Law, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Wright, Connolly, McCormack, Miller-Lerman, Cassel, and Stacy, JJ.

Stacy, J.

I. INTRODUCTION

This is the second direct appeal brought by De'Aris R. Trice, challenging his conviction for second degree murder. In his first direct appeal, we concluded the jury had not been properly instructed on the interplay between second degree murder and sudden quarrel manslaughter.[1] We noted the step instruction used by the trial court was correct when given, but our subsequent holding in *State v. Smith*[2] rendered the instruction an incorrect statement of the law. We reversed the judgment and remanded the cause for another trial.

On remand, Trice waived a jury. Following a 2-day bench trial, he again was found guilty of second degree murder and again was sentenced to a prison term of 40 years to life. He timely filed this direct appeal, assigning error to various evidentiary rulings and arguing the sentence imposed was excessive. Finding no reversible error, we affirm.

II. BACKGROUND

On December 26, 2010, Timothy Warren was stabbed when a fight broke out during a party in Norfolk, Nebraska. Warren died from his injuries.

Our opinion in *State v. Trice*[3] recited the circumstances surrounding the stabbing and summarized the evidence adduced at Trice's first trial. In most respects, the evidence adduced at Trice's second trial was similar to that adduced at his first trial. We recite here only that evidence from the second trial which is relevant to the errors assigned on appeal.

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[1] See *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013).

[2] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[3] *State v. Trice, supra* note 1.

1. Testimony of Robyn Baldwin

In the first trial, Robyn Baldwin testified and was cross-examined. She was subpoenaed to appear as a witness in the second trial, but failed to appear. In the first trial, Baldwin testified that the day before the stabbing, she overheard her sister, Trice's girlfriend, tell him she wanted to end the relationship. Baldwin then heard Trice respond: "'Well, if you're done with me, then I might as well just kill myself or hurt somebody . . . I'll just go murder somebody. I might as well be in jail without you in my life.'"

Roughly 1 month before Trice's second trial, the State served Baldwin with a subpoena to testify. The deputy sheriff who served the subpoena testified he called Baldwin on her cell phone and she agreed to meet him later that day to accept service. He personally served Baldwin with the subpoena.

The district court clerk who was responsible for checking in subpoenaed witnesses during the second trial testified that Baldwin had not appeared and had not telephoned the court to indicate she would be late. A Norfolk police officer who was familiar with Baldwin also testified he had "been all through" the courthouse while witnesses were showing up for trial and did not see Baldwin.

The State asked the court to find Baldwin unavailable under Neb. Rev. Stat. § 27-804(1)(e) (Reissue 2008) and offered a transcript of Baldwin's testimony from the first trial. Trice objected, pointing out Baldwin lived in the area and "had been found" previously. The trial court concluded Baldwin was unavailable and received the transcript of her testimony from the first trial into evidence over Trice's hearsay objection.

2. Testimony of Ronald Trice

Trice's brother Ronald testified and was cross-examined in the first trial but was not present for the second trial. In the first trial, Ronald testified about Trice's activities in the days leading up to the party and described what happened

during the party, both before and after the stabbing. Ronald also testified about a conversation he had with Trice shortly after the stabbing. During this conversation, Ronald asked Trice "five or six times" whether he was responsible for the stabbing and each time Trice denied stabbing anyone. Ronald then said, "'I don't need you to lie to me, did you do it?'" to which Trice replied, "'Yeah, I — I had to, I had to protect you and me.'"

About 6 weeks before the second trial, the State filed a "Certificate to Compel Attendance of Witness" seeking to have Ronald served with process in Chicago, Illinois, where it was understood he was living. Roughly 20 days before trial, the State discovered the paperwork had not arrived in Chicago due to a clerical mistake. The paperwork was immediately reissued, and the State contacted the extradition unit in Chicago to request expedited service. The extradition unit agreed to make it a "top priority" and indicated it would use investigators to locate and serve Ronald. The State stayed in contact with the authorities in Chicago up to and including the time of trial. One week before trial, Chicago authorities reported an investigator had gone to Ronald's address to attempt service. The investigator made contact there with Ronald's parents, who reported Ronald was no longer in Illinois. The investigator was unable to serve Ronald and did not have any other information on his whereabouts, but did learn Ronald might be planning to return to Norfolk for trial. The possibility that Ronald planned to be in Norfolk during trial was supported by Ronald's former girlfriend, who testified she asked Ronald "whether or not he's going to appear in court," and he replied that "he will be in town, but he's not testifying."

The State suggested Ronald was actively resisting efforts to procure his attendance and asked the trial court to find him unavailable under § 27-804(1)(e). Trice argued the State had not made a sufficient effort to procure Ronald's attendance and thus had not shown he was unavailable. The court found

Ronald was unavailable and received the transcript of his testimony from the first trial into evidence over Trice's hearsay objection.

3. Testimony of Guadalupe Reyes

Guadalupe Reyes testified that at the time of the stabbing, she was dating Jaron Hoard. Hoard was one of two eyewitnesses who testified to seeing Trice stab the victim. Reyes did not attend the party, but she testified that a few hours after the party, Hoard came home "crying" and under "[a] lot of stress." Reyes asked Hoard what was wrong, and he replied that "his friend got stabbed." Trice objected to Reyes' testimony regarding Hoard's statement on hearsay grounds. The trial court overruled the hearsay objection, finding the statement was admissible as a prior consistent statement under Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 2008). The trial court expressly rejected the State's alternative theory that Hoard's statement was admissible as an excited utterance under Neb. Rev. Stat. § 27-803(1) (Reissue 2008).

4. Telephone Call Between Trice and His Father

After Trice was arrested and while he was being held in jail, Trice had a telephone conversation with his father. The conversation was recorded by the jail. A portion of the call was transcribed and offered by the State at the second trial. The transcript shows Trice's father asked him, "What are you pleading?" and Trice answered, "Not Guilty." His father then asked, "By reason of what? Self-defense?" and Trice replied, "Yes sir." The State suggested Trice's response (that he planned to claim self-defense) amounted to an admission that he had stabbed the victim.

Trice objected to the admission of the transcript on grounds his father's statements were inadmissible hearsay. The court overruled the hearsay objection and received the transcript into evidence, concluding the conversation amounted to an adoptive admission under § 27-801(4)(b).

At the conclusion of the 2-day bench trial, Trice was found guilty of second degree murder. After requesting an update to the presentence investigation, the trial court sentenced Trice to a term of 40 years to life in prison. Trice timely appealed.

III. ASSIGNMENTS OF ERROR

Trice assigns the trial court erred in (1) finding Baldwin and Ronald unavailable and admitting transcripts of their testimony from the first trial over Trice's hearsay objection, (2) admitting Reyes' testimony over Trice's hearsay objection, (3) admitting the transcript of the jail call over Trice's hearsay objection, and (4) imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1,2] For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness has been shown.[4] Where the rules of evidence commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[5] 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.[6]

[3] 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 whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.[7]

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[4] See, *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012); *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998).

[5] *State v. Kitt, supra* note 4.

[6] *Id.*

[7] *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[8] An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.[9]

V. ANALYSIS

1. Hearsay Exception: Unavailability Under § 27-804(1)(e)

Trice claims the trial court erred when it found Baldwin and Ronald were unavailable and admitted transcripts of their prior trial testimony under the exception to hearsay found in § 27-804(2)(a). Under that statute, testimony given by a witness at a prior proceeding is not "excluded by the hearsay rule if the declarant is unavailable as a witness."[10]

Section 27-804(1)(e) defines "unavailability" to include situations where a witness "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." A declarant is not unavailable if his absence is due to the "wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."[11]

[5,6] The burden to establish a declarant's unavailability is on the party seeking to introduce the evidence.[12] In a criminal case, a witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness'

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[8] *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

[9] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[10] § 27-804(2).

[11] § 27-804(1)(e). Accord *State v. Wiley*, 223 Neb. 835, 394 N.W.2d 641 (1986) (holding requirement of unavailability under § 27-804 is not satisfied if proponent has caused unavailability).

[12] *State v. Carter, supra* note 4.

presence at trial.[13] There must be evidence of diligence on the part of the prosecution to locate the witness and evidence of the unavailability of the witness to testify.[14] For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness has been shown.[15]

Trice assigns error to the court's finding of unavailability, arguing the State failed to make a good faith effort to procure the attendance of both Baldwin and Ronald at the second trial. We analyze the State's efforts regarding each witness separately.

(a) Unavailability of Baldwin

In prior cases, we have addressed unavailability when a witness cannot be located,[16] when a witness is outside the subpoena power of the court,[17] and when a witness is present at trial but refuses to testify.[18] This case presents our first opportunity to address unavailability when a witness has been located and served with a subpoena, but fails to appear for trial.

We begin by noting that the plain language of § 27-804(1)(e) provides a witness can be procured "by process or other reasonable means." We understand this language to indicate process is not just one of the reasonable means of procuring a witness at trial, it is the preferred means. When a witness against an accused in a criminal case is within the reach of process, the prosecution generally must resort to process to

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[13] *Id.*

[14] *Callies v. State*, 157 Neb. 640, 61 N.W.2d 370 (1953).

[15] *State v. Kitt, supra* note 4; *State v. Carter, supra* note 4.

[16] *State v. Carter, supra* note 4.

[17] *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Williams*, 211 Neb. 693, 320 N.W.2d 105 (1982).

[18] *State v. Kitt, supra* note 4.

satisfy the good faith standard.[19] This is so even when a witness is outside a court's subpoena power.[20] While issuance of a subpoena is not an absolute prerequisite to proving a witness is unavailable,[21] serving a witness with a subpoena to testify ordinarily constitutes a sufficient good faith effort to procure the witness' attendance at trial.[22]

Trice argues that merely serving the subpoena on Baldwin was insufficient evidence of good faith. He argues that when Baldwin failed to appear, the State should have requested a bench warrant, and he suggests it was error to find Baldwin unavailable before additional steps were taken to enforce the subpoena.

In *Ohio v. Roberts*,[23] the U.S. Supreme Court explained that "'[t]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.'" The Court recognized a temporal component to the good faith inquiry when it observed that "[t]he ultimate question is whether the witness is unavailable despite good-faith efforts undertaken *prior to trial* to locate and present that witness."[24]

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[19] 2 McCormick on Evidence § 253 (Kenneth S. Broun et al. eds., 7th ed. 2013).

[20] See *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) (where witness was inmate housed in another state, good faith effort to obtain presence of witness at trial required prosecution to at least attempt to secure his presence through available process, such as writ of habeas corpus ad testificandum).

[21] *Hardy v. Cross*, 565 U.S. 65, 132 S. Ct. 490, 181 L. Ed. 2d 468 (2011).

[22] See, e.g., *Morgan v. State*, 903 N.E.2d 1010 (Ind. App. 2009); *Cross v. State*, 144 Md. App. 77, 796 A.2d 145 (2002); *State v. Schilling*, 474 N.W.2d 203 (Minn. App. 1991); *State v. Dillon*, 191 W. Va. 648, 447 S.E.2d 583 (1994).

[23] *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (quoting *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (Burger, C.J., concurring)), *abrogated on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[24] *Id*. (emphasis supplied).

[7] When considering whether a good faith effort to procure a witness has been made under § 27-804(1)(e), the proper inquiry is whether the means utilized by the proponent prior to trial were reasonable, not whether other means remain available at the time of trial or whether additional steps might have been undertaken.[25] "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence," but the prosecution is not required "to exhaust every avenue of inquiry" to demonstrate unavailability.[26]

We find no abuse of discretion in the trial court's conclusion that Baldwin was unavailable. The State made a good faith effort to secure Baldwin's attendance at trial by personally serving her with a subpoena to testify roughly 1 month before trial. And while Baldwin ultimately failed to obey the subpoena, there was no evidence her absence at trial was due to any prosecutorial wrongdoing.

We are not persuaded by Trice's argument that unavailability was not shown because no bench warrant was issued after Baldwin failed to appear. When a subpoenaed witness fails to comply with process and is absent from the trial due to no wrongdoing of the proponent, decisions about whether additional efforts to obtain the presence of the witness would be successful or practicable are properly left to the discretion of the trial court.[27]

On this record, the trial court did not abuse its discretion by making the unavailability determination without first requiring

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[25] See *Hardy v. Cross, supra* note 21. See, also, 23 C.J.S. *Criminal Law* § 1476 at 458 (2006) ("[t]he question is whether good-faith efforts were made to procure the testimony of a witness, not whether increased efforts would have produced testimony").

[26] *Hardy v. Cross, supra* note 21, 565 U.S. at 71-72.

[27] Accord *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992) (superseded in part by statute as stated in *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010)).

efforts to enforce the subpoena. We assume a motion for bench warrant would have been sustained if requested, but no such request was made. And when the issue of unavailability was presented to the trial court for ruling, neither party suggested a ruling was premature or should be postponed, or that additional steps would be successful in obtaining Baldwin's presence. While the trial court certainly had discretion—even without a motion—to issue an attachment for the arrest of Baldwin when she failed to obey the subpoena,[28] we cannot conclude it was an abuse of discretion not to issue an attachment under the circumstances.[29] This assignment of error is without merit.

(b) Unavailability of Ronald

The State did not locate Ronald or serve him with process compelling his appearance as a witness in the second trial. The issue on appeal is whether the prosecution made a diligent, good faith effort to locate Ronald and procure his attendance at the second trial.[30]

In *Callies v. State*,[31] we found reversible error in the trial court's conclusion that the witness was unavailable. The record contained little more than the prosecutor's unsworn statement that a subpoena had been "issued and returned,"[32] unserved, and the prosecutor's suggestion that the "witness could not

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[28] Neb. Rev. Stat. § 25-1230 (Reissue 2008) (when witness fails to appear in obedience to subpoena, courts "may issue an attachment to the sheriff . . . to arrest and bring the person therein named before the court" to give his or her testimony and "answer for the contempt").

[29] See, e.g., *Hardy v. Cross, supra* note 21; *Cross v. State, supra* note 22 (holding trial court did not abuse its discretion in finding unavailable two witnesses who had been subpoenaed but failed to appear at trial, despite fact that prosecution did not request attachment order to hold witnesses in jail).

[30] *State v. Carter, supra* note 4; *Callies v. State, supra* note 14.

[31] *Callies v. State, supra* note 14.

[32] *Id*. at 648, 61 N.W.2d at 376.

be located."[33] We observed that neither the subpoena nor the return was in evidence and that the prosecution had not offered testimony from any officer who attempted to serve the subpoena. As such, we had no evidence on which to determine whether a diligent search had been conducted, whether the whereabouts of the witness were known, or whether the witness could be located. We announced "[t]here must be evidence of diligence on the part of the prosecution to locate the witness, and evidence of the unavailability of the witness to testify."[34]

In *State v. Williams*,[35] we found no abuse of discretion in the trial court's ruling that one of the witnesses who had testified at the preliminary hearing was unavailable at the time of trial. The evidence established that about 1 week before trial, the prosecution learned the witness had moved from the area and was living at an address in either Creston, Iowa; Creston, Nebraska; or Crescent, Iowa. A police officer attempted to contact the witness in all three towns, and eventually determined the address in Crescent was correct. The officer contacted the sheriff's office in Crescent and asked that a deputy be sent to the address to serve a subpoena. Despite these efforts, by the time trial commenced, the witness had not been located and the subpoena remained unserved. We concluded the prosecution had made a reasonably diligent search and inquiry into the witness' whereabouts, and there was sufficient evidence to establish the witness was unavailable at the time of trial.

In *State v. Carter*,[36] we found the prosecution had met its burden of showing good faith and diligence in attempting to locate and produce a witness who had testified in the

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[33] *Id.*

[34] *Id.* at 649, 61 N.W.2d at 376.

[35] *State v. Williams, supra* note 17.

[36] *State v. Carter, supra* note 4.

defendant's first murder trial, but had not been located or served with process before his subsequent trial. The evidence showed that about 2 weeks before the subsequent trial began, the State filed a praecipe for subpoena to compel the witness' attendance. Efforts to serve the subpoena at known addresses for the witness were unsuccessful. Officers contacted relatives, and eventually learned the witness had moved to Arkansas. Officers contacted authorities there and learned the witness had applied for an Arkansas driver's license several months earlier using an address in West Helena, Arkansas. Prosecutors then requested an order compelling attendance of the witness and relayed it to the court in West Helena, which court subsequently issued the order and delivered it to the local police department for service. Arkansas police searched for the witness but could not locate her. Arkansas police spoke to the witness' sister, who was uncooperative and reported she had not seen the witness for a week. A car registered to the witness was placed under surveillance, but the witness had not been located by the time of the hearing to determine unavailability, which was scheduled 2 days before the start of trial. After reviewing the record, we concluded the State had made a good faith, diligent effort to locate the witness prior to trial and the court had not abused its discretion in finding the witness was unavailable.

Our review of the record in the present case shows the prosecution's efforts to locate and serve Ronald were strikingly similar to those we found in *Carter* had satisfied the standard of diligence and good faith. Here, the prosecution demonstrated considerable coordination with out-of-state authorities in an effort to locate and serve Ronald with process to compel his attendance at trial. Those coordinated efforts began well in advance of trial and continued up to the time of trial. We conclude there was no abuse of discretion in the trial court's finding that the State made a diligent, good faith effort to locate Ronald and secure his presence at trial and that Ronald was unavailable under § 27-804(1)(e).

(c) Unavailability and Confrontation Clause

[8-10] In his brief, Trice also argues the admission of Baldwin's and Ronald's prior testimony violated his rights under the Confrontation Clause. However, Trice did not raise a Confrontation Clause objection at trial. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.[37] An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.[38] In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[39] Finding no plain error in the trial court's ruling concerning the unavailability of Baldwin and Ronald, we reject Trice's Confrontation Clause argument without further discussion.

2. Reyes' Testimony as Hearsay

Over Trice's hearsay objection, the court permitted Reyes to testify that when Hoard arrived home from the party, he told her "his friend got stabbed." The trial court concluded Hoard's statement was admissible as a prior consistent statement under § 27-801(4)(a)(ii). The court expressly rejected the State's alternative position that Hoard's statement was admissible as an excited utterance under § 27-803(1).

On appeal, Trice argues the trial court erred in overruling his hearsay objection because Hoard's testimony had not been attacked in such a manner that a prior consistent statement was warranted to rebut an express or implied charge of recent

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[37] *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[38] *Id.*

[39] *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001).

fabrication.[40] The State concedes in its brief that the elements necessary to admit a prior consistent statement are not present. However, the State suggests it was not reversible error to overrule the hearsay objection, because Hoard's statement should have been admitted under the excited utterance exception to the hearsay rule.[41]

Even assuming the statement "his friend got stabbed" was being offered for its truth, we need not consider whether Hoard's statement to Reyes was an excited utterance or a prior consistent statement, because we conclude any error in overruling Trice's hearsay objection and admitting the statement was harmless. The evidence was cumulative, because Hoard also testified about his statement to Reyes. In the second trial, Hoard testified that after he returned home, he told Reyes, "I just seen my — I just witnessed my friend just get stabbed." The admission of Hoard's own testimony in this regard is not assigned as error on appeal.

[11] Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.[42] We conclude that any error in admitting Reyes' testimony was harmless beyond a reasonable doubt and does not require reversal.

3. Transcript of Telephone Call as Hearsay

Trice argues the trial court erred in overruling his hearsay objection to the partial transcript of the jail call between Trice and his father. The State responds that the conversation amounted to an adoptive admission under § 27-801(4)(b)(ii) and that the court correctly overruled the hearsay objection on that ground.

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[40] See § 27-801(4)(a)(ii).

[41] See § 27-803(1).

[42] *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

Section 27-801(4)(b) excludes from the definition of hearsay a statement which is "offered against a party and is . . . (ii) a statement of which he has manifested his adoption or belief in its truth." "Where the party against whom a statement is offered is present, hears the statement being made, and makes no objection" the trial court may admit such evidence as nonhearsay.[43]

Here, Trice and his father were talking to one another on the telephone. When Trice told his father he was entering a plea of not guilty, his father asked, "By reason of what? Self-defense?" Trice replied, "Yes sir." Assuming without deciding that the father's question constituted an assertion subject to the hearsay rule, it is clear Trice heard his father's words and expressed agreement with them. The trial court correctly overruled Trice's hearsay objection and admitted this as nonhearsay under § 27-801(4)(b)(ii).

Trice also argues that admission of the jail-call transcript violated his rights under the Confrontation Clause. We do not reach this argument, because Trice did not raise a Confrontation Clause objection at trial, and he cannot now assert a different ground for his objection than was offered to the trier of fact.[44]

4. Excessive Sentence

Trice was convicted of second degree murder, a Class IB felony.[45] The statutory sentencing range for Class IB felonies is 20 years to life in prison.[46] Trice was sentenced to a prison term of 40 years to life—the same indeterminate sentence imposed following his first trial.

[12-14] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality,

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[43] *In re Interest of M.*, 215 Neb. 383, 390, 338 N.W.2d 764, 769 (1983).

[44] *State v. Shipps, supra* note 37.

[45] See Neb. Rev. Stat. § 28-304 (Reissue 2008).

[46] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014).

(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.[47] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the 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.[48] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[49]

Trice concedes his sentence of 40 years to life in prison is within the statutory range, but argues on appeal that the maximum term of life in prison amounts to an abuse of discretion. Trice suggests the trial court did not give sufficient consideration to his age, his educational struggles, or his limited criminal history. Our review of the record shows otherwise.

When imposing sentence, the trial court considered the information in the original and updated presentence investigation reports and the information provided during both sentencing hearings. The presentence report indicates Trice was 21 years old when the crime was committed. He dropped out of school in the 10th grade and was diagnosed with a learning disability. Trice had an extensive juvenile history in both Illinois and Nebraska, but this murder was his first felony conviction as an adult. In addition to the information in the presentence report, the court asked Trice several questions about his family relationships and his educational progress. When announcing the sentence, the court emphasized the tragic

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[47] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[48] *State v. Dixon, supra* note 47; *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[49] *State v. McGuire, supra* note 47.

nature of the crime, the senseless loss of life, Trice's lack of remorse, and his continued refusal to accept responsibility for the crime.

We also note the State recommended that the sentence be increased from what was imposed after the first trial, pointing to evidence in the second trial that Trice had made "efforts to thwart justice" and tried to "harm or get rid of" one of the State's eyewitnesses. The court rejected the State's recommendation and instead found no sufficient basis on which to either increase or decrease the previously imposed sentence of 40 years to life in prison.

Contrary to Trice's assertions on appeal, there is no evidence that the district court failed to consider all of the relevant factors in imposing sentence. After reviewing the record, we find no abuse of discretion in the sentence imposed by the trial court and conclude Trice's assertions to the contrary are meritless.

VI. CONCLUSION

Finding no reversible error in any of the assignments of error on appeal, we affirm the judgment and sentence of the trial court in all respects.

Affirmed.

Heavican, C.J., not participating.

State of Nebraska, appellee, v. Darnell L. Russell, appellant.

874 N.W.2d 8

Filed January 15, 2016. No. S-15-037.

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. **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. **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 determination made by the court below.
5. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.
6. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
7. **Criminal Law: Pretrial Procedure: Appeal and Error.** Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.

8. **Pretrial Procedure: Prosecuting Attorneys: Evidence: Words and Phrases.** Whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
9. **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.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Daniel R. Stockmann for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Wright, Connolly, McCormack, Miller-Lerman, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

Darnell L. Russell appeals from his conviction for conspiracy to commit unlawful possession with intent to deliver a controlled substance, crack cocaine. Russell claims the court erred in allowing a police officer to testify concerning the meaning of certain cell phone calls and text messages between Russell and other persons involved in the drug conspiracy. He also claims the court erred in allowing a witness to testify despite the State's failure to timely disclose the person's status as a witness. Finally, Russell claims the court erred in convicting him of a Class IB felony instead of a Class II felony and by imposing an excessive sentence.

SCOPE 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. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015). 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. *Id.*

[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. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Wang*, 291 Neb. 632, 867 N.W.2d 564 (2015).

FACTS

Background

The Greater Omaha Safe Streets Task Force is a coalition of local, state, and federal law enforcement agencies that conducts long-term investigations related to narcotics and violent crime. In the summer of 2012, the task force began an operation to investigate the distribution of crack cocaine in Omaha, Nebraska. Approximately 15 people were targeted during the investigation, 8 of whom were ultimately arrested, including Russell.

Russell was charged with conspiracy to commit unlawful possession with intent to deliver a controlled substance, crack cocaine, under Neb. Rev. Stat. § 28-202 (Reissue 2008), a Class IB felony. He was also charged with being a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008), but that charge was not pursued.

Pretrial Motions

On the morning that Russell's trial was set to begin, he filed a motion to continue as well as a motion in limine to exclude the testimony of F.L., a confidential informant. Both motions

were based on Russell's assertion that F.L.'s identity was not timely disclosed, in violation of the court's discovery order. During a hearing on the motions, Russell's counsel explained that he had received police reports during the discovery process detailing the work of two separate confidential informants, but was advised as to the identity of only one of them. Ten days before trial, Russell received the State's notice to endorse two additional witnesses, one of whom was F.L. However, it was not until 4 days prior to trial that Russell's counsel was first advised that F.L. was the identity of the second confidential informant. Russell argued that because F.L.'s identity was not timely disclosed, he was unable to properly investigate F.L. prior to trial, and that therefore, a continuance or exclusion of F.L.'s testimony was appropriate.

In response, counsel for the State asserted that approximately 1 month before trial, he advised Russell's counsel that the State would be presenting testimony from two confidential informants at trial, one of whom Russell's counsel had already deposed. Counsel for the State inquired at that time whether Russell wished to depose the other confidential informant, which Russell's counsel declined to do. Counsel for the State further explained that he filed a notice to endorse F.L. as a witness approximately 10 days before trial, as soon as he realized that F.L.'s name was not included on the initial list of endorsements. The State argued that there was no prejudice to the defense because F.L. would not testify to anything that was not articulated in the reports that Russell had received more than 3 months before trial, and F.L. would be available for Russell to depose that evening.

The court overruled both of Russell's motions, concluding there was no prejudice from the alleged discovery violation. It emphasized that the substance of F.L.'s testimony was known to Russell well before the trial was to begin, that F.L. would be available for a deposition before his testimony would be presented at trial, and that Russell had sufficient time to deal with any late disclosure.

Trial and Sentencing

The evidence at trial established that the task force utilized wiretaps, controlled buys, surveillance, and other investigatory techniques to identify various persons in a crack cocaine distribution chain. Briefly stated, officers began the investigation by using a confidential informant to conduct a number of controlled buys from two street-level dealers, which in turn provided the necessary probable cause for officers to obtain warrants to intercept calls and text messages to and from the cell phones of those street-level dealers. Using the information gleaned from those intercepts, officers conducted physical surveillance and were able to identify Russell as the supplier for both of the street-level dealers. At that point, law enforcement obtained a warrant to intercept calls and text messages from Russell's cell phone as well, which led officers up the distribution chain to Russell's supplier.

Throughout the course of Russell's trial, the prosecution played for the jury several of the intercepted cell phone calls involving Russell and others in the distribution chain. Officer James Paul, the lead investigator for this operation, was asked on multiple occasions to testify as to the meaning of certain drug-related code words and phrases that were used during the calls. Before doing so, however, Officer Paul testified that he had been in law enforcement for 22 years and had extensive experience and training in the investigation of narcotics crimes. Officer Paul indicated that he had participated in thousands of narcotics investigations involving crack cocaine and had interviewed hundreds of users and dealers in the area regarding how crack cocaine is bought and sold. Through this experience, Officer Paul gained a familiarity with various code words and jargon used by people who are involved in the distribution of crack cocaine.

After the cell phone calls were played for the jury, Officer Paul testified regarding the meaning of drug-related code words and offered his opinion that Russell was discussing either buying or selling crack cocaine in the calls and text messages.

Russell objected to the testimony on the ground that it usurped the jury's factfinding role as to the meaning of the calls and messages. The district court overruled Russell's objections and allowed Officer Paul to testify.

At the conclusion of the trial, the jury found Russell guilty of conspiracy to commit unlawful possession with intent to deliver 140 grams or more of crack cocaine. A sentencing hearing was subsequently held in the district court, during which Russell argued that pursuant to § 28-202(4), his crime was actually a Class II felony, rather than a Class IB felony. The district court rejected Russell's argument and sentenced him on the Class IB felony to 20 to 25 years' imprisonment, with credit for 173 days served. Russell timely appeals.

ASSIGNMENTS OF ERROR

Russell assigns that the district court erred by (1) allowing Officer Paul to give his opinion regarding the meaning of cell phone calls involving Russell that were intercepted by wiretap; (2) allowing F.L. to testify despite the State's untimely disclosure of his identity, in violation of the court's discovery order; (3) finding Russell guilty of a Class IB felony rather than a Class II felony; and (4) imposing a sentence that was excessive and an abuse of discretion.

ANALYSIS

Testimony of Officer Paul

Russell first contends that the district court erred in allowing Officer Paul to give his opinion regarding the meaning of the calls that were intercepted from Russell's cell phone. He argues that it was unclear whether Officer Paul testified as a lay witness or as an expert witness, but that either way, the testimony was inadmissible. Russell asserts that if Officer Paul testified as a lay witness, his opinion was inadmissible because it invaded the province of the jury in that the jury was itself equipped to determine the meaning behind the cell phone calls. If Officer Paul testified as an expert witness, Russell asserts

that his opinion was inadmissible because his status as an expert was not disclosed to Russell before trial.

[5,6] The State argues that Russell cannot object to the evidence on a different ground than was offered at trial. We agree. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *Id*. Accordingly, our analysis is limited to Russell's claim that Officer Paul's testimony invaded the province of the jury, as that was the only basis upon which he objected at trial.

We review this assignment of error for abuse of discretion. 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. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015). 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. *Id.*

Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2008), provides that if the witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue.

This court has not previously addressed the propriety of a police officer's testifying as to the meaning of code words or slang used by persons involved in drug trafficking. However, Nebraska has essentially adopted rules 701 and 702 of the Federal Rules of Evidence. We therefore look to the federal courts, which apply Fed. R. Evid. 701 and 702. These courts have determined that such opinion testimony in lay and expert

form is admissible provided that foundational or procedural requirements are met.

In *U.S. v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996), the court stated: "There is no more reason to expect unassisted jurors to understand drug dealers' cryptic slang than antitrust theory or asbestosis." See, also, *U.S. v. Rollins*, 862 F.2d 1282 (7th Cir. 1988). Such testimony is helpful because the meaning of narcotics code words and phrases is not within the common understanding of most jurors.

Here, several of the calls involved code words or slang with which the ordinary juror would not be familiar but which were understood by Officer Paul, who had many years of experience investigating drug crimes in the Omaha area. Other calls contained phrases or references that would not make sense without information obtained from the investigation. Cyphering the meaning and intent of the cell phone calls involving Russell was something that the jury would be unable to do without the interpretation of the slang or code words used during the wiretapped calls. The district court did not abuse its discretion in admitting Officer Paul's testimony regarding his opinion as to the meaning of the code words or slang in the cell phone calls presented to the jury. There was proper foundation for Officer Paul's opinion. It was rationally based upon his perception, and it was helpful to the determination of a fact in issue.

Testimony of F.L.

Russell next argues that the district court abused its discretion in denying his motions to continue or exclude the testimony of F.L.

F.L. was an informant who had agreed to conduct controlled buys in lieu of being charged with felony possession of a controlled substance. F.L. conducted a controlled buy from a certain individual. It was the State's theory that Russell supplied the crack cocaine to the individual, who then sold it to F.L. Russell claims he did not learn of the identity of F.L. until 4 days prior to the beginning of the trial. Russell's motion

to continue the trial was overruled. His motion in limine to exclude the testimony of F.L. pursuant to Neb. Rev. Stat. § 29-1919(3) (Reissue 2008) was also overruled.

[7] Discovery in a criminal case is generally controlled by either a statute or court rule. *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014). Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. *Id.* Section 29-1919 sets forth various remedies the court may employ when there is a claimed violation of a discovery order.

In its discovery order of December 17, 2013, the court ordered mutual and reciprocal discovery pursuant to statute. Neb. Rev. Stat. § 29-1912(1)(d) (Cum. Supp. 2014) requires the prosecutor to disclose the names and addresses of witnesses on whose evidence the charge is based. Before trial, the prosecution advised Russell that the State would call two informants to testify. Russell was aware of the identity of one of those informants and had already deposed him. Although the prosecutor did not identify the second informant as F.L., he did offer to allow Russell to depose him, which offer Russell declined.

[8] The record establishes that a month before the start of the trial, the prosecution knew F.L. would testify, but did not make that known to Russell until just 10 days prior to trial. Whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013).

We conclude that the State's late disclosure of the witness did not hinder Russell's preparation of his defense. Russell was

aware well before trial of the substance of F.L.'s testimony and that the State planned to call him as a witness. Russell was given an opportunity to depose F.L. several weeks before trial but declined to do so. F.L.'s testimony at trial was similar to that of the first informant, who had previously been deposed by Russell. Russell admitted that he knew 2 weeks before trial that F.L. was the second informant. Because the failure to disclose F.L. as a witness until 4 days before trial did not prejudice Russell, we conclude that the court did not abuse its discretion in overruling the motions to continue trial or exclude the testimony of F.L.

Classification of Crime

Russell claims the court erred in concluding that his crime was a Class IB felony rather than a Class II felony. Section 28-202(4) provides: "Conspiracy is a crime of the same class as the most serious offense which is an object of the conspiracy, except that conspiracy to commit a Class I felony is a Class II felony." Statutory interpretation is a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Wang*, 291 Neb. 632, 867 N.W.2d 564 (2015).

At the sentencing hearing, the district court found that Russell had been convicted of a Class IB felony and therefore was subject to the penalty range for a Class IB felony of a minimum of 20 years' imprisonment and a maximum of life imprisonment. Russell argues that a person charged with a conspiracy is to face the same penalty as he would on the underlying felony that is the subject of the conspiracy. Russell argues there is an exception when the subject of the conspiracy is a Class I felony. Under this exception, § 28-202(4) provides that the conspiracy is a Class II felony. He argues that the Legislature did not intend for conspiracy to commit a Class I felony be punishable as a Class I felony, which imposes death or life imprisonment. We agree, but this argument misses the point.

Russell was found guilty of conspiracy to distribute more than 140 grams of crack cocaine. Possession with intent to distribute more than 140 grams of crack cocaine is a Class IB felony and not a Class I felony. Based on the weight of the crack cocaine that was involved (more than 140 grams), the most serious offense which was the subject of the conspiracy was a Class IB felony. Under the plain language of § 28-202(4), Russell's conspiracy conviction is also a Class IB felony because the "except clause" does not apply, since a Class I felony was not involved.

The problem with Russell's argument is that the crime for which Russell was convicted was not a Class I felony. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014), which was in effect at the time Russell was sentenced, provided in relevant part:

> (1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into nine classes which are distinguished from one another by the following penalties which are authorized upon conviction:
>
> Class I felony . . . Death
> Class IA felony . . . Life imprisonment
> Class IB felony . . . Maximum—life imprisonment
> Minimum—twenty years imprisonment
> Class IC felony . . . Maximum—fifty years imprisonment
> Mandatory minimum—five years imprisonment
> Class ID felony . . . Maximum—fifty years imprisonment
> Mandatory minimum—three years imprisonment
>
> Class II, III, IIIA, and IV felonies are not described herein.

The plain language of § 28-105 establishes nine classes of felonies, of which five are similar in the sense that the classification label begins with "I." But this does not mean that those five classes are all Class I felonies. A Class I felony is not the same as a Class IB felony, and the penalties are

different. The district court was correct in determining that Russell's offense was a Class IB felony and in sentencing him accordingly.

Excessive Sentence

[9] Russell argues that his sentence was excessive and therefore an abuse of discretion. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). Russell's sentence was within the applicable limits. The question is whether the court abused its discretion in the sentence it imposed upon Russell. The presentence investigation report shows that Russell had an extensive criminal record, including multiple drug and firearm charges, and that he committed this crime while on a supervised release. He was assessed as a very high risk to reoffend. The sentence imposed by the court was within the statutory requirements, and we conclude that the sentence was appropriate. The court did not abuse its discretion in sentencing Russell to 20 to 25 years' imprisonment.

CONCLUSION

For the reasons set forth herein, we affirm the judgment and sentence of the district court.

Affirmed.

Heavican, C.J., not participating.

State of Nebraska, appellee, v. Bryant L. Irish, appellant.

873 N.W.2d 161

Filed January 15, 2016. No. S-15-270.

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 determination made by the court below.
2. **Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to support a 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.
3. **Proximate Cause.** The determination of causation, including proximate causation, is ordinarily a question of fact.
4. **Motor Vehicles: Drunk Driving: Proximate Cause.** The elements of driving under the influence in violation of Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2014) are: (1) The defendant was operating a motor vehicle, (2) the defendant was operating a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) or § 60-6,197 (Cum. Supp. 2014), and (3) the defendant's act of driving under the influence proximately caused serious bodily injury to another person.
5. **Motor Vehicles: Drunk Driving: Proximate Cause: Proof.** To convict an accused driver in cases involving alcohol brought under Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2014), the State must prove beyond a reasonable doubt that the act of driving while under the influence of alcoholic liquor was a proximate cause of serious bodily injury to another person.
6. **Motor Vehicles: Drunk Driving.** In making a determination as to causation under Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2014), a court should not focus on a defendant's intoxication rather than his or her act of driving while under the influence of alcohol or drugs.

7. **Statutes: Courts: Appeal and Error.** The U.S. Supreme Court's interpretation of a federal statute is not binding upon the Nebraska Supreme Court's interpretation of a state statute.
8. **Negligence: Proximate Cause.** A court need not read phrases like "results from" to require "but for" causality where there are textual or contextual indications to the contrary.
9. **Proximate Cause: Criminal Law: Torts.** The concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances.
10. **Proximate Cause.** As a general matter, to say one event proximately caused another is a way of making two separate but related assertions: First, it means the former event caused the latter; second, it means that it was not just any cause, but one with a sufficient connection to the result.
11. **Negligence: Proximate Cause.** The idea of proximate cause, as distinct from actual cause or cause in fact, is a flexible concept that generally refers to the basic requirement that there must be some direct relation between the injury asserted and the injurious conduct alleged.
12. ____: ____. A requirement of proximate cause serves to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.
13. **Negligence: Proximate Cause: Words and Phrases.** A "proximate cause" is a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces a death or injury and without which the death or injury would not have occurred.
14. **Proximate Cause: Proof.** Three basic requirements must be met in establishing proximate cause: (1) that without the misconduct, the injury would not have occurred, commonly known as the "but for" rule; (2) that the injury was a natural and probable result of the misconduct; and (3) that there was no efficient intervening cause.
15. **Criminal Law: Negligence: Proximate Cause: Words and Phrases.** Criminal conduct is a proximate cause of the event if the event in question would not have occurred but for that conduct; conversely, conduct is not a proximate cause of an event if that event would have occurred without such conduct.
16. **Negligence: Proximate Cause.** An intervening cause supersedes and cuts off the causal link only when the intervening cause is not foreseeable.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Alan G. Stoler, P.C., L.L.O., for appellant.

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

Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Cassel, J.

INTRODUCTION

A statute[1] criminalizes the act of proximately causing serious bodily injury to another while driving under the influence of alcohol. Because "but for" causation is a component of proximate causation, the State had to prove that but for the defendant's act of driving while under the influence of alcohol, the serious bodily injury would not have occurred. The State did so. And because the injury was a direct and natural result of the defendant's act of driving while under the influence and there was no efficient intervening cause, the evidence supports the conviction.

BACKGROUND

At approximately 12:55 a.m. on February 9, 2014, Bryant L. Irish and his passenger were involved in a one-vehicle rollover accident. Irish's passenger suffered head injuries after being ejected from the vehicle, a pickup truck. The State charged Irish with driving under the influence of alcoholic liquor causing serious bodily injury in violation of § 60-6,198(1).

At the start of a bench trial, the parties stipulated to a number of facts:

- A test of Irish's blood after the accident showed a blood alcohol content of .117 of a gram per 100 milliliters of blood.

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[1] Neb. Rev. Stat. § 60-6,198(1) (Cum. Supp. 2014).

- Irish's passenger suffered serious bodily injury as defined in the relevant statute.
- It appeared that the pickup had failed to negotiate a curve in the road.
- Two warning signs were in the area prior to a 90-degree turn: a "turn ahead" sign and a "road work ahead" sign.
- An accident reconstructionist opined that the vehicle's minimum speed at the time it began to brake was 86.74 miles per hour. The posted speed limit was 45 miles per hour.
- The roadway contained patches of ice and snow cover.
- There were no centerline or fog line markings on the roadway.
- The front airbags did not deploy, and the occupants did not use seatbelts.
- According to research, the use of seatbelts prevents serious injury and death during collisions and is effective in preventing ejections.

Law enforcement officers testified regarding what Irish told them following the accident. Irish admitted that he was driving the pickup and that he consumed "no more than" 10 beers. Irish said that when the road began to curve and he attempted to turn, he realized it was too icy to maneuver his vehicle.

An accident reconstructionist testified that speeding was "definitely a factor" in the accident. The reconstructionist also explained that motor skills and reflexes "slow down by the increase of alcohol in the system." He testified that an intoxicated person often shows a lack of judgment.

The district court convicted Irish of the charged offense. The court found beyond a reasonable doubt that Irish was driving under the influence of alcoholic liquor at the relevant time and that the impairment by alcohol caused the motor vehicle accident which proximately caused the serious bodily injury to the passenger. The court found that no efficient intervening cause existed.

Irish moved for a new trial. Among other grounds, he asserted that the verdict was contrary to the law in light of the U.S. Supreme Court's decision in *Burrage v. United States*.[2] The district court overruled the motion and later imposed a sentence of probation.

Irish filed a timely appeal, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Irish assigns two errors. First, he alleges that the district court erred by failing to strictly construe the proximate cause element of § 60-6,198(1) to require a "but for" causal analysis of proximate cause. Second, Irish claims that had the court properly analyzed the proximate cause requirement as a "but for" requirement, it could not have found him guilty beyond a reasonable doubt of violating § 60-6,198(1).

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 determination made by the court below.[3]

[2,3] When reviewing the sufficiency of the evidence to support a 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.[4] The determination of causation, including proximate causation, is ordinarily a question of fact.[5]

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[2] *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).

[3] *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

[4] *Id.*

[5] *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

ANALYSIS

Elements of Crime

[4,5] We first recall what the State must prove in order to obtain a conviction for driving under the influence causing serious bodily injury. The elements of driving under the influence in violation of § 60-6,198 are: (1) The defendant was operating a motor vehicle, (2) the defendant was operating a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) or § 60-6,197 (Cum. Supp. 2014), and (3) the defendant's act of driving under the influence proximately caused serious bodily injury to another person.[6] Thus, to convict an accused driver in cases involving alcohol brought under § 60-6,198, the State must prove beyond a reasonable doubt that the act of driving while under the influence of alcoholic liquor was a proximate cause of serious bodily injury to another person.[7]

[6] We digress to note that in making a determination as to causation, a court should not focus on a defendant's intoxication rather than his or her act of driving while under the influence of alcohol or drugs. Several of our motor vehicle homicide cases contain language suggesting that a defendant's intoxicated condition rather than the act of driving was key, and to that extent, we disapprove of those cases.[8] Although the district court articulated that Irish's impairment by alcohol caused the accident, that articulation did not discount the part that Irish's act of driving played in causing the motor vehicle accident.

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

[7] See *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). See, also, *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005); *State v. Bartlett*, 3 Neb. App. 218, 525 N.W.2d 237 (1994).

[8] See, *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992); *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989); *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978).

Sufficiency of Evidence

The crux of this appeal is whether a reasonable trier of fact could have found beyond a reasonable doubt that Irish's act of driving while under the influence of alcohol proximately caused serious bodily injury to his passenger. Irish argues that the district court could not have found him guilty beyond a reasonable doubt, because too many other factors contributed to the accident.

Relying upon *Burrage v. United States*,[9] Irish argues that the State was required to prove "but for" causation. In *Burrage*, the defendant was convicted under a federal statute that imposed a 20-year mandatory minimum sentence on a defendant who unlawfully distributed a Schedule I or II drug when "death or serious bodily injury results from the use of such substance."[10] The Supreme Court reasoned that the statute's use of the phrase "results from" required "but for" causation. The Court determined that the penalty enhancement provision did not apply when use of a covered drug contributed to, but was not a "but for" cause of, the victim's death or injury. In order for the defendant to be liable under the mandatory minimum provision, the drug had to be an independently sufficient cause of the victim's death or serious bodily injury.

[7,8] The *Burrage* decision is not particularly instructive for two reasons. First, *Burrage* involved statutory interpretation of a federal statute. But we are called to interpret a state statute. The U.S. Supreme Court's interpretation of a federal statute is not binding upon our interpretation of a state statute.[11] And here, the statutes address different matters. Second, the statutory causation language in *Burrage* was "results from," but in the instant appeal, the statute's causation phrase is "proximately causes." A court need not read phrases like "results

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[9] *Burrage v. United States, supra* note 2.

[10] See 21 U.S.C. § 841(b)(1)(C) (2012).

[11] See *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

from" to require "but for" causality where there are textual or contextual indications to the contrary.[12] In this case, the text of the statute plainly calls for proximate causation. And as we explain in detail below, proximate cause includes the concept of "but for" causation.

[9-12] The concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances.[13] As a general matter, to say one event proximately caused another is a way of making two separate but related assertions: First, it means the former event caused the latter; second, it means that it was not just any cause, but one with a sufficient connection to the result.[14] The idea of proximate cause, as distinct from actual cause or cause in fact, is a flexible concept that generally refers to the basic requirement that there must be some direct relation between the injury asserted and the injurious conduct alleged.[15] A requirement of proximate cause serves to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.[16]

[13-15] Proximate causation and "but for" causation are interrelated. A "proximate cause" is a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces a death or injury and without which the death or injury would not have occurred.[17] Three basic requirements must be met in establishing proximate cause: (1) that without the misconduct,

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[12] See *Burrage v. United States, supra* note 2.

[13] *Paroline v. United States*, 572 U.S. 434, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014).

[14] See *id.*

[15] See *id.*

[16] See *id.*

[17] See *State v. Sommers, supra* note 8.

the injury would not have occurred, commonly known as the "but for" rule; (2) that the injury was a natural and probable result of the misconduct; and (3) that there was no efficient intervening cause.[18] Criminal conduct is a proximate cause of the event if the event in question would not have occurred but for that conduct; conversely, conduct is not a proximate cause of an event if that event would have occurred without such conduct.[19] Thus, "but for" causation is encompassed within proximate causation.

A reasonable trier of fact could find "but for" causation in this case. If Irish had not been driving the pickup while under the influence, his passenger would not have been seriously injured when Irish failed to negotiate a curve and rolled the pickup, leading to the ejection of the passenger. There is a causal nexus between Irish's act of driving while under the influence and the passenger's serious bodily injury; such injury did not merely occur while Irish was driving.

The presence of other factors combining with Irish's act of driving while under the influence does not defeat "but for" causation. Irish argues that "but for" causation cannot be established due to other considerations such as vehicle speed, road construction, failure of the passenger to wear a seatbelt, and snow and ice on the road. We find helpful the following explanation of the U.S. Supreme Court:

> Thus, "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." . . . The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is

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[18] See *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). See, also, *State v. Muro, supra* note 5.

[19] *State v. Muro, supra* note 5.

> administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.[20]

The other factors to which Irish points may have combined with Irish's act of driving to produce the result, but a reasonable trier of fact could conclude that the other factors alone would not have done so. And Irish's act of driving while under the influence was an independently sufficient cause of the passenger's serious bodily injury. Thus, "but for" causation exists.

[16] A reasonable trier of fact could also conclude that the passenger's serious bodily injury was a direct and natural result of Irish's act of driving the pickup while under the influence of alcohol and that no intervening cause superseded and severed the causal link. An intervening cause supersedes and cuts off the causal link only when the intervening cause is not foreseeable.[21] The other factors that Irish claims contributed to the accident were not efficient intervening causes, because they were foreseeable. And, as noted, there was sufficient causal connection between Irish's act of driving while under the influence of alcohol and the resulting serious bodily injury to Irish's passenger.

The evidence, viewed in the light most favorable to the prosecution, supports a conclusion that Irish's act of driving in violation of § 60-6,196 proximately caused serious bodily injury to his passenger. We recognize that the district court did not use the words "but for" in its findings or any similar language to show that it clearly considered the first component of proximate causation. Rather, the court stated: "[I]mpairment by alcohol caused the motor vehicle accident which, in turn, proximately caused the serious bodily injury to

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[20] *Burrage v. United States, supra* note 2, 571 U.S. at 211.

[21] See *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

his passenger . . . . No efficient intervening cause exists." The court correctly concluded that proximate causation existed, although its articulation was not precisely correct. Because a reasonable trier of fact could find that Irish's act of driving while under the influence was both a "but for" cause and a proximate cause of the passenger's serious bodily injury, the State met its burden of proof to sustain a conviction under § 60-6,198(1).

CONCLUSION

A reasonable trier of fact could conclude that the passenger would not have suffered serious bodily injury but for Irish's act of driving while under the influence of alcohol, that the serious bodily injury was a direct and natural result of Irish's act of driving while under the influence, and that there was no efficient intervening cause. Because a reasonable trier of fact could find that the State met its burden of proof on causation, there was sufficient evidence to support Irish's conviction.

Affirmed.

Heavican, C.J., and McCormack, J., not participating.

Keith D. Purdie, appellant, v. Nebraska Department of Correctional Services and Brian Gage, in his individual capacity, appellees.

872 N.W.2d 895

Filed January 15, 2016. No. S-15-282.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court.
2. **Administrative Law: Jurisdiction.** The presence of a "contested case" is a predicate to jurisdiction in a case under Neb. Rev. Stat. § 84-917(a) (Reissue 2014) of the Administrative Procedure Act.
3. **Prisoners: Due Process.** Prison inmates have no inherent due process right to have their security level downgraded, and therefore an inmate is not entitled to a hearing on the matter.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Bishop, Judges, on appeal thereto from the District Court for Lancaster County, Lori A. Maret, Judge. Judgment of Court of Appeals affirmed.

Keith D. Purdie, pro se.

Douglas J. Peterson, Attorney General, and Kyle J. Citta for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Keith D. Purdie filed a petition in the district court for Lancaster County seeking judicial review pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 2014), of a decision by the Department of Correctional Services (DCS) regarding Purdie's level of custody. The district court determined that DCS' decision did not involve a contested case and that therefore the court lacked jurisdiction. The district court dismissed Purdie's petition. Purdie appealed the dismissal. The Nebraska Court of Appeals determined that the district court had properly concluded that it lacked jurisdiction and that therefore the Court of Appeals also lacked jurisdiction over the appeal. The Court of Appeals dismissed the appeal.

We granted Purdie's petition for further review. We agree with the lower courts that the decision regarding Purdie's level of custody was not made in a "contested case" as defined in the APA, and we conclude that the presence of a "contested case" is a jurisdictional requirement under the APA. The district court correctly determined that it lacked jurisdiction over Purdie's petition for review, and the Court of Appeals correctly concluded that it lacked jurisdiction to adjudicate the merits and dismissed the appeal. Accordingly, we affirm the order of dismissal of the Court of Appeals.

STATEMENT OF FACTS

Purdie, an inmate at the Tecumseh State Correctional Institution (TSCI), applied for reclassification of his custody level from medium custody to minimum custody. The unit administrator at TSCI determined that Purdie's classification should remain at medium custody. Purdie appealed the classification decision to the DCS "Director's Review Committee." The committee agreed with the institutional decision and denied Purdie's appeal.

Purdie filed a pro se petition in the district court for Lancaster County seeking judicial review of DCS' decision regarding his custody classification. Purdie alleged that his petition was filed pursuant to the APA and that the action involved a contested case.

DCS filed a motion under Neb. Ct. R. Pldg. § 6-1112(b)(1), asserting the petition should be dismissed for lack of jurisdiction. The court determined that DCS' decision was not made in a "contested case" and that therefore it lacked jurisdiction under the APA. The district court sustained the motion to dismiss. Purdie filed a notice of appeal, and the district court granted his application to proceed in forma pauperis on appeal.

The Court of Appeals on its own motion filed an order in which it dismissed the appeal for lack of jurisdiction. In the order, the Court of Appeals agreed with the district court's conclusion that Purdie's judicial review sought in the district court was not taken from a contested case and that the district court lacked jurisdiction under the APA. The Court of Appeals concluded that it lacked the power to determine the merits and dismissed the appeal for lack of jurisdiction.

We granted Purdie's petition for further review of the Court of Appeals' order which dismissed his appeal.

ASSIGNMENT OF ERROR

Purdie claims that the Court of Appeals erred when it concluded that DCS' decision regarding his level of custody was not made in a contested case and dismissed his appeal.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court. *O'Neal v. State*, 290 Neb. 943, 863 N.W.2d 162 (2015).

ANALYSIS

Purdie claims that the Court of Appeals erred when it dismissed the appeal. Purdie asserts that he sought judicial review of a contested case and that therefore neither the district court nor the Court of Appeals lacked jurisdiction. We conclude that the presence of a contested case is jurisdictional under the APA, that DCS' decision regarding Purdie's level of custody was not made in a contested case, and that the district court lacked jurisdiction under the APA, as the Court of Appeals correctly concluded. Accordingly, the order of the Court of Appeals which dismissed the appeal for lack of jurisdiction is affirmed.

Purdie, an inmate at TSCI, alleged in his petition for review filed in the district court that he had been aggrieved by a final decision in a contested case and that therefore he was entitled to judicial review under the APA. In this case, Purdie applied for reclassification of his level of custody. The unit administrator at TSCI denied the request for reclassification. Purdie thereafter appealed the classification decision, and the DCS' review committee agreed with the institutional decision and denied Purdie's appeal.

[2] Section 84-917(1) of the APA provides that "[a]ny person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA]." Therefore, whether Purdie was entitled to judicial review of DCS' decision depends upon whether he was aggrieved by "a final decision in a contested case," which, by definition, depends upon whether DCS' decision regarding Purdie's level of custody was made in a contested case. Section 84-901(3) of the APA defines "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." The presence of a "contested case" is a predicate to

jurisdiction in an APA case. See *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

[3] The substance of Purdie's case was his unsuccessful request for a more favorable level of custody. Purdie has not directed us to a law or constitutional right ensuring entitlement to a particular level of custody the determination of which requires a hearing. To the contrary, we have previously rejected such proposed entitlement. In *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 116, 517 N.W.2d 108, 112 (1994), this court stated that "prison inmates have no inherent due process right to have their security level downgraded" and that therefore an inmate is not entitled to a hearing on the matter. See, also, *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) (due process liberty interest in inmate custody classification generally limited to freedom from restraint which imposes atypical and significant hardship in relation to ordinary incidents of prison life). Furthermore, there is no indication in the record that a hearing was held on the matter, and Purdie does not point us to any authority to the effect there is any requirement "by law or constitutional right" that the classification decision is "to be determined after an agency hearing." See § 84-901(3).

DCS' custodial classification decision may be contrasted to other DCS decisions which are subject to judicial review under the APA because statutory law makes it so. In *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 819-20, 539 N.W.2d 432, 434 (1995), we stated that Neb. Rev. Stat. § 83-4,123 (Reissue 2014) regarding disciplinary procedures in adult institutions "permits judicial review [under the APA] of disciplinary cases in adult institutions only when the disciplinary action imposed on the inmate involves the imposition of disciplinary isolation or the loss of good-time credit." For this proposition, we cited *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994), which

also relied on § 83-4,123. Section 83-4,123 provides that "[n]othing in sections 83-4,109 to 83-4,123," regarding disciplinary procedures in adult institutions, should be construed to restrict or impair "judicial review for disciplinary cases which involve the imposition of disciplinary isolation or the loss of good-time credit in accordance with the [APA]." Thus, in these cases, we recognized that the law, specifically § 83-4,123, required that certain types of disciplinary cases be treated as "contested cases" for purposes of judicial review under the APA, but we have not found a constitutional or statutory basis for requiring level of custody decisions to be treated as contested cases for APA purposes. See *Abdullah v. Nebraska Dept. of Corr. Services*, 246 Neb. 109, 517 N.W.2d 108 (1994).

As just noted, there is a statutory basis for treating certain disciplinary decisions as contested cases for APA purposes, and in a similar manner, there are statutory bases which render the decisions of other agencies "contested cases" for APA purposes. See, *Langvardt v. Horton*, 254 Neb. 878, 889, 581 N.W.2d 60, 67 (1998) (noting that Neb. Rev. Stat. § 71-159 (Reissue 1996) provided that disciplinary measures taken against a professional licensee could be appealed "'in accordance with the [APA]'" and that therefore disciplinary proceeding was contested case); *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980) (noting that appeals to State Board of Education provided for in Neb. Rev. Stat. § 79-1103.05(2) (Reissue 1976) were contested cases subject to judicial review under APA).

By contrast, in other cases, we have determined that agency decisions were not made in contested cases when no hearing was required by law. For example, in *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006), we noted that the relevant statute did not require a hearing before the Department of Administrative Services to decide issues raised by petitioners and that therefore the proceeding was not a "contested case"

under the APA. In *Kerr v. Board of Regents*, 15 Neb. App. 907, 739 N.W.2d 224 (2007), it was noted that no law required that the question of whether a student should remain in college be determined by an agency or in an agency hearing and that therefore the decision to dismiss the student was not made in a "contested case" as defined in the APA.

Because the custodial classification at issue in this case did not involve "legal rights, duties, or privileges of specific parties" and the matter was not "required by law or constitutional right to be determined after an agency hearing," DCS' decision was not made in a "contested case" as defined in § 84-901(3). Because DCS' decision was not a final decision in a "contested case," Purdie was not entitled to judicial review of the decision under § 84-917(1) of the APA.

To summarize, the presence of a contested case is necessary to establish jurisdiction under the APA; in the absence of a contested case, the district court is not authorized under the APA to review the category of cases arising from institutional decisions. See *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015) (subject matter jurisdiction is power of tribunal to hear and determine case in general class or category to which proceedings in question belong and to deal with general subject matter involved). The district court did not have jurisdiction under the APA, and it did not err when it dismissed Purdie's petition for lack of jurisdiction.

When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the 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. *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012). Therefore, the Court of Appeals did not err when it dismissed this appeal for lack of jurisdiction.

Regarding the character of dismissals, we note that we have recently cautioned against dismissing an action for the stated reason that the court lacks jurisdiction when in fact the

correct explanation for dismissal is instead some other reason, such as failure to state a claim. See, *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015); *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014); *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008). However, in the present case, the absence of a contested case is properly characterized as leading to a dismissal for lack of jurisdiction.

Section 84-917(1) provides that a person "aggrieved by a final decision in a contested case" is entitled to judicial review of the decision under the APA. In *Big John's Billiards v. Balka*, 254 Neb. 528, 530, 577 N.W.2d 294, 296 (1998), referring to § 84-917 (Reissue 1994), we stated that "[f]or a district court to have jurisdiction over an administrative agency's decision, that decision must be final." Similar to our reasoning in *Big John's Billards*, a "contested case" is also a jurisdictional requirement to invoke judicial review pursuant to the APA and the absence of a "contested case" deprives the district court of the authority to hear the case under the APA.

For completeness, we note that in his brief in support of further review, Purdie states that a prison official changed Purdie's tentative release date as "punishment." Brief for appellant at 7. Purdie therefore asserts that this case involves a disciplinary decision and not simply a decision regarding his level of custody and that thus, it should be considered a "contested case." However, these allegations regarding an alleged punitive change in his tentative release date were not included in Purdie's petition for review initially filed in the district court. Instead, Purdie appears to be attempting to raise a new challenge on appeal. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014). We therefore give no consideration to Purdie's argument regarding an alleged punitive change in his tentative release date.

CONCLUSION

As applicable to this case, the APA authorizes judicial review of an agency's decision only when such decision is made in a "contested case." The DCS' decision regarding Purdie's level of custody was not made in a "contested case" as defined in the APA. The district court lacked jurisdiction to review the level of custody decision and properly dismissed the case for lack of jurisdiction. Because the district court lacked jurisdiction, the Court of Appeals correctly concluded that it lacked jurisdiction over this appeal. We therefore affirm the order of the Court of Appeals which dismissed this appeal.

Affirmed.

Stacy, J., not participating.

Village at North Platte, appellant, v. Lincoln County Board of Equalization, appellee.

873 N.W.2d 201

Filed January 15, 2016. No. S-15-508.

1. **Taxation: Appeal and Error.** An appellate court reviews questions of law arising during appellate review of decisions by the Nebraska Tax Equalization and Review Commission de novo on the record.
2. **Statutes: Jurisdiction.** Statutory interpretation and subject matter jurisdiction present questions of law.
3. **Taxation: Property: Valuation.** Neb. Rev. Stat. § 77-1502(2) (Cum. Supp. 2014) requires that a protest of property valuation shall contain or have attached a statement of the reason or reasons why the requested change should be made.
4. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
5. ____. 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.
6. **Words and Phrases.** It is axiomatic that without some level of compliance, there can never be substantial compliance.
7. **Taxation: Jurisdiction.** County boards of equalization can exercise only such powers as are expressly granted to them by statute, and statutes conferring power and authority upon a county board of equalization are strictly construed.
8. **Taxation: Property: Valuation: Dismissal and Nonsuit.** Where a protest of property valuation fails to contain or have attached the statement of the reason or reasons for the protest, Neb. Rev. Stat. § 77-1502(2) (Cum. Supp. 2014) requires a county board of equalization to dismiss it.

9. **Taxation: Jurisdiction: Appeal and Error.** The Nebraska Tax Equalization and Review Commission obtains exclusive jurisdiction over an appeal when: (1) the commission has the power or authority to hear the appeal; (2) the appeal is timely filed; (3) the filing fee, if applicable, is timely received and thereafter paid; and (4) a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from, is timely filed.
10. **Taxation: Appeal and Error.** The Nebraska Tax Equalization and Review Commission has the power and duty to hear and determine appeals of any decision of any county board of equalization.
11. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
12. **Taxation: Property: Valuation.** A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization.
13. **Jurisdiction: Courts.** The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases.
14. **Jurisdiction: Administrative Law.** A tribunal may have subject matter jurisdiction in a matter over a certain class of case, but it may nonetheless lack the authority to address a particular question or grant the particular relief requested.
15. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.

Appeal from the Tax Equalization and Review Commission. Affirmed.

William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

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

Cassel, J.

INTRODUCTION

According to statute, a taxpayer's property valuation protest must "contain or have attached a statement of the reason or reasons why the requested change should be made."[1] In this appeal, the taxpayer's protest form specified the assessed and requested valuation amounts but stated no reason for the requested change. The statute's plain meaning required a "reason" and not just two different numbers. The protest did not substantially comply with the statute. And because the statute required the county board of equalization to dismiss the protest, the board had no power to do otherwise. It then follows that on appeal, the Nebraska Tax Equalization and Review Commission (TERC) lacked authority to consider the merits of the property's value.

BACKGROUND

Section 77-1502(2) both imposes a requirement and specifies a consequence for its violation. The full sentence imposing the requirement states, "The protest shall contain or have attached a statement of the reason or reasons why the requested change should be made and a description of the property to which the protest applies."[2] The statute then states, "If the protest does not contain or have attached the statement of the reason or reasons for the protest or the applicable description of the property, the protest shall be dismissed by the county board of equalization."[3]

Village at North Platte (the taxpayer), through its legal counsel, filed a property valuation protest using a "Form 422A." We digress to note that the taxpayer is a private entity and not a "village" in the sense of Nebraska's least-populated type of

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[1] Neb. Rev. Stat. § 77-1502(2) (Cum. Supp. 2014).

[2] *Id.*

[3] *Id.*

municipality.[4] The protest form included a legal description of real property located in Lincoln County, Nebraska. The protest showed a protested valuation of $1,881,100 and a requested valuation of $1 million.

But the taxpayer left blank the box on the form designated "Reasons for requested valuation change (Attach additional pages if needed.)." And it did not attach a statement containing a reason for the protest. The Lincoln County Board of Equalization (the Board) dismissed the protest, citing § 77-1502(2).

The taxpayer appealed to TERC. In the taxpayer's TERC appeal form, it listed the reason for the appeal as follows: "This property is valued in excess of its actual value and is not equalized with comparable and similar property in the county." The Board moved to dismiss the appeal. It asserted that TERC lacked jurisdiction because the Board did not have jurisdiction to hear the protest due to the taxpayer's failure to state the reason for the protest.

Following a hearing, TERC entered an order for dismissal with prejudice. TERC stated:

> The statute requires that an appeal contain a reason or reasons why the requested change should be made. A reason why a requested change should be made and a requested change are not the same thing. [TERC] cannot conclude that making a requested change is the same as stating a reason why the change should be made without reading the statute in such a way as to make the requirement for a reason for the requested change meaningless.

TERC concluded that the Board did not have jurisdiction to hear the appeal and, thus, that TERC did not have jurisdiction over the appeal.

The taxpayer timely filed an appeal. Pursuant to statutory authority,[5] we moved the appeal to our docket.

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[4] See Neb. Rev. Stat. § 17-201 (Cum. Supp. 2014).

[5] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENT OF ERROR

The taxpayer assigns that TERC erred in finding the Board did not have subject matter jurisdiction and, therefore, that TERC did not have jurisdiction over the appeal or petition.

STANDARD OF REVIEW

[1,2] An appellate court reviews questions of law arising during appellate review of decisions by TERC de novo on the record.[6] Statutory interpretation[7] and subject matter jurisdiction[8] present questions of law.

ANALYSIS

Reason for Requested Change

[3] A protest of property valuation "shall contain or have attached a statement of the reason or reasons why the requested change should be made."[9] There is no dispute that the taxpayer did not include a reason in the space on the form for that purpose, nor did it attach a statement setting forth the reason for its requested change. Nevertheless, the taxpayer claims that it complied with the statutory requirement, because its protest "contained a reason for the appeal: that the property was overvalued, as indicated by the Protested Valuation of $1,881,[1]00 and the Requested Valuation of $1,000,000."[10]

[4,5] We recall basic principles of statutory interpretation. Statutory language is to be given its plain and ordinary meaning.[11] A court must attempt to give effect to all parts of a

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[6] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 290 Neb. 726, 861 N.W.2d 718 (2015).

[7] See *id.*

[8] See *McDougle v. State ex rel. Bruning*, 289 Neb. 19, 853 N.W.2d 159 (2014).

[9] § 77-1502(2).

[10] Brief for appellant at 7.

[11] *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015).

statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[12]

The statute plainly requires a reason why the requested change should be made. The taxpayer failed to provide one. As TERC correctly reasoned, a requested change is not synonymous with a reason why the requested change should be made.

We reject the taxpayer's argument that a reason for the protest was apparent from the face of the protest form. The taxpayer contends that by reading its protest in its entirety, it "clearly set forth its position that the property was valued in excess of the actual value when it indicated that the assessed value of the subject property, as ref[l]ected in the Protested Valuation, was significantly higher than the market value reflected in the Requested Valuation."[13] We disagree. A difference between the amount of the assessed value and the amount of the requested value provides no explanation, i.e., no "reason," for the numerical difference. In the cliche "five W's" formula of journalism, a mere numerical difference provides a "what" but omits the "why." Different figures could result for a multitude of reasons. It could be that, as it appears to be here, the taxpayer claims the property was overvalued by the assessor. But the difference could result from a claim that the taxpayer's property was not fairly and properly equalized. And, importantly, it could result from some reason for which the Board would be unable to afford any relief.

A county board of equalization should not have to guess the basis for a taxpayer's property valuation protest, and the statutory requirement exists to frame the issue for a hearing before a county board of equalization. Otherwise, the county assessor or some other representative of the county's interests

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[12] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[13] Brief for appellant at 8.

would have no meaningful way of preparing for a hearing on a taxpayer's protest.

The taxpayer's reasoning would eviscerate the statutory mandate to state a reason. This, in turn, would violate the canon requiring that no sentence of the statute be rejected as superfluous.

Substantial Compliance

The taxpayer also asserts that the doctrine of substantial compliance should apply. In cases involving the Political Subdivisions Tort Claims Act, for example, we have applied a substantial compliance analysis when there was a question about whether the content of a tort claim met the requirements of the statute.[14]

[6] But here, the taxpayer did not comply with the statutory requirement to any degree. The taxpayer completely failed to set forth a reason for the requested change. "It is axiomatic that without some level of compliance, there can never be substantial compliance."[15] Because no reason for the change was given, the taxpayer did not substantially comply with the statutory requirement.

Dismissal by Board

[7,8] Section 77-1502(2) prevented the Board from reaching the merits of the taxpayer's protest. County boards of equalization can exercise only such powers as are expressly granted to them by statute, and statutes conferring power and authority upon a county board of equalization are strictly construed.[16] Where a protest fails to "contain or have attached the statement of the reason or reasons for the protest," the statute

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[14] See *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008).

[15] *Loontjer v. Robinson*, 266 Neb. 902, 913, 670 N.W.2d 301, 309 (2003) (Hendry, C.J., concurring in result).

[16] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., supra* note 6.

requires the board to "dismiss[]" it.[17] Because the taxpayer's protest did not include a reason for the requested change, the Board did not have authority to do anything other than dismiss the protest.

Dismissal by TERC

TERC dismissed the taxpayer's appeal for lack of jurisdiction. It did so after determining that the taxpayer's protest did not include a reason for the requested valuation change and that the Board was required to dismiss the protest.

[9,10] TERC's jurisdiction over an appeal is derived from statute. TERC obtains exclusive jurisdiction over an appeal when: (1) TERC has the power or authority to hear the appeal; (2) the appeal is timely filed; (3) the filing fee, if applicable, is timely received and thereafter paid; and (4) a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from, is timely filed.[18] Section 77-5013(1) specifically provides, "Only the requirements of this subsection shall be deemed jurisdictional." We observe that TERC has the power and duty to hear and determine appeals of any decision of any county board of equalization.[19] And there is no assertion that the other jurisdictional requirements have not been met.

But meeting the statutory jurisdictional prerequisites does not necessarily mean that TERC will have power to reach the merits of the property's valuation. TERC determined that it lacked jurisdiction to hear the appeal, because the Board did not have subject matter jurisdiction to hear the protest. In the factual situation before us, we conclude that TERC lacked

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[17] § 77-1502(2).

[18] See Neb. Rev. Stat. § 77-5013(1) (Cum. Supp. 2014).

[19] See Neb. Rev. Stat. § 77-5007(1), (2), (5) through (7), (10), and (13) (Supp. 2015).

authority to reach the merits of the property's valuation. To explain, we must recall and apply principles of subject matter jurisdiction.

[11,12] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.[20] A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization.[21] Thus, the Board generally has the power to hear and decide protests of property valuations.

[13,14] "'But the question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases.'"[22] A tribunal may have subject matter jurisdiction in a matter over a certain class of case, but it may nonetheless lack the authority to address a particular question or grant the particular relief requested.[23] Because the taxpayer's protest failed to include a reason for its requested change in valuation, the statute mandated that the Board dismiss the protest. The Board therefore lacked authority to reach the merits of the valuation of the property.

[15] It is well settled that if the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[24] A comparable rule is applicable here. Because the Board lacked authority to hear the taxpayer's property valuation protest on the merits of the valuation, TERC likewise lacked authority to do so.

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[20] *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015).

[21] *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000).

[22] *Nebraska Republican Party v. Gale*, 283 Neb. 596, 599, 812 N.W.2d 273, 276 (2012), quoting *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

[23] See *Nebraska Republican Party v. Gale, supra* note 22.

[24] See *O'Neal v. State*, 290 Neb. 943, 863 N.W.2d 162 (2015).

One can envision a different situation—where a county board of equalization might erroneously conclude that a protest failed to state a reason. It may well follow that TERC would have authority to correct the erroneous dismissal. But, clearly, that is not the situation in the case before us. Because the taxpayer manifestly failed to state any reason for the requested change, we need not address the contours of TERC's power where a county board incorrectly reaches a similar conclusion.

CONCLUSION

Because the taxpayer's protest failed to include a reason for the requested change in valuation, the Board correctly dismissed the protest; it lacked statutory authority to take any other action. Although TERC articulated that it lacked "jurisdiction" of the appeal, we conclude that it correctly declined to reach the merits of the appeal regarding the property's value. We therefore affirm.

Affirmed.

McCormack, J., not participating.

In re Estate of William Lorenz, deceased. Theresa Lorenz, Personal Representative of the Estate of William Lorenz, deceased, appellee, v. Alice Shea, appellant.

873 N.W.2d 396

Filed January 29, 2016. No. S-13-528.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.

Petition for further review from the Court of Appeals, Inbody, Chief Judge, and Irwin and Bishop, Judges, on appeal thereto from the County Court for Douglas County, Sheryl L. Lohaus, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Jeffrey A. Silver for appellant.

Richard A. DeWitt, Robert M. Gonderinger, and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee.

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

Wright, J.

NATURE OF CASE

Alice Shea (Alice), the former wife of William Lorenz (William), filed a petition seeking allowance of her claims against William's estate, seeking the appointment of a special administrator, and challenging the second codicil of William's will. The county court for Douglas County allowed Alice's claims in part but awarded summary judgment to the personal representative on Alice's request for the appointment of a special administrator and her challenge to the second codicil. Alice appealed. In general, the Nebraska Court of Appeals affirmed the county court's order but modified the court's dismissal of Alice's request for the appointment of a special administrator to reflect that such request should have been dismissed without prejudice. See *In re Estate of Lorenz*, 22 Neb. App. 548, 858 N.W.2d 230 (2014).

In her petition for further review, the personal representative, Theresa Lorenz (Theresa), claims that the Court of Appeals erred in reversing certain determinations made by the county court and in modifying the county court's order. We granted Theresa's petition for further review.

SCOPE OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Shell*, 290 Neb. 791, 862 N.W.2d 276 (2015). When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below. *Id*. Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Wang*, 290 Neb. 757, 861 N.W.2d 728 (2015).

STATEMENT OF FACTS

Background

William died on February 20, 2010, at the age of 91. He was single at the time of his death, having been divorced

from Alice since 2006. Pursuant to their Iowa divorce decree, William was ordered to pay Alice (1) a property settlement in the amount of $113,761 and (2) alimony in the amount of $2,000 per month until Alice dies or remarries. The decree provided that "[i]n the event William predeceases Alice, this alimony award shall be a lien against" the estate.

On May 4, 2010, Theresa, one of William's children, filed a "Petition for Formal Probate of Will, Determination of Heirs, and Appointment of Personal Representative." The petition sought to admit William's "Last Will and Testament" and two codicils dated February 24, 2005, and May 11, 2007, to probate. The petition sought the appointment of Theresa as personal representative, and a notice of the petition was published in The Daily Record, a legal newspaper in Douglas County, for 3 consecutive weeks in May 2010.

On June 24, 2010, the county court entered an order admitting the will and two codicils to formal probate as "valid, unrevoked and the last Will of [William]." The court also appointed Theresa as the personal representative of the estate. In her affidavit, Theresa averred that she mailed a copy of the notice of the proceedings to Alice.

On August 30, 2010, Alice filed three separate claims in the estate, all of which related back to the 2006 divorce decree. The claims were for (1) future alimony in the amount of $2,000 per month for Alice's lifetime; (2) delinquent alimony as of August 1, 2010, in the amount of $6,000 plus interest; and (3) past due property settlement funds in the amount of $1,189.65 plus interest.

The "Short Form Inventory" filed by Theresa on September 23, 2010, listed the "probate property" owned by William at the time of his death as (1) a checking account ($12,007.11), (2) an investment account ($100,163), and (3) household goods and furnishings and miscellaneous tangible personal property ($500). The total value of the probate property listed was $112,670.11. Nonprobate transfers were not listed on the

inventory. On October 28, Theresa disallowed all three of the claims Alice had filed.

Alice then filed a petition for the allowance of her claims, for the appointment of a special administrator pursuant to Neb. Rev. Stat. § 30-2457 (Reissue 2008), and to challenge the second codicil. In her petition, Alice alleged that on August 30, 2010, she filed three claims against the estate for future alimony, delinquent alimony, and past-due property settlement funds. She alleged that Theresa's disallowance of the claims was improper based on the clear and unambiguous language of the divorce decree, which specifically provided that "[i]n the event William predeceases Alice, this alimony award shall be a lien against" the estate. Alice alleged that based on this decree and her life expectancy, the amount that would be due Alice under the decree of dissolution would be $224,400. Alice asked the court to allow each of her three claims, including but not limited to an award of $224,400.

Alice's petition also requested the appointment of a special administrator. She alleged that Theresa had a general power of attorney for William since June 29, 2006, and was also the personal representative of the estate. She alleged that from the time Theresa's power of attorney became activated through the date of William's death, William's liquid assets were reduced from approximately $1 million to $112,000 and that during this time, Theresa had actual knowledge of the alimony award in the divorce decree. She alleged that because Theresa was acting as both attorney in fact and personal representative, she had "a conflict of interest to properly administer and/or preserve the estate, including but not limited to collecting assets belonging to the [e]state and therefore a special administrator [was] necessary pursuant to and in accordance with Neb. Rev. Stat. §30-2457."

Finally, Alice's petition challenged the second codicil executed by William on May 11, 2007, as being "subsequent to the date he was declared unable to conduct and manage his business affairs, pursuant to a Certificate of Disability." She

alleged that because William was incompetent to execute the second codicil, it should be declared null and void and of no force and effect. The second codicil effectively removed Alice from William's will, except that it provided that if Alice survived him, his executor "may" in his or her sole discretion allocate a portion of the "rest, residue and remainder" of the estate to Theresa as trustee of the William F. Lorenz Alimony Trust, which funds may be used to pay Alice's $2,000 per month alimony.

Theresa answered and asked the court for an order denying each of the claims submitted by Alice, except the claim for future alimony in the amount of $2,000 per month until Alice dies or remarries. She further requested an order authorizing and approving the satisfaction of such claim for future alimony through the funding of the William F. Lorenz Alimony Trust, pursuant to the second codicil of William's will.

Theresa alleged that Alice lacked standing to seek appointment of a special administrator and was improperly seeking to require the estate to incur expenses for the sole benefit of Alice, which expenses "should in equity be borne by [Alice]." She alleged that Alice failed to state a cause of action for the appointment of a special administrator and that William had made adequate provision for the payment of future alimony payments to Alice via the alimony trust provision of the second codicil.

As to the second codicil, Theresa alleged that Alice, as a creditor of the estate, had no standing to assert the invalidity of the second codicil; that it was formally admitted to probate by order of the Douglas County Court after notice to interested persons and a formal hearing; and that the order was final and nonappealable.

On March 14, 2013, Theresa filed a motion for summary judgment. She alleged that the estate was entitled to judgment as a matter of law on all of the claims in the petition and asked the court to dismiss the petition with prejudice, with the exception of the following: (1) Alice's statement of claim

for alimony in the amount of $2,000 per month commencing September 1, 2010, should be allowed, but that such obligation shall terminate upon Alice's death or remarriage, and (2) Alice's statement of claim for a property settlement in the amount of $1,189.65 plus interest should be partially allowed in the amount of $129.78, but otherwise disallowed.

At a hearing on the summary judgment, the county court took judicial notice of its June 24, 2010, order admitting the will and two codicils to formal probate as "valid, unrevoked, and the last will of William." The county court found that a genuine issue of material fact existed regarding Alice's claim for interest for delinquent alimony, but both parties stipulated and conceded that the actual amount of delinquent alimony had been paid. It found that Alice's claim for alimony commencing September 1, 2010, in the amount of $2,000 per month should be allowed until she dies or remarries and that her claim for interest as a result of a late property settlement payment should be allowed in the amount of $129.78.

The county court concluded that Alice's demand for Theresa to compel beneficiaries of payable-on-death (POD) transfers to pay such transfers over to the estate as a basis for the appointment of a special administrator was not timely as required by Neb. Rev. Stat. § 30-2726 (Reissue 2008). It found that the petition for a special administrator was not warranted, because "the procedure by which to suspend and remove [Theresa as] Personal Representative and thereby [for] Appointment of a Special Administrator" was not followed as set forth in Neb. Rev. Stat. §§ 30-2454 and 30-2457 (Reissue 2008) and *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008). It also found Alice's challenge to the validity of the second codicil was untimely, because the court's order dated June 24, 2010, validated William's will and both codicils, and the order was final and nonappealable.

Accordingly, the county court granted Theresa's motion for summary judgment, except for Alice's claim for interest for delinquent alimony, her claim for alimony in the amount of

$2,000 per month, and her claim for interest in the amount of $129.78 on a late property settlement payment. It dismissed with prejudice Alice's request for appointment of a special administrator and her challenge to the second codicil. Alice timely appealed to the Court of Appeals.

Court of Appeals' Decision

The Court of Appeals affirmed the county court's order that Alice's challenge to the second codicil was untimely and affirmed the dismissal with prejudice of such challenge. *In re Estate of Lorenz*, 22 Neb. App. 548, 858 N.W.2d 230 (2014).

As to the dismissal of Alice's request for the appointment of a special administrator, the Court of Appeals found that nothing in § 30-2457 required that a personal representative be suspended or removed prior to the filing of an application to appoint a special administrator. It concluded that because a personal representative and a special administrator can coexist, it was not a prerequisite to suspend or remove Theresa as personal representative before filing a motion for appointment of a special administrator. It found that the county court erred in dismissing the petition with prejudice on the basis that Alice failed to follow the proper procedure.

Because this finding did not completely resolve the issue, the Court of Appeals addressed the county court's second reason for denying the appointment of a special administrator: its conclusion that Alice's demand to compel the beneficiaries of the POD transfers to pay such transfers over to the estate as a basis for the appointment of a special administrator was not timely, as required by § 30-2726.

The Court of Appeals analyzed the operative statute and summarized its purpose as follows:

> When a decedent's POD asset has been transferred outside his or her estate, § 30-2726 provides the mechanism by which such nonprobate transfer may be recovered by the estate if the estate is not otherwise able to meet its obligations. To employ the process set forth in

> § 30-2726(b) to recover nonprobate transfers, a "written demand" must be made upon the personal representative and then a proceeding to recover those nonprobate assets must be commenced within 1 year of the decedent's death.

In re Estate of Lorenz, 22 Neb. App. at 568, 858 N.W.2d at 245.

Theresa argued that Alice failed to make a written demand upon Theresa to recover any POD transfers within 1 year of William's death. Alice argued sufficient written demand had been made by filing her claims against the estate and by timely filing a proceeding to establish the claims when they were disallowed. She asserted that once her claims were filed, Theresa knew the estate's assets would be insufficient to pay Alice's alimony claim, which was in fact evidenced by the present insolvent condition of the estate.

The Court of Appeals found that Alice had filed separate statements of claim for each obligation owed to her by the estate: a property settlement in the amount of $1,189.65 plus interest, delinquent alimony of $6,000 plus interest, and future alimony of $2,000 per month for life. These claims were filed on August 30, 2010, within 6 months of William's death on February 20, and put Theresa on notice of the obligations allegedly due Alice. Although the claims, by themselves, made no reference to § 30-2726 or the need to recover nonprobate assets, the Court of Appeals noted that Alice also filed the petition within 1 year of William's death, which sought the appointment of a special administrator because of "significant dissipation of assets" and Theresa's "conflict of interest to properly administer and/or preserve the estate, including but not limited to collecting assets belonging to the [e]state."

The Court of Appeals concluded that Alice's filing of her claims—when considered along with the filing of her petition—set forth sufficient written demand to put Theresa on notice that nonprobate transfers might need to be collected

for the estate to meet its obligations to Alice. Because the three claims and petition were filed within 1 year of William's death, it found the county court erred in concluding that Alice's written demand was not timely.

The Court of Appeals next addressed who could bring such an action once a written demand was made upon the personal representative. It concluded that only the personal representative had standing to bring such action against those beneficiaries and that as such, it was the duty of the personal representative to bring such action to recover nonprobate transfers pursuant to § 30-2726 when a timely written demand has been made.

The Court of Appeals concluded that by the time the matter was heard before the county court, it was too late for either the personal representative or an appointed special administrator to commence an action to recover the POD funds. Thus, it concluded that although the county court erred, there was no basis to appoint the special administrator, because more than 1 year had passed since William's death. The Court of Appeals reversed the county court's dismissal with prejudice insofar as it may have precluded any future effort to appoint a special administrator for reasons other than commencement of an action under § 30-2726 to recover POD funds.

In summary, the Court of Appeals concluded that there was no basis to appoint a special administrator but that the dismissal of Alice's request should have been without prejudice. It therefore modified the county court's order accordingly. Theresa moved for a rehearing, which motion was overruled. We granted Theresa's petition for further review.

Petition for Further Review

In her petition for further review, Theresa assigns three errors, all of which relate to the issue of the special administrator. She claims that the Court of Appeals erred in reversing the county court's determination that Alice did not make a timely written demand under § 30-2726(b) and in concluding that her

claims and petition were a sufficient written demand under the statute. Theresa claims that the Court of Appeals erred in modifying the dismissal of Alice's request for the appointment of a special administrator to be without prejudice. Theresa claims that the Court of Appeals erred in concluding that Alice's request for the appointment of a special administrator did not need to follow the two-step procedure of *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008). Alice has not filed a cross-petition.

ANALYSIS

We first focus on the Court of Appeals' conclusion that Alice's statement of claims, along with her petition for allowance of those claims and request for appointment of a special administrator, was in effect a written demand that put Theresa on notice that nonprobate transfers may need to be collected for the estate to meet its obligations for future alimony to Alice.

Section 30-2726 provides in relevant part:

> (a) If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or POD designation . . . is not effective against the estate of a deceased party to the extent needed to pay claims against the estate . . . .
>
> (b) A surviving party or beneficiary who receives payment from an account after death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled under section 30-2722, to the extent necessary to discharge the amounts described in subsection (a) of this section remaining unpaid after application of the decedent's estate. A proceeding to assert the liability for claims against the estate . . . may not be commenced unless the personal representative has received a written demand by . . . a creditor . . . . The

proceeding must be commenced within one year after death of the decedent.

The question is whether Alice's claims and her petition to allow the claims, none of which mentioned § 30-2726(b), constituted the written demand required by § 30-2726(b). Theresa argues that Alice's petition was not a demand upon the personal representative to do anything, much less a demand to recover nonprobate assets. She argues that it was simply a request upon the court for the appointment of a special administrator to generally administer the estate and not a specific request to recover nonprobate assets. Hence, Theresa asserts there was no written demand as required upon the personal representative.

Theresa further asserts that rather than considering whether any written communication from Alice to Theresa constituted an actual explicit demand to recover nonprobate assets, the Court of Appeals instead erroneously found that Alice's statements of claim, together with the petition, were sufficient to put Theresa on notice that nonprobate transfers might need to be collected for the estate to meet its obligations to Alice. Theresa argues that pursuant to our holdings in *In re Estate of Feuerhelm*, 215 Neb. 872, 341 N.W.2d 342 (1983), and *J.R. Simplot Co. v. Jelinek*, 275 Neb. 548, 748 N.W.2d 17 (2008), giving notice of a potential claim or demand is not itself a claim or demand.

In *In re Estate of Feuerhelm, supra*, we held that mere notice to a representative of an estate regarding a possible demand or claim against an estate did not constitute presenting or filing a claim under the relevant statute. In *J.R. Simplot Co. v. Jelinek, supra*, we reaffirmed our holding in *In re Estate of Feuerhelm* and concluded that a party's filing entitled "demand for notice" was, at most, notice to a representative of an estate regarding a possible demand or claim against the estate, but did not qualify as a statement of claim.

Alice argues that the facts in this case are different from those in *In re Estate of Feuerhelm* and *Jelinek*. She asserts that

Theresa had knowledge of the alimony award and absolute personal knowledge of William's assets, including how they were held from the time of the dissolution of marriage to the date of his death. Theresa was William's attorney in fact pursuant to a durable power of attorney that had been activated by William's doctor's certification that he was not mentally capable of handling his affairs. She claims that Theresa controlled all the assets prior to William's passing, including into which accounts those assets were deposited. It was Theresa who decided what assets would be subject to estate administration on William's passing.

Alice asserts that the Court of Appeals has properly concluded that her filing of claims, particularly when considered along with her petition for appointment of a special administrator, set forth sufficient written demand to have put Theresa on notice that nonprobate transfers might need to be collected for the estate to meet its obligations to Alice. Because Theresa had intimate knowledge of the disposition of the POD accounts to herself and her siblings, Alice asserts that this demand could not have come as a surprise to Theresa.

We disagree with the Court of Appeals' conclusion that Alice's filing of her claims and petition for allowance of those claims was sufficient written demand under § 30-2726. The purpose of the statute is to alert the personal representative of the need to recover nonprobate assets and to trigger the personal representative's duty and authority to initiate proceedings to do so. Additionally, it protects the beneficiaries of such nonprobate assets from incurring liability for claims made against the estate more than 1 year after the death of the decedent.

Given the facts of this particular case, we have no doubt that Theresa knew that nonprobate transfers may need to be collected in order for the estate to meet its obligations to Alice. But whether Theresa had notice of this fact is not the issue, because the statute requires more than notice—it requires a written *demand* upon the personal representative

before a proceeding to recover nonprobate assets may be commenced. Alice's statement of claims and petition for allowance of those claims made no demand of Theresa to initiate such proceedings. Thus, we agree with the county court that Alice failed to make a timely written demand as required under § 30-2726, and we reverse the decision of the Court of Appeals to the contrary.

Although our reasoning differs substantially, we agree with the Court of Appeals' ultimate conclusion that Alice's request for the appointment of a special administrator was properly dismissed by the county court. However, we disagree with the Court of Appeals' modification of the dismissal to be without prejudice. The dismissal with prejudice applies only to Alice's request for the appointment of a special administrator for the purpose of commencing an action under § 30-2726 and would not prevent Alice from requesting a special administrator on some other basis in the future. Therefore, it was not necessary for the Court of Appeals to modify the county court's order.

Finally, Theresa claims the Court of Appeals erred in reversing the county court's determination that Alice's petition for a special administrator did not follow the proper procedure. The Court of Appeals concluded that because a personal representative and a special administrator can coexist, Alice was not required to petition to suspend or remove Theresa as a prerequisite to filing a petition for the appointment of a special administrator. The Court of Appeals found that § 30-2457 permitted a special administrator to be appointed after notice when a personal representative cannot or should not act and also permits the appointment of a special administrator without notice when an emergency exists.

The Court of Appeals found nothing in § 30-2457 which stated that a personal representative must be suspended or removed prior to the filing of an application to appoint a special administrator. It noted that this two-step process may not always be necessary and that numerous situations could arise

wherein an interested person would want a special administrator to be appointed to deal with specific issues that the personal representative cannot or should not handle, even though the personal representative is otherwise fully capable of handling the rest of the estate's administration.

We have not specifically addressed whether the petition must ask for the removal of the personal representative and the appointment of a special administrator as a prerequisite to such appointment. However, because we find that Alice failed to make a timely written demand under § 30-2726(b) and that her request to appoint a special administrator on this basis should be dismissed with prejudice, we decline to consider whether Alice followed the proper procedure for appointment of a special administrator.

For the reasons set forth above, we affirm the decision of the Court of Appeals in part and in part reverse, and we remand the cause with directions to affirm the order of the county court, which determined that Alice did not make a timely written demand as required by § 30-2726(b), and to affirm the order of the county court, which dismissed with prejudice Alice's request for the appointment of a special administrator.

Affirmed in part, and in part reversed
and remanded with directions.

State of Nebraska, appellee, v. Aaron L. Determan, appellant.

873 N.W.2d 390

Filed January 29, 2016. No. S-13-756.

1. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
2. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
3. **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.
4. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
5. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing.
6. **Postconviction: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2008), a defendant has just 30 days to appeal from the denial of an evidentiary hearing; the failure to do so results in the defendant's losing the right to pursue those allegations further.
7. **Criminal Law: Appeal and Error.** When a decision of the Nebraska Supreme Court results in a new rule, that rule applies to all criminal cases still pending on direct review.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Saline County, Vicky L. Johnson, Judge. Judgment of Court of Appeals affirmed.

Jeffrey A. Gaertig, of Carlson, Schafer & Davis, P.C., L.L.O., for appellant.

Aaron L. Determan, pro se.

Douglas J. Peterson and Jon Bruning, Attorneys General, Nathan A. Liss, and Melissa R. Vincent for appellee.

Wright, Connolly, Cassel, and Stacy, JJ.

Per Curiam.

INTRODUCTION

Aaron L. Determan's motion for postconviction relief was granted in part, and in part denied. Determan appealed the portion of the district court's order denying relief. The Nebraska Court of Appeals vacated that portion of the district court's order denying relief and remanded the cause for further proceedings. The primary issue presented by this appeal is what procedure the district court should follow when considering a postconviction motion that raises both an allegation that trial counsel was ineffective for failing to file a direct appeal and other ineffective assistance of counsel claims.

FACTUAL BACKGROUND

Determan pled guilty to one count of unlawful manufacture or distribution of a controlled substance. He was sentenced to 8 to 10 years' imprisonment. Determan's direct appeal was dismissed on June 28, 2013, in case No. A-13-441, because his poverty affidavit was untimely filed.

On August 16, 2013, Determan filed a motion for postconviction relief alleging that his counsel was ineffective in failing to (1) file a direct appeal, (2) object to the denial of Determan's motion to postpone sentencing, (3) advise Determan of the strength and weakness of the State's evidence,

(4) argue mitigating factors at sentencing, and (5) object when the State violated the terms of the plea agreement by making a statement at sentencing.

The district court granted Determan an evidentiary hearing on the allegation regarding Determan's direct appeal, but denied the remaining allegations. In denying those allegations, the district court concluded that Determan could not show that his counsel's performance was deficient.

Determan appealed from the denial of postconviction relief. In vacating the order and remanding the cause, the Court of Appeals relied upon its decision in *State v. Seeger*.[1] In *Seeger*, the defendant had filed a postconviction motion alleging that his trial counsel was ineffective for failing to file a direct appeal and was also ineffective in other particulars. The district court granted an evidentiary hearing on the direct appeal issue, but denied the remainder of the claims. The defendant appealed from that denial.

On appeal, the defendant argued that the district court erred both in denying his other claims of ineffective assistance of counsel and in not deferring ruling on those other claims until after it held an evidentiary hearing on his direct appeal allegation.

The Court of Appeals concluded that there was no authority for the defendant's position that the ruling on the other claims should be deferred until after a new evidentiary hearing was held and that thus, it was not error for the district court to decide those issues before holding an evidentiary hearing on the direct appeal claim. But the Court of Appeals observed that "judicial economy may have been served by deferring ruling on the balance of the postconviction claims."[2] The Court of Appeals noted:

> A better procedure would be to defer ruling on the balance of the postconviction claims until after the evidentiary hearing on the entitlement to a new direct appeal has

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[1] *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012).

[2] *Id.* at 230, 822 N.W.2d at 441.

> been held. If a new direct appeal is granted, the remaining postconviction claims could be dismissed as premature and thereafter raised in the direct appeal.[3]

Though the Court of Appeals set forth this procedure, it addressed the district court's denial of the defendant's claim in that appeal and affirmed.

In the case at bar, the district court did not follow the procedure set forth in *Seeger*. Instead, in one order, the district court granted an evidentiary hearing on Determan's direct appeal claim while denying the remainder of his claims. The Court of Appeals, citing *Seeger*, vacated the denial of the "other" claims and remanded the cause for further proceedings. The Court of Appeals also made the holding in *Seeger* explicit:

> Therefore, we are now setting forth that where a defendant alleges multiple postconviction claims of ineffective assistance of counsel including a claim that counsel was deficient in failing to timely file, or otherwise timely perfect, a direct appeal, the district court shall make its determination regarding the claim regarding the direct appeal, including holding an evidentiary hearing if the court determines that an evidentiary hearing is necessary, prior to addressing the defendant's other postconviction claims. We also note that although the issue is not directly presented to us, judicial economy would be best served by following this same procedure in all postconviction cases where the district court determines that an evidentiary hearing is needed on one or more of the defendant's claims but not on other claims.[4]

Accordingly, the Court of Appeals vacated the district court's denial of the "other" allegations and remanded the cause for further proceedings.[5]

We granted the State's petition for further review.

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[3] *Id*. at 230-31, 822 N.W.2d at 442.

[4] *State v. Determan*, 22 Neb. App. 683, 691-92, 859 N.W.2d 899, 906 (2015).

[5] *State v. Determan, supra.*

ASSIGNMENTS OF ERROR

The State assigns that the Court of Appeals erred in (1) mandating an incorrect procedure for the district court to follow when considering postconviction motions that allege the ineffective assistance of counsel for failing to file a direct appeal and (2) vacating the district court's order and remanding the cause for further proceedings where the procedure was newly adopted in *State v. Determan*.[6]

STANDARD OF REVIEW

[1-3] In appeals from postconviction proceedings, we independently resolve questions of law.[7] A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.[8] Thus, 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.[9]

[4] Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[10]

ANALYSIS

In its petition for further review, the State argues that the Court of Appeals erred in the procedure it set forth for district courts to follow when considering those postconviction motions that alleged both the ineffectiveness of counsel in

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[6] *Id.*

[7] *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014).

[8] *Id.*

[9] *Id.*

[10] *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

failing to file a direct appeal and other allegations of ineffective assistance of counsel.

The Court of Appeals' procedure, as stated in *Seeger* and *Determan*, requires a district court to first "make its determination regarding the claim regarding the direct appeal, including holding an evidentiary hearing if the court determines that an evidentiary hearing is necessary, prior to addressing the defendant's other postconviction claims."[11]

[5,6] The State argues that the Court of Appeals' procedure is incorrect insofar as it risks depriving a defendant of his right to appeal should the district court deny that portion of a postconviction motion seeking a new direct appeal. The State correctly notes that within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final, appealable order as to the claims denied without a hearing.[12] As such, a defendant has just 30 days to appeal from that denial.[13] The failure to do so results in the defendant's losing the right to pursue those allegations further.[14]

The procedure as set forth by the Court of Appeals requires a defendant to wait for one final order entered after all of his or her claims are disposed of. The procedure, as currently composed, places a defendant in a tenuous position: he or she must either appeal from the denial of his or her request for a new direct appeal or hope that the district court grants postconviction relief on the yet-unresolved claims. Moreover, as the State notes, the district court's later determination of the nondirect appeal claims could be rendered meaningless where a new

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[11] *State v. Determan, supra* note 4, 22 Neb. App. at 692, 859 N.W.2d at 906.

[12] See, *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014); *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[13] Neb. Rev. Stat. § 25-1912 (Reissue 2008).

[14] See, *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

direct appeal is granted, because those claims could be raised in a new direct appeal.[15]

We agree with the Court of Appeals that multiple appeals from various parts of one postconviction motion do not serve judicial economy. And we agree with the State that such a procedure as currently set forth by the Court of Appeals could, in certain circumstances, place a defendant in a difficult position and result in needless determinations by the district court regarding the underlying merits of a postconviction motion.

Keeping in mind these considerations, we modify the Court of Appeals' procedure to be followed by those district courts that are presented with postconviction motions alleging both a direct appeal claim and other claims of ineffective assistance of counsel. In the future, the district court should first address the claim that counsel was ineffective for failing to file a direct appeal, including holding an evidentiary hearing, if required. Upon reaching its decision, the district court should enter a final order on that claim only. If the claim for a new direct appeal is denied, a defendant should be permitted to appeal that denial. Only after the resolution of that appeal, or, alternatively, the expiration of the defendant's time to appeal, should the district court proceed to consider the remaining claims.

We note that this procedure is applicable only in those situations where a defendant raises both the ineffectiveness of counsel for not filing a direct appeal along with other allegations of ineffectiveness. In situations where a defendant does not allege the ineffectiveness of counsel in not filing a direct appeal, the usual rule of finality applies, and an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.[16]

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[15] *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[16] *State v. Robinson, supra* note 12; *State v. Harris, supra* note 12; *State v. Silvers, supra* note 12.

While we adopt a slightly different procedure than the one proposed by the Court of Appeals, we agree that the proper disposition of the underlying appeal in this case is that the district court's order denying certain postconviction claims should be vacated and the cause remanded for further proceedings. And we emphasize that this will be the disposition of cases violating this procedure in the future.

[7] Finally, we note that the State argues that this procedural rule is newly adopted and thus should be applied only prospectively. This is a correct statement as far as it goes. But, "'[w]hen a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review.'"[17] And this case is still pending on direct review. Moreover, though the parameters of the procedural rule might not have been well defined prior to the Court of Appeals' decision in this case, a version of the procedure existed such that we are not persuaded that the rule was new.

We affirm the decision of the Court of Appeals.

CONCLUSION

The decision of the Court of Appeals is affirmed.

Affirmed.

Heavican, C.J., and Miller-Lerman, J., participating on briefs.

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[17] *State v. Mantich*, 287 Neb. 320, 329, 842 N.W.2d 716, 724 (2014) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)).

State of Nebraska, appellee, v. Frederick E. McSwine, also known as Frederick E. Johnson, appellant.

873 N.W.2d 405

Filed January 29, 2016. No. S-13-887.

1. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
2. **Appeal and Error.** Plain error may be found 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.
3. **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.
4. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.
5. **Trial: Prosecuting Attorneys: Appeal and Error.** If an appellate court concludes that a prosecutor's acts were misconduct, the court next considers whether the misconduct prejudiced the defendant's right to a fair trial.
6. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
7. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
8. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the

remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.

9. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.
10. **Trial: Evidence.** A fact finder can rely only on evidence actually offered and admitted at trial and is not permitted to rely on matters not in evidence.
11. **Juries: Jury Instructions.** The purpose of jury instructions is to assure decisions that are consistent with the evidence and the law, and to inform the jury clearly and succinctly of the role it is to play, the decisions it must make, and to assist and guide the jury in understanding the case and considering testimony.
12. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
13. **Trial: Appeal and Error.** A party is normally required to object to a perceived error by a trial court in order to preserve that issue for appeal.
14. **Appeal and Error.** A party is not permitted, without objection, to take the chances of a favorable result and then, if disappointed, for the first time complain.
15. **Trial: Prosecuting Attorneys.** Public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial.
16. **Prosecuting Attorneys: Convictions.** It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
17. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

Petition for further review from the Court of Appeals, Irwin, Inbody, and Pirtle, Judges, on appeal thereto from the District Court for Lancaster County, Paul D. Merritt, Jr., Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Mark E. Rappl for appellant.

Douglas J. Peterson and Jon Bruning, Attorneys General, and Kimberly A. Klein for appellee.

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

Heavican, C.J.

INTRODUCTION

Frederick E. McSwine, also known as Frederick E. Johnson, was convicted of terroristic threats, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. He was sentenced to a total of 57 to 85 years' imprisonment. On appeal, the Nebraska Court of Appeals reversed, concluding on plain error review that the State committed prosecutorial misconduct in its closing arguments.[1] We granted the State's petition for further review. We reverse the decision of the Court of Appeals and remand the cause for further proceedings.

FACTUAL BACKGROUND

McSwine was charged with terroristic threats, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. The charges arise from October 2012 allegations that McSwine abducted C.S. at knifepoint and drove her around rural Lancaster County, in an area near Waverly, Nebraska, periodically stopping to sexually assault her. McSwine and C.S. originally met because McSwine worked at a convenience store in Waverly, which store C.S. had frequented.

C.S. testified that McSwine knocked on her door the morning of October 13, 2012, and asked to use her bathroom. This was not the first time that McSwine had asked to use her bathroom; a week or two earlier, at a time when C.S. had guests, McSwine stopped to use the bathroom and left without incident. But according to C.S.' testimony, on this occasion, after purportedly using the bathroom, McSwine pulled out a pocketknife and forced C.S. out of the apartment. At the

[1] *State v. McSwine*, 22 Neb. App. 791, 860 N.W.2d 776 (2015).

time, C.S.' boyfriend was sleeping in the apartment. C.S. was wearing a pair of pajama shorts under a pair of longer pajama pants, a sports bra, and a flannel shirt. C.S. was not wearing shoes. She also left her identification, money, and cell phone in her apartment.

C.S. testified that McSwine then drove around rural Lancaster County, near Waverly. On three occasions, McSwine allegedly drove into isolated areas and forced C.S. to engage in various sexual acts. After about 5 hours, McSwine allowed C.S. to leave his car. C.S. jumped over a guardrail near where McSwine let her out of the car and ran, still barefoot, to a nearby home, where law enforcement was notified. According to C.S., though McSwine originally let her leave the car, she later saw him head toward her as she knocked on the door of the home.

In addition to C.S.' testimony, the State offered the testimony of a friend of McSwine's. This witness testified that McSwine told him that he had abducted and sexually assaulted C.S. at knifepoint. His testimony largely corroborated the narrative to which C.S. testified. The witness' testimony was given as part of a cooperation agreement with the State.

The State also offered testimony of the nurse who performed C.S.' sexual assault examination. According to the nurse's testimony, there was a laceration to C.S.' vagina. The nurse testified that lacerations such as the one C.S. suffered were caused by blunt force trauma and were consistent with sexual assault and also with sexual penetration "if it's rough sex where there's a lot of force."

McSwine testified in his own behalf. McSwine did not contest that he had sexual contact with C.S. and agreed that those acts occurred in isolated areas surrounding Waverly. But McSwine testified that those acts were consensual. McSwine testified that C.S. became upset with him when she discovered that he had lied to her about having a charger for his cell phone. According to McSwine, C.S. then accused McSwine of being selfish, of lying to her, and of using her for sex. At this

point, according to McSwine, C.S. insisted that he stop the car and let her out. McSwine testified that he did so.

McSwine's counsel argued in closing arguments that C.S. had concocted the story about McSwine's abducting and sexually assaulting her because she was angry at McSwine and because she did not want her parents or boyfriend to be upset with her because of her actions.

At trial, the State introduced certain text messages from McSwine to his wife and from McSwine to a friend. According to the State, these messages showed McSwine's feelings of guilt and remorse over his actions involving C.S. In summary, the State argued McSwine both knew that C.S. had run from his car directly to a residence and assumed that C.S. would inform law enforcement of McSwine's actions and could identify him because they had previously met.

In the messages from McSwine to his wife, McSwine indicated that he had "messed up bad" and that "[c]ops are probably going to be looking for me [and] if they are I'm going to run." McSwine also apologized to his wife and stated that he "[did not] deserve [her and wished he] didn't f*** everything up." In a later text message, McSwine asked his wife if she "would give [him] up even if [he] was dead wrong and did some foul s***." In these messages, McSwine discussed running away to Mexico or to a "reservation."

In the messages from McSwine to his friend, McSwine stated that he had gotten himself into trouble, that he "might be taking a trip," and that he did not know "what [he] was thinking." McSwine then stated that he "f*** this all up."

But McSwine testified that the text messages did not indicate grief or remorse about kidnapping and sexually assaulting C.S., but instead were an indication of his concern about an incident that happened prior to the incident involving C.S. McSwine testified that in the early morning hours of October 13, 2012, he had been selling marijuana to the friend of a friend in Eagle, Nebraska. During the exchange, McSwine got nervous that the buyer was going to rob him, so he hit the

buyer and ran into and through a nearby house. An elderly woman in the house confronted him; he apologized and ran back out.

McSwine testified that at the time of this incident, he had just finished smoking methamphetamine. McSwine explained that he assumed that because he was on parole, he would be facing significant charges for this encounter.

Other than McSwine's testimony, there was no evidence presented at trial that this trespassing incident occurred. On cross-examination, the State inquired whether McSwine knew if any reports had been filed on this incident. McSwine replied that he did not know.

During its closing argument, the State focused in part on McSwine's testimony about the motivation for the text messages. The prosecutor informed the jury that McSwine's testimony that he trespassed by walking into someone's house was "unsupported by any evidence at all. It's just him saying that that happened." In the prosecutor's rebuttal, he stated: "There is nothing that supports [McSwine's] statement or his testimony that he ran through some house . . . nothing. It's just his word." There was no objection to either of these comments.

Following closing arguments, the jury was instructed and then retired to deliberate. During those deliberations, the jurors inquired of the court as follows: "Did [the prosecutor] say that there was no evidence . . . including a police report . . . of . . . McSwine's presence in a local house . . . ?" The court responded to the jury's question by informing the jury that it had all of the evidence it was going to receive in the case and further directed the jury to one of its instructions. Neither the State nor McSwine's counsel objected to the court's handling of the question.

McSwine was ultimately found guilty. He filed a motion for new trial, alleging that the prosecutor's statements during closing arguments indicating that there was no evidence to support McSwine's testimony that he had trespassed through a house

in the early morning hours of October 13, 2012, were misleading, because there was evidence of a trespass, supported by various police reports. The police reports were originally provided to the defense by the State, but were not offered by either side or otherwise admitted as evidence at trial.

In support of his motion for new trial, McSwine offered into evidence those police reports. According to the reports, at the time of the event, the homeowner identified McSwine as the trespasser based upon a picture obtained from the security camera of a convenience store located in Eagle. Months later, however, the homeowner was not able to identify McSwine from a photographic lineup. Also offered was an affidavit from McSwine's counsel averring that his failure to object was a mistake and not trial strategy and that he failed to object because, at the time, he believed the State was arguing that there was no such evidence "'presented at trial.'"

McSwine's motion for new trial was overruled because counsel did not object to the comments. McSwine was sentenced to a total of 57 to 85 years' imprisonment. McSwine appealed to the Court of Appeals. Among other assignments of error, McSwine argued that the State committed prosecutorial misconduct in its closing arguments.

The Court of Appeals first noted that McSwine did not object to the prosecutor's statements at the time the statements were made. The Court of Appeals then reviewed the record for plain error and concluded that there was plain error in the State's closing arguments:

> Evidence offered by McSwine at the hearing on his motion for new trial revealed that the prosecutor's statements about the lack of evidence supporting McSwine's testimony were misleading. On two separate occasions, the prosecutor told the jury that there was no evidence which supported McSwine's testimony that on October 13, 2012, prior to his interaction with C.S., he had committed various criminal offenses, including trespassing through a residence. The prosecutor's comments were not

> qualified in a way so as to suggest that there was simply no evidence presented at the trial. Instead, the prosecutor unambiguously stated that the only evidence of the trespass was McSwine's testimony: "There is nothing that supports [McSwine's] statement or his testimony that he ran through some house . . . nothing. It's just his word." These comments were misleading in that they made it appear to the jury as though McSwine's explanation about why he sent the incriminating text messages lacked any credibility, when, in fact, there was evidence that McSwine had committed other criminal acts on October 13 which in no way involved C.S.
>
> Even more concerning than the effect these false statements had on the jurors is the evidence that the prosecutor knew the statements to be false or misleading when making them. The prosecutor knew that there was, in fact, evidence about the trespass, because he forwarded to defense counsel police reports about that trespass and about McSwine's being the one who committed the trespass. In addition, defense counsel stated in his affidavit that he and the prosecutor had a discussion about the trespass prior to trial. At that time, the prosecutor specifically indicated that he was not going to offer any evidence about that act at trial.
>
> Because the prosecutor's comments were misleading and were made with knowledge of their inaccuracy and untruthfulness, we conclude that the comments were improper in nature.[2]

The Court of Appeals then turned to the issue of whether the improper nature of the statements prejudiced McSwine's right to a fair trial and concluded that it did.

The Court of Appeals also found merit to McSwine's assertion that his trial counsel was ineffective for failing to timely object to the prosecutor's statements about the lack of evidence to support McSwine's explanation of the text messages.

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[2] *Id.* at 799-800, 860 N.W.2d at 784.

The Court of Appeals declined to reach McSwine's remaining assignments of error. Ultimately, the Court of Appeals reversed McSwine's convictions and remanded the cause for a new trial.[3] We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred in reversing McSwine's convictions and remanding the cause for a new trial.

STANDARD OF REVIEW

[1] An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.[4]

[2] Plain error may be found 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.[5]

ANALYSIS

The Court of Appeals reversed McSwine's convictions and remanded the cause for a new trial. The basis of the court's opinion was that the State committed prosecutorial misconduct such that despite a lack of objection by McSwine was so plainly error that "[left] uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process."[6]

We begin our analysis by noting that this case presents an odd procedural position. In the "typical" direct appeal which ultimately raises issues of plain error, the "error" is not raised

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[3] *State v. McSwine, supra* note 1.

[4] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[5] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[6] *State v. McSwine, supra* note 1, 22 Neb. App. at 798, 860 N.W.2d at 783. Accord *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

until the case reaches the appellate level. A defendant might raise that "error" in its brief on direct appeal, or this court might note it on its own motion.[7] But in this case, the perceived error was initially raised at the trial court level in a motion for new trial. The motion for new trial was denied because of the lack of an objection at trial. The district court declined McSwine's invitation to find plain error.

We ordinarily review the denial of a motion for new trial for an abuse of discretion, and we cannot conclude that the district court abused its discretion in denying the motion for new trial. Indeed, everyone agrees that no objection was made to the prosecutor's statements at trial.

But this does not end our inquiry, because the Court of Appeals concluded that the prosecutor's statements during closing arguments constituted, as a matter of plain error, prosecutorial misconduct. We therefore turn to an analysis of whether that conclusion was correct.

Relevant Propositions of Law.

[3-5] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[8] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[9] But if we conclude that a prosecutor's acts were misconduct, we next consider whether the misconduct prejudiced the defendant's right to a fair trial.[10]

[6-8] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.[11] Whether prosecutorial misconduct is prejudicial depends largely on

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[7] See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[8] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[9] *Id.*

[10] *Id.*

[11] *Id.*

the context of the trial as a whole.[12] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[13]

Were Statements Misconduct?

We turn first to the conclusion of the Court of Appeals that the prosecutor's statements were misconduct. We conclude that the statements were not misleading and did not unduly influence the jury. As such, they were not misconduct.

The statements at issue were related to McSwine's defense at trial that his text messages were not referring to C.S.' sexual assault allegations, but instead were related to a trespassing incident that McSwine was involved in earlier that same day. The State, in discussing that defense, noted there was no evidence "at all," beyond McSwine's word, of this earlier incident. As has been noted, McSwine did not object to these statements. Only after the jury returned a verdict against McSwine did he complain, via a motion for new trial, that these statements were misleading.

The Court of Appeals concluded that the prosecutor's closing statements were misleading. The court reasoned that the statements did not limit the term "evidence" to only that evidence presented at trial; rather, the statements suggested to the jury that there was no evidence "at all," when there was evidence to support McSwine's statements.[14] However, that evidence was not offered at trial.

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[12] *Id.*

[13] *Id.*

[14] *State v. McSwine, supra* note 1.

There were police reports about the incident, which had been forwarded to McSwine's counsel by the State. At that time, the State indicated that it would not offer evidence of the incident at trial. According to McSwine, this showed that the State was aware of evidence relating to the trespassing incident and that therefore, the prosecutor's statement that there was no evidence "at all" regarding the incident was misleading.

[9,10] We agree that the State had knowledge of these reports. Despite this knowledge, we cannot conclude that the jury was misled or unduly influenced by the prosecutor's closing argument, because the jury was well instructed as to what "evidence" was within the context of this trial. A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.[15] A fact finder can rely only on evidence actually offered and admitted at trial and is not permitted to rely on matters not in evidence.[16] It is undisputed that there was no evidence presented at trial which corroborated McSwine's testimony about the trespassing incident.

The jury was informed at various times and in various ways of what it could consider in reaching its determination. Just prior to closing statements, the jury was told that "[t]he attorneys, in making these arguments, will be commenting upon the testimony you have heard and the evidence that has been presented during the trial."

During the jury's formal instructions, instruction No. 1 informed the jury that it "is your duty to decide what the facts are" and that "[i]n determining what the facts are you must rely solely upon the evidence in this trial and that general knowledge and common sense that everyone has."

In instruction No. 10, the jury was further instructed: "The evidence from which you are to find the facts consists of the

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[15] See *State v. Pierce,* 231 Neb. 966, 439 N.W.2d 435 (1989).

[16] See *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

following: (1) The testimony of the witnesses; (2) the exhibits received in evidence; and (3) any facts that have been stipulated . . . .” That same instruction also specifically informed the jury that “[s]tatements, arguments and questions” were not evidence.

During its deliberations, the jury asked the court if the prosecutor had said that there was no evidence, “including a police report,” of the trespassing incident in Eagle. But in a supplemental answer to the question, the jury was informed that “[y]ou have all of the evidence you are going to receive in this case.” That answer also specifically referred the jury back to instruction No. 10, which provides in part that arguments of counsel are not evidence.

[11,12] “The purpose of jury instructions is to assure decisions that are consistent with the evidence and the law”[17] and “to inform the jury clearly and succinctly of the role it is to play, the decisions it must make, and to assist and guide the jury in understanding the case and considering testimony.”[18] Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[19]

In this case, the jury was instructed in various ways that the only evidence it was to consider was that which was presented at trial. It seems incongruous to instruct the jury that “evidence” means the evidence presented at trial and simultaneously find the prosecutor commits misconduct if he does not qualify references to “evidence” to make sure the jury understands he means only the “evidence” presented at trial. This is particularly so when McSwine did not object at trial and instead raised the issue of misconduct only after learning of the jury’s verdict. We therefore conclude that the jury was not misled or unduly influenced by the prosecutor’s failure to qualify his references to evidence as being the evidence

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[17] 89 C.J.S. *Trial* § 718 at 192 (2012).

[18] 23A C.J.S. *Criminal Law* § 1760 at 330 (2006).

[19] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

presented at trial, or his statement that there was no evidence "at all" to corroborate McSwine's testimony.

Were Statements Prejudicial?

We conclude that the prosecutor's statements were not misconduct. But even if they were, those statements were not so prejudicial as to violate McSwine's due process rights. In making that determination, a court considers (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.[20]

We turn first to the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury. We find this weighs against finding prejudice. As noted in detail above, the statements made by the prosecutor did not mislead or unduly influence the jury to any significant "degree," because the jury was well instructed as to what it could consider in its deliberations. The jury was aware it could consider only that evidence which was presented at trial and that the arguments of counsel were not evidence.

We further note that in the motion for new trial, even McSwine's counsel averred that he did not object because he "believed [that the prosecutor] argued that no evidence, other than [McSwine's] testimony, was 'presented at trial' about a trespassing in Eagle, Nebraska." Counsel explained that his failure to object was because he "misheard" the prosecutor.

The second factor is whether the conduct or remarks were extensive or isolated. As an initial matter, having reviewed the entirety of closing arguments, we observe that these mentions were brief in the context of a much longer closing argument. The remarks consisted of perhaps 30 seconds out

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[20] *State v. Dubray, supra* note 8.

of nearly 45 minutes' worth of the State's closing and rebuttal arguments.

Moreover, when the State's closing arguments are considered collectively with its cross-examination of McSwine, it seems clear that the State did not strongly contest McSwine's story regarding the trespassing incident in Eagle, but only questioned his explanation that it was that incident to which the text messages referred:

> [State:] And you run — I believe you indicated that you run [sic] into a house?
>
> [McSwine:] Yes. I ran through a house.
>
> Q Where is your car at?
>
> A If the house is here and the parking lot is here, my car is here.
>
> And we met on the side of the house, here.
>
> So, I backed out and I ran through the house and came around the block to the parking.
>
> Q How long were you in this house?
>
> A Twenty — 20 seconds, maybe 30 seconds.
>
> Q So, your testimony is that you did not enter this house for the purpose of stealing anything or anything like that, right?
>
> A Absolutely not.
>
> Q You just went into this house so that you could lose this guy that you thought was following you?
>
> A Correct.
>
> Q And you encountered people in the house?
>
> A Yes.
>
> Q And I believe that you kind of gestured like this, you put your hands up and got out of there, right?
>
> A Yes.
>
> Q So, there's no reason to believe that these people thought you were in there for the purpose of stealing anything or like — anything like that, right?
>
> A Well, I can't, you know, intelligently tell you what they were thinking or what they feel, I mean that's crazy.

> Q But you had no permission to go in the house.
>
> A No.
>
> Q Did you say anything to the people that were in the house?
>
> A I told the lady I'm just passing through. She looked scared. I felt bad.
>
> Q Did this guy [you were supposed to be selling marijuana to] that you don't know the name of, did he follow you into the house?
>
> A No. I paused, briefly, to see if he was giving chase, and he was not.
>
> Q And is it your testimony that going into this house was the only way in which to get away from this guy?
>
> A Maybe not the only way, but I felt it was a — clever, at the time.
>
> Q All right. So, you get to your car after this, right, and then — Where do you go from there?
>
> A From that car, I went to [C.S.'] house.

During the prosecution's closing argument, in the context of discussing McSwine's explanation for the text messages, it noted: "[B]y the way, [the story was] unsupported by any evidence at all." The prosecutor then continued, "[w]hen was the last time a federal agent had to go get somebody for a simple trespassing? He's talking about raping [C.S.]"

In its rebuttal closing argument, the prosecution again suggested that McSwine's explanation for those text messages just did not make sense:

> I would submit to you that the timing of this, these text messages, is extremely compelling as to what he's talking about and what he's referring to. His statements are only that. There is nothing that supports his statement or his testimony that he ran through some house in Eagle, nothing. It's just his word.

When considered collectively and not in isolation, the crux of the State's argument was not that the trespassing event did not take place; rather, the crux of the argument was that

McSwine's explanation that this event caused him to send those text messages did not make sense. As such, we conclude that the second factor weighs against a finding of prejudice.

We turn next to the third factor, whether defense counsel invited the error.

Our review of the record suggests that in his closing argument, McSwine's counsel noted that there was, in evidence, a picture of McSwine taken from security footage at a convenience store in Eagle. Defense counsel then noted: "Why does law enforcement go into [a convenience store] looking for surveillance video of someone? Why? It only makes sense [if] it's because there's been a call about a trespass, somebody entering the house, and that's why they're going there."

But there was no evidence at trial that any police call regarding the trespass was made. It appears that defense counsel invited the jury to consider evidence outside of trial. This arguably invited the State to clarify, during its rebuttal argument, that there was nothing except McSwine's word to support his trespass story. We conclude there was reason to believe that the error was invited. This factor also weighs against finding prejudice.

The fourth factor is whether the court gave any curative instruction. In this case, McSwine did not object to the statements and, as such, did not request a curative instruction or a mistrial based on these statements. But the instructions the jury received prior to deliberations did address what the jury was to consider in reaching its decision, and after the jury asked its question, these instructions were reiterated. At most, this factor is neutral.

The final factor is the strength of the evidence supporting McSwine's convictions, and in this case, such evidence is strong. C.S. testified that McSwine abducted and sexually assaulted her at knifepoint. C.S. also testified that she had known McSwine because she frequented a local convenience store where he worked and because he had once used the bathroom in her apartment. A friend of McSwine's also testified

that McSwine told him that he had abducted and sexually assaulted C.S. at knifepoint. The physical evidence, notably the laceration to C.S.' vagina, also supported the conclusion that a sexual assault had occurred.

Moreover, the circumstances surrounding the incident do not support the conclusion that the sexual contact between C.S. and McSwine was consensual. Both agree that C.S. was wearing little by way of clothing and left her apartment without shoes, a cell phone, money, or her identification. The parties also both agree that the sexual contact occurred in isolated and remote areas of Lancaster County, requiring C.S. to walk barefoot through coarse vegetation and over rocky earth.

Having considered the above factors, we conclude that even assuming the prosecutor's statements were misconduct, such statements were not prejudicial.

We also note that certainly the prosecutor's statements did not amount to plain error, and we determine that the Court of Appeals erred in finding otherwise.

[13,14] Under most circumstances, we require a party to object to a perceived error by a trial court in order to preserve that issue for appeal.[21] A party is not permitted, without objection, to take the chances of a favorable result and then, if disappointed, for the first time complain.[22] Conversely, plain error may be found on appeal when an error is 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.[23]

Plain error should be resorted to only in those rare instances where it is warranted; to conclude otherwise would swallow the general rule. In short, a party is not permitted a second

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[21] See *State v. Collins*, 281 Neb. 927, 949, 799 N.W.2d 693 (2011).

[22] *Id.*

[23] *State v. Alarcon-Chavez, supra* note 5.

bite at the apple. And plain error certainly is not a vehicle that should be routinely used to "save" an issue for appeal where a proper objection should have been, but was not, made at trial.

We do not, as the dissent suggests, conclude that a district court cannot, on a motion for new trial, consider whether a prosecutor's statement was plain error. In fact, the district court considered plain error here and ultimately found none. We simply take issue with the Court of Appeals' finding of plain error in this case for two reasons. First, there was no error to form the basis for plain error. And second, the Court of Appeals' finding that trial counsel's performance was ineffective independently supports the ultimate conclusion without relying on the plain error doctrine.

We pause to note that because the jury was both properly instructed and repeatedly instructed, we do not find misconduct or prejudice. But statements like those made in this case could impermissibly lead the jury to consider information not contained in the record. On different facts, these statements could lead to a conclusion that the prosecutor committed misconduct.

[15,16] We therefore remind the State that public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial.[24] As explained by the U.S. Supreme Court, a prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[25]

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[24] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[25] *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

"It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[26] Because the "average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed," "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."[27] Beyond the reversal of a defendant's criminal conviction, the State's failure to comply with this duty could result in discipline by this court.[28]

Was Trial Counsel Ineffective?

In addition to concluding that the prosecutor's statements during closing arguments were plain error, the Court of Appeals concluded that McSwine's trial counsel was ineffective for failing to object to those statements when they were made. We disagree.

[17] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[29] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[30]

As we have noted above, the prosecutor's statements, when considered in the context of all the trial proceedings, were not misleading and did not unduly influence the jury and, thus, were not misconduct. Counsel cannot be deficient for failing to object to statements which were not misconduct. Moreover, as the above analysis shows, McSwine was not prejudiced by

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[26] *Id.*

[27] *Id.*

[28] See Neb. Ct. R., ch. 3, art. 3.

[29] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[30] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

counsel's performance. We conclude that the Court of Appeals erred in finding otherwise.

CONCLUSION

We reverse the Court of Appeals' decision reversing McSwine's convictions. We remand the cause to the Court of Appeals for consideration of any remaining assignments of error.

Reversed and remanded for further proceedings.

Stacy, J., not participating.

Connolly, J., dissenting.

I dissent. I disagree with the majority for two reasons. First, the issue presented by McSwine's motion for a new trial was whether the prosecutor's closing argument was plain error. McSwine conceded that his attorney did not object but raised plain error in the proceedings. The trial court stated that even if it could consider plain error in a motion for a new trial, it found none. But because McSwine did not object, the majority concludes that the trial court did not abuse its discretion in overruling his motion for a new trial. In effect, the majority concludes that a trial court has no inherent duty or statutory duty under Neb. Rev. Stat. § 29-2101(1) (Reissue 2008) to consider whether plain error from prosecutorial misconduct occurred during a trial. I disagree.

Second, I disagree with the majority that the prosecutor's false statements of fact were not misconduct and that the Nebraska Court of Appeals incorrectly held the prosecutor's closing argument was plain error. I believe it is always misconduct for a prosecuting attorney to knowingly make false statements of fact in a case, whether the court admitted the evidence or not. And because the false statements were crucial to McSwine's only defense and made when McSwine could not rebut them, I agree with the Court of Appeals that the prosecutor's misconduct was plain error.

TRIAL COURTS HAVE A STATUTORY DUTY TO CONSIDER A CLAIM OF PLAIN ERROR IN A MOTION FOR A NEW TRIAL UNDER § 29-2101(1)

Section 29-2101, in relevant part, authorizes a trial court to grant a defendant a new trial for one of seven listed reasons if the asserted reason materially affected the defendant's substantial rights. Section 29-2101(1) authorizes a new trial for one of four disjunctive irregularities in the proceedings if they prevented a defendant from having a fair trial: an "[i]rregularity in [1] the proceedings of the court, [2] *of the prosecuting attorney*, *or* [3] of the witnesses for the state *or* [4] in any order of the court or abuse of discretion *by which the defendant was prevented from having a fair trial*." (Emphasis supplied.)

An irregularity in a prosecuting attorney's proceedings is listed separately from an irregularity or abuse of discretion in a court order or ruling. So on its face, § 29-2101(1) contemplates raising the prosecutor's misconduct apart from any claimed irregularity in a court order or ruling. And because any irregularity under § 29-2101(1) must be one that deprived the defendant of a fair trial, a valid claim of irregularity is one that affected a defendant's substantial rights.

As we know, plain error exists when there is error, plainly evident from the record but not complained of at trial, that 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.[1] An irregularity that deprives a defendant of a fair trial is one that, left uncorrected, necessarily results in a miscarriage of justice. The Due Process Clause guarantees a defendant a fair trial, and prosecutorial misconduct can deprive a defendant of that right.[2]

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[1] See, e.g., *State v. Kays*, 289 Neb. 260, 854 N.W.2d 783 (2014).

[2] See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

So § 29-2101(1) provides a defendant a statutory remedy to raise prosecutorial misconduct that rises to the level of a due process violation. And McSwine did not waive his right to a fair trial by his attorney's failure to object to prosecutorial misconduct.

A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim. Although it can be demonstrated by a person's conduct in some circumstances, an appellate court will generally not find a waiver of a right constitutionally guaranteed or statutorily granted unless the record shows that a defendant affirmatively waived the right.[3] But that is not the case here.

In McSwine's motion for a new trial, his attorney alleged that after an initial investigation of the trespass, a deputy sheriff interviewed the victims in their home and told them that they might have to testify. But before a rule 404(3)[4] hearing, the prosecutor informed McSwine's attorney that he would not present evidence of the trespass McSwine committed in Eagle. McSwine's attorney further alleged that during closing argument, McSwine complained to his attorney that the prosecutor lied when he said there was no evidence that McSwine had run through a house in Eagle. At the time, McSwine's attorney incorrectly believed the prosecutor had argued there was no evidence presented at trial about the trespass. But after the trial, his attorney ordered a transcript and reviewed it. His attorney then moved for a new trial. These facts do not show a voluntary waiver of McSwine's claim of prosecutorial misconduct, and certainly not of his right to a fair trial. But the majority's reasoning will allow trial courts to conclude that in considering a motion for a new trial, a defense counsel has forfeited a defendant's right to a fair trial if the defense counsel failed to object to prosecutorial misconduct.

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[3] *State v. Qualls*, 284 Neb. 929, 824 N.W.2d 362 (2012).

[4] See Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Cum. Supp. 2014).

I do not agree with that reasoning. In a previous appeal raising a trial court's denial of a motion for a new trial, we considered whether the prosecutor's alleged misconduct in closing argument was plain error without implying that the trial court had no duty to consider that argument because the defense counsel failed to object.[5] More important, we have specifically held that a trial court has the inherent power and discretion to grant a new trial because of plain error.[6] This power would often be of little use if trial courts were free to ignore a miscarriage of justice because a party failed to object. Federal courts similarly hold that under Fed. R. Crim. P. 33 ("[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires"), a trial court has broad power to correct a miscarriage of justice, including prosecutorial misconduct, subject to the plain error doctrine if the defendant did not object.[7]

So I disagree with the majority's conclusion that a trial court cannot consider plain error if the defendant failed to object at trial. That conclusion is contrary to § 29-2101 and our case law. In my opinion, the issue is whether the trial court erred in failing to determine that the prosecutor's closing argument was plain error.

PROSECUTOR'S FALSE STATEMENTS WERE MISCONDUCT

Closing Arguments and Relevant Facts

The prosecutorial misconduct claim involves two different statements that the prosecutor made in closing arguments. In

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[5] See *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[6] See *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977). See, also, *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[7] See, e.g., *U.S. v. McBride*, 862 F.2d 1316 (8th Cir. 1988); 3 Charles Alan Wright & Sarah N. Welling, Federal Practice and Procedure: Federal Rules of Criminal Procedure §§ 581, 588 (4th ed. 2011).

the State's initial argument, the prosecutor emphasized that some of McSwine's text messages to his wife or a friend were made after he had let the complaining witness out of the car. He argued that when McSwine sent messages that he was in big trouble for something that he had done, it was implausible that he was referring to "some simple trespassing where he walked through somebody's house, which is, by the way, *unsupported by any evidence at all. It's just him saying that that happened*." (Emphasis supplied.) He then referred to McSwine's statements that he might have to go to Mexico or "the reservation" because the cops would be looking for him and only federal marshals could go onto a reservation. The prosecutor argued that it was implausible that federal marshals would go after someone on a reservation for a trespass, which showed that McSwine really meant he was in trouble for raping the complaining witness.

In McSwine's closing argument, his attorney first said that the prosecutor "has said a lot of things. Some things that maybe I hadn't prepared for. I'll do my best to address those." McSwine's defense was that the complaining witness was not credible, because she had lied or omitted facts during the investigation, and that his claim they had consensual sex was credible despite his text messages. In arguing that his text messages were about his parole violations—including the trespass in Eagle—he reminded the jurors of a photograph of McSwine from Casey's convenience store in Eagle. He asked the jurors to consider why officers would have gone there looking for a surveillance video when Casey's had no connection to any of the alleged sexual crimes: "Why? It only makes sense [if] it's because there's been a call about a trespass, somebody entering the house, and that's why they're going there. And then, Lancaster County deputies see this and they say, I — we know that guy, we know him from Ollie's."

To put this argument in context, the evidence showed that the complaining witness knew McSwine from her contacts with him at Ollie's gas station in Waverly, where he had previously

worked. A deputy sheriff, who had seen McSwine at Ollie's several times, identified him in a photograph taken at Casey's in Eagle on the morning of October 13, 2012. The deputy sheriff testified that McSwine was at Casey's about 7 a.m. and about 8:15 a.m. that day.

McSwine testified that he was in Eagle on October 13, 2012, to sell marijuana to two people: someone he knew and a friend of that person whom he did not know. He said he smoked methamphetamine with the person he knew and that they then went to Casey's about 7 a.m. He said that after visiting a former employer in Eagle, he returned to Casey's before going to a used car lot, where he had arranged to meet the second buyer. McSwine said the second buyer appeared nervous, causing him to fear that he was about to be robbed. So he punched the buyer and ran into a nearby house where he had seen an elderly man leaving through the back door. Inside the house, he was confronted by an elderly woman. McSwine said that when he ran out the front door, he did not see the second buyer and left in his car.

In response to McSwine's closing argument, the prosecutor emphatically argued that his claim about his text messages referring to a trespass in Eagle was implausible:

> I would submit to you that the timing of this, these text messages, is extremely compelling as to what he's talking about and what he's referring to. His statements are only that. *There is nothing that supports his statement or his testimony that he ran through some house in Eagle, nothing.* It's just his word. And you have to apply the same factors to . . . McSwine that you do [to a witness who testified against McSwine]. He's a convicted felon. He was violating his parole all over the place.

This argument was obviously intended to persuade the jurors that McSwine was lying about the trespass, and the reason for the trespass, because there were no facts showing that a trespass occurred. But the prosecutor knew otherwise.

Prosecutor's Statements Were Misleading

Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.[8] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[9] It follows that conduct which does mislead the jury is misconduct.[10]

I believe that the majority erroneously concludes that the prosecutor's false statements were not misconduct because they were not misleading and did not influence the jury. To reach that conclusion, the majority relies on the court's general admonitions that (1) the attorneys' arguments are not evidence; (2) the jury must rely solely on the evidence presented; and (3) evidence consisted of testimony, admitted evidence, and stipulated facts. I do not agree that general admonitions to the jury that arguments are not evidence can cure a prosecutor's false statements of fact.[11]

> A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[12]

Because the "'average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed,' 'improper suggestions, insinuations and, especially, assertions of personal

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[8] *Dubray, supra* note 2.

[9] *Id.*

[10] See, *id.*; *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012). Accord, e.g., *U.S. v. Myerson*, 18 F.3d 153 (2d Cir. 1994).

[11] See *Clark v. Doe*, 119 Ohio App. 3d 296, 695 N.E.2d 276 (1997).

[12] *Barfield, supra* note 5, 272 Neb. at 512, 723 N.W.2d at 312-13, quoting *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

knowledge are apt to carry much weight against the accused when they should properly carry none.'"[13]

"[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."[14] "For this reason, it is improper for the government to present to the jury statements or inferences it knows to be false or has very strong reason to doubt."[15]

It is true that the prosecutor's argument was not misleading because it was based on *admitted* evidence. Instead, the prosecutor's false statements were misleading because they conveyed to the jury that McSwine was not credible based on the prosecutor's knowledge of the *available* evidence. A lie, by definition, is a false statement made with the intent to mislead, and a knowing false statement of fact can never be consistent with a prosecutor's duty to do justice. It is precisely because jurors believe that the prosecutor has knowledge of the relevant facts—admitted or not—that prosecutors have a duty to be truthful in their statements, especially in closing arguments.

Accordingly, a prosecutor cannot misstate the record,[16] state facts not in evidence,[17] or suggest that there are facts not in evidence that are favorable to the State.[18] "By going beyond the record, the prosecutor becomes an unsworn witness, engages in extraneous and irrelevant argument, diverts the jury from its proper function, and seriously threatens the

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[13] *Id.* at 512, 723 N.W.2d at 313, quoting *Berger, supra* note 12.

[14] *United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[15] *U.S. v. Reyes*, 577 F.3d 1069, 1077 (9th Cir. 2009).

[16] See Bennett L. Gershman, Prosecutorial Misconduct § 11:30 (2d ed. 2015) (citing cases).

[17] See Doug Norwood, Prosecutorial Misconduct in Closing Argument § 15.1 (2014) (citing cases).

[18] *Id.*, § 15.3 (citing cases). See, also, *Dubray, supra* note 2.

defendant's right to a fair trial."[19] And a prosecutor's duty to be truthful in his or her statements to the jury extends to not making false statements about the known but unadmitted facts of the case.

Both federal and state courts have held that a prosecutor's knowing false statements of fact were misconduct, even if the known contrary facts were not admitted in evidence. Some of these cases were cited in McSwine's brief. But because it appears the majority is unconcerned with other courts' reasoning, I discuss cases relevant to show that the Court of Appeals' decision was correct.

For example, the Ninth Circuit considered a case in which the government charged the defendant with falsifying corporate books by conspiring to compensate employees with stock options that were backdated but not recorded as a compensation expense.[20] The accounting violation made the publicly traded corporation appear more profitable than it was. The defendant testified that he had no intent to deceive and had relied on the finance department's statements to ensure that the books were accurate. A low-level employee in the finance department testified that she and other employees did not know about the backdating scheme. But both the defense and the government knew that higher-level employees in the department, who did not testify, had admitted their knowledge of the backdating procedures and had themselves been targets of investigations.

In closing argument, to support the defendant's position that he was not responsible for the misstatements, he argued that the finance department knew about the backdating procedures. The prosecutor responded by arguing that the employees in the finance department had no knowledge of the backdating scheme. The trial court denied the defendant's motion for a new trial because the defense counsel had told the jury that

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[19] Gershman, *supra* note 16, § 11:32 at 591 (citing cases).

[20] *Reyes, supra* note 15.

there were finance department employees who knew about the backdating procedures without seeking their immunity and calling them as witnesses.

The Ninth Circuit rejected this reasoning because the "[d]efense counsel made no knowingly false statements."[21] Conversely, the prosecutor, who had the burden to prove guilt, had "asserted as fact a proposition that he knew was contradicted by evidence not presented to the jury."[22] The court emphasized that it would not lightly tolerate a prosecutor's false statements because such arguments "harm the trial process and the integrity of our prosecutorial system."[23] And the false statements were particularly prejudicial because they struck directly at the defendant's main defense: that he had delegated the backdating responsibility, the finance department knew how it was being done, and he had relied on its statements. The court reversed the conviction and remanded the matter for a new trial. As in this case, the prosecutor knew that his statements were false even if the contrary evidence was not received as part of the record.

The First Circuit reached the same conclusion in *U.S. v. Udechukwu*.[24] There, the government accused the defendant of being a drug courier from Nigeria, and the evidence clearly established the elements of the crime. But her defense was duress, i.e., that she was forced to carry drugs by a man who had threatened her and her family. She had given the prosecutor the man's hotel telephone number and offered to participate in a controlled delivery. The government had used her information to verify the man as a drug trafficker in Aruba, and the prosecutor informed the defense attorney that government agents had been tracking him for some time. Yet at trial, the government disclosed neither the man's name nor his

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[21] *Id.* at 1077.

[22] *Id.* at 1076.

[23] *Id.* at 1078.

[24] *U.S. v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993).

existence. In closing argument, the prosecutor questioned the existence of the man and strongly suggested that the defendant's story was unbelievable. The First Circuit concluded that the prosecutor had committed two errors: (1) failing to give the defendant salient evidence and (2)

> a deliberate insinuation that the truth is to the contrary. As we [have previously] pointed out . . . "it [is] not improper to urge the jury to evaluate the plausibility of the justification defense in light of the other evidence (and the lack thereof)," but "it is plainly improper for a prosecutor to imply reliance on knowledge or evidence not available to the jury." *It is all the more improper* to imply reliance on a fact that the prosecutor knows to be untrue, or to question the existence of someone who is known by the prosecution to exist.[25]

Again, the court's conclusion that the prosecutor's false statements were misconduct did not depend on whether the government had admitted the contrary available evidence.

The Sixth Circuit's reasoning in *United States v. Toney*[26] also supports McSwine's argument that the prosecutor's false statements were misconduct. In that case, the government prosecuted the defendant for bank robbery. Three masked men robbed a bank, and no witness could positively identify the third man. But a search of the defendant's residence uncovered a nylon stocking mask and "bait money" that had been placed in the money stolen from the bank.[27] The defendant admitted to the FBI that he planned the robbery but claimed that he had backed out the day before and did not participate. He said he won the money playing poker with his replacement in the robbery and other men. The replacement robber had told investigators that he gambled with the defendant after the robbery and that the defendant won a substantial sum. But

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[25] *Id.* at 1106 (citation omitted) (emphasis supplied).

[26] *United States v. Toney*, 599 F.2d 787 (6th Cir. 1979).

[27] *Id.* at 788.

the government did not make this statement available to the defense until the last day of the trial and successfully objected to the statement as hearsay when the defendant sought to introduce it. In response to the defendant's testimony, the government also presented counterwitnesses, one of whom stated that the replacement robber had not been present during the gambling; the other stated that the defendant had lost money. In closing argument, the prosecutor attacked the defendant's credibility and suggested the defendant was unbelievable because no witness testified that the replacement robber was gambling with the defendant.

In determining that the government's violation of *Brady v. Maryland*[28] was not harmless, the Sixth Circuit focused on this closing argument:

> In the circumstances, we find this line of argument to be foul play. As he was making the argument, the prosecutor well knew that evidence did exist to corroborate [the defendant's] story in this regard and that it had come from [the replacement robber] himself. Moreover, the nature of the closing argument forecloses any possible claim that the exclusion of the [replacement robber's] statement could have been harmless error. The prosecutor told the jury that it should convict because of the absence of evidence which he knew existed. We have no choice but to assume that the jury was persuaded by the prosecutor's remarks and convicted for that reason.[29]

None of these federal courts were concerned with whether the government submitted the available contrary evidence. And state courts' decisions are consistent with these federal cases. In *Garcia v. State*,[30] the Florida Supreme Court reversed a trial court's denial of postconviction relief and vacated the

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[28] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[29] *United States v. Toney, supra* note 26, 599 F.2d at 790-91.

[30] *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993).

defendant's convictions and sentences because the State had withheld evidence relevant to the defendant's death sentence and the prosecution's closing argument was contrary to the evidence that the State had withheld. The defendant was one of four participants in a robbery in which the two storeowners were killed. After he was arrested, the defendant twice told investigators that another participant had shot the owners. In the first statement, the defendant gave a false name for the shooter, who had apparently assumed someone else's name. But in the second statement, he clarified that the name he had given was another name for the shooter and gave the shooter's real name. Additionally, a witness who turned in the alleged real shooter said that he initially gave officers the false name when they arrested him, but the State withheld the witness' statement from the defense counsel.

The Florida Supreme Court concluded that the evidence did not support the prosecutor's argument that the fictional name (Joe Perez) referred to a fictional person and that the "*available evidence*" showed the opposite was true.[31] "For the State prosecutorial team to argue on this record that Joe Perez was a nonexistent person created by [the defendant] during questioning constitutes an impropriety sufficiently egregious to taint the jury recommendation."[32] The court stated that "while the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts."[33]

Finally, in *State v. Bvocik*,[34] the prosecution charged the defendant with using a computer to facilitate meeting an

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[31] *Id.* at 1331 (emphasis supplied).

[32] *Id.* at 1332.

[33] *Id.* at 1331.

[34] *State v. Bvocik*, 324 Wis. 2d 352, 781 N.W.2d 719 (Wis. App. 2010).

underage girl for sex. The State had to prove that he only had reason to believe the correspondent, who was actually a 28-year-old woman, was under age 16. Her profile on a Web site stated that she was age 28 but that she was into "'age-play.'"[35] The government did not present the woman's true age to the jury, and she did not testify. She had elicited the defendant's interest in sex acts. Then at some point, she got nervous and told him that she was age 14. She contacted the police when he still wanted to meet with her. An officer testified that she was brought to his office at a high school where he was the police liaison. The defendant claimed that he did not really believe she was underage because of her graphic descriptions of her sexual experiences. In closing argument, the prosecutor suggested that the woman's listed birth date (February 14, 1977) was untrue and obviously suspicious because it was Valentine's Day—despite knowing that her birth date was accurate.

The appellate court reversed. It stated that under Wisconsin law, when a prosecutor asks a jury to draw an inference that the prosecutor knows or should know is not true, it is improper argument that may require reversal. The court explained that this type of argument could be highly prejudicial because the defense has no opportunity to present rebuttal evidence. Additionally, during deliberations, the jury submitted a question to the court. It wanted to know the correct age of the "girl" in question. The court concluded that this question showed the prosecutor's argument had its intended effect. The transcript of the Web site conversation and the officer's testimony that he brought her to a high school increased the plausibility of the prosecutor's suggestion that the woman was actually age 14. If the woman's true age had been part of the record, then the suggestion would likely not have required a reversal. But the prosecutor's suggestion diverted the jury

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[35] *Id.* at 354, 781 N.W.2d at 721.

from the real issue, which was only whether the defendant had reason to believe the woman was underage.

These cases show that courts should not tolerate prosecutors' making false arguments to a jury that are contrary to the known facts of the case—whether presented or not. That conclusion should be obvious and is consistent with our holdings on fraudulent misrepresentations in civil cases, which include half-truths intended to deceive:

> "When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent. 'Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.' '"To reveal some information on a subject triggers the duty to reveal all known material facts."' Consistent with imposing liability for half-truths, the Restatement (Second) of Torts § 527 provides that an ambiguous statement is fraudulent if made with the intent that it be understood in its false sense or with reckless disregard as to how it will be understood."[36]

The same reasoning should certainly apply when a defendant's personal liberty is at stake. Yet the majority concludes that a prosecutor's false statements are not misconduct if the court admonishes the jurors to consider only the evidence and that arguments are not evidence. I do not think a prosecutor's duty to be truthful should hinge upon whether the jurors would have understood to ignore the prosecutor's false statements because of the court's admonition to consider only admitted "evidence." A heated argument is qualitatively distinct from false statements of fact. The prosecutor obviously intended

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[36] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 150, 854 N.W.2d 298, 312 (2014).

to undermine McSwine's defense by asking the jurors to rely on his knowledge of the relevant facts. And the majority's reasoning will encourage, rather than discourage, prosecutorial misconduct.

Finally, I reject the majority's conclusion that McSwine's attorney invited the prosecutor's false statements. It is true that McSwine's attorney asked the jurors to infer that police officers had gone to Casey's and obtained his photograph because someone reported a trespass. He appears to have been responding to the prosecutor's unexpected argument that McSwine's trespass claim was unsupported by the evidence. But McSwine's attorney did not refer to evidence outside of the record or misstate the available evidence. Instead, he asked the jurors to draw a reasonable inference from the admitted evidence.

Even if McSwine's closing argument suggested there must be evidence outside the record, that suggestion only permitted the prosecutor to respond in kind, i.e., to go outside the record *truthfully*—not to falsely represent the known available evidence outside the record. Because the prosecutor knew there were facts to support McSwine's claim that he had committed crimes unrelated to the charged offenses, he could only argue that the defense had not presented such evidence. He could not argue that no evidence existed to support McSwine's defense when he knew otherwise.

Of course, having concluded that the prosecutor's false statements were not misconduct, the majority has no reason to consider whether they were prejudicial. But because McSwine's guilt was clearly tied to whether the jury believed the complaining witness had consented to the sexual acts underlying these charges, I believe McSwine was prejudiced by the prosecutor's false statements. The primary issue in this case was the witnesses' credibility. And the prosecutor's statements obviously raised the jurors' concerns over credibility or they would not have asked whether the prosecutor had said "there was no evidence (including a police report) of . . .

McSwine's presence in a local house in Eagle, NE?" Finally, the prosecutor's false statements were made when McSwine could no longer rebut them.

In sum, I do not agree that a court's general admonitions can cure a prosecutor's misrepresentations that directly undermine a defendant's primary defense. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones."[37] False statements of fact are foul blows. So I think the Court of Appeals got it right. I would affirm the Court of Appeals' decision.

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[37] *Berger, supra* note 12, 295 U.S. at 88.

State of Nebraska, appellee, v. Fredrick A. Collins, Jr., appellant.

873 N.W.2d 657

Filed January 29, 2016. No. S-15-109.

1. **Sentences: Words and Phrases: Appeal and Error.** An appellate court reviews criminal sentences for abuse of discretion, which 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.
2. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
3. **Constitutional Law: Criminal Law: Attorney and Client.** The Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, give one accused of a crime the right to the assistance of counsel.
4. **Courts: Attorney and Client: Appeal and Error.** In first appeals as of right, though not discretionary appeals, states must appoint counsel to represent indigent defendants.
5. **Postconviction: Jurisdiction: Effectiveness of Counsel: Appeal and Error.** The power to grant a new direct appeal is implicit in Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2014), and the district court has jurisdiction to exercise such power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
6. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, an appellate court must determine whether the 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.

7. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
8. **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. The determining factor is whether the record is sufficient to adequately review the question.
9. **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.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Mary Mullin Dvorak for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Heavican, C.J.

I. INTRODUCTION

Fredrick A. Collins, Jr., was convicted of first degree sexual assault of a person at least 12 but less than 16 years of age, pursuant to Neb. Rev. Stat. § 28-319(1)(c) (Reissue 2008). His direct appeal was dismissed due to the untimely payment of his docket fee. Collins then filed a motion for postconviction relief, alleging that his trial counsel was ineffective for failing to timely file a direct appeal, and also alleging that trial counsel was ineffective in other ways. The district court denied most of his motion without a hearing, but, following an evidentiary hearing, awarded Collins a new direct appeal. This is that appeal.

II. FACTUAL BACKGROUND

Collins was originally charged with first degree sexual assault of a child and third degree sexual assault of a child. Pursuant to a plea agreement, Collins pled no contest to first degree sexual assault, pursuant to § 28-319(1)(c). On June 26, 2013, he was sentenced to 10 to 15 years' imprisonment, with credit for 396 days' time served. The child in question was Collins' 12-year-old stepdaughter. The record shows that various incidents of sexual abuse—including walking around naked, masturbating in front of the victim, inappropriately touching the victim, and, eventually, digitally penetrating the victim—took place for over a year.

Collins filed a notice of appeal with the Nebraska Court of Appeals, but it was dismissed due to the lack of payment of a docket fee or the granting of in forma pauperis status.

On June 20, 2014, Collins filed a motion seeking postconviction relief. In that motion, Collins alleged that his trial counsel was ineffective (1) for failing to file a direct appeal and (2) for various actions made or not made at trial. On September 16, the district court granted Collins' request for an evidentiary hearing on his allegation regarding his direct appeal, and denied a hearing with respect to the remainder of Collins' allegations. In so denying, the district court concluded that either Collins' allegations were insufficiently pled because he did not allege how he was prejudiced or the allegations were not supported by the record.

Following an evidentiary hearing, on January 7, 2015, the district court granted Collins a new direct appeal. That appeal was filed on February 3. In the appeal, Collins assigns that his sentence was excessive and that his trial counsel was ineffective in various ways, all of which were raised in Collins' original postconviction motion. At no point did Collins appeal from the district court's September 16, 2014, denial of his allegations of ineffective assistance of counsel.

III. ASSIGNMENTS OF ERROR

Collins first assigns that the sentence imposed by the district court was excessive. Collins also assigns that he was denied effective assistance of counsel when his trial counsel (1) failed to inform Collins of the potential penalty for a Class II felony, (2) failed to attack the validity of the information for lack of jurisdiction, (3) failed to make a motion for DNA testing or investigate why a sexual assault evidence collection kit was not completed, (4) failed to file a motion to discharge or dismiss, (5) failed to move to sever the offense, (6) failed to file a motion seeking to exclude testimony from the victim and two witnesses, (7) failed to conduct depositions of a police detective and a child advocacy center employee, (8) failed to show Collins transcripts of any depositions, (9) failed to object to or correct the factual basis provided at Collins' plea hearing, (10) coerced Collins into accepting a plea deal, and (11) failed to attend a presentence investigation interview with Collins or review presentence investigation errors with Collins.

IV. STANDARD OF REVIEW

[1] An appellate court reviews criminal sentences for abuse of discretion, which 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.[1]

[2] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[2]

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[1] *State v. Johnson*, 290 Neb. 369, 859 N.W.2d 877 (2015).

[2] *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

V. ANALYSIS

1. State's Jurisdictional Argument

Before addressing the issues presented by Collins on appeal, we must first address the State's contention that we lack jurisdiction to determine those assignments of error which were raised before the district court as ineffective assistance of counsel claims in Collins' earlier postconviction action. As noted above, Collins raised an allegation regarding his counsel's failure to file a direct appeal, as well as other allegations regarding his trial counsel's performance. The district court considered all claims on their merits. Ultimately, the court granted the request for an evidentiary hearing on the appeal issue and ordered a new appeal, but denied the remainder of Collins' claims.

Collins did not appeal from the denial. For this reason, the State argues that this court lacks jurisdiction to decide any issues raised both in the postconviction action and in the direct appeal. Collins, though, argues that the Court of Appeals' decisions in *State v. Seeger*,[3] and *State v. Determan*[4] support the conclusion that the district court ought not to have decided those issues.

As an initial matter, we do not believe that the issue raised by the State affects this court's jurisdiction to decide this appeal. Rather, we read the State as arguing that Collins is procedurally barred from asserting those issues on direct appeal because he did not appeal from the district court's denial of the claims.

Under ordinary circumstances, the State would be correct. Normally, Collins' failure to appeal from the order of the district court denying his other postconviction claims would be fatal to those claims. Any attempt by Collins to again allege

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[3] *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012).

[4] *State v. Determan*, 22 Neb. App. 683, 859 N.W.2d 899 (2015).

error in those particulars would be a collateral attack on the order denying relief and impermissible.[5]

Nor does our recent decision in *State v. Determan*[6] provide Collins any relief. In *Determan*, we modified a procedure that the Court of Appeals had adopted for district courts to follow when deciding postconviction claims that raised both an allegation that trial counsel was ineffective for failing to file a direct appeal and other ineffective assistance of counsel claims. We concluded that the failure to follow this procedure would result in the vacating and remanding of the district court's order denying postconviction relief. But an appellant must still appeal from that order to obtain relief, and Collins did not do so.

[3] We will not apply a procedural bar here. This case presents an unusual factual circumstance which raises constitutional concerns. The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel.[7] Similarly, Neb. Const. art. I, § 11, confers on criminal defendants the right to appear and defend in person or by counsel. The district court's order recited that at all pertinent times, Collins was represented by court-appointed counsel. Thus, the record is clear that Collins was considered to be indigent.

[4] On a direct appeal, then, Collins was entitled to the effective assistance of counsel. In *Douglas v. California*,[8] the U.S. Supreme Court held that in first appeals as of right, states must appoint counsel to represent indigent defendants. The U.S. Supreme Court has since made clear that its holding in

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[5] *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[6] *State v. Determan, ante* p. 557, 873 N.W.2d 390 (2016).

[7] See *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

[8] *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

Douglas did not extend to discretionary appeals to a state's highest court.[9]

[5] This court has stated that the power to grant a new direct appeal is implicit in Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2014) and that the district court has jurisdiction to exercise such power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.[10] And in this case, the district court granted Collins a new direct appeal after concluding that this right was earlier infringed upon as a result of the ineffectiveness of counsel.

But to apply a procedural bar here to limit this court's review of assignments of error which would normally have been reviewed during an appeal immediately after final judgment would deprive Collins of a counseled appeal on those allegations. Because our postconviction statute allows a district court to order a new direct appeal where a defendant directs trial counsel to appeal,[11] the direct appeal must have the same incidents that the ineffectively lost appeal would have had. And the right to the assistance of counsel is clearly one of those incidents.

We therefore turn to the merits of Collins' direct appeal.

2. Excessive Sentence

[6] On appeal, Collins first assigns that his sentence was excessive. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, an appellate court must determine whether the 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.[12] An abuse of discretion occurs when a

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[9] *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

[10] *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

[11] See *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

[12] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

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.[13]

[7] In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[14]

Collins was convicted of a Class II felony, which is punishable by 1 to 50 years' imprisonment.[15] Collins was sentenced to 10 to 15 years' imprisonment. As such, his sentence was within the statutory limits.

The sentence was also not otherwise excessive. In sentencing Collins, the district court noted that it was aware of Collins' lack of a criminal history, but explained that a prison sentence was warranted due to the period of time over which the abuse took place, as well as the young age of the victim. In short, a review of the sentencing hearing shows that the district court appropriately considered the relevant sentencing factors.

Collins' sentence was not excessive. His first assignment of error is without merit.

3. Ineffective Assistance of Counsel

[8,9] On appeal, Collins makes various claims regarding the ineffectiveness of his trial counsel. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[16] The determining factor is whether the record is sufficient to adequately

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[13] See *State v. Johnson, supra* note 1.

[14] *State v. Dixon, supra* note 12.

[15] Neb. Rev. Stat. § 28-105 (Reissue 2008 & Cum. Supp. 2014).

[16] See *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

review the question.[17] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[18]

(a) Failure to Inform Collins of Penalty for Class II Felony

Collins argues that his counsel was ineffective in failing to properly inform him of the potential penalty for a Class II felony. We conclude that we have a sufficient record to review this claim.

In order to show that his counsel was ineffective, Collins must show that his counsel's performance was deficient and that he was prejudiced by counsel's deficiency. But in this case, a review of the bill of exceptions from Collins' plea hearing reveals that the district court accurately informed Collins of the penalty connected with a Class II felony. For this reason, Collins cannot show that he was prejudiced by any deficient conduct on the part of trial counsel. This assignment of error is without merit.

(b) Remaining Allegations

Collins makes various other allegations of ineffective assistance of counsel. We have reviewed the allegations and conclude that the record on direct appeal is not sufficient to address them. Accordingly, we decline to reach the remainder of Collins' assignments of error.

VI. CONCLUSION

The decision of the district court is affirmed.

Affirmed.

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[17] *Id.*

[18] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

State of Nebraska, appellee, v. Matthew G. Hinrichsen, appellant.

877 N.W.2d 211

Filed February 5, 2016. No. S-14-083.

1. **Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Statutes.** The meaning and interpretation of a statute present a question of law.
3. **Jury Instructions.** Whether jury instructions are correct is a question of law.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned 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. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.
7. ____: ____: ____. A trial court is required to give an instruction on manslaughter where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.
8. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
9. **Criminal Law: Due Process: Proof.** Due process requires a prosecutor to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

10. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
11. **Jury Instructions.** A jury instruction based on the language of a statute is sufficient.
12. **Homicide: Jury Instructions: Due Process: Proof.** In a first degree murder case, an explicit jury instruction advising that the State must prove lack of sudden quarrel provocation beyond a reasonable doubt is not required in order to comport with the dictates of due process.
13. **Homicide: Juries.** In finding beyond a reasonable doubt that a defendant acted with deliberate and premeditated malice, a jury is necessarily simultaneously finding beyond a reasonable doubt that the defendant did not act upon sudden quarrel provocation.
14. **Jury Instructions: Appeal and Error.** The failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
15. ____: ____. When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.
16. **Pretrial Procedure: Jury Instructions: Evidence: Appeal and Error.** A pretrial ruling on the propriety of a jury instruction is akin to a motion in limine on an evidentiary ruling. An appellant must make a timely request for the jury instruction at trial in order to preserve the issue for appeal.
17. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of 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.
18. **Trial: Juries: Appeal and Error.** Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
19. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Antelope County: James G. Kube, Judge. Affirmed.

James R. Mowbray and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

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

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

Heavican, C.J.

A jury convicted Matthew G. Hinrichsen of two counts of first degree murder for the killing of Victoria D. Lee and her husband, Gabino A. Vargas; one count of using a firearm to commit a felony; and one count of possessing a firearm during the commission of a felony. Hinrichsen denied that he intended to kill the victims.

On appeal, Hinrichsen primarily argues that because sudden quarrel provocation negates malice, the step instruction for first degree murder violated his right to due process. We conclude that when the jury found premeditated and deliberate malice beyond a reasonable doubt, it simultaneously found no sudden quarrel provocation beyond a reasonable doubt. Hinrichsen received due process, and his other arguments lack merit. We affirm his convictions and sentences.

I. BACKGROUND

1. Historical Facts

Lee and Hinrichsen began dating in the fall of 2009. In approximately April 2011, they moved into the basement of Hinrichsen's parents' home in Ewing, Nebraska. Lee lived there until at least July 2012. Afterward, she continued to have an "on-again-off-again" relationship with Hinrichsen and still had belongings at the Ewing home. After July, Lee would sometimes stay in Ewing or with her parents in Iowa. At other times, she would spend time in Omaha, Nebraska, where she was taking college courses.

Around the end of 2011, Vargas moved to Ewing to work on a dairy farm located about 2 miles from the Hinrichsens' home. Beginning in midsummer 2012, Lee began to come to the farm to help Vargas. In about September, Vargas began

living in a mobile home on the dairy farm. According to Vargas' roommate, Lee would sometimes stay with Vargas in the mobile home.

Lee and Vargas married on October 22, 2012. But Lee continued to live at the Hinrichsen house part time until October 29, when she moved her things out. On that date, Lee informed Hinrichsen for the first time of her marriage to Vargas. Hinrichsen testified that he and Lee were still romantically involved up until October 29. After October 29, Lee stayed either with Vargas in Ewing or with her parents in Iowa.

During November 2012, Hinrichsen made numerous telephone calls to Lee which were preserved on a digital recorder found in Lee's belongings. In the recordings, Hinrichsen threatened to harm Lee and Vargas and expressed his hatred of Vargas. On November 30, Hinrichsen purchased an AK-47 assault rifle and ammunition.

The homicides occurred during the early morning hours of December 8, 2012. Hinrichsen testified that on December 7, he had "a couple of" mixed drinks at his parents' house late in the afternoon. He then went to a bar in Orchard, Nebraska, where he continued to drink alcohol. Around 6:30 p.m., he made two telephone calls to Lee. He then called his cell phone provider to suspend service to Lee's cell phone, which was still part of his cell phone service plan. The Orchard bartender testified that Hinrichsen spent hundreds of dollars on Keno and told her, "'I can't take it to the grave.'"

At approximately 9 or 10 p.m., Hinrichsen left Orchard and went to a bar in Ewing, where he continued to drink alcohol. He also bought wine or champagne and shared it with other bar patrons, something he did not normally do. Hinrichsen left that bar a little before midnight. At 12:17 a.m., Lee called a 911 emergency dispatcher and reported that someone with a gun was at her house. A recording of the 911 call was admitted into evidence. In the background of the recording, Hinrichsen can be heard yelling, "Die, you fucking bitch. Fucking die. Rot in hell. Fucking die. Fucking burn in hell."

Hinrichsen's profanities continue for about 1½ minutes, and then the recording goes silent. Because Lee's cell phone had been deactivated, the dispatcher could not pinpoint her exact location and instead dispatched officers to the general area. Shortly thereafter, a 911 call reported a fire in the mobile home where Lee and Vargas lived. At 12:33 a.m., Hinrichsen texted a friend: "I'm fucking done with life I love you man good luck."

Hinrichsen arrived at his parents' property around 1 a.m. When his father encountered him, Hinrichsen was naked and told his father that he had killed Lee and Vargas and burned the evidence, including their bodies and his clothes. Hinrichsen also left a suicide note for his parents. When law enforcement officers arrived a short time later and encountered Hinrichsen on the property, he was wearing only a rain poncho and was carrying an automatic pistol. Hinrichsen yelled things at the officers, including "'[k]ill me. . . . I don't deserve to live.'" Hinrichsen's father got the gun away from Hinrichsen before the officers arrested him. Officers then put out a fire in a burn barrel and found the clothes Hinrichsen had been wearing that evening. Officers also found an AK-47 rifle and ammunition hidden on the property, as well as a bloody coat. In the vehicle that Hinrichsen had been driving, officers found blood on the console and an empty magazine clip.

At trial, Hinrichsen admitted that he had killed Lee and Vargas. He testified, however, that he did not intend to kill them. According to Hinrichsen, he did not even know that Lee was at Vargas' house on December 7, 2012, because she had texted him earlier that day and said that she was going to Iowa. Hinrichsen explained that at approximately 5 p.m. on December 7, he saw that Lee had changed her surname on a social media site and became upset. At that point, he decided to go to the bars. Around midnight, he got sick and decided to go home. On the way home, he decided to go to Vargas' home to scare him into moving away. Hinrichsen had an AK-47 rifle and a .22-caliber pistol with him because he had planned to go

hunting. When he arrived at Vargas' home, he saw Lee's car in the driveway and "lost control" because Lee had said she was going to Iowa. Because he was angry, he rammed Vargas' vehicle twice. Hinrichsen testified that he then grabbed the AK-47 rifle and took it with him to the door of the residence to intimidate Vargas.

Hinrichsen yelled and beat on the door, but it was locked. He shot out the window and unlocked the door. He then beat on Vargas' bedroom door, but it was either locked or being held shut. Hinrichsen fired two shots into the door and, after doing so, was able to push his way into the room. He found Vargas lying in a pool of blood on the floor by the door and not moving. An autopsy showed Vargas died as a result of gunshot wounds to the chest. Hinrichsen then saw Lee on the telephone asking for help as she knelt naked by the bed. According to Hinrichsen, her nakedness made him angrier. He went toward her, and Lee fell, either when she tried to run around the bed or when he shoved her. When Lee fell, Hinrichsen began hitting her with the barrel and the butt of the AK-47 rifle. An autopsy showed Lee died as a result of blunt force trauma to her head.

At some point, Hinrichsen set Vargas' residence on fire. Hinrichsen claimed he did not do so immediately after the attack, but instead first drove to his parents' home where he decided to shoot himself, but then realized the AK-47 was not functional. At that point, the killings seemed "surreal" to him, so he drove back to Vargas' home to see if Lee and Vargas were really dead. According to Hinrichsen, the scene was "pretty gruesome" and he "didn't want to leave that behind," so he set the residence on fire. When he returned to his parents' house, he left a suicide note for his parents and tried to burn his bloody clothes because he "didn't want anybody to find me like that." He hid the AK-47 rifle in the attic, put on a rain poncho, and grabbed the .22-caliber pistol with the thought of killing himself with the pistol. Hinrichsen changed his mind after realizing the bullet would probably only be big

enough to hurt him, but not kill him. When he saw a sheriff's vehicle, he began yelling profanities and asking officers to shoot him.

2. Procedural History

Before trial, Hinrichsen submitted a written motion asking the court to instruct the jury on the defense of intoxication. The court overruled the motion after finding that Neb. Rev. Stat. § 29-122 (Cum. Supp. 2014) eliminated the intoxication defense in Nebraska. The court rejected Hinrichsen's argument that § 29-122 was unconstitutional because it relieved the State of its burden to prove his mental state beyond a reasonable doubt. At the jury instruction conference at the close of trial, Hinrichsen neither requested an intoxication instruction nor submitted a proposed intoxication instruction to the court.

Hinrichsen did, however, object to the court's proposed jury instructions for each count of first degree murder and to the court's definition of a "sudden quarrel." Hinrichsen also offered alternative instructions on both of these issues. The court overruled his objections and rejected his alternative instructions. Hinrichsen did not object to the court's proposed instruction on premeditation at the jury instruction conference, but did offer an alternative premeditation instruction.

The jury returned a guilty verdict on all four counts. The court sentenced Hinrichsen to terms of life-to-life imprisonment for each murder conviction. It sentenced him to consecutive terms of 25 to 30 years' imprisonment for possession of a firearm during the commission of a felony and 40 to 50 years' imprisonment for use of a firearm to commit a felony. This is Hinrichsen's direct appeal from his convictions and sentences.

II. ASSIGNMENTS OF ERROR

Hinrichsen assigns the trial court erred in (1) not instructing the jury that the State, as an element of first degree murder, had to prove the killings were not the result of a sudden

quarrel brought about by a sufficient provocation; (2) improperly instructing the jury on the definition of "sudden quarrel"; (3) improperly instructing the jury on the definition of "premeditation"; (4) not giving Hinrichsen's requested instruction on intoxication; and (5) admitting photographic evidence of the victims while they were alive.

III. STANDARD OF REVIEW

[1,2] An appellate court independently reviews questions of law decided by a lower court.[1] The meaning and interpretation of a statute present a question of law.[2]

[3-5] Whether jury instructions are correct is a question of law.[3] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[4] 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.[5]

IV. ANALYSIS

[6-8] The trial court instructed the jury on first degree murder, second degree murder, and manslaughter. Where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.[6] A

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[1] See *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

[2] See *State v. McIntyre*, 290 Neb. 1021, 863 N.W.2d 471 (2015).

[3] *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[4] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015); *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

[5] *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015); *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[6] See, Neb. Rev. Stat. § 29-2027 (Supp. 2015); *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

trial court is required to give an instruction on manslaughter where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.[7] A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.[8] Here, no one challenges the fact that the trial court found the evidence sufficient to warrant an instruction on manslaughter, and we therefore do not address that issue.

1. First Degree Murder Instructions

Hinrichsen assigns that the trial court's instructions on the first degree murder charges were erroneous in several respects. We address each argument in turn.

(a) Sudden Quarrel

Hinrichsen's primary argument is that the court failed to instruct the jury that the State had to prove beyond a reasonable doubt that the killings were not the result of a sudden quarrel brought about by a sufficient provocation in order to convict him of first degree murder. He contends that by failing to give an express instruction to this effect, the court violated his right to due process of law. Hinrichsen's argument is premised on the proposition that the malice element of murder is negated by evidence that the killing was provoked by a sudden quarrel provocation,[9] so that the jury must be able to consider that the existence of sudden quarrel provocation negates malice. He contends the instructions given did not allow the jury to consider this crucial issue. Alternatively, Hinrichsen contends the court should have defined the term "sudden quarrel" to clarify that provocation negates the element of malice in a first degree murder charge.

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[7] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[8] *Id.*

[9] See, *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013); *Smith, supra* note 7; *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

(i) Court's Instructions and Hinrichsen's Proposed Instructions

The trial court instructed the jury using an acquittal first step instruction. The jury was instructed that the elements of first degree murder were that Hinrichsen killed the victims (1) purposely and (2) with deliberate and premeditated malice. The jury was instructed that if it found the State had proved each of these elements beyond a reasonable doubt, it was the jury's duty to convict Hinrichsen of first degree murder. If, however, the jury found the State had failed to prove any of the elements beyond a reasonable doubt, the jury was to then consider whether the State had proved second degree murder. The jury was instructed that the elements of second degree murder were that the killings occurred (1) intentionally (2) without premeditation and (3) not upon a sudden quarrel. If the jury found the State had proved each of these elements beyond a reasonable doubt, it was instructed that its duty was to convict Hinrichsen of second degree murder. If, however, the jury found the State had failed to prove any of the elements of second degree murder beyond a reasonable doubt, it was to then consider whether the State had proved manslaughter. The jury was instructed that the elements of manslaughter were that the killing occurred either (1) intentionally upon a sudden quarrel or (2) unintentionally during the commission of an unlawful act.

The court instructed the jury that "[d]eliberate" meant "not suddenly or rashly. Deliberation requires that one consider the probable consequences of his actions before acting." The court instructed that "[p]remeditation" meant "to form a desire to do something before it is done. The time needed for premeditation may be so short as to be instantaneous, provided that the intent to act is formed before the act and not simultaneously with the act." The court instructed that "[m]alice" meant "intentionally doing a wrongful act without just cause or excuse." And the court instructed that "[s]udden quarrel" meant

> that level of provocation sufficient to cause a reasonable person to lose normal self-control; passion suddenly aroused which clouds reason and prevents rational action. It does not necessarily require an exchange of angry words or an altercation which occurs at the same time as the killing. It does not require a physical struggle or other combative bodily contact between the defendant and the victim. It is a degree of provocation which excites the passion of a reasonable person enough to obscure one's power of reasoning, resulting in an action which occurs rashly, without due deliberation and reflection. It does not, however, include specific individual qualities of the defendant which might render him particularly excitable, such as voluntary intoxication.

Hinrichsen's proposed instructions were substantially similar to those given by the court but would have included, as an additional element of first degree murder, that the State needed to prove that he did not kill the victims upon a sudden quarrel. Alternatively, Hinrichsen proposed to refine the definition of the term "sudden quarrel" given to the jury by adding a statement that "[p]rovocation negates the element of malice found in the crime of first degree murder."

(ii) State v. Smith

The jury instructions given properly enumerated each statutory element of each degree of Nebraska homicide.[10] Nevertheless, Hinrichsen argues they violated his right to due process of law. To support this argument, he relies extensively on *State v. Smith*,[11] decided by this court in 2011.

In *Smith*, we addressed the validity of the Nebraska jury instructions for second degree murder and voluntary manslaughter. The instruction given in *Smith* defined second degree murder as an intentional killing done without premeditation

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[10] See Neb. Rev. Stat. §§ 28-303 to 28-305 (Reissue 2008 & Supp. 2015).

[11] *Smith, supra* note 7.

and stated that if the jury found the State proved each of those elements beyond a reasonable doubt, it had a duty to find the defendant guilty of second degree murder. The instruction told the jury it could consider whether the defendant had committed manslaughter only if it found that the State had failed to prove one or more elements of the crime of second degree murder beyond a reasonable doubt. The defendant argued the instruction deprived him of due process because it did not allow the jury to consider whether his intent to kill was the result of a sudden quarrel.

We agreed that the instruction was error. We concluded that in Nebraska, both second degree murder and voluntary manslaughter were intentional crimes. The distinguishing factor between them "is that [for voluntary manslaughter,] the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by our jurisprudence."[12] We reasoned that under the common law, "'homicide, even if intentional, was said to be without malice and hence manslaughter if committed in the heat of passion upon adequate provocation.'"[13] We held that under Nebraska law, "an intentional killing committed without malice upon a 'sudden quarrel,' as that term is defined by our jurisprudence, constitutes the offense of manslaughter."[14]

Based on this clarification of the elements of the crimes of second degree murder and voluntary manslaughter, we concluded that the second degree murder to manslaughter step instruction given in *Smith* was incorrect. Specifically, the instruction was wrong because it "required the jury to convict [the defendant] on second degree murder if it found that [he had] killed [the victim] intentionally, but it did not permit the jury to consider the alternative possibility that the

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[12] *Id.* at 732, 806 N.W.2d at 393.

[13] *Id.* at 732-33, 806 N.W.2d at 393, quoting A.L.I., Model Penal Code and Commentaries § 210.3, comment 1 (1980).

[14] *Id.* at 734, 806 N.W.2d at 394.

killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter."[15] We held that a trial court must give a manslaughter instruction under § 29-2027 (Reissue 2008) when there is any evidence upon which a jury could believe that the defendant committed manslaughter and not murder. But we did not specify the contents of such an instruction. Instead, we held that the trial court's failure to give such an instruction did not prejudice the defendant because there was no evidence to support the giving of the instruction.

Shortly after *Smith* was decided, the Nebraska Court of Appeals misinterpreted our holding in an unrelated case with the same caption:

> The Nebraska Supreme Court found that the jury . . . should have been given a step instruction requiring the jury to convict on second degree murder if it found that [the defendant] killed [the victim] intentionally, without premeditation, but that *if the jury acquitted him of that charge*, it could consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.[16]

On further review, we clarified that the Court of Appeals had misinterpreted *Smith* "to require a step instruction under which the jury would consider the 'alternative possibility' of voluntary manslaughter only if it acquitted the defendant of second degree murder."[17] We reasoned:

> Necessarily implicit in the Court of Appeals' reference to a "step" instruction is that if a jury concludes a defendant killed another intentionally and without premeditation, thereby determining his guilt of second degree murder, it could never consider voluntary manslaughter. That is

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[15] *Id.*

[16] *State v. Smith*, 19 Neb. App. 708, 722, 811 N.W.2d 720, 734 (2012) (emphasis supplied).

[17] *Smith, supra* note 6, 284 Neb. at 656, 822 N.W.2d at 416.

> incorrect because under our holding in *Smith*, both second degree murder and voluntary manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation. If the provocation exists, it lessens the degree of the homicide from murder to manslaughter.[18]

We held that the jury must be instructed as follows:

> [W]here there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation.[19]

In *State v. Trice*,[20] we addressed this issue again. There, the trial court had given the jury an acquittal-first step instruction for second degree murder and manslaughter before we issued our 2011 decision in *Smith*. Because the defendant's appeal was pending when we issued *Smith*, we held that the holding of that case applied retroactively to the defendant in *Trice* and that the instruction given was error. We also concluded that the evidence of a sudden quarrel provocation, while weak, was sufficient to support a reasonable inference that the defendant had killed under an adequate provocation. We rejected the State's argument that the jury had implicitly rejected a voluntary manslaughter conviction. We reasoned that the instruction was insufficient to put the sudden quarrel provocation before the jury: "The problem, of course, is that under the instructions given (and presumably followed), the jury never actually considered whether [the defendant] acted upon a sudden quarrel."[21]

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[18] *Id.* at 656, 822 N.W.2d at 417.

[19] *Id.*

[20] *Trice, supra* note 9.

[21] *Id.* at 192, 835 N.W.2d at 674.

(iii) Due Process and Sudden Quarrel

Hinrichsen argues that because a jury in a second degree murder case must be specifically instructed that the State has to prove lack of sudden quarrel provocation in order to prove the murder, a jury in a first degree murder case must also be specifically instructed that the State has to prove lack of sudden quarrel provocation in order to prove the murder. He contends the lack of such an explicit instruction violates his due process rights, because in Nebraska, a sudden quarrel upon sufficient provocation negates the murder element of malice.[22] He relies on the premise that the State may not shift the burden of proof to the defendant when an affirmative defense negates an element of the crime.[23]

[9,10] Due process requires a prosecutor to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.[24] The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.[25]

In *Mullaney v. Wilbur*,[26] the U.S. Supreme Court applied the due process concept to jury instructions in a case similar to the instant case. The Maine law at issue in *Mullaney* defined murder as the "'unlaw[ful] kill[ing] [of] a human being with malice aforethought, either express or implied.'"[27] It defined manslaughter as the "'unlaw[ful] kill[ing] [of] a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought.'"[28] The jury was instructed that if the prosecution established the homicide was both intentional and unlawful, malice aforethought

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[22] See, *Trice, supra* note 9; *Smith, supra* note 7; *Lyle, supra* note 9.

[23] See *Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013).

[24] *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[25] *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

[26] *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

[27] *Id*., 421 U.S. at 686 n.3.

[28] *Id*.

(murder) was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation (and committed only manslaughter). The jury was further instructed that malice aforethought and heat of passion on sudden provocation were two inconsistent things, so that by proving the existence of the latter, the defendant would necessarily negate the existence of the former and reduce the homicide from murder to manslaughter. The Court reasoned that this shifting of the burden of persuasion was improper because it required the defendant to prove the lack of an element, malice aforethought, required to convict him of murder. The Court held "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."[29]

Two years later, the Court decided *Patterson v. New York*,[30] another jury instruction case similar to the instant case. In *Patterson*, the defendant was charged with second degree murder, which New York defined as intentionally causing the death of another person. New York defined manslaughter as the intentional killing of another "'under circumstances which do not constitute murder because [the actor] acts under the influence of extreme emotional disturbance.'"[31] New York required the defendant to demonstrate the existence of extreme emotional disturbance by a preponderance of the evidence in order to reduce the murder to manslaughter, and the jury was so instructed.

The defendant in *Patterson* appealed, arguing this instruction and shifting of the burden of persuasion violated the dictates of *Mullaney*. But the Court held this was constitutional.

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[29] *Id.*, 421 U.S. at 704.

[30] *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

[31] *Id.*, 432 U.S. at 199.

It reasoned that under the New York scheme, in order to prove murder, the State had to prove the death, the intent to kill, and causation beyond a reasonable doubt. Thus, the State had the burden of persuasion on all the essential elements of the crime. This distinguished the New York law from the Maine law at issue in *Mullaney*, where the element of malice aforethought was *presumed* if the State proved intent, and the defendant then had to disprove it. The Court reasoned that the New York affirmative defense of an extreme emotional disturbance did not "serve to negate any facts of the crime" and that thus, it was appropriate to require the defendant to carry the burden of persuasion on the defense.[32] The Court specifically held that it would not adopt "as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."[33] Instead, it clarified that the "Due Process Clause requires the prosecution to prove beyond a reasonable doubt *all of the elements included in the definition of the offense* of which the defendant is charged."[34]

[11] As noted, first degree murder in Nebraska occurs when a person kills another purposely and with deliberate and premeditated malice.[35] The jury was so instructed in this case, and a jury instruction is sufficient if it uses the language of the statute.[36] Here, due process did not require more. Under *Patterson*, due process is met as long as the State has to prove beyond a reasonable doubt all of those enumerated elements: a killing, done purposely, with deliberate and premeditated malice. In the instant case, the jury was instructed that to convict Hinrichsen of first degree murder, it had to find "from the

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[32] *Id.*, 432 U.S. at 207.

[33] *Id.*, 432 U.S. at 210.

[34] *Id.* (emphasis supplied).

[35] § 28-303(1).

[36] See *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

evidence beyond a reasonable doubt" that he killed the victims, that he did so purposely, and that he did so with deliberate and premeditated malice. There was no burden imposed on the defendant to disprove any of these elements.

But Hinrichsen contends that due process was violated because the jury was not expressly instructed that the State was required to prove the absence of sudden quarrel provocation. He contends that such an instruction is necessary because "malice is an element of first degree murder and a sudden quarrel upon sufficient provocation negates malice."[37] In *Smith v. U.S.*,[38] the Court recently clarified that the principle of due process is violated if the State shifts the burden of proof to a defendant where the defendant's affirmative defense negates an element of the crime. Hinrichsen generally argues this principle was violated because the nature of the acquittal-first step instruction effectively prevented the jury from considering his sudden quarrel defense until it had already found him guilty of first degree murder.

Several federal courts have rejected similar arguments. In *Dunckhurst v. Deeds*,[39] the defendant was convicted of first degree murder. He filed for habeas relief, contending the trial court erred by denying his request for a jury instruction explicitly requiring the State to prove the homicide was not committed in the heat of passion (with provocation). The Ninth Circuit examined all of the jury instructions given and concluded that even though no express instruction requiring the State to disprove provocation was given, the jury was properly instructed that the State had the burden to prove beyond a reasonable doubt every element of the offense of first degree murder. Specifically, the jury was instructed that it had to prove the killing was with deliberation and premeditation and that it was done without legal cause or excuse. The court reasoned these

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[37] Brief for appellant at 21.

[38] *Smith, supra* note 23.

[39] *Dunckhurst v. Deeds*, 859 F.2d 110 (9th Cir. 1988).

instructions, viewed as a whole, adequately informed the jury of the State's burden of proof.

In *U.S. v. Molina-Uribe*,[40] the defendant was charged with first degree murder.[41] He requested an instruction requiring the government to prove the "absence of sudden quarrel and heat of passion upon sudden provocation" beyond a reasonable doubt, but the court refused the instruction.[42] Reasoning that the murder charge placed no burden of any kind upon the defendant and that he did not have to prove the absence of provocation in order to defeat the murder charge, the Fifth Circuit held the instructions given did not violate due process.

The Fourth Circuit has also weighed in on this issue. In *Gutherie v. Warden, Maryland Penitentiary*,[43] the defendant was convicted of first degree murder. The court found *Mullaney* was violated as to the second degree murder and manslaughter instructions because the jury was instructed that the defendant had the burden of proving he acted in the heat of passion upon sudden provocation in order to reduce the murder to manslaughter. But it reasoned this constitutional error in the instructions was harmless, because the jury actually convicted the defendant of first degree murder and "'in proving the elements of first degree murder beyond any reasonable doubt . . . the state necessarily disproved manslaughter beyond a reasonable doubt.'"[44] The court specifically reasoned that first degree murder required the jury to find premeditation, and because a finding of premeditation necessarily was a finding that the defendant engaged in thought before the act occurred, the premeditation finding

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[40] *U.S. v. Molina-Uribe*, 853 F.2d 1193 (5th Cir. 1988), *overruled on other grounds, U.S. v. Bachynsky*, 934 F.2d 1349 (5th Cir. 1991), *overruled on other grounds, U.S. v. Johnson*, 1 F.3d 296 (5th Cir. 1993).

[41] See 18 U.S.C. § 1111 (2012).

[42] *Molina-Uribe, supra* note 40, 853 F.2d at 1200.

[43] *Gutherie v. Warden, Maryland Penitentiary,* 683 F.2d 820 (4th Cir. 1982).

[44] *Id*. at 823.

simultaneously negated a finding of manslaughter in the heat of passion.

The rationale that no specific jury instruction on the heat of passion or provocation burden of proof is necessary is also supported by the U.S. Supreme Court's decision in *Victor v. Nebraska*.[45] In the context of analyzing whether the jury instructions given comported with due process by adequately defining the concept of beyond a reasonable doubt, the Court stated:

> [S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, . . . *the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof*. . . . Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury."[46]

State courts have also rejected the due process argument that Hinrichsen advances. In *State v. Auchampach*,[47] the defendant was convicted of first degree murder. At trial, he admitted the killings but denied they were premeditated and claimed they occurred in the heat of passion. During the jury instruction conference, the court concluded the defendant had presented sufficient evidence to warrant an instruction on heat of passion manslaughter. However, it refused his request to give the Minnesota jury instruction which enumerated the absence of heat of passion as an element of premeditated first degree murder.

On appeal, the defendant contended this was error, arguing the trial court's "refusal [to give the instruction] relieved the state of proving beyond a reasonable doubt an element of first-degree intentional murder—that [he] did not act in the

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[45] *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

[46] *Id.*, 511 U.S. at 5 (citations omitted) (emphasis supplied).

[47] *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995).

heat of passion."[48] In reviewing the argument, the court noted due process required that the jury be instructed on the State's burden to prove beyond a reasonable doubt every element of the crime charged.[49] It also noted that in reviewing the sufficiency of the jury instructions, the instructions must be viewed in their entirety.[50]

The court reasoned that under the applicable Minnesota statute, the absence of heat of passion was not an enumerated element of premeditated first degree murder and that therefore, under *Patterson*, there was no constitutional requirement that the State prove the absence of heat of passion beyond a reasonable doubt before it could convict the defendant of first degree murder.[51] It reasoned, however, that under Minnesota law, the State nevertheless had the burden to so prove the lack of heat of passion in order to obtain a conviction for first degree murder.[52] Notably, it did not find that such a burden meant that the jury had to receive an explicit instruction to that effect. Rather, viewing the jury instructions as a whole, the court reasoned they adequately informed the jury of the State's burden of proof. Specifically, the jury was instructed that it had to find guilt beyond a reasonable doubt, was instructed on the definition of heat of passion, and was instructed that an "unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated."[53] Moreover, the court reasoned that at closing argument, the defendant argued he was not guilty of first degree murder because there was no premeditation and that thus, the jury was fully aware of the issue before it.

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[48] *Id.* at 816.

[49] *Id.*

[50] *Id.*

[51] *Auchampach, supra* note 47. See *Patterson, supra* note 30.

[52] *Auchampach, supra* note 47.

[53] *Id.* at 818.

In *People v. Hernandez*,[54] the defendant was charged with first degree murder. California defined that crime as an unlawful killing with malice aforethought, premeditation, and deliberation. The jury was instructed that "deliberation mean[t] a decision to kill after a careful weighing of the considerations for and against this choice; premeditation mean[t] a decision to kill before commission of the act that caused death; . . . a '*decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated*.'"[55] The defendant contended these instructions were insufficient because they did not "specifically inform the jury that provocation is relevant to determine whether the defendant killed without premeditation and deliberation."[56] But the court disagreed, stating, "[W]hen the instructions are read as a whole there is no reasonable likelihood the jury did not understand [that provocation is relevant to the issues of premeditation and deliberation.] [T]he jury was instructed . . . that a rash, impulsive decision to kill is not deliberate and premeditated."[57] It thus reasoned that "the jurors would have understood that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation."[58]

[12] Following the general rationale articulated by the various federal and state authorities cited, and in light of the fact that lack of sudden quarrel is not a statutory element of first degree murder in Nebraska, we find that an explicit jury instruction advising that the State must prove lack of sudden quarrel provocation beyond a reasonable doubt is not

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[54] *People v. Hernandez*, 183 Cal. App. 4th 1327, 107 Cal. Rptr. 3d 915 (2010).

[55] *Id*. at 1332, 107 Cal. Rptr. 3d at 920 (emphasis in original).

[56] *Id*. at 1333, 107 Cal. Rptr. 3d at 920.

[57] *Id*. at 1334, 107 Cal. Rptr. 3d at 921.

[58] *Id.*

required in order to comport with the dictates of due process. Instead, the question is whether the jury instructions given, viewed as a whole, adequately informed the jury that the State had the burden to prove lack of sudden provocation beyond a reasonable doubt in order to convict Hinrichsen of first degree murder.

We think it is clear that they did. The instructions given required the State to prove beyond a reasonable doubt that the victims were killed intentionally and with deliberate and premeditated malice. Malice was defined as an act done without just cause or excuse. Deliberate was defined as "not suddenly or rashly. Deliberation requires that one consider the probable consequences of his actions before acting." Premeditation was defined as "to form a design to do something before it is done." The jury was expressly instructed that it could find Hinrichsen guilty of first degree murder only if it found the State had proved each of these elements beyond a reasonable doubt.

[13] Under the plain language of the instructions given, to convict on the first degree murder charge, the State had to prove beyond a reasonable doubt that (1) Hinrichsen's intent to do the act was formed before the act was done (premeditated) and (2) his intent was formed not suddenly or rashly, but instead was formed after he had considered the probable consequences of his act (deliberate). In Nebraska, sudden quarrel is present when there is reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that *one acted rashly and from passion, without due deliberation and reflection*, rather than from judgment. Thus, in finding beyond a reasonable doubt that Hinrichsen acted with deliberate and premeditated malice, the jury necessarily simultaneously found beyond a reasonable doubt that there was no sudden quarrel provocation, i.e., that he did not act without due deliberation and reflection. It is logically impossible to both deliberate and not deliberate at the same time. The crucial question of whether

Hinrichsen acted with deliberate and premeditated malice, or instead acted without due deliberation and reflection, was very much presented to the jury even if the jury was not directly instructed that sudden quarrel provocation negates malice. And the burden of proving whether Hinrichsen acted with deliberate and premeditated malice, and thus did not act under a sudden provocation, rested on the State. There was no shifting of the burden to the defendant.

The first degree murder step instruction given in this case is thus very different from the second degree murder step instruction we addressed in *Smith* and found to be erroneous.[59] The key distinction is that in *Smith*, the jury was prevented from considering the crucial issue—whether the killing, although intentional, was the result of a sudden quarrel. The existence of a sudden quarrel was an additional element the jury needed to consider, but the instruction prevented it from doing so.

Here, the existence of a sudden quarrel is not an additional element. Rather, it is the converse of the enumerated elements of first degree murder.[60] To find Hinrichsen guilty of first degree murder, the jury had to be convinced that none of the evidence, whether offered by the State or by Hinrichsen, raised a reasonable doubt that Hinrichsen killed with deliberate and premeditated malice.[61] Thus, the jury was not in any way prevented from considering the crucial issue. When it decided beyond a reasonable doubt that Hinrichsen killed with deliberate and premeditated malice, it necessarily also decided beyond a reasonable doubt that the converse was true—i.e., his actions were not the result of a sudden quarrel, done "rashly, without due deliberation and reflection." Instead of preventing the jury from considering the crucial issue, the jury instructions here

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[59] See *Smith, supra* note 7.

[60] See *Auchampach, supra* note 47.

[61] See *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).

directly presented that issue to the jury for its consideration. And the instructions at all times placed the burden of proof on the State.

Thus, the due process requirements of *Mullaney*,[62] *Patterson*,[63] and *Smith*[64] are met by the Nebraska jury instructions as they currently read—the instructions require the State to prove beyond a reasonable doubt every enumerated element necessary to convict of first degree murder: intent, purpose, deliberation, premeditation, and malice. And the definitions of deliberate and premeditation necessarily require the jury to find the absence of provocation beyond a reasonable doubt in order to find the existence beyond a reasonable doubt of deliberate and premeditated malice. Although the current instructions do not explicitly inform the jury that the State has the burden to disprove sudden quarrel provocation beyond a reasonable doubt in order to convict of first degree murder, the instructions read as a whole do require the State to prove beyond a reasonable doubt that the converse was true: that the actions were done with deliberate and premeditated malice, which necessarily disproves sudden quarrel provocation. These instructions properly keep the burden of disproving the existence of sudden quarrel provocation on the State. There is no unconstitutional shifting of the burden to the defendant.

We have already held as much in at least one recent case. In *State v. Alarcon-Chavez*,[65] the defendant was charged with and convicted of first degree murder. Over the defendant's objection, the trial court gave the standard step instruction from NJI2d Crim. 3.1 defining the elements of first degree murder, second degree murder, and manslaughter. On appeal, he contended the step instruction as to the distinction between second degree murder and manslaughter was incorrect based on our

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[62] *Mullaney, supra* note 26.

[63] *Patterson, supra* note 30.

[64] *Smith, supra* note 23.

[65] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

holding in *Smith*.[66] We acknowledged he was correct, but reasoned the error was not prejudicial to the defendant:

> We have held that a defendant convicted of first degree murder under a step instruction cannot be prejudiced by any error in the instructions on second degree murder or manslaughter because under the step instruction, the jury would not have reached those levels of homicide. . . .
>
> Here, the jury considered how [the victim's] death occurred and concluded [the defendant] killed her purposely and with deliberate and premeditated malice. *In so concluding, the jury necessarily considered and rejected that the killing was the result of provocation and was therefore without malice*. The jury found the evidence met the elements of first degree murder. Under these circumstances where the jury found that premeditation, intent, and malice existed beyond a reasonable doubt, [the defendant] was not prejudiced [by any error in the second degree murder/]manslaughter instruction.[67]

Because the given jury instructions on first degree murder accurately placed the burden of proof on the State, Hinrichsen's contention that the district court erred in not adding a sentence to its definition of sudden quarrel is also without merit. In future cases, however, it would be a better practice for courts, in first degree murder cases in which evidence of provocation has been adduced by the defendant, to clarify the definition of deliberation. We encourage courts in such cases to define "deliberate" to mean "not suddenly or rashly, but doing an act after first considering the probable consequences. An act is not deliberate if it is the result of sudden quarrel provocation."

(b) Premeditation

The district court gave the NJI2d Crim. 4.0 instruction for premeditation, defining that term to mean "to form a design to

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[66] See *Smith, supra* note 7.

[67] *Alarcon-Chavez, supra* note 65, 284 Neb. at 335, 821 N.W.2d at 368-69 (emphasis supplied).

do something before it is done. The time needed for premeditation may be so short as to be instantaneous, provided that the intent to act is formed before the act and not simultaneous with the act." This definition of premeditation has been repeatedly advanced and affirmed by this court.[68] Hinrichsen submitted a proposed jury instruction defining premeditation to include only the first sentence of the instruction given. He contends his proposed instruction is the statutory definition of premeditation from Neb. Rev. Stat. § 28-302(3) (Reissue 2008) and that this court has exceeded the scope of its authority by expanding on that definition in our cases.

[14] Although Hinrichsen submitted a proposed jury instruction on premeditation, he did not object to the instruction actually given by the district court. The failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.[69] Even if the issue had been preserved, there was no error, as our prior cases have not impermissibly expanded the definition of premeditation set forth in § 28-302(3), but instead have simply interpreted the meaning of the term "before" as used in that statute.[70]

2. Voluntary Intoxication

Months prior to trial, Hinrichsen asked the court to give a jury instruction on the defense of intoxication. The State objected, citing § 29-122. That statute, enacted in 2011, provides:

> A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and convincing evidence, that

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[68] See, e.g., *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[69] See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[70] See *Taylor, supra* note 68.

> he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

Hinrichsen argued § 29-122 was unconstitutional and did not bar his intoxication defense. The district court disagreed.

[15] At trial, Hinrichsen did not renew his request for a jury instruction on intoxication or offer a proposed instruction to that effect. Nevertheless, in this appeal, he contends that the trial court erred in not giving one. When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.[71]

[16] We conclude that Hinrichsen did not preserve the issue for appeal simply by seeking the pretrial order. A pretrial ruling on the propriety of a jury instruction is unusual, and under the circumstances of this case, is akin to a motion in limine on an evidentiary ruling.[72] We have repeatedly held that a pretrial evidentiary ruling is not preserved for appeal unless the issue is raised at trial.[73] We apply that same rationale here and conclude that Hinrichsen did not preserve the intoxication defense issue for appellate review. And we find no plain error in the trial court's refusal to give the instruction.

3. Admission of Photograph

During the testimony of Lee's mother, the State offered a photograph of Lee and Vargas on their wedding day. Hinrichsen objected on relevancy grounds, but the trial court overruled the objection. Hinrichsen challenges that ruling on appeal.

[17] The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value

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[71] *Kass, supra* note 36.

[72] See, generally, *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

[73] See *id.*

against their possible prejudicial effect.[74] In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of 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.[75]

[18,19] The State contends the photographs were admitted for identification purposes because the bodies of the victims were burned beyond recognition. We need not decide whether the admission was error, because we conclude any error was harmless error. Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.[76] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[77] We conclude the actual guilty verdict rendered was surely unattributable to any error in admitting the photograph.

V. CONCLUSION

For the foregoing reasons, we affirm Hinrichsen's convictions and sentences.

Affirmed.

Stephan, J., not participating.

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[74] *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[75] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[76] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[77] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

Wright, J., concurring in the result.

I respectfully concur in the result, but I write separately to reiterate the rule that Neb. Rev. Stat. § 29-2027 (Supp. 2015)

requires the court to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury. In a case where there is evidence that a defendant killed intentionally but was acting under a provocation, the jury must be instructed that it has the option of convicting the defendant of voluntary manslaughter or second degree murder or first degree murder depending upon its determination of the fact issue regarding provocation.

Premeditation or provocation are fact issues that should be considered simultaneously when there is proper evidence of a provocation. The logic of this rule is that since provocation negates premeditation and premeditation negates provocation, the jury should consider and decide this question at the same time. When the defendant has presented proper evidence that the defendant was acting under a provocation, that issue should be addressed at the same time that the jury considers whether the act causing the death was premeditated.

In a first degree murder case, the State presents its evidence that the murder was premeditated. If the defendant offers evidence that the killing was the result of provocation, the State's evidence must establish beyond a reasonable doubt that the murder was not the result of a provocation. In that manner, the burden remains upon the State to prove the elements of the crime and thus, the burden of proof never shifts to the defendant. The State disproves the defense of provocation by its evidence of premeditation. The question is whether the State's evidence negates beyond a reasonable doubt the claim of provocation. The State negates the defendant's claim of provocation by presenting evidence that proves beyond a reasonable doubt that the defendant killed the victim with premeditation and malice aforethought.

An acquittal first step instruction precludes the jury from effectively considering the factual issue of provocation in its determination of a defendant's guilt. As the dissent points out, our reasoning in *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012), and *State v. Trice*, 286 Neb. 183, 835 N.W.2d

667 (2013), applies equally to an acquittal first step instruction on first degree murder. Voluntary manslaughter is not a lesser-included offense of first degree murder. And under a step instruction on the three degrees of homicide, the jury must acquit the defendant of first and second degree murder before it considers the issue of provocation. This has the effect of prioritizing the evidence by requiring the jury to consider first and second degree murder before it can consider the evidence of provocation. I agree with the dissent's position that the court is required to instruct the jury in a manner that explains the jury's options under § 29-2027 of whether to convict the defendant of first degree murder, second degree murder, or manslaughter.

But the reason that I concur is that clearly Hinrichsen was not entitled to a provocation instruction. The fact that the trial court instructed on provocation does not establish that Hinrichsen was prejudiced by the court's step instruction. There is simply no evidence that Hinrichsen was provoked into killing two people in the manner that he did.

Connolly, J., dissenting.

I dissent. First, our 2012 decision in *State v. Smith*[1] requires a trial court to instruct a jury of its option to convict a defendant of second degree murder or sudden quarrel (voluntary) manslaughter, depending on its resolution of a provocation defense. This requirement—that a court must instruct the jury on its options for conviction—should also apply to a first degree murder prosecution when a trial court determines that there is adequate evidence of a sudden quarrel provocation to put the issue before the jury. So, under Neb. Rev. Stat. § 29-2027 (Supp. 2015), I believe a court should minimally give two instructions: (1) the jury must consider evidence of a sudden quarrel provocation in deciding whether the State has proved the elements of first degree murder; and (2) it cannot

[1] *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

convict a defendant of murder if it finds that evidence of a sudden quarrel provocation creates a reasonable doubt about the defendant's guilt.

Second, the majority's reasoning in distinguishing *Smith* directly conflicts with due process requirements. I recognize that this court has rejected several due process challenges to jury instructions in first degree murder prosecutions. But our recent decisions and a recent U.S. Supreme Court decision compel me to reevaluate our due process holdings. I conclude federal due process decisions show that we have erroneously upheld acquittal-first step instructions in first degree murder prosecutions with voluntary manslaughter as a lesser degree offense. Because the Due Process Clause requires the State to disprove any affirmative defense that negates an element of the charged crime, we were wrong.

Notably, the majority does not dispute that the State must disprove a provocation defense. Instead, it concludes that under an acquittal-first step instruction in a first degree murder prosecution, the jury necessarily rejects the existence of a sudden quarrel provocation. The majority points out that in 2012, we reached the same conclusion in a per curiam decision, *State v. Alarcon-Chavez*.[2] But the reasoning in *Alarcon-Chavez*, and the majority's reasoning today, is inconsistent with our decisions in *State v. Smith* and *State v. Trice*.[3]

Third, the majority misconstrues or mistakenly relies on federal and state cases that do not support its holding. In doing so, it ignores the majority of jurisdictions that require the prosecution to disprove an adequately raised provocation defense under similar homicide statutes. It is long overdue for this court to join those courts in recognizing that the Due Process Clause requires no less.

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[2] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[3] *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013).

OUR PRE-2011 CASE LAW WAS INCONSISTENT

Before 2011, we generally rejected challenges to our acquittal-first step instructions for two reasons. We have reasoned that if a defendant is convicted of first degree murder, the defendant cannot be prejudiced by any error in an instruction for second degree murder or manslaughter, because the jury never reaches those issues.[4] And we have said that because an acquittal-first step instruction provides a logical and orderly process for guiding a jury's deliberations, it is not error to require a jury to consider the greater homicide offense first.[5]

But the cases from other states that we originally cited did not support our conclusion that an acquittal-first step instruction is always appropriate. Specifically, they did not show that a step instruction, without any clarifying instructions, is proper when a jury will only consider a mitigating circumstance in a lesser offense if it acquits the defendant of a greater offense.[6]

Conversely, we reasoned in *State v. Jones*[7] that a jury is free to consider the defendant's guilt of a lesser degree manslaughter offense before deciding his or her guilt of murder. But the fact is that a jury either considers whether a defendant acted under a sudden provocation or does not. And if, as we have often stated, it is true that jurors follow their instructions, then they do not consider a provocation defense in determining a defendant's guilt of murder. So while some of our cases have

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[4] See, e.g., *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), and *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[5] See, e.g., *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003); *Jones, supra* note 4.

[6] See *Jones, supra* note 4 (citing cases).

[7] *Id.*

been inconsistent, our recent cases have rejected the rationale that a jury considers a defendant's provocation defense.

STATE V. SMITH ALSO REQUIRES AN OPTION INSTRUCTION IN FIRST DEGREE MURDER PROSECUTIONS IF THERE IS ADEQUATE EVIDENCE OF A SUDDEN QUARREL PROVOCATION

In 2011, we reaffirmed our 1989 holding in *State v. Pettit*[8] that a sudden quarrel manslaughter is an intentional homicide that does not negate the actor's intent to kill.[9] We overruled our contrary holding in *Jones* that manslaughter is an unintentional homicide[10] and reaffirmed *Pettit*'s holding that an adequate provocation is an extenuating circumstance that mitigates the defendant's culpability—but not one that justifies or excuses a killing.

Because our 2011 holding reaffirmed that the only distinction between second degree murder and voluntary manslaughter is a legal provocation, we held that the court's step instruction was incorrect. As the majority recognizes, we held that the instruction incorrectly "required the jury to convict on second degree murder if it found that [the defendant] killed [the victim] intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter."[11] We held that a trial court must give an instruction under § 29-2027 if any evidence exists upon which a jury could believe that the defendant committed manslaughter and not murder. Section 29-2027, in relevant part, provides that "[i]n all trials for murder the jur[ors,] if they find the prisoner guilty thereof, shall ascertain in their

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[8] *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

[9] See *Smith, supra* note 4.

[10] *Jones, supra* note 4.

[11] *Smith, supra* note 4, 282 Neb. at 734, 806 N.W.2d at 394.

verdict whether it is murder in the first or second degree or manslaughter."

In 2012, we clarified in *State v. Smith*[12] that in nonhomicide cases, a trial court does not have a duty to instruct on a lesser-included offense unless the defendant requests the instruction. But we also stated that in murder prosecutions, § 29-2027 is "a mandatory rule that [requires a court] to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not."[13]

Moreover, in *Smith*, we emphasized that voluntary manslaughter is not a lesser-included offense of second degree murder under our elements test, because it is possible to commit second degree murder without committing voluntary manslaughter. Instead, a sudden quarrel provocation is an extenuating circumstance that lessens *the degree* of homicide to manslaughter. We held that under § 29-2027, "where there is evidence that [a defendant killed intentionally and was acting under a provocation], a jury must be given the option of convicting [the defendant] of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation."[14]

So, *Smith* directly conflicts with, and effectively abrogates, the reasoning in *Jones*[15] that under an acquittal-first step instruction, a jury considers whether a defendant is guilty of a sudden quarrel provocation before determining that he is guilty of murder. Under *Jones*, we presumed that a jury considered whether the defendant was guilty of manslaughter before finding his guilt of murder. If that were so, we would have had no reason to require an option instruction in *Smith*. Instead, in *Smith*, we implicitly recognized that an acquittal-first step

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[12] *Smith, supra* note 1.

[13] *Id.* at 651, 822 N.W.2d at 414.

[14] *Id.* at 656, 822 N.W.2d at 417.

[15] *Jones, supra* note 4.

instruction precludes the jury from considering a provocation defense in determining a defendant's guilt of murder.

And the majority recognizes that we made this reasoning explicit in *State v. Trice*.[16] There, we specifically rejected the State's argument that the jury had implicitly rejected a voluntary manslaughter conviction under an acquittal-first step instruction by convicting the defendant of second degree murder. We concluded that "under the instructions given (and presumably followed), the jury never actually considered whether [the defendant] acted upon a sudden quarrel."[17]

The majority acknowledges our holdings in *Smith* and *Trice*. But it ignores the obvious implications for first degree murder prosecutions. The reasoning in *Smith* and *Trice* applies equally to an acquittal-first step instruction on first degree murder, second degree murder, and sudden quarrel manslaughter. That is, if a jury cannot consider whether a defendant's "'intent to kill was the result of a sudden quarrel'" in a step instruction on second degree murder and voluntary manslaughter,[18] a jury also cannot consider whether a defendant's intent to kill was the result of a sudden quarrel in a step instruction on all three degrees of homicide. As the instructions in this case illustrate, a jury must acquit the defendant of *two* murder charges before the step instruction permits it to even consider a sudden quarrel provocation. Whether the charged crime is first degree murder or second degree murder, the mitigating circumstance exists only as an element of the lesser degree manslaughter offense.

Moreover, just as voluntary manslaughter is not a lesser-included offense of second degree murder under our elements test, it is not a lesser-included offense of first degree murder. One can commit a deliberate and premeditated murder without killing under a sudden quarrel provocation. Because

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[16] *Trice, supra* note 3.

[17] *Id.* at 192, 835 N.W.2d at 674.

[18] See *id.* at 189, 835 N.W.2d at 672.

it is a *lesser degree* offense, our reasoning in *Smith* should also apply here. It applies because whether the charge is first degree murder or second degree murder, the emotional disturbance caused by an adequate provocation is an additional consideration outside of the elements of the murder charge that results in a less culpable state of mind. The provocation reduces the degree of homicide to manslaughter despite the actor's intent to kill.

Because an acquittal-first step instruction precludes the jury from considering a sudden quarrel provocation when determining guilt of first degree murder, *Smith* requires a trial court to instruct the jury in a manner that explains its options under § 29-2027: i.e., whether to convict the defendant of first degree murder, second degree murder, or manslaughter. As I explain more fully later, that mandate should minimally require two jury instructions in a first degree murder case: (1) an instruction that jurors must consider evidence of a sudden quarrel provocation when determining whether the State has proved the elements of first degree murder; and (2) an instruction that they cannot convict the defendant of first degree murder if they find that evidence of a sudden quarrel provocation creates a reasonable doubt about the defendant's guilt of murder. Without such instructions, the jurors cannot exercise their option to convict the defendant of voluntary manslaughter, as § 29-2027 requires.

I believe the majority incorrectly concludes that in the instruction on first degree murder, the jury necessarily finds beyond a reasonable doubt that the defendant did not kill while provoked by a sudden quarrel. It reasons as follows: For first degree murder, the State must prove that the defendant acted with deliberate and premeditated malice. The definitions of the deliberate and premeditated elements require a jury to find that the defendant formed an intent to kill before acting and that the defendant did not act rashly or suddenly. In contrast, a sudden quarrel provocation means that a defendant acted rashly and from passion, without due deliberation and reflection.

> Thus, in finding beyond a reasonable doubt that Hinrichsen acted with deliberate and premeditated malice, the jury necessarily simultaneously found beyond a reasonable doubt that there was no sudden quarrel provocation, i.e., that he did not act without due deliberation and reflection. It is logically impossible to both deliberate and not deliberate at the same time.

Applying this reasoning, the majority concludes that our 2011 decision in *Smith* is distinguishable because here, the provocation defense was necessarily presented to the jury:

> The key distinction is that in *Smith*, the jury was prevented from considering the crucial issue—whether the killing, although intentional, was the result of a sudden quarrel. The existence of a sudden quarrel was an additional element the jury needed to consider, but the instruction prevented it from doing so.
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> Here, the existence of a sudden quarrel is not an additional element. Rather, it is the converse of the enumerated elements of first degree murder. To find Hinrichsen guilty of first degree murder, the jury had to be convinced that none of the evidence, whether offered by the State or by Hinrichsen, raised a reasonable doubt that Hinrichsen killed with deliberate and premeditated malice.

This reasoning is incorrect and contrary to our case law. I agree that it is logically impossible to deliberate and not deliberate. But under an acquittal-first step instruction, the court never informs the jury that murder and manslaughter are mutually exclusive homicides or that the jury can consider the sudden quarrel defense in considering whether the State has proved the elements of murder. The majority's assumption that the sudden quarrel defense is presented to the jury and that the jury understands the State has the burden to disprove the defense is nothing more than an implausible legal fiction.

First, nothing in the instructions informs the jury that the State has the burden to disprove a sudden quarrel defense.

Second, the jury does not consider the defense because a sudden quarrel provocation is obviously not an element of either first or second degree murder. It is an extenuating circumstance that exists outside of the elements of a murder charge. By holding in *Smith* that voluntary manslaughter is not a lesser-included offense murder, we implicitly recognized this relationship. And we have explicitly recognized the same in rejecting a due process challenge to step instructions on second degree murder and voluntary manslaughter:

> Under Nebraska law, second degree murder is defined as causing the death of another intentionally, but without premeditation. . . . The definition of manslaughter includes the intentional killing of another, without malice, upon a sudden quarrel. . . . In order to convict a person of second degree murder, the State is required to prove all three elements—the death, the intent to kill, and causation—beyond a reasonable doubt. None of the elements is presumed upon proof of the others, nor is any element presumed in the absence of proof by the defendant of the converse of that element. As in [the] New York [statutes that the U.S. Supreme Court considered in *Patterson v. New York*[19]], the fact that a homicide occurs "upon a sudden quarrel" *is an additional circumstance* which serves to mitigate an intentional killing.[20]

The same reasoning applies to first degree murder. To prove first degree murder, the State must show that a defendant killed another "'purposely and with deliberate and premeditated malice.'"[21] In 2013, we rejected an argument that an acquittal-first step instruction in a first degree murder

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[19] *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

[20] *State v. Cave*, 240 Neb. 783, 789, 484 N.W.2d 458, 464 (1992) (emphasis supplied).

[21] *State v. Bauldwin*, 283 Neb. 678, 706, 811 N.W.2d 267, 290 (2012), quoting Neb. Rev. Stat. § 28-303 (Reissue 2008).

prosecution must include an element that requires the State to disprove a sudden quarrel defense because the "absence of a sudden quarrel is not an element of [first degree murder]."[22] So nothing in the elements of the first degree murder charge of an acquittal-first step instruction informs a jury that evidence of a sudden quarrel provocation rebuts the murder elements or that the State must prove the absence of a sudden quarrel. And an acquittal-first step instruction blocks a jury from considering a provocation defense in a lesser degree manslaughter instruction.

Here, the instructions informed the jury that it must convict Hinrichsen of first degree murder if it concluded that the State had proved the elements of that charge beyond a reasonable doubt. In effect, the instructions told the jurors to stop deliberating at this point. And if the jury acquitted Hinrichsen of first degree murder and found that the State had proved the elements of second degree murder, the instruction again threw up a roadblock to convict and cease deliberating.

The question is not whether a Philadelphia lawyer could see through these instructions and conclude that the jury could consider the provocation evidence in deciding a defendant's guilt of murder. The question is whether the jury instructions are constructed so that *the jury* would not consider a mitigating circumstance in a lesser degree manslaughter offense.[23] The acquittal-first step instruction created more than a risk that the jury would not consider Hinrichsen's sudden quarrel defense in determining his guilt of murder; it effectively instructed the jury not to do so.

In sum, the instructions themselves and our case law support a conclusion that the jury did not consider Hinrichsen's provocation defense when determining his guilt of first degree murder. So the majority's reasoning that the jury understood

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[22] See *State v. Morgan*, 286 Neb. 556, 562, 837 N.W.2d 543, 549-50 (2013).

[23] See *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990).

the State had the burden to disprove Hinrichsen's provocation defense, and rejected it, boils down to this syllogism: The elements of first degree murder and voluntary manslaughter are mutually exclusive. Therefore, by finding that the State proved that Hinrichsen killed purposely and with deliberate and premeditated malice, the jury could not find that he was guilty of voluntary manslaughter. As I explain next, this reasoning only highlights the due process problem presented by an acquittal-first step instruction for first degree murder and voluntary manslaughter.

DUE PROCESS REQUIRES THE STATE TO DISPROVE ANY AFFIRMATIVE DEFENSE THAT NEGATES AN ELEMENT OF THE CRIME

First Degree Murder and Manslaughter are Mutually Exclusive Homicides

As the majority opinion shows, proof of a sudden quarrel manslaughter negates the deliberation element of first degree murder. Other courts agree.[24] As the majority states, "It is logically impossible to both deliberate and not deliberate at the same time." Other courts also recognize that a legal provocation negates the premeditation element,[25] and we have agreed that to be adequate, a provocation must negate the elements of murder: "It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent."[26] Even more fundamentally, the majority acknowledges that under our statutes, proof of manslaughter

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[24] See, *People v. Jones*, 223 Cal. App. 4th 995, 167 Cal. Rptr. 3d 659 (2014); *Villella v. State*, 833 So. 2d 192 (Fla. App. 2002); *State v. Van Zante*, 26 Wash. App. 739, 614 P.2d 217 (1980).

[25] See *id.*

[26] *Smith, supra* note 1, 284 Neb. at 642, 822 N.W.2d at 408, citing *Smith, supra* note 4; *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

negates the malice element of first degree murder—because manslaughter is a homicide committed "without malice."[27]

As stated, a first degree murder charge requires the State to prove the defendant killed another person "purposely and with deliberate and premeditated *malice*."[28] The "malice" element requires the State to prove a defendant killed intentionally, without just cause or excuse.[29] This definition does not obviously exclude a voluntary manslaughter conviction because a sudden quarrel provocation is an extenuating circumstance that mitigates, *but does not justify or excuse*, a killing.[30]

But first degree murder is a homicide committed with malice. In contrast, a "person commits manslaughter if he or she kills another *without malice* . . . upon a sudden quarrel."[31] So regardless of how our definitions of "malice" and "without malice" have changed over the decades, the Legislature long ago determined that first degree murder and voluntary manslaughter are mutually exclusive homicides. A defendant cannot be guilty of murder if the defendant killed while provoked by a legal provocation. We have implicitly and explicitly recognized that proof of a sudden quarrel manslaughter negates the malice element of first degree murder.[32]

So obviously, in a first degree murder prosecution, the State will not prove the offense of voluntary manslaughter.[33] To do so would disprove the murder charge. Because it is the defendant, not the State, who presents this evidence, the Illinois Supreme Court held almost 30 years ago that it is grave (plain) error to instruct the jury in a murder prosecution that the State has the

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[27] See Neb. Rev. Stat. § 28-305 (Supp. 2015).

[28] See § 28-303.

[29] *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013).

[30] See *Smith, supra* note 4 (reaffirming *Pettit, supra* note 8).

[31] § 28-305(1); *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[32] See, *Trice, supra* note 3; *Smith, supra* note 4; *Lyle, supra* note 26; *Pettit, supra* note 8.

[33] See *Lyle, supra* note 26.

burden to prove both murder and a manslaughter offense based on a mitigating mental state.[34] And we have specifically stated that in a first degree murder prosecution, "[i]t is a question for the trier of fact *whether the defendant* . . . has presented sufficient evidence of provocation to cast a reasonable doubt on the element of malice."[35]

Because the State has no incentive to prove a sudden quarrel manslaughter in a first degree murder prosecution and proof of such provocation precludes a first degree murder conviction, the defendant produces provocation evidence as a partial affirmative defense.[36] It does not justify or excuse the killing. But because it precludes a murder conviction and lessens the degree of homicide from murder to manslaughter,[37] a legal provocation operates as a *partial* excuse to a murder charge.[38] And because the defense rests on considerations outside the elements of the charged murder and negates a defendant's criminal liability for that crime even if the State could otherwise prove those elements, it is an affirmative defense.[39]

If a defendant produces evidence sufficient to raise an affirmative defense, our case law requires the State to disprove that theory beyond a reasonable doubt.[40] As discussed

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[34] See *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141, 122 Ill. Dec. 1 (1988).

[35] *Lyle, supra* note 26, 258 Neb. at 271-72, 603 N.W.2d at 31 (emphasis supplied).

[36] See *Cave, supra* note 20. Accord, *State v. Austin*, 244 Conn. 226, 710 A.2d 732 (1998); *People v. McVay*, 170 Ill. App. 3d 443, 524 N.E.2d 635, 120 Ill. Dec. 605 (1988).

[37] See *Smith, supra* note 1.

[38] See, e.g., Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027 (2011).

[39] See, e.g., *U.S. v. Davenport*, 519 F.3d 940 (9th Cir. 2008). Accord *Patterson, supra* note 19.

[40] See, *Burlison, supra* note 4; *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992).

next, when an affirmative defense negates an element of the charged crime, federal courts have interpreted the Due Process Clause to unquestionably demand that the State disprove the defense.

U.S. Supreme Court Precedent on Due Process Requirements

In three seminal cases in the 1970's and 1980's, the U.S. Supreme Court considered whether the jury instructions in murder prosecutions violated due process requirements. In the first case, *Mullaney v. Wilbur*,[41] the Maine Supreme Court had interpreted its homicide statutes to mean that malice, as an element of murder, was presumed when the State proved a homicide was intentional and unlawful, unless the defendant proved by a preponderance of the evidence that he had killed under a sudden provocation. The trial court explained that malice aforethought and sudden provocation were inconsistent and that malice was presumed unless the defendant proved that he killed in the heat of passion—thereby negating malice aforethought. The U.S. Supreme Court held that this shifting of the burden of proof on the critical fact in dispute violated due process. By requiring the defendant to prove the critical fact in dispute, Maine's laws increased the likelihood of an erroneous murder conviction:

> Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result . . . . We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.[42]

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[41] *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

[42] *Id.*, 421 U.S. at 703-04 (emphasis in original).

But 2 years later, in *Patterson v. New York*,[43] the Court upheld the constitutionality of a New York statute that created an affirmative defense—extreme emotional distress—to a charge of second degree murder. If a defendant proved the defense by a preponderance of the evidence, the second degree murder charge was reduced to manslaughter. The only elements that the State was required to prove for murder were the death, the defendant's intent to kill, and causation.

The Court distinguished *Mullaney* as addressing laws that required the defendant to prove a fact that negated an element of the murder charge.

> [M]alice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, *i.e.,* lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation.[44]

"Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."[45] In contrast, New York's affirmative defense did not violate due process because it "*does not serve to negative any facts of the crime which the State is to prove in order to convict of murder*. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion . . . ."[46]

Finally, in *Martin v. Ohio*,[47] the defendant had the burden of proving by a preponderance of the evidence a self-defense claim that overlapped and could tend to negate a component of the murder charge that required the State to prove the

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[43] *Patterson, supra* note 19.

[44] *Id.*, 432 U.S. at 216.

[45] *Id.*, 432 U.S. at 215.

[46] *Id.*, 432 U.S. at 207 (emphasis supplied).

[47] *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).

defendant killed with prior calculation and design. The majority concluded that the instructions did not unconstitutionally shift the burden to the defendant to disprove an element of the murder charge *because the trial court instructed the jury to consider the defense in determining guilt*:

> To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by [the defendant] in connection with her plea of self-defense, raised a reasonable doubt that [the defendant] had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. *It was also told, however, that it could acquit if* it found by a preponderance of the evidence that [the defendant] had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger. . . .
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> *It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case*, *i.e.,* that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. *Such an instruction would relieve the State of its burden and plainly run afoul of* Winship*'s mandate.* . . . The instructions in this case could be clearer in this respect, but when read as a whole, we think they are *adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime*.[48]

Justice Powell, writing for the four dissenting justices, concluded *Patterson* shows that the Due Process Clause prohibits

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[48] *Id.*, 480 U.S. at 233-34 (emphasis supplied), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

shifting the burden to a defendant to prove a defense that negates an element of the crime and that the instructions in *Martin* created an unacceptable risk the jury would lower the State's burden of proof:

> The Court found that this burden shifting [in *Patterson*] did not violate due process, largely because the affirmative defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder." . . . *The clear implication of this ruling is that when an affirmative defense does negate an element of the crime, the state may not shift the burden*. . . .
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> The reason for treating a defense that negates an element of the crime differently from other affirmative defenses is plain. If the jury is told that the prosecution has the burden of proving all the elements of a crime, but then also is instructed that the defendant has the burden of *dis*proving one of those same elements, there is a danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence. For example, the jury might reasonably believe that by raising the defense, the accused has assumed the ultimate burden of proving that particular element. Or, it might reconcile the instructions simply by balancing the evidence that supports the prosecutor's case against the evidence supporting the affirmative defense, and conclude that the state has satisfied its burden if the prosecution's version is more persuasive. In either case, the jury is given the unmistakable but erroneous impression that the defendant shares the risk of nonpersuasion as to a fact necessary for conviction.[49]

The import of *Martin* is that due process does not require the State to disprove an affirmative defense to a murder charge that does not necessarily negate an element of the crime, even if some facts that prove the defense would, if

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[49] *Id.*, 480 U.S. at 237-38 (emphasis supplied) (Powell, J., dissenting; Brennan, Marshall, and Blackmun, JJ., join).

believed, *tend to* negate an element of the murder charge. But in that circumstance, due process does prohibit the State from precluding the jury's consideration of a defense that overlaps an essential element when determining guilt, because the evidence could create a reasonable doubt regarding the proof of that element.

More recently, the Court put to rest any argument that *Patterson* had limited *Mullaney*'s holding to only those jury instructions that presume an element of a murder charge. In *Smith v. U.S.*,[50] the Court adopted Justice Powell's statement in his *Martin* dissent that under *Patterson*, states may not shift the burden to the defendant on an affirmative defense that negates an element of the crime. In *Smith*,[51] the Court relied on that statement to explain when the government cannot constitutionally put the burden of persuasion on a defendant to prove an affirmative defense:

> Allocating to a defendant the burden of proving withdrawal [from a drug conspiracy] does not violate the Due Process Clause. While the Government must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged,"[52] . . . "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required[.]"[53] *The State is foreclosed from shifting the burden of proof to the defendant only "when an affirmative defense does negate an element of the crime."*[54] . . . Where instead it "excuse[s] conduct that would otherwise be punishable," but "does not controvert any of the elements of the offense itself," the Government has

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[50] *Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013).

[51] *Id.*, 568 U.S. at 110 (emphasis in original).

[52] *In re Winship, supra* note 48, 397 U.S. at 364.

[53] *Patterson, supra* note 19, 432 U.S. at 210.

[54] *Martin, supra* note 47, 480 U.S. at 237 (Powell, J., dissenting).

> no constitutional duty to overcome the defense beyond a reasonable doubt.[55]

Our acquittal-first step instruction does not comply with the Court's clear statement that states cannot shift the burden of proof to a defendant on an affirmative defense that negates an element of the crime. As previously explained, in Nebraska, proof of a sudden quarrel provocation negates the deliberate, premeditated, and malice elements of first degree murder. Conversely, malice is a mens rea that does not exist if the defendant killed as the result of a sudden quarrel provocation. Yet, evidence of a sudden quarrel provocation will only be produced by a defendant in a murder prosecution because proving that the defendant killed under a provocation negates the level of culpability required for murder.

So the due process question is which party should bear the burden of persuasion to prove or disprove an affirmative defense that, if believed, negates elements of the charged crime. Under *Smith v. U.S.*, it cannot be the defendant. Lower federal courts had previously agreed that *Mullaney* precludes shifting the burden of persuasion to a defendant on such defenses.

Federal Courts of Appeals' Decisions

Nebraska's homicide statutes are similar to the federal government's homicide statutes. Like Nebraska's manslaughter statute, the federal manslaughter statute requires proof that the defendant acted "without malice" and voluntary manslaughter is unlawful killing upon a sudden quarrel or heat of passion.[56] But the federal murder statute defines both first degree and second degree murder to include "malice aforethought" as an element.[57] Even before the U.S. Supreme Court issued *Smith v. U.S.* in 2013, federal appellate courts had applied *Mullaney*

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[55] *Dixon v. United States*, 548 U.S. 1, 6, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006).

[56] See 18 U.S.C. § 1112(a) (2012).

[57] See 18 U.S.C. § 1111(a) (2012).

to invalidate jury instructions that placed the burden of persuasion on a defendant to prove a provocation that does nothing more than rebut the malice element of murder.

For example, in *United States v. Lofton*,[58] the Tenth Circuit held that in a federal murder prosecution with a heat of passion defense, *Mullaney* required the trial court to put the defendant's theory squarely before the jury and inform the jury that the government had the burden to show its absence. The court concluded that *Patterson* did not apply because under New York law, malice was not an element of the second degree murder charge. In contrast, malice was an element of murder under federal law, and a heat of passion defense directly negated malice. But in *Lofton*, the only part of the step instruction that informed the jury of the heat of passion defense was the manslaughter instruction. The requirement that a court instruct the jury on the government's burden to disprove the heat of passion defense was not satisfied by the instruction that the government was required to prove heat of passion to secure a manslaughter conviction.

In *Lofton*, the Tenth Circuit explicitly rejected the government's argument that "the court implicitly defined malice and heat of passion as mutually exclusive and that the structure of the charge forced the jury to find the presence of malice, and thus the absence of heat of passion, in order to find murder":

> [T]he charge did not specifically distinguish the two as inconsistent mental states or inform the jury that finding one necessarily precluded finding the other. Moreover, while the court distinguished first-degree from second-degree murder on the basis of premeditation, it did not differentiate second-degree murder from manslaughter on the basis of the distinction between malice and heat of passion.
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> Indeed, the very structure of the charge precluded the jury from considering the effect of [the] heat of passion

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[58] *United States v. Lofton*, 776 F.2d 918 (10th Cir. 1985).

> defense on the murder count. Instruction 13 advised the jury that if it found the defendant not guilty of first-degree murder, it must then consider if she was guilty of second-degree murder; if it found that she was not guilty of second-degree murder, it must then determine if she was guilty of manslaughter. . . . Thus, the jury was instructed to consider manslaughter only if it found [the defendant] not guilty of murder. The verdict form followed this same format. Although the charge instructed the jury at least seven times of the Government's burden of proof beyond a reasonable doubt of each element of the crime, and notwithstanding the direction that the instructions must be considered as a whole, this was insufficient to inform the jury that the Government must prove the absence of heat of passion beyond a reasonable doubt. A clear and unambiguous instruction to this effect is the constitutional minimum required by *Mullaney*.[59]

Two years later, the Ninth Circuit agreed with the Tenth Circuit's reasoning: "We construe *Mullaney* to require jury instructions for murder to state that the government bears the burden of proving beyond a reasonable doubt the absence of heat of passion or sudden quarrel where that defense is raised."[60]

The Fifth Circuit, however, initially disagreed with the Ninth and Tenth Circuits. In *U.S. v. Molina-Uribe*,[61] the court acknowledged that the "part of *Mullaney* which survives *Patterson* [is] the rule that a State may not place upon the defendant the burden of persuasion on an issue that, if established, would necessarily negate an element of

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[59] *Id.* at 921, 922. Accord *U.S. v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005).

[60] *U.S. v. Lesina*, 833 F.2d 156, 160 (9th Cir. 1987). Accord *U.S. v. Bushyhead*, 270 F.3d 905 (9th Cir. 2001). See, also, *U.S. v. Jackson*, 368 F.3d 59 (2d Cir. 2004); 2A Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 45:03, notes (6th ed. 2009 & Supp. 2015); 2 Leonard B. Sand et al., Modern Federal Jury Instructions, No. 41-4 (2005).

[61] *U.S. v. Molina-Uribe*, 853 F.2d 1193 (5th Cir. 1988), *overruled on other grounds, U.S. v. Bachynsky*, 934 F.2d 1349 (5th Cir. 1991).

the crime."[62] But like this court in *State v. Morgan*,[63] the Fifth Circuit stated that the instructions did not define malice aforethought in terms of an absence of heat of passion. It concluded that the instructions did not violate *Mullaney* because "malice is neither presumed nor required to be disproved by the defendant."[64] It further reasoned that because the government had the burden of proving heat of passion, (presumably, in a lesser-included instruction for manslaughter), no burden was placed on the defendant to prove that the murder was committed in the heat of passion. Finally, it reasoned that in determining whether the victim was killed with premeditation and malice aforethought, the jury was instructed to "'consider all the facts and circumstances preceding, surrounding and following the killing . . . which tend to shed light upon the condition of the mind and heart of the accused before and at the time of the deed.'"[65]

The Fifth Circuit has not overruled its holding in *Molina-Uribe*. But the year after it issued this opinion, it reached the opposite conclusion in *U.S. v. Browner*.[66] There, the court acknowledged that a heat of passion defense negates the malice element in the federal homicide statute and that this relationship requires the government to disprove an adequately raised provocation:

> [T]he federal statute simply declares the language of the common-law offense, and so when the defendant, without legal justification but actuated by a [heat of passion] kills intentionally (or with one of the other mental states that constitutes malice), the killing is nevertheless deemed to be in the *absence of malice* under the federal statute. . . .

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[62] *Id.* at 1204 n.33, quoting *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980).

[63] *Morgan, supra* note 22.

[64] *Molina-Uribe, supra* note 61, 853 F.2d at 1204.

[65] *Id.* at 1205.

[66] *U.S. v. Browner*, 889 F.2d 549 (5th Cir. 1989).

> The malice that would otherwise attach is *negated* by the fact that the intentional killing occurred in the heat of passion in response to a sufficient provocation. . . . Since malice is an element of murder, no murder can occur when a sufficient provocation induces the requisite heat of passion. Thus, the malice element of the traditional offense of murder implicitly forces prosecutors to *disprove* the existence of adequate provocation when the evidence suggests that it may be present.[67]

The Sixth Circuit has applied the same reasoning to state court jury instructions. It held that regardless of whether a state court has characterized a manslaughter statute as an affirmative defense, the constitutional inquiry is whether a mitigating circumstance in the manslaughter statute, like a sudden passion, negates an element of the murder charge. It reasoned that under *Mullaney*, a state may not constitutionally require a defendant to negate an element of the charged crime, even if this proof is designated an affirmative defense.[68]

It is true that in federal habeas actions, the Ninth and Tenth Circuits have been lenient in reviewing challenges to state court jury instructions. But in those cases, the courts' reviews were limited by the federal habeas statute or the jury instructions under review at least required the jury to consider the provocation defense in determining guilt of murder.

For example, the Ninth Circuit rejected a challenge to a Nevada state court's murder and manslaughter step instruction that specifically defined malice "'as used in the definition of Murder, [to mean] the intentional doing of a wrongful act *without legal cause or excuse or what the law considers adequate provocation*.'"[69] "Thus, to find [the defendant] guilty of first

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[67] *Id.* at 552 (emphasis in original). Accord *Lizama v. U.S. Parole Com'n*, 245 F.3d 503 (5th Cir. 2001).

[68] See *Rhodes v. Brigano*, 91 F.3d 803 (6th Cir. 1996).

[69] *Dunckhurst v. Deeds*, 859 F.2d 110, 112 (9th Cir. 1988) (emphasis in original).

degree murder, the jury necessarily had to find that the State proved beyond a reasonable doubt that [he] killed [the victim] with malice aforethought, i.e., without adequate provocation."[70] Notably, while the Ninth Circuit concluded that this definition of malice was sufficient to convey the prosecution's burden of proof, the Nevada Supreme Court has since explicitly held that the State has the burden to prove a defendant did not act in the heat of passion.[71]

The Tenth Circuit similarly upheld an Oklahoma state court's jury instruction that did not require the state to prove the absence of heat of passion, which evidence was produced as an affirmative defense. But the instructions did inform the jurors that "'[m]alice and heat of passion cannot co-exist'" and that they should consider all the circumstances in determining whether the defendant had acted with malice or in the heat of passion.[72] The court noted the instruction was given only because it was a lesser-included offense, not because the defendant had squarely raised the defense. In that circumstance, the instructions were adequate.

In 2006, in *Bland v. Sirmons*,[73] the Tenth Circuit rejected another federal habeas challenge to Oklahoma's jury instructions, despite concluding that the claim was procedurally barred. As in the earlier case, the jury instructions did not require the prosecution to prove that the defendant did not act in the heat of passion. In dicta, the court stated that *Patterson* had limited *Mullaney* "to situations where a fact is presumed or implied against a defendant."[74] The court nonetheless acknowledged that if its decision "in *Lofton* were controlling, [the

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[70] *Id.* at 113.

[71] See *Crawford v. State*, 121 Nev. 744, 121 P.3d 582 (2005).

[72] See *Davis v. Maynard*, 869 F.2d 1401, 1405 (10th Cir. 1989), *vacated on other grounds, Saffle v. Davis*, 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990).

[73] *Bland v. Sirmons*, 459 F.3d 999, 1014 (10th Cir. 2006).

[74] *Id.* at 1013.

petitioner] might well be entitled to relief."[75] But it explained that *Lofton* could not support a habeas challenge to the instructions under the federal Antiterrorism and Effective Death Penalty Act of 1996.

Congress had passed that act a decade before the Tenth Circuit decided *Bland*. Since its enactment, a federal court cannot grant habeas relief unless a state court decision "'was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*.'"[76] The "decisions of lower federal courts applying Supreme Court precedent are not determinative."[77] The Tenth Circuit concluded that because the Fifth Circuit had disagreed with its decision in *Lofton*, "the lower federal courts have in fact divided as to the proper scope of *Mullaney* after *Patterson*."[78] It concluded that the state court ruling upholding the instruction was not an unreasonable application of "*Mullaney*, as the Supreme Court construed that rule in *Patterson*."[79]

As explained, however, in 2013, the U.S. Supreme Court clarified the reach of *Mullaney*. Under *Smith v. U.S.*, the State is foreclosed from shifting the burden of proof to a defendant on an affirmative defense that negates an element of the crime.[80] *Smith* was a unanimous decision, and its explanation of due process requirements shows that *Patterson* did not limit *Mullaney* "to situations where a fact is presumed or implied against a defendant."[81] Under *Smith*, *Mullaney*'s central tenet still applies: It is intolerable for the defendant to bear the risk

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[75] *Id.* at 1014.

[76] *Id.* (emphasis in original), citing 28 U.S.C. § 2254(d)(1) (2012).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] See *Smith, supra* note 50 and text quoted at note 51.

[81] *Bland, supra* note 73, 459 F.3d at 1013.

of error on the critical fact in dispute distinguishing murder from manslaughter.

Moreover, in 2013, the Seventh Circuit specifically relied on *Smith v. U.S.* to explain why the government has the burden to disprove an adequate provocation claim in a federal murder prosecution.[82] In that decision, the court stated that a provocation defense is like an entrapment defense because, if believed, it negates a defendant's culpability. So a provocation defense simply "puts the government to its proof" and requires it to prove the defendant did not kill in the heat of passion.[83] Citing *Smith*, the court explained that a provocation defense is unlike an affirmative defense that does not have a mutually exclusive relationship with an element of the crime: "To prove that a defendant has killed in the heat of passion is unlike proof that the statute of limitations has run, because proof that prosecution is time-barred does not negate any element of the crime."[84]

The Seventh Circuit's decision illustrates that since the U.S. Supreme Court issued *Smith v. U.S.*, there is clearly established federal precedent by the Supreme Court on the due process requirement that the prosecution disprove an affirmative defense that negates an element of the charged offense.

Of course, the due process requirement stated in *Smith v. U.S.* applies only if an affirmative defense negates an element of the charged crime. So the majority, by acknowledging that *Smith* applies here, agrees that a sudden quarrel provocation is an affirmative defense that the State must disprove because it negates elements of the first degree murder charge. But it dodges *Smith*'s requirements. Instead, it relies on precedent that is outdated or misconstrued to conclude that the jury understood the State had the burden to prove Hinrichsen did not kill as the result of a sudden provocation and that the

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[82] See *U.S. v. Delaney*, 717 F.3d 553 (7th Cir. 2013).

[83] *Id.* at 559.

[84] *Id.*, citing *Smith, supra* note 50.

State met its burden. And its prescribed placebo for future first degree murder prosecutions will not cure the due process problem nor bring the instruction in compliance with our decision in *State v. Smith*.[85]

MAJORITY'S SUGGESTED INSTRUCTION IS INADEQUATE

Despite concluding that the acquittal-first step instruction for first degree murder complies with the due process requirements, the majority suggests the following instruction for future cases:

> In future cases, . . . it would be a better practice for courts, in first degree murder cases in which evidence of provocation has been adduced by the defendant, to clarify the definition of deliberation. We encourage courts in such cases to define "deliberate" to mean "not suddenly or rashly, but doing an act after first considering the probable consequences. An act is not deliberate if it is the result of sudden quarrel provocation."

But why should such an instruction be necessary if under our current instructions, jurors already consider sudden quarrel evidence and conclude that the State disproved the defense when they convict a defendant of first degree murder? If jurors actually understood that the deliberation element and a provocation defense are mutually exclusive and that by proving the deliberation element, the State necessarily disproves a provocation defense, there should be no need to inform them that an act is not deliberate if it is the result of a sudden quarrel provocation. So the majority's suggestion that in the future, courts give a mutually exclusive instruction in the definition of deliberation is an implicit acknowledgment that a jury currently (1) does not consider sudden quarrel evidence in determining a defendant's guilt of first degree murder and (2) does not understand that by proving the deliberation element, the State disproves a provocation defense.

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[85] *Smith, supra* note 1.

Of course, having jurors in the future consider evidence of a sudden quarrel in deciding whether a defendant deliberated a homicide is an improvement over our current instructions. And if the majority were requiring courts in the future to consider evidence of the provocation defense in deciding guilt of murder, that instruction would partially bring our instruction in compliance with *Martin v. Ohio*.[86] As explained, under that case, a State cannot preclude a jury from considering evidence of an affirmative defense that overlaps and tends to negate an element of the charged crime.

But only instructing a jury that an act is not deliberate if it is the result of a sudden quarrel provocation would give jurors the impression that a provocation defense is irrelevant to the elements of premeditation and malice. And proof of a sudden quarrel provocation also negates the elements of premeditation and malice. So I believe a better option under § 29-2027 is to instruct the jury that (1) the jury must consider evidence of a sudden quarrel provocation in deciding whether the State has proved the elements of first degree murder; and (2) it cannot convict a defendant of murder if it finds that evidence of a sudden quarrel provocation creates a reasonable doubt about the defendant's guilt. This instruction would better explain a jury's options under § 29-2027, as *State v. Smith* requires.

But even if the suggested instruction were adequate, the majority knows well that suggested instructions are toothless, as our 2009 decision in *State v. Goodwin*[87] illustrated. There, we found no constitutional infirmity or error in the acquittal-first step instruction in a first degree murder case. Nonetheless, we encouraged courts in future cases to give an instruction under NJI2d Crim. 3.1, which we described as providing a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses. But in 2012,

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[86] See *Martin, supra* note 47.

[87] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

an appeal arose in which the court did not give the instruction. We affirmed because we had held in *Goodwin* that the step instruction was constitutional.[88]

Additionally, nothing in our current step instruction or the suggested instruction for first degree murder complies with the mandate in *State v. Smith*: i.e., "a jury must be given the option of convicting [the defendant] of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation."[89]

But the more important point is that the majority's legal fiction is false. The acquittal-first step instruction blocks the jury's consideration of the provocation defense, and the instructions do not explain the defense's mutually exclusive relationship with the murder elements. Moreover, even if the jury were instructed to consider the mutually exclusive relationship between a provocation defense and each element of murder negated by that defense, this correction would not resolve the burden of proof problem. And the cases relied on by the majority do not support its conclusion that a court is not required to instruct a jury that the State has the burden to disprove a sudden quarrel provocation.

CASES CITED BY THE MAJORITY DO NOT SUPPORT ITS HOLDING

Federal Court Decisions

As stated, the majority recognizes that *Smith v. U.S.* applies here because it prohibits states from shifting the burden of proof to the defendant for an affirmative defense that negates an element of the crime. Nonetheless, the majority erroneously relies on the following statement in *Patterson* to conclude that "due process is met as long as the state has to prove beyond a reasonable doubt all of those enumerated elements" of first degree murder:

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[88] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[89] *Smith, supra* note 1, 284 Neb. at 656, 822 N.W.2d at 417.

> Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.[90]

Taken out of context, this statement appears to support the majority's conclusion. But the only reason that the U.S. Supreme Court saw no reason to require New York to prove a defendant did not kill as the result of an extreme emotional distress was because it had already determined that this affirmative defense "d[id] not serve to negative any facts of the crime which the State is to prove in order to convict of murder."[91]

But the same is not true here. Unlike the affirmative defense in *Patterson*, this court has acknowledged that an adequate provocation must negate three elements of first degree murder: premeditation, deliberation, and malice. Moreover, in distinguishing *Mullaney*, the Court in *Patterson* specifically stated that shifting "the burden of persuasion with respect to a fact which the State deems so important that it must be *either* proved *or* presumed is impermissible under the Due Process Clause."[92] It may have been reasonable before *Smith v. U.S.*[93] to interpret *Patterson* as nonetheless limiting *Mullaney* to

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[90] *Patterson, supra* note 19, 432 U.S. at 210.

[91] *Id.*, 432 U.S. at 207.

[92] *Id.*, 432 U.S. at 215 (emphasis supplied).

[93] *Smith, supra* note 50.

those laws that presumed the element of malice upon proof of an intentional and unlawful homicide. But the Court's decision in *Smith* refutes that interpretation of *Patterson*. There, the Court adopted Justice Powell's interpretation of *Patterson*: "The clear implication of this ruling [in *Patterson*] is that when an affirmative defense *does* negate an element of the crime, the state may not shift the burden."[94] So the majority incorrectly reduces *Patterson* to requiring only that the State prove the elements of the charged crime beyond a reasonable doubt. And its acknowledgment that the Supreme Court's decision in *Smith v. U.S.* applies here directly conflicts with its reliance on its incorrect interpretation of *Patterson*.

The majority similarly takes false comfort in the Ninth Circuit's decision upholding a Utah state court's jury instructions on murder and provocation. It misconstrues the holding by failing to mention the significant fact that the Utah instruction at least defined malice to mean "'the intentional doing of a wrongful act *without legal cause or excuse or what the law considers adequate provocation*.'"[95] As previously stated, the Ninth Circuit concluded that this instruction required the jury to find that the defendant did not kill because of a sudden provocation in order to find him guilty of first degree murder. Leaving aside whether this instruction would be adequate under *Smith v. U.S.*, our jury instruction does not define "malice" to exclude a sudden quarrel provocation. Nothing in the court's acquittal-first step instruction allowed the jury to consider Hinrichsen's provocation defense in determining his guilt of first degree murder. So unlike Utah's jury instruction, the acquittal-first step instruction here violated both *Martin v. Ohio*[96] and *Mullaney v. Wilbur*.[97]

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[94] *Martin, supra* note 47, 480 U.S. at 237 (emphasis in original) (Powell, J., dissenting), quoted in *Smith, supra* note 50.

[95] See *Dunckhurst, supra* note 69, 859 F.2d at 112 (emphasis in original).

[96] *Martin, supra* note 47.

[97] *Mullaney, supra* note 41.

Similarly, the Fifth Circuit's decision in *Molina-Uribe*[98] is a thin reed for the majority to hold onto in a constitutional analysis. As explained, a year after it held that the government need not prove the absence of a heat of passion, it specifically recognized that because a heat of passion defense negates the malice element in the federal homicide statute, the government must prove the defendant did not kill in the heat of passion when the defense is raised.[99] Additionally, an integral part of the Fifth Circuit's reasoning was that in determining whether the victim was killed with premeditation and malice aforethought, the jury was instructed to "'consider all the facts and circumstances preceding, surrounding and following the killing . . . which tend to shed light upon the condition of the mind and heart of the accused before and at the time of the deed.'"[100] That instruction is not given in Nebraska. So the Fifth Circuit's decision fails to validate our acquittal-first step instruction.

The majority also erroneously relies on the Fourth Circuit's decision in *Guthrie v. Warden, Maryland Penitentiary*.[101] There, malice, as an element of second degree murder, was presumed when the State proved the defendant killed willfully and intentionally, and without legal excuse or justification, unless the defendant proved that he killed because of a sudden provocation. The Fourth Circuit held that these instructions were a clear violation of *Mullaney*. But because the defendant was convicted of first degree murder, it held that the violation was harmless error: i.e., by proving the murder was deliberate and premeditated, the State had necessarily "'disproved manslaughter beyond a reasonable doubt.'"[102] The court reasoned that the defendant's heat of passion defense

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[98] *Molina-Uribe, supra* note 61.

[99] See *Browner, supra* note 66.

[100] *Molina-Uribe, supra* note 61, 853 F.2d at 1205.

[101] *Guthrie v. Warden, Maryland Penitentiary*, 683 F.2d 820 (4th Cir. 1982).

[102] *Id.* at 823.

was relevant only to the distinction between manslaughter and second degree murder and did not "touch on" the elements of first degree murder.[103]

But this harmless error analysis does not support the majority's conclusion that our acquittal-first step instruction complies with due process requirements. The Fourth Circuit held that the instruction was error. And however questionable its reasoning was in determining that the error was harmless, the Fourth Circuit reasoned that the provocation defense did not negate any element of the first degree murder charge. But this court has acknowledged that in Nebraska, proof of a sudden quarrel provocation negates three elements of first degree murder. And the majority explicitly acknowledges here that a provocation defense negates the elements of malice and deliberation.

More important, the Fifth Circuit's reasoning in *Molina-Uribe* and the Fourth Circuit's reasoning in *Guthrie* have been effectively abrogated by *Smith v. U.S.* Both courts explicitly or implicitly reasoned that the government's proof of the murder elements negated the provocation defense. It is true that a malice element in a murder charge and a provocation defense under a manslaughter statute have a mutually exclusive relationship. They cannot both exist. But by foreclosing states from shifting the burden of proof to the defendant "'when an affirmative defense *does* negate an element of the crime,'"[104] the Supreme Court clearly meant that for such defenses, the prosecution must "overcome the defense beyond a reasonable doubt."[105] *In re Winship*[106] has required states to prove the elements of a crime beyond a reasonable doubt since 1970. And the principle that states may not shift the burden to the defendant to prove an affirmative

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[103] See *id.*

[104] *Smith, supra* note 50, 568 U.S. at 110 (emphasis in original).

[105] See *id.*

[106] *In re Winship, supra* note 48.

defense that negates an element of the crime is an extension of *In re Winship*—not synonymous with it. The Court clearly meant that a state must disprove any additional consideration in an affirmative defense that negates an element of the charged crime.

The majority avoids this requirement by engaging in a formalistic interpretation of the Court's mandate that states cannot shift the burden of proof. It reasons that our jury instruction complies with due process because it does not specifically instruct the jury that the defendant has the burden to disprove any element of the murder charge. But just because our jury instruction does not explicitly inform the jury that the defendant bears this burden does not make it constitutional. The defendant, not the State, produces the provocation evidence, and a provocation is a circumstance that exists outside of the listed elements that the State must prove. As noted, this court has stated that "[i]t is a question for the trier of fact *whether the defendant* . . . has presented sufficient evidence of provocation to cast a reasonable doubt on the element of malice."[107] And like this court, a jury will reasonably conclude that the defendant has the burden to negate the elements of first degree murder unless it is specifically informed that the State has the burden to disprove the defense.

Contrary to the majority's reasoning, it is *because* the elements and affirmative defense have a mutually exclusive relationship that the State must disprove a provocation defense. Without this burden of proof instruction, there is a danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence.[108] That is, even when a jury is expressly allowed to consider any evidence of a sudden provocation, a jury could determine that a defendant had

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[107] *Lyle, supra* note 26, 258 Neb. at 271-72, 603 N.W.2d at 31 (emphasis supplied).

[108] See *Martin, supra* note 47 (Powell, J., dissenting).

failed to negate the elements of malice, deliberation, and premeditation, instead of determining that the State proved them beyond a reasonable doubt.

This is the reasoning that the U.S. Supreme Court implicitly agreed with in *Smith v. U.S.* when it adopted Justice Powell's statement that a state must disprove a defense that negates an element of the crime. I cannot reconcile the *Smith* Court's reasoning with the majority's conclusion that our instruction complies with due process because proof of the murder elements necessarily negates a sudden quarrel defense.

State Courts Cited By the Majority Require the State to Disprove a Provocation Defense

State court decisions, of course, are not determinative of what the federal Due Process Clause requires when they conflict with the U.S. Supreme Court's precedent. I discuss these cases only to demonstrate that the majority's purported support is not support at all. To the contrary, the jury instructions in other jurisdictions only emphasize this court's increasing isolation in continuing to uphold our acquittal-first step instructions in first degree murder cases.

The majority discusses a Minnesota case and a California case for support that a court need not explicitly instruct the jury that the State must prove the absence of a heat of passion defense if the instructions, viewed as a whole, are sufficient to convey the State's burden of proof. Neither case supports its holding.

The California case is distinguishable because the court was dealing with a different issue. In California, malice aforethought is an element of both first degree murder and second degree murder. But first degree murder requires additional proof that the defendant deliberated and premeditated the murder. A provocation that subjectively precludes a person from deliberating and premeditating a murder negates those elements and reduces a homicide from first degree to second

degree murder. In contrast, a provocation that would cause an objectively reasonable person to react with deadly passion negates the element of malice and reduces a murder to voluntary manslaughter.[109] Since at least 2000, the California Supreme Court has required the State to prove the absence of a provocation when the issue is properly raised.[110]

The California Court of Appeals did not decide *People v. Hernandez*,[111] the case the majority relies on, until 2010. An instruction on the State's burden to disprove the provocation was not at issue in *Hernandez*. The trial court presumably followed the California Supreme Court's earlier mandate. The trial court also instructed the jury that a provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The issue in *Hernandez* was whether the defendant was entitled to a more specific instruction on how the jury should consider a provocation, assuming it found that one existed, in determining the defendant's guilt of second degree murder or manslaughter. The California Court of Appeals concluded that a trial court is not required to give the more specific instruction unless it is requested—which the defendant did not do. The court further concluded that the instructions, read as a whole, were adequate to ensure that the jury understood the claimed provocation was also relevant to negating premeditation and deliberation. It noted that the trial court had separately instructed the jury that a decision to kill which is made rashly, impulsively, or without careful consideration is not deliberate and premeditated.

Hernandez illustrates that California law is more lenient on the effect of a provocation and that its jury instructions are more explicit than Nebraska's on the relationship of a

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[109] See *People v. Hernandez*, 183 Cal. App. 4th 1327, 107 Cal. Rptr. 3d 915 (2010).

[110] See *People v. Rios*, 23 Cal. 4th 450, 2 P.3d 1066, 97 Cal. Rptr. 2d 512 (2000).

[111] *Hernandez, supra* note 109.

provocation to the elements of first degree murder. The instructions here did not explain the mutually exclusive relationship between a provocation and any element of murder. But more to the point, *Hernandez* did not hold that a court need not instruct a jury on the State's burden to prove the absence of a provocation when the issue is raised. The court simply was not addressing that issue.

The Minnesota case that the majority cites, *State v. Auchampach*,[112] is distinguishable for a different reason. Minnesota's homicide statutes are significantly different than Nebraska's. Most important, the first degree murder statute does not have a malice element. Instead, it sets out seven acts that constitute the crime. The first listed act is intentionally causing the death of another with premeditation; the other acts are causing the death of another under specified circumstances.[113] Additionally, the voluntary manslaughter statute does not have a "without malice" element.[114]

The defendant in *Auchampach* was charged with premeditated murder. The trial court instructed the jury that under Minnesota law, a defendant is guilty of manslaughter and not murder if the defendant killed in the heat of passion. It further instructed that if the jurors concluded the defendant had committed a crime but was in doubt about which crime, they could only find him guilty of manslaughter. Finally, the court instructed the jury that an "unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated."[115] But the court refused to instruct the jury that the prosecution had the burden to prove the absence of a provocation.

On appeal, the Minnesota Supreme Court concluded that the State was not constitutionally required to disprove a provocation because the absence of a heat of passion was not

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[112] *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995).

[113] See Minn. Stat. § 609.185 (2014).

[114] See Minn. Stat. § 609.20(1) (2014).

[115] *Auchampach, supra* note 112, 540 N.W.2d at 818.

an element of premeditated murder. It nonetheless held that in future cases, a court must explicitly instruct a jury that the prosecution has the burden to prove the absence of an adequately raised provocation. And it concluded that the trial court's instructions had been adequate to convey the prosecution's burden to disprove the provocation.

But because of the difference in Minnesota's murder statute, *Auchampach* is not persuasive authority for jury instructions under our homicide statutes. The court had no reason to consider whether a provocation claim would negate a malice element of murder. Neither malice nor its converse exists in Minnesota's homicide statutes. It is true that the jury instructions indicated that a provocation defense negated the premeditated element of murder under Minnesota's statutes. But the important point here is that the court corrected its instructions to explicitly inform juries that the State must prove the absence of a provocation. And the only reason for explicitly requiring this instruction is to clarify to a jury that the State bears the risk of error on the critical fact in dispute (provocation) that distinguishes murder from manslaughter.

In short, like the federal cases that the majority cites, the state cases it cites are distinguishable. They are either not dealing with homicide statutes that retain the common-law concepts of "malice" and "without malice," or the instructions that were given at least required the jury to consider that an element of the crime and a provocation defense could not coexist.

The lack of supporting cases in the majority opinion is not surprising. Even when the U.S. Supreme Court decided *Mullaney* in 1975, the large majority of states already required "the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt."[116] Since *Mullaney* was issued, other courts have reached the same

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[116] *Mullaney, supra* note 41, 421 U.S. at 696, citing Wayne R. LaFave & Austin W. Scott, Jr., Handbook on Criminal Law 539-40 (1972).

conclusion.[117] And many state legislatures have abandoned the common-law concept of malice,[118] perhaps, in part, because of the burden of proof problems created by this element.

But none of the cases cited by the majority, state or federal, upheld an acquittal-first step instruction that precluded the jury from considering the mitigating circumstance of a sudden provocation in determining a defendant's guilt of murder.

SUMMATION

Despite concluding that Nebraska's acquittal-first step instruction does not offend due process, the majority could, of course, require an explicit instruction in future cases that the State has the burden to prove the defendant did not kill as the result of a sudden quarrel provocation. The majority claims that our instruction implicitly requires the State to disprove a provocation defense. So it could follow the Minnesota Supreme Court's lead, and make this burden explicit to ensure that the jury understands that the State bears the risk of nonpersuasion on the issue of provocation.

Alternatively, it could have, and should have, extended *State v. Smith*[119] to first degree murder prosecutions. Under *Smith*, § 29-2027 is a procedural rule for murder prosecutions that requires a jury instruction to clarify the jury's options of conviction, depending on its resolution of a provocation defense. Instead, the majority clings to a legal fiction that our acquittal-first step instruction poses no due process problem. It reaches this conclusion despite this court's requirement that a sudden quarrel provocation negate the deliberate, premeditated, and malice elements of first degree murder.

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[117] See, e.g., *Rios, supra* note 110; *Reddick, supra* note 34; *Commonwealth v. Nieves*, 394 Mass. 355, 476 N.E.2d 179 (1985); *Auchampach, supra* note 112; *Crawford, supra* note 71.

[118] See, e.g., *Patterson, supra* note 19; Ala. Code § 13A-6-2, commentary (2006); Ky. Rev. Stat. Ann. § 507.020, commentary (West 2006); La. Stat. Ann. § 14:30, reporter's comment (2007); Minn. Stat. § 609.185 (2014).

[119] *Smith, supra* note 1.

Although the majority acknowledges that the U.S. Supreme Court's decision in *Smith v. U.S.*[120] applies here, it interprets the decision so that it is meaningless. But *Smith* clarified that the Due Process Clause requires the State to overcome a provocation defense because it negates three elements of first degree murder. I believe that the majority's interpretation is wrong. Because of the recent changes in our own case law and the U.S. Supreme Court's recent clarification of due process requirements, I can no longer agree that our instruction complies with due process. I dissent.

Miller-Lerman, J., joins in this dissent.

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[120] *Smith, supra* note 50.

Shelley Jane Brozek, appellee and cross-appellant, v. Kirk Steven Brozek, appellant and cross-appellee.

874 N.W.2d 17

Filed February 5, 2016. Nos. S-14-957, S-14-1141.

1. **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.
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. **Contracts: Statutes: Appeal and Error.** The construction of a contract and the meaning of a statute are questions of law which an appellate court reviews de novo.
4. **Contracts: Stock.** The general rules of contract construction apply to restrictive share agreements.
5. **Contracts.** If a contract's terms are clear, a court may not resort to the rules of construction and must give the terms their plain and ordinary meaning as a reasonable person would understand them.
6. ____. A court must consider a contract as a whole and, if possible, give effect to every part of the contract.
7. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
8. **Property Division.** Equitable property division is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties.
9. ____. The ultimate test in determining the appropriateness of a property division is fairness and reasonableness as determined by the facts of each case.

10. ____. Generally, the date on which a court values the marital estate should be rationally related to the property composing the marital estate.
11. **Divorce: Property Division.** Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.
12. ____: ____. The marital estate does not include property that a spouse acquired before the marriage, or by gift or inheritance.
13. ____: ____. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.
14. **Property Division: Proof.** The party claiming that property is nonmarital has the burden of proving the property's separate status.
15. **Statutes.** A court gives statutory language its plain and ordinary meaning.
16. **Statutes: Legislature: Intent.** A court's duty in interpreting a statute is to determine and give effect to the Legislature's purpose as ascertained from the statute's entire language considered in its plain, ordinary, and popular sense.
17. **Divorce: Jurisdiction: Attorney Fees: Appeal and Error.** An order helping a party pay for his or her attorney's work on appeal is an order in aid of the appeal process under Neb. Rev. Stat. § 42-351(2) (Reissue 2008).
18. **Divorce: Alimony.** In considering alimony, a court should weigh four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the party seeking support to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
19. ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), a court should consider the income and earning capacity of each party and the general equities before deciding whether to award alimony.
20. **Divorce: Property Division: Alimony.** The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately.
21. **Divorce: Alimony.** In weighing a request for alimony, the court may take into account all of the property owned by the parties when entering the decree, whether accumulated by their joint efforts or acquired by inheritance.
22. **Divorce: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.

23. ____: ____. A dissolution court deciding whether to award attorney fees should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeals from the District Court for Antelope County: Mark A. Johnson, Judge. Affirmed.

David A. Domina and Christopher A. Mihalo, of Domina Law Group, P.C., L.L.O., for appellant.

Russell A. Westerhold, of Fraser Stryker, P.C., L.L.O., for appellee.

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

Connolly, J.

I. SUMMARY

Shelley Jane Brozek and Kirk Steven Brozek separated, and the court later dissolved their marriage of about 20 years. The decree divided the marital estate and ordered Kirk to buy some of Shelley's separate property. Kirk appeals, and Shelley cross-appeals. Kirk argues that the court erred by ordering him to buy Shelley's shares in a closely held farming corporation for an amount higher than the value determined under a stock redemption agreement. He also argues that the court erred in dividing the marital estate, that it should have given him a credit for premarital property he disposed of during the marriage, and that it lacked jurisdiction to award Shelley attorney fees after he filed a notice of appeal. Shelley argues that the court should have awarded her alimony, a cash award for the inadequacy of the marital estate, and attorney fees. We affirm the decree and the order awarding Shelley attorney fees.

II. BACKGROUND

1. Parties' Work History

Shelley and Kirk married in October 1993. They have two daughters, and Kirk adopted Shelley's son from a prior marriage. The parties separated on December 24, 2011, after more than 18 years together.

A month later, Shelley filed a dissolution complaint. When the court tried the case in April 2014, Shelley was 50 and Kirk was 47 years of age. Only one of their children was still a minor.

Kirk has farmed since he graduated from college in 1986. He farms with his father, brother, and adopted son.

Before Shelley married Kirk, she worked as a grocery clerk and secretary, and she also worked in sales. She did not pursue education beyond high school and testified that her marriage to Kirk did not interrupt her education or career.

Shelley stated she and Kirk were in "total agreement" that she would not work outside the home. She maintained the marital home, brought meals and equipment parts to the field, mowed and sprayed pasture, and helped put up hay on a few small tracts. Kirk's brother, though, testified that Shelley seldom helped with the farming operation and "was mostly in the way."

2. The Corporations

Kirk's farming is interwoven with two closely held corporations. The first, Brozek & Sons, Inc., is "the operating entity of the farming operation." It owns the land, sells the grain, and pays the Brozeks and others for their services. Its largest asset is about 3,400 acres of land. Kirk and his brother personally rent some of Brozek & Sons' land, but the corporation "also operate[s] some of its own ground."

The other corporation is Brozek Farms, Inc., which is "principally an equipment company." It leases the equipment it owns to Brozek & Sons.

Kirk and Shelley are shareholders of both Brozek & Sons and Brozek Farms. Kirk's parents gifted him shares of Brozek

& Sons before and during the marriage. Shelley testified that she received her shares by gift during the marriage. Kirk has 75,541.67 shares, and Shelley has 12,000 shares of Brozek & Sons, comprising stakes of about 21 percent and 3 percent, respectively. Kirk has 437.5 shares, and Shelley has 62.5 shares of Brozek Farms.

Kirk, Shelley, and the other shareholders of Brozek & Sons signed a "Redemption Agreement" in 2003. The agreement states that no sale, assignment, or other disposition of Brozek & Sons shares is valid unless made under the agreement.

At trial, the parties disputed the meaning of two paragraphs of the agreement. The second paragraph provides:

> Transfer to Related Stockholder. Anything in this agreement to the contrary notwithstanding, a Stockholder may at any time or from time to time transfer all or any part of his stock to his spouse, one or more of his children, or a trustee or custodian for the exclusive benefit of himself, his spouse, or his issue . . . .

The third paragraph provides: "Sale During Life. A Stockholder desiring, during his lifetime, to sell or otherwise encumber his stock shall make a written offer to sell to [Brozek & Sons] upon the following terms and conditions, and [Brozek & Sons] shall purchase all of such shares of stock . . . ." The original price was $8.50 per share, but Kirk testified that the Brozek & Sons board increased it to $12 in 2013.

Shelley testified that she did not want to remain a shareholder of either Brozek & Sons or Brozek Farms because "I don't think that would be reasonable." Kirk testified that he did not want to purchase Shelley's Brozek & Sons shares for a price above the value determined under the redemption agreement.

In contrast to Brozek & Sons, there is no redemption agreement for Brozek Farms. Kirk testified that he was willing to buy Shelley's Brozek Farms shares at a price determined by the court.

Kirk and Shelley hired experts to appraise their Brozek & Sons and Brozek Farms shares using a net asset approach.

Shelley's expert valued a minority share of Brozek & Sons at $50 in August 2011 and August 2012. He valued a minority share of Brozek Farms at $341 in August 2011 and $290 in August 2012. As of December 24, 2011, Kirk's expert valued Shelley's Brozek & Sons shares at about $34 each and her Brozek Farms shares at about $270 each. Shelley's expert reviewed the reports of Kirk's expert and testified that the main differences were the valuation dates and the discounts for lack of control and marketability.

3. Disputed Personal Property

Because Brozek & Sons held the land, Kirk and Shelley did not own any real estate. But they did accumulate significant personal property during the marriage, including several horses. Shelley could not remember how many horses she and Kirk had when they separated, but she thought there might have been six. She did not possess any of the horses at the time of trial because her current residence lacked facilities.

In Kirk's "Statement of Financial Condition" as of December 31, 2011, he said that he had "Horses 7 head" but named only six animals. In a "2011 Depreciation and Amortization Report," Kirk included a "Horse/MH" in addition to the six horses he named in his "Statement of Financial Condition." Kirk had taken depreciation on all of the horses except one.

Kirk valued the horses at $12,600. Shelley suggested that the court include half of the horses' value in the marital estate and award the horses to Kirk.

The parties acquired a horse trailer during their marriage. Shelley possessed the trailer at the time of trial but did not want it because she did not have any horses. Kirk stated that he did not want the trailer.

Shelley and Kirk also bought automobiles during their marriage, including a 2004 Ford pickup truck. Kirk was driving the truck when he and Shelley separated but said that their adult daughter was driving it at the time of trial. Shelley testified that their adult daughter drove, but did not own, the truck,

which was "part of the whole package of vehicles that Kirk and I own."

4. Kirk's Premarital Property

Kirk attempted to identify and trace a significant amount of premarital personal property. For items that he no longer had at his separation from Shelley, Kirk asked for a "credit or set-off" against the marital estate.

Kirk's alleged premarital property included two checking accounts. He used one for household use and the other for farm use. Kirk said that the farm account had about $79,000 when he married Shelley. He added Shelley's name to both accounts after their marriage, and they used the accounts until they separated.

For the premarital machinery that he had sold or traded in, Kirk wanted a credit against the marital estate. He submitted evidence of the purchase price of the machinery, which he said was evidence of its "value" because his equipment held its value as it aged or even appreciated. But he acknowledged that farm equipment generally depreciates.

The premarital machinery that Kirk no longer possessed included two tractors, a disk, a cultivator, a fertilizer spreader, and a drill. Kirk testified that he sold or traded in each of these items at some point but could not remember what consideration he received. He remembered using the trade-in value of a premarital shredder and an unspecified amount of "cash boot" to acquire a different shredder in 2011. Asked what the trade-in value for the shredder was, Kirk took "a guess that my memory is $3,500." He said he kept "unique files for each unique item of equipment," but files matching that description are not in the record.

Finally, Kirk wanted a "bushel for bushel set-off," or at least a credit, for the crops he harvested in 1993. He said he farmed a particular number of acres of corn, popcorn, and soybeans in 1993. Using an "average [yield] of the area of the other fields in the area," he estimated how many bushels he harvested, and

valued them at $190,000. Kirk used the proceeds of his 1993 harvest to "reinvest[] my cash fund, and inventory of grain to fund the next years crop" and "rolled such investments, year to year, from 1993 through December 24, 2011."

5. Parties' Income and Their Postseparation Circumstances

Most of Shelley and Kirk's income came from Kirk's personal farming activities and the salaries he drew from Brozek & Sons and Brozek Farms. According to Kirk's W-2 wage and tax statements, he received combined wages from Brozek & Sons and Brozek Farms of $31,800 in 2008, $33,600 in 2009, and $33,600 in 2010. Brozek & Sons also paid the family's health insurance premiums, telephone bills, Internet bills, and fuel costs. Brozek & Sons also let Kirk and Shelley live rent free in a house owned by the corporation. Kirk said his annual net farm income with straight-line depreciation was about $35,600 in 2008; $124,000 in 2009; and $77,400 in 2010.

After their separation, Kirk continued to farm and Shelley's pursuits varied. She found employment with a large hog producer caring for "reject pigs" that had "something wrong with them." Once the pigs put on weight, Shelley and the producer sold them and split any profits.

Shelley also sold a few steers from her cattle herd. She took about 24 cows and 17 calves with her when she left the marital home in December 2011. Shelley had maintained the herd but could not grow it because of financial constraints. Her hope was to support herself by growing the herd, but she needed more pasture.

Outside of her livestock operation, Shelley has done some "odd jobs" for friends. She thought that the only other jobs available to her in the area were those paying around minimum wage. She estimated that her living expenses were $5,160 per month.

According to her separately filed federal tax returns, Shelley had a total income of about $17,200 in 2012 and $17,600 in

2013. According to Kirk's federal tax return, he lost $13,000 in 2012.

6. Decree

In September 2014, the court entered its operative decree dissolving the parties' marriage. It determined that Kirk and Shelley's Brozek & Sons and Brozek Farms shares were their separate property. But Kirk should nevertheless buy Shelley's shares in both corporations because leaving them in Shelley's hands "would be impractical and lead to an inequitable result."

The court valued Shelley's Brozek & Sons shares at $50 each and her Brozek Farms shares at $315.50 each. It stated that the appraisals of Shelley's expert reflected the "current market value closest to the date of trial" and were more persuasive than the opinions of Kirk's expert.

The court ordered Kirk to pay Shelley $600,000 for her 12,000 shares of Brozek & Sons and $19,718.75 for her 62.5 shares of Brozek Farms. And, on the issue that has largely driven this appeal, it found that the redemption agreement did not apply to Kirk's purchase of the Brozek & Sons shares because the agreement, by its terms, did not apply to transfers between spouses.

The court rejected Kirk's attempts to trace his premarital property. Regarding the checking accounts, it stated that the funds "have been so commingled that it is not practicable to attempt to separate them to any logical end." Similarly, giving Kirk a credit for the value of the premarital machinery that he traded in during the marriage would require speculation. Nor was Kirk entitled to a "grain-for-grain credit" for his 1993 harvest. He only estimated the number of bushels he actually harvested. Plus, the court was not persuaded that "after nearly 20 years of marriage the [market] value of the grain was not completely commingled in the years that farming operations were not as profitable as when they were more so."

The court valued the parties' net marital estate at about $2.5 million, nearly $2.4 million of which it awarded to Kirk.

The most substantial items were about $1.2 million of crops held in storage in December 2011 and $485,000 of machinery. The court determined that funds in both the household and farm checking accounts on December 23 and 24, 2011, were marital property. It awarded Kirk the 2004 Ford pickup, the horse trailer, and "7 head of horses valued at $6,300." It awarded Shelley 36 head of cattle valued at about $40,000. To equalize the marital estate, the court ordered Kirk to pay Shelley about $1.1 million.

Shelley argued that she should receive additional compensation because the corporate ownership of farming assets made the marital estate inadequate. The court referred to Shelley's request as one for a "*Grace* award" under our decision in *Grace v. Grace*.[1] The court declined Shelley's invitation, emphasizing that the marital estate was substantial and that Kirk's average income from 2009 to 2011 was $96,000. Furthermore, Shelley would be compensated for the effort she and Kirk put into the Brozek family corporations through the forced sale of her shares to Kirk for about $620,000.

The court similarly denied Shelley's request for $3,000 per month of alimony for 10 years. It acknowledged "a great disparity in incomes of the parties." But it concluded that the marriage had not interrupted Shelley's career or educational pursuits and that she would not have to delay any such pursuits to care for the children, the youngest of which was nearly the age of majority. Plus, the court noted that Shelley would receive cash for her shares in the Brozek corporations and a large equalization payment: "This will, as a natural consequence, reduce [Kirk's] earning capacity and likewise increase [Shelley's] earning capacity due to access to over **$1,887,984.00** in cash or assets for investment in her cattle herd or otherwise."

The court ordered each party to pay their own attorney fees and costs.

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[1] *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

In October 2014, Kirk filed his notice of appeal. About 2 weeks later, Shelley filed a "Motion for Temporary Relief Pending Appeal." Because she had not paid any of her attorney fees yet, she asked for "a reasonable amount of attorneys' fees to allow for her defense of [Kirk's] appeal." The court sustained Shelley's motion and awarded her $10,000 of "[t]emporary attorney fees."

Kirk filed a notice of appeal from the court's order on Shelley's motion for temporary relief. We sustained his motion to consolidate the two appeals for briefing and disposition.

III. ASSIGNMENTS OF ERROR

Kirk assigns, restated, that the court erred by (1) ordering him to buy Shelley's Brozek & Sons shares at a price contrary to the redemption agreement; (2) not valuing Shelley's Brozek & Sons and Brozek Farms shares as of the date of the parties' separation; (3) awarding him the horse trailer, the 2004 Ford pickup, and the horses; (4) not giving him a credit against the marital estate for the value of his premarital checking accounts, machinery, and crops; and (5) awarding Shelley attorney fees after he appealed from the decree.

On cross-appeal, Shelley assigns that the court erred by not awarding her (1) alimony, (2) a *Grace* award, and (3) attorney fees in the decree.

IV. STANDARD OF REVIEW

[1,2] 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.[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]

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[2] See *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015).

[3] *Id.*

[3] The construction of a contract and the meaning of a statute are questions of law which an appellate court reviews de novo.[4]

V. ANALYSIS

1. Kirk's Appeals

(a) Redemption Agreement

Kirk argues that the redemption agreement should control the price he pays for Shelley's Brozek & Sons shares. The third paragraph of the agreement provides that shareholders who wish to sell their shares must offer them to the corporation at a price determined under the agreement. At the time of trial, that price was $12 per share. But the court decided that the repurchase provision in the third paragraph did not apply, because a sale between Kirk and Shelley was a transfer to a related stockholder under the second paragraph of the agreement.

Stock transfer restrictions, such as redemption agreements, are generally enforceable under Nebraska law.[5] A transfer of shares contrary to a restrictive agreement is voidable in equity.[6] But we have not yet considered redemption agreements in a marital dissolution action.

When dividing marital property, most courts do not treat a redemption agreement as conclusive evidence of a share's value.[7] Instead, a majority consider the price in the agreement

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[4] See, *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015); *Labenz v. Labenz*, 291 Neb. 455, 866 N.W.2d 88 (2015).

[5] See, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *F.H.T., Inc. v. Feurhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982); *Elson v. Schmidt*, 140 Neb. 646, 1 N.W.2d 314 (1941); 18 C.J.S. *Corporations* § 260 (2007).

[6] See *Pennfield Oil Co. v. Winstrom, supra* note 5.

[7] See 2 Brett R. Turner, Equitable Distribution of Property § 7:19 (3d ed. 2005). See, also, 1 Barth H. Goldberg, Valuation of Divorce Assets § 6:4 (rev. ed. 2005 & Cum. Supp. 2015-16); 2 Arnold H. Rutkin, Valuation and Distribution of Marital Property § 22.08[3][c] (2006).

as merely evidence of value.[8] A few jurisdictions presume that the agreed-upon price is correct,[9] and a minority hold that a redemption agreement is controlling as a matter of law.[10]

But we need not decide how a redemption agreement would apply in this circumstance if the redemption agreement does not, by its terms, actually apply to the facts of this case. As the court noted, the mandatory redemption provision in the third paragraph of the agreement is preceded by an exception in the second paragraph for transfers between related shareholders: "Anything in this agreement to the contrary notwithstanding, a Stockholder may at any time or from time to time transfer all or any part of his stock to his spouse . . . ." The court reasoned that Kirk and Shelley were still spouses, so it could order Kirk to buy Shelley's shares under the second paragraph notwithstanding the redemption provision in the third paragraph.

[4-6] The general rules of contract construction apply to restrictive share agreements.[11] If a contract's terms are clear, a court may not resort to the rules of construction and must give the terms their plain and ordinary meaning as a reasonable person would understand them.[12] A court must consider a contract as a whole and, if possible, give effect to every part of the contract.[13]

We agree with the trial court that Kirk could buy Shelley's shares notwithstanding the redemption provision in the third paragraph of the agreement. The second paragraph states that shareholders can "transfer" their shares to their spouse "[a]nything in this agreement to the contrary notwithstanding."

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[8] See, e.g., *Barton v. Barton*, 281 Ga. 565, 639 S.E.2d 481 (2007).

[9] See, e.g., *In re Marriage of DeCosse*, 282 Mont. 212, 936 P.2d 821 (1997).

[10] See, e.g., *Mocnik v. Mocnik*, 838 P.2d 500 (Okla. 1992). See, also, 2 Turner, *supra* note 7.

[11] See 18 C.J.S., *supra* note 5, § 253.

[12] See *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015).

[13] See *id.*

And a transfer is "[a]ny mode of disposing of or parting with an asset or an interest in an asset, including . . . the payment of money . . . ."[14] A sale of property (voluntary or not) is a transfer of the property.[15] Kirk was Shelley's spouse, so under the second paragraph of the agreement, the court could order him to buy Shelley's shares for $50 each, notwithstanding the buy-back provision in the third paragraph.

We note that Kirk, Shelley, and the court all agreed that Shelley's Brozek & Sons shares were her separate property. Generally, a dissolution court should award separate property to the spouse who owns it, and any other division of the nonmarital property is suspect.[16] But Kirk does not argue that the court lacked the power to order him to buy Shelley's Brozek & Sons shares because they were nonmarital. Instead, he complains that the court required him to pay too much for them. So we need not consider in what circumstances a court may order one spouse to buy another spouse's separate property.[17]

(b) Value and Division of Marital Property

Kirk argues that the court "misvalued" and "misallocated" a horse trailer, horses, and a 2004 Dodge pickup truck that the parties acquired during the marriage.[18] The court determined that these assets were marital and awarded them to Kirk. He contends that the court overvalued the horses because all but three of them "belong to" or are "owned by" the parties'

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[14] Black's Law Dictionary 1727 (10th ed. 2014).

[15] See, *id.* at 1537; Webster's Third New International Dictionary of the English Language, Unabridged 2003 (1993). See, also, 11 Samuel Williston, A Treatise on the Law of Contracts § 30:10 (Richard A. Lord ed., 4th ed. 2012).

[16] See 2 Turner, *supra* note 7, § 8:33.

[17] See *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

[18] Brief for appellant at 17.

daughters.[19] He argues the court should have awarded the horse trailer to Shelley because she wanted it and he did not. And he argues that the court should not have awarded him the entire value of the 2004 Ford pickup truck because their adult daughter drove the truck.

[7-9] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.[20] Equitable property division is a three-step process.[21] The first step is to classify the parties' property as marital or nonmarital.[22] The second step is to value the marital assets and marital liabilities of the parties.[23] The third step is to calculate and divide the net marital estate between the parties.[24] The ultimate test in determining the appropriateness of a property division is fairness and reasonableness as determined by the facts of each case.[25]

We conclude that the court did not abuse its discretion by distributing the horse trailer, horses, and pickup truck to Kirk. The court had a good reason for not awarding the horse trailer to Shelley: she did not have any horses. Contrary to Kirk's argument, Shelley did not ask the court to award her the horse trailer. She testified that she did not have much use for a horse trailer but that "[i]f the Court feels that I need that trailer, then so be it."

The court did not err by awarding the horses to Kirk, because Shelley lacked the facilities to keep them. Nor did the court abuse its discretion by assigning the horses a value of $6,300. The court evidently accepted Shelley's suggestion to include half of the horses' value—$12,600 according to

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[19] *Id.* at 31.

[20] *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

Kirk—in the marital estate and award the horses to Kirk. Kirk argues that the decree, which included "7 head of horses" in the marital estate, "awards more horses than exist."[26] Asked how many horses she and Kirk had when they separated, Shelley testified, "Six, maybe, or something. I don't know." But Kirk said in his December 2011 "Statement of Financial Condition" that he had "Horses 7 head," and his "2011 Depreciation and Amortization Report" seems to list seven different horses. So the record supports the court's finding that the parties had seven horses.

Finally, the court did not abuse its discretion by including the 2004 Ford pickup truck in the marital estate and awarding it to Kirk. Kirk does not dispute that he and Shelley bought the truck during the marriage with marital funds. And he testified that he was driving the truck when he and Shelley separated. Even if the parties were allowing their adult daughter to drive the truck at the time of trial, she was not the owner. So this fact did not oblige the court to "neutralize[]" the truck for equitable distribution purposes.[27]

(c) Valuation Date

Kirk argues that the court should have used the separation date instead of the trial date to value "the assets."[28] He states that he and Shelley "stayed away from one another" after December 24, 2011, and suggests that "[t]he assets are not more related to the trial date than the separation date."[29]

[10] Generally, the date on which a court values the marital estate should be rationally related to the property composing the marital estate.[30] But as Shelley notes, the court actually valued much of the marital property on the separation date. For

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[26] Brief for appellant at 31.

[27] *Id.* at 32.

[28] *Id.* at 23.

[29] *Id.* at 22, 24.

[30] *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

example, the court valued the household and farm checking accounts as of December 23 and 24, 2011. The values that the court used for automobiles, trailers, cattle, snowmobiles, and other personal property match those in Shelley's "Marital Balance Sheet" and Kirk's "Statement of Financial Condition," which are dated December 24 and 31, 2011. An exception is the parties' farm equipment, for which the court accepted the values from an appraisal dated December 12, 2012. But Kirk put that appraisal in evidence, so he can hardly complain about the court's using it.

Kirk's main complaint is that the court should have used his appraisal of Shelley's corporate shares, which valued them on the date of separation. The court found Shelley's appraisals more persuasive, in part, because they were "reflective of the current market value closest to date of trial." The shares were Shelley's nonmarital property, and we are not aware of any authority requiring a court to value nonmarital corporate shares as of the date when the acrimony between two shareholders reached a boiling point. Shelley's expert testified that appraisers generally prefer the most recent information because the value of a corporation's assets can fluctuate. Kirk counters that a "price-spike" occurred between the dates of separation and trial which, in hindsight, proved to be "a short-term artificial run-up in land values."[31] Even if Kirk is correct, the court had no way of knowing what the future held.

(d) Tracing of Premarital Assets

Kirk argues that the court should have given him a credit against the marital estate for the value of some of his premarital property. In his brief, he reproduces a list of about 30 assets copied from his "Statement of Financial Condition" and asserts that "[t]hese are the nonmarital assets."[32] The court

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[31] Brief for appellant at 23, 25.

[32] *Id.* at 28.

decided that some of these assets were Kirk's nonmarital property. And, for the retirement accounts, the court awarded Kirk a portion of their value that is substantially higher than the value that Kirk claims in his brief. He specifically argues that the court should have given him a credit for the value of (1) the premarital portion of the farm checking account, (2) the crops from his 1993 harvest, and (3) the machinery he owned at the time of his marriage. We restrict our review to those issues.[33]

[11-14] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.[34] Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.[35] Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.[36] Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.[37] If the separate property remains segregated or is traceable into its product, commingling does not occur.[38] The burden of proof rests with the party claiming that property is nonmarital.[39]

After reviewing the record, we conclude that Kirk did not trace the value of the premarital funds in the farm checking account, the crops from his 1993 harvest, or the premarital machinery. He cites an armful of exhibits and concludes that "[t]he evidence is of direct, concrete documents that

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[33] See *In re Claims Against Pierce Elevator, supra* note 17.

[34] *Coufal v. Coufal, supra* note 2.

[35] See, *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[36] See, *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985); *Charron v. Charron*, 16 Neb. App. 724, 751 N.W.2d 645 (2008).

[37] *Coufal v. Coufal, supra* note 2.

[38] *Id.*

[39] See *Gangwish v. Gangwish, supra* note 35.

substantiate the values."[40] But he does not identify the different permutations that his premarital property underwent during the marriage. And, after reviewing the evidence, we cannot follow the threads in the hodgepodge of figures.

For the farm checking account, Kirk presented evidence of its value before the marriage and its value on the separation date. Between those two points, Shelley became an account holder and Kirk made an unknown number of deposits and withdrawals. Kirk did not present any evidence of the withdrawal amounts during the marriage. Without any evidence of what withdrawals the parties made during the marriage, "the overwhelming likelihood is that tracing of withdrawals is not possible."[41]

Similarly, Kirk did not show what form his 1993 crops had taken by the time he and Shelley separated. He said that he "rolled" the proceeds of his 1993 harvest into the next years' crop, a process which he repeated each year through 2011. The proceeds of the 1993 harvest were therefore mixed with the proceeds of marital harvests and subject to the vicissitudes of the farming economy for nearly 20 years. Besides, Kirk could not show the number of bushels he actually harvested in 1993. He instead relied on an estimate using average yields for the area.

For his premarital machinery, Kirk argues that we should require less specificity because "tracing the value of continuously traded-in equipment would be futile."[42] He analogizes his farm machinery to the cattle herd which the Nebraska Court of Appeals treated as a single asset in *Shafer v. Shafer*.[43] There, the husband brought into the marriage 116 head of cattle worth about $60,000. By the time of trial, the herd

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[40] Brief for appellant at 31.

[41] See 1 Brett R. Turner, Equitable Distribution of Property § 6:52 at 637 (3d ed. 2005).

[42] Brief for appellant at 30-31.

[43] *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007).

was 166 head worth about $120,000. The husband testified that he continuously replaced the livestock as he sold them and that the herd gradually grew throughout the marriage, except for a brief period of drought. The husband sought a "set-aside" against the marital estate for the value of his premarital cattle.[44]

The Court of Appeals "view[ed] the cattle herd as in effect a single asset—rather than taking a 'cow by cow' approach."[45] The husband had sold his premarital cows, but the herd itself persisted through the roughly 13-year marriage:

> [W]hile an individual cow which [the husband] owned in 1991 was long ago turned into hamburger, hot dogs, and shoe leather and thus is not traceable, the cattle herd itself, which has always been part of [the husband's] farming operation, is in fact traceable. To do otherwise seems to us to exalt form over substance and ignore the equitable nature of a dissolution action.[46]

The Court of Appeals decided that the trial court should have given the husband a $60,000 credit against the marital estate for the premarital portion of the herd.

We conclude that Kirk's premarital machinery is distinguishable from the cattle herd in *Shafer*. A cow-and-calf herd is often a self-sustaining body: it produces calves each year, about half of which are heifers that eventually have calves of their own. The same cannot be said about farm equipment. The coupling of a tractor and grain cart will not produce a lawnmower next spring.

Ideally, to trace the value of an item of premarital machinery that Kirk traded in during the marriage, we would have evidence of the ratio of marital-to-nonmarital funds he used to acquire the new asset.[47] With one exception, Kirk testified

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[44] *Id.* at 177, 741 N.W.2d at 178.

[45] *Id.* at 178, 741 N.W.2d at 179.

[46] *Id.*

[47] See 1 Turner, *supra* note 41, § 5:61.

that he did not know what consideration he received for selling or trading in his premarital machinery. He was able to "guess" he received $3,500 for a premarital shredder which he applied toward the purchase price of a new shredder. A spouse can establish a "tracing link" through his own testimony,[48] but the court was entitled to discount Kirk's testimony about the shredder because of his admitted uncertainty.

To summarize, as the spouse claiming a credit for nonmarital property, Kirk had the burden to show what portion of the parties' machinery was attributable to his premarital assets. Kirk did not meet his burden. We are aware that, in *Bussell v. Bussell*,[49] the Court of Appeals applied its reasoning from *Shafer* to premarital farm equipment exchanged for different farm equipment during the marriage. But we do not know what evidence the record contained in *Bussell*. To the extent that *Bussell* is inconsistent with this opinion, we disapprove of it.

(e) Postappeal Attorney Fees

Kirk argues that the court lacked jurisdiction to award Shelley $10,000 of attorney fees after he filed a notice of appeal from the decree. Shelley contends that the court retained jurisdiction to award her attorney fees for her lawyer's anticipated work on appeal.

Generally, a trial court loses jurisdiction once a party appeals.[50] But Neb. Rev. Stat. § 42-351(2) (Reissue 2008) creates several exceptions in dissolution cases:

> When final orders relating to [domestic relations actions] are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary

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[48] *Id.*, § 5:63 at 639.

[49] *Bussell v. Bussell*, 21 Neb. App. 280, 837 N.W.2d 840 (2013).

[50] See *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

> to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, *or other appropriate orders in aid of the appeal process*. Such orders shall not be construed to prejudice any party on appeal.

(Emphasis supplied.) Shelley argues that an award to help pay for her attorney's work on appeal was an "appropriate order[] in aid of the appeal process" under § 42-351(2).

[15,16] We give statutory language its plain and ordinary meaning.[51] Our duty is to determine and give effect to the Legislature's purpose as ascertained from the statute's entire language considered in its plain, ordinary, and popular sense.[52]

[17] We conclude that an order helping a party pay for his or her attorney's work on appeal is an "order[] in aid of the appeal process." The court therefore had jurisdiction under § 42-351(2) to award Shelley attorney fees after Kirk appealed from the decree. Nor can we say that the amount of the award was an abuse of discretion. The issues raised by the parties below warranted an assumption that the appellate work would be substantial.

2. Shelley's Cross-Appeals

(a) Alimony

[18,19] Shelley argues that the court abused its discretion by not awarding her alimony. In considering alimony, a court should weigh four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the party seeking support to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.[53] In addition to the specific criteria listed in Neb.

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[51] *Pettit v. Nebraska Dept. of Corr. Servs.*, 291 Neb. 513, 867 N.W.2d 553 (2015).

[52] See *id.*

[53] See *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015).

Rev. Stat. § 42-365 (Reissue 2008), a court should consider the income and earning capacity of each party and the general equities.[54]

[20] The statutory criteria for dividing property and awarding alimony overlap, but the two serve different purposes and courts should consider them separately.[55] The purpose of a property division is to distribute the marital assets equitably between the parties.[56] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in § 42-365 make it appropriate.

Shelley emphasizes that she was married to Kirk for 18 years before they separated and that his income far exceeds hers. She contributed to the marriage by raising the children and doing the "things that a typical Nebraska farm wife does on a day to day basis."[57] Her goal is to support herself by growing her cattle herd, and she estimated that it might take 10 years for her to do so. She suggests that alimony of $3,000 per month for 10 years would be reasonable.

[21] We conclude that the court did not abuse its discretion by declining to award Shelley alimony. The length of the marriage and disparity of incomes favors an award. But the marriage did not interrupt Shelley's career or education, and she will not have any childcare duties to hamper her career or educational pursuits after the marriage. At the time of trial, she planned to support herself by growing her cattle herd. The main obstacle to increasing her stock was Shelley's lack of capital, so the court was justified in considering the substantial amount of money that she will receive from Kirk's purchase of her corporate shares and the payment to equalize the

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[54] See *id.*

[55] § 42-365.

[56] *Id.*

[57] Brief for appellee on cross-appeal at 32.

division of the marital estate. Shelley notes that the division of the marital estate and the award of alimony are separate inquiries under § 42-365. But that does not mean that a party's resources are irrelevant to her need for alimony. In weighing a request for alimony, the court may take into account all of the property owned by the parties when entering the decree, whether accumulated by their joint efforts or acquired by inheritance.[58]

(b) "*Grace* Award"

Shelley argues that the court should have given her additional compensation for the inadequacy of the marital estate. She emphasizes that Kirk received a small salary relative to Brozek & Sons' revenue and that the marital estate would have been larger if Kirk had received a higher salary. Kirk contends that Shelley is not entitled to additional compensation because she "departs this marriage with substantial assets."[59]

As noted, property received by gift or inheritance is usually not part of the marital estate. But in *Van Newkirk v. Van Newkirk*,[60] we recognized an exception if both spouses have contributed to the improvement or operation of the nonmarital property, or if the spouse who did not receive the nonmarital property nevertheless significantly cared for it during the marriage. We do not apply the *Van Newkirk* exception unless the contributions were significant and we have evidence of their value.[61]

Here, the court found that the *Van Newkirk* exception did not apply because Shelley "failed to introduce evidence of the value of her contribution toward the improvements or operation of [Brozek & Sons]." Plus, the court said that the

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[58] See *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

[59] Reply brief for appellant at 11.

[60] *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982).

[61] See *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997).

decree adequately compensated Shelley for her efforts during the marriage.

On appeal, Shelley does not challenge the court's refusal to apply the *Van Newkirk* exception. Instead, she argues that under *Grace v. Grace*,[62] the court should have given her a cash award for the inadequacy of the marital estate. In *Grace*, the husband had a minority stake in a closely held family ranching corporation with assets of $6.8 to $9.1 million. The corporation employed the husband, paying him $1,500 per month and providing him food, lodging, utilities, a truck, and fuel. He received all of his shares by gift or inheritance.

We concluded that the *Van Newkirk* exception did not apply because the wife had not cared for or contributed to the improvement of the corporation. But we said that *Van Newkirk* was not "an ironclad, rigid rule for all circumstances."[63] We emphasized that the division of property depends on the facts and equities of each case. In *Grace*, "the fact remain[ed] that due to the way the parties to this marriage lived during the marriage, they did not acquire a house or a car or any property a married couple of 16 years, with above average assets, would be expected to acquire."[64] So we ordered the husband to pay the wife $100,000 as part of the division of property.

We have since referred to the award in *Grace* as "compensation for the inadequacy of the marital estate."[65] The Court of Appeals has affirmed the denial of a *Grace* award in cases with marital estates between $500,000 and $600,000.[66] It has

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[62] *Grace v. Grace, supra* note 1.

[63] *Id.* at 699, 380 N.W.2d at 284.

[64] *Id.* at 701, 380 N.W.2d at 285.

[65] *Medlock v. Medlock*, 263 Neb. 666, 679, 642 N.W.2d 113, 125-26 (2002). See, also, *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001).

[66] See, *Shuck v. Shuck*, 18 Neb. App. 867, 806 N.W.2d 580 (2011); *Charron v. Charron, supra* note 36.

affirmed the provision of a *Grace* award in cases in which the marital estate was about $130,000 or "consisted only of two vehicles and some furniture."[67]

We conclude that the court did not abuse its discretion by refusing Shelley's request for a *Grace* award. The parties' net marital estate is about $2.5 million. Shelley might wish that the marital estate were larger, but it is not inadequate. Because Kirk personally farmed some land in addition to his work for Brozek & Sons, he and Shelley acquired substantial assets, such as machinery and crops in storage. If Kirk's efforts during the marriage enhanced the value of Brozek & Sons and Brozek Farms, the increased value was reflected in the price that Kirk paid for Shelley's shares in both corporations.

(c) No Attorney Fees in Decree

[22,23] Shelley argues that the court should have awarded her about $200,000 for the attorney fees she incurred in prosecuting the divorce. A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.[68] A dissolution court should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.[69]

After reviewing the relevant factors, we conclude that the court did not abuse its discretion by declining to award Shelley attorney fees in the decree. We note that Shelley stated the sums of attorney fees she had incurred from various law firms, but she did not submit an affidavit or other evidence that showed the work performed by her lawyers. An affidavit

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[67] *Keig v. Keig*, 20 Neb. App. 362, 374, 826 N.W.2d 879, 888 (2012). See *Walker v. Walker, supra* note 65.

[68] *Anderson v. Anderson, supra* note 53.

[69] See *id.*

is not a prerequisite to an attorney fee award, but it is the best practice.[70]

VI. CONCLUSION

We conclude that the corporate buy-sell agreement in this case does not, by its terms, apply to transfers between spouses. Because the court ordered one spouse to buy the other spouse's shares, it was not bound by the value determined under the agreement. As to the remaining issues raised by Kirk, we do not believe that the court's division of the marital estate or its refusal to award Kirk a credit for the value of long-gone premarital property was an abuse of discretion. And the court had statutory jurisdiction to award Shelley attorney fees for the prospective appellate work of her lawyer after Kirk appealed from the decree. Nor do we find any merit to the errors that Shelley assigns in her cross-appeal. We therefore affirm.

Affirmed.

Wright and McCormack, JJ., not participating.

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[70] *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

State of Nebraska, appellee, v. Detron L. Perry, appellant.

874 N.W.2d 36

Filed February 12, 2016. No. S-14-506.

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.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.
3. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
4. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
5. **Warrantless Searches: Probable Cause.** Probable cause, standing alone, is not an exception that justifies the search of a person without a warrant.
6. **Criminal Law: Police Officers and Sheriffs: Arrests: Probable Cause.** Under Nebraska law, a person may be arrested without a warrant when an officer has probable cause to believe the person either has committed a felony or has committed a misdemeanor in the officer's presence.

7. **Arrests: Probable Cause.** Probable cause must be particularized with respect to the person being arrested.
8. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
9. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.
10. **Probable Cause: Words and Phrases.** Probable cause means less than evidence which would justify condemnation.
11. **Criminal Law: Search and Seizure: Probable Cause: Police Officers and Sheriffs: Motor Vehicles: Controlled Substances.** The odor of marijuana, alone or in combination with other factors, creates probable cause for an officer to infer that one or all of the occupants of a vehicle had recently committed the crime of possessing a controlled substance, thus providing probable cause for an arrest and a valid search of the person incident thereto.
12. **Arrests: Probable Cause: Controlled Substances.** The odor of marijuana in an area will not inevitably provide probable cause to arrest all those in proximity to the odor.
13. **Search and Seizure: Arrests: Search Warrants: Warrants: Probable Cause.** A search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.

Appeal from the District Court for Douglas County: Joseph S. Troia, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, L. Robert Marcuzzo, and Natalie M. Andrews for appellant.

Douglas J. Peterson and Jon Bruning, Attorneys General, and Austin N. Relph, for appellee.

Wright, Connolly, Cassel, and Stacy, JJ., and Inbody, Judge.

Stacy, J.

After a stipulated bench trial, the district court for Douglas County found Detron L. Perry guilty of possession of a controlled substance. Perry appeals, arguing the court erred in

overruling his motion to suppress evidence found during a search of his person. We find no reversible error and affirm.

I. FACTS

On September 5, 2012, law enforcement officers Chris Brown and Mike Sundermeier of the Omaha Police Department were on patrol in the area of 35th and Hamilton Streets in Omaha, Nebraska. They observed a vehicle traveling eastbound on Hamilton Street. It turned northbound onto 35th Street without using a turn signal, and when the brakes were applied, the officers noticed the vehicle's left taillight was not functioning.

The officers initiated a traffic stop. Brown approached the driver's side of the car, and Sundermeier approached the passenger side. Perry was driving, and his brother Devaughn Perry (Devaughn) was the front seat passenger. When Perry rolled down his window to speak with the officers, Brown immediately detected the odor of burnt marijuana coming from the vehicle. Brown described the odor as "a little faint," but he knew it was burnt marijuana because he had smelled it frequently when making traffic stops.

After noticing the odor, Brown saw Sundermeier talking to Devaughn. Brown noticed Devaughn kept putting his right hand between his right leg and the door. Brown then heard Sundermeier tell Devaughn to keep his hands on his lap, but Devaughn was not complying. When Devaughn eventually brought his hands up, Brown saw the top part of a twisted plastic baggie in Devaughn's right hand. At about the same time, Sundermeier opened the vehicle door and grabbed Devaughn's right hand, because he feared Devaughn was holding a weapon. Sundermeier discovered a baggie containing a white rocklike substance in Devaughn's hand. Devaughn was then removed from the vehicle and placed under arrest.

Brown then asked Perry to step out of the vehicle. Perry complied, and Brown searched Perry's person. Brown found what appeared to be crack cocaine in Perry's front pocket.

Brown then placed Perry in handcuffs and searched him again. During this search, Brown found pills in Perry's front right coin pocket he suspected were "ecstasy." Perry showed the officers his identification and was cooperative throughout the traffic stop.

The officers took Perry and Devaughn to the police cruiser. Perry's vehicle was then searched, and the officers discovered a marijuana cigarette in the center console and a firearm underneath the front passenger seat. Subsequent field tests revealed that the suspected crack cocaine found on both Perry and Devaughn was fake crack cocaine, known as gank. The pills discovered in Perry's pocket were found to be a form of "ecstasy."

The State formally charged Perry with unlawful possession of a controlled substance (benzylpiperazine, a form of "ecstasy"), a Class IV felony. Prior to trial, Perry moved to suppress the evidence obtained during his search and arrest. At the hearing on the motion to suppress, the officers testified to the above facts.

The court overruled Perry's motion to suppress. It found that the officers could have arrested Perry for the taillight violation and impliedly concluded the search of Perry's person was a search incident to an arrest. The court further found that the smell of marijuana coming from the vehicle provided probable cause to search the vehicle. In ruling on the motion to suppress, the court made a finding that Perry "was no[t] cooperative and gave a false name."

Following the suppression hearing, the court held a stipulated bench trial. The State offered into evidence a transcript of the hearing on the motion to suppress and a laboratory report documenting that the pills found on Perry were in fact "ecstasy." Perry then renewed the objections raised in his motion to suppress. The court ultimately found the search was valid, reasoning the smell of marijuana, combined with the officers' knowledge that the passenger was furtively holding a baggie of suspected drugs, provided probable cause to arrest

Perry. Perry was found guilty of unlawful possession of a controlled substance and sentenced to probation for a term of 4 years. He timely filed this direct appeal.

II. ASSIGNMENTS OF ERROR

Perry assigns, restated and consolidated, that the district court erred in (1) finding he was uncooperative with police and gave a false name during the traffic stop and (2) overruling his motion to suppress evidence found during the search of his person.

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.[1] Regarding historical facts, we review the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[2]

IV. ANALYSIS

1. Search Incident to Arrest

[2,3] Perry argues the evidence obtained during the search of his person must be suppressed because the search violated his constitutional rights. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.[3] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few

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[1] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014); *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014).

[2] *Id.*

[3] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015); *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

specifically established and well-delineated exceptions, which must be strictly confined by their justifications.[4]

[4] The search here was conducted without a warrant. Thus, to be valid, it must fall within one of the warrantless search exceptions recognized by this court.[5] The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.[6]

Before addressing the applicability of any exception to the instant case, we pause to address the effect of our recent decision in *City of Beatrice v. Meints*.[7] In that case, we acknowledged we had often been imprecise when describing the exceptions to the warrant requirement and had incorrectly noted that "probable cause" was such an exception.[8] *Meints* clarified that probable cause, standing alone, is not an exception to the search warrant requirement "as applied to real property."[9]

[5] For precisely the reason articulated in *Meints*—a probable cause exception to the warrant requirement would swallow the rule—we now clarify that probable cause, standing alone, is not an exception that justifies the search of a person without a warrant. To the extent our prior cases indicate otherwise, they are disapproved.[10]

A valid arrest based on probable cause that a person is engaged in criminal activity is allowed by the Fourth

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[4] *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[5] See *id.*

[6] *Id.*

[7] *City of Beatrice v. Meints*, 289 Neb. 558, 856 N.W.2d 410 (2014), *cert. denied* 575 U.S. 1038, 135 S. Ct. 2388, 192 L. Ed. 2d 166 (2015).

[8] See, *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010); *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008); *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[9] *City of Beatrice v. Meints, supra* note 7, 289 Neb. at 567, 856 N.W.2d at 417.

[10] See cases cited *supra* note 8.

Amendment, and if an arrest is made based upon probable cause, a full search of the person may be made incident to that arrest.[11]

[6,7] The question here, then, is whether the officers had probable cause to arrest Perry. Under Nebraska law, a person may be arrested without a warrant when an officer has probable cause to believe the person either has committed a felony or has committed a misdemeanor in the officer's presence.[12] Probable cause must be particularized with respect to the person being arrested.[13]

(a) Probable Cause to Arrest Perry

The trial court ultimately analyzed whether the officers had probable cause to arrest Perry under the framework of *Maryland v. Pringle*.[14] In that case, a car with three occupants was stopped at 3:16 a.m. for speeding. When the driver was asked for his license and registration, he opened the glove compartment and an officer saw a large amount of rolled-up money inside. The officer had the driver step out of the vehicle and issued him a warning. He then asked for consent to search the vehicle, and the driver gave it. The search revealed $763 in cash and five plastic baggies containing cocaine. The baggies were found between a raised armrest and the back seat of the vehicle.

The officer questioned all three occupants of the vehicle about the drugs and money, but none offered any information. All three were placed under arrest and taken to the police

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[11] See, *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *State v. Evans*, 223 Neb. 383, 389 N.W.2d 777 (1986).

[12] Neb. Rev. Stat. § 29-404.02 (Reissue 2008); *State v. Evans, supra* note 11.

[13] *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *State v. Evans, supra* note 11.

[14] *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003).

station. At the station, the front seat passenger confessed the drugs were his and informed police the other two did not know about them. After the passenger was charged with drug possession, he moved to suppress his confession. He argued it was the fruit of an illegal arrest because the officer lacked probable cause to arrest him.

The U.S. Supreme Court noted that a warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause. It reasoned that once the officer found the five plastic baggies containing cocaine, he had probable cause to believe a felony had been committed. It focused its analysis on whether the officer had probable cause to believe the passenger committed that crime.

[8-10] In doing so, the Court in *Pringle* noted that "the probable-cause standard is '"a practical, nontechnical conception"' that deals with '"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'"[15] It further noted that probable cause is "'a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'"[16] Similarly, we have noted that probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[17] We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[18] Probable cause "'means less than evidence which would justify condemnation.'"[19]

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[15] *Id.*, 540 U.S. at 370.

[16] *Id.*, 540 U.S. at 370-71.

[17] *State v. Matit, supra* note 1.

[18] *Id.*

[19] *Maryland v. Pringle, supra* note 14, 540 U.S. at 371.

The Court in *Pringle* reasoned that to determine whether an officer had probable cause to arrest an individual, it had to examine the events leading up to the arrest and then decide "'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause."[20] It reasoned that because the drugs and money were in the car and none of the three occupants offered any information about their ownership, it was "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine."[21] Thus, a reasonable officer could conclude there was probable cause to believe the passenger committed the crime of possession of cocaine, either solely or jointly. As part of the rationale, the Court noted that the occupants "were in a relatively small automobile," not a public place.[22] It reasoned that passengers in a car "'will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.'"[23] It noted that the "quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."[24]

In reaching the conclusion in *Pringle*, the Court distinguished both *Ybarra v. Illinois*[25] and *United States v. Di Re*.[26] In *Ybarra*, an investigator obtained a search warrant authorizing the search of a tavern and the bartender thereof, based

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[20] *Id.*

[21] *Id.*, 540 U.S. at 372.

[22] *Id.*, 540 U.S. at 373.

[23] *Id.*

[24] *Id.*

[25] *Ybarra v. Illinois, supra* note 13.

[26] *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948).

on allegations the bartender had been observed with heroin packets. The search was conducted in the late afternoon, when 13 or fewer customers were present. One officer patted down each of the customers. When he patted down one customer, Ventura Ybarra, he felt a "'cigarette pack with objects in it.'"[27] He later returned and refrisked Ybarra and seized the cigarette pack. Inside, he found tinfoil packets containing heroin.

Ybarra was charged with the unlawful possession of a controlled substance. He moved to suppress the contraband found on his person, arguing the warrant did not authorize a search of his person. The Court held that where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. It found none existed with respect to Ybarra, in that the police had no reason to believe he was committing, had committed, or was about to commit any criminal offense.

In *Di Re*, an informant told an investigator that he had an appointment to buy counterfeit gasoline coupons from a man referred to as "Buttitta" at a specific place. The investigator went to the place and found a vehicle occupied by Buttitta, the informant, and Michael Di Re. The informant possessed counterfeit gasoline coupons and told the investigator at the scene that he obtained them from Buttitta. The investigator arrested all three and took them to the police station.

At the station, Di Re was searched and counterfeit gasoline coupons were found on his person. He was subsequently charged for possessing them, and moved to suppress the contraband, arguing the search was not justified by a search incident to a lawful arrest. The Court concluded there was no probable cause to justify the arrest. It reasoned that to have probable cause to arrest Di Re for a felony, the police needed information implicating him in either possessing or knowing

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[27] *Ybarra v. Illinois, supra* note 13, 444 U.S. at 88.

that the coupons were counterfeit. It noted there was no evidence of a conspiracy, because there was no evidence Di Re was even in the car when the informant obtained the coupons from Buttitta or that he even knew the transaction occurred. It noted that the meeting occurred during the day in a public place and that even if Di Re had seen the exchange of papers, he likely would not have known what they were or that they were counterfeit. It further noted that the informant specifically implicated Buttitta, but gave no indication that Di Re was involved. It therefore concluded the officer lacked probable cause to arrest Di Re, and thus the search incident to the arrest was invalid.

The Eighth Circuit has also decided a similar case using the *Maryland v. Pringle* framework. In *U.S. v. Chauncey*,[28] the defendant was driving a vehicle stopped by an officer for having expired license plate tags. The defendant stepped from the vehicle and approached the officer. When questioned, he told the officer the vehicle had recently been purchased by his passenger and produced a bill of sale. When the officer then approached the passenger side of the car, he noticed a strong odor of raw marijuana and saw the passenger closing a drawstring bag in her lap. He seized the bag, confirmed it contained marijuana, and handcuffed both the defendant and the passenger while he searched the vehicle. The defendant was searched, but no contraband was found on his person. When the vehicle was searched, the officer found marijuana seeds and stems, a scale, and several sandwich bags. Both the driver and the passenger were arrested.

The defendant was subsequently charged with possession with intent to distribute, and he moved to suppress, arguing his arrest was made without probable cause. The court disagreed. It reasoned that the case fell somewhere between *Pringle* and *Di Re*. It noted that like *Di Re*, there was evidence

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[28] *U.S. v. Chauncey*, 420 F.3d 864 (8th Cir. 2005).

tending to point to the passenger, as the marijuana was located in her purse. But it also reasoned that like *Pringle*, there was evidence to suggest the defendant was engaged in a common enterprise with the passenger. It noted that the smell of marijuana in the car was quite strong, so that the defendant had to have been aware of it in the vehicle. It also noted that the seeds, stems, and scale found inside the vehicle indicated the drug activity was open and notorious, so the defendant reasonably was aware of it. It thus concluded there was sufficient evidence to suggest to an objectively reasonable officer that the defendant was involved in the commission of a crime, and his arrest was supported by probable cause.

We have applied the *Maryland v. Pringle* framework in at least one similar case. In *State v. Voichahoske*[29] the defendant was a passenger in a car occupied by the driver and two others. The vehicle was stopped for speeding, and the officer had the driver come to his patrol car while he checked on her license and insurance. The driver lied about her name and said the car belonged to her cousin. The cousin was a person known to the officer for being involved with narcotics. The driver told the officer she did not know the back seat passengers, but identified the defendant, the front seat passenger, by name. The officer knew the defendant was also suspected of being involved in narcotics. While talking to the driver, the officer observed the passengers in the car continuously moving around.

The officer left the driver in the patrol car and went to talk to the passengers. They gave slightly contradictory versions of their travel plans. One of the back seat passengers was unable to hold still and continuously rubbed her vaginal area, complaining she had just started her menstrual cycle. This caused the officer to suspect she might be hiding contraband. The officer returned to his patrol car and asked the driver's

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[29] *State v. Voichahoske, supra* note 8.

permission to search the vehicle. She refused, so he called for a canine unit. One arrived 12 minutes later. The dog alerted to both the passenger side door and the driver's side door. The passengers were then removed from the vehicle.

The passengers were questioned, and the defendant eventually confessed he had lied about the driver's identity and was hiding her driver's license in his wallet. The passengers were taken to a police station and searched. The defendant had a marijuana pipe in his sock and a bag of white powder in his rectum. The defendant was charged with possessing a controlled substance, and he moved to suppress the evidence found on his person.

In an analysis that perhaps did not clearly differentiate between probable cause to search the defendant and probable cause to arrest him, we discussed *Pringle* and whether there was probable cause "sufficiently particularized" to the defendant.[30] In this respect, we noted that the dog's alert provided probable cause that someone in the car possessed drugs. We also noted the defendant lied about the driver's identity and concealed her identification in his wallet. We further noted the passengers in the car had time to conceal evidence on their persons, and we found the officers had probable cause to believe drugs would be found on the defendant under a common enterprise theory.

The threshold issue here is whether the officers had probable cause to believe Perry was involved in a crime so as to conduct a valid arrest without a warrant. We analyze this issue under the framework provided by the U.S. Supreme Court in *Maryland v. Pringle*.[31] We find that the facts known to the officers at the time of the arrest were (1) the odor of burnt marijuana coming from the vehicle as soon as the driver's window was rolled down, (2) the presence of two individuals

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[30] *Id*. at 76, 709 N.W.2d at 671.

[31] *Maryland v. Pringle, supra* note 14.

in the front seat of the vehicle, (3) the vehicle passenger's noncooperation with officers and attempt to hide the contents of the baggie in his hand from the officers, and (4) the discovery that the baggie contained what appeared to be crack cocaine, a controlled substance.

[11] The appellate courts of this State have consistently held that the odor of marijuana, alone or in combination with other factors, creates probable cause for an officer to infer that one or all of the occupants of a vehicle had recently committed the crime of possessing a controlled substance, thus providing probable cause for an arrest and a valid search of the person incident thereto.[32] This line of cases is in accord with various other jurisdictions.[33] The general rationale is based on common sense—the odor of marijuana indicates marijuana likely is present in the car, which makes it likely the car's occupants are committing the crime of possessing marijuana.[34]

Perry argues there is no precedential value in our prior cases holding the smell of marijuana emanating from a vehicle provides probable cause to search the occupants thereof, because the cases were decided at a time when possession of any quantity of marijuana was a crime. He contends that because possession of less than an ounce of marijuana is now only an infraction,[35] the mere smell of marijuana is not sufficient probable cause that a crime is being or has been committed and does not justify an arrest. We disagree.

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[32] See, *State v. Masters*, 216 Neb. 304, 343 N.W.2d 744 (1984); *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981); *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979); *State v. Clark*, 21 Neb. App. 581, 842 N.W.2d 151 (2013); *State v. Reha*, 12 Neb. App. 767, 686 N.W.2d 80 (2004).

[33] E.g., *Blake v. State*, 772 So. 2d 1200 (Ala. Crim. App. 2000); *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997); *State v. Mitchell*, 167 Wis. 2d 672, 482 N.W.2d 364 (1992); *Ford v. State*, 37 Md. App. 373, 377 A.2d 577 (1977).

[34] See *Blake v. State, supra* note 33.

[35] See Neb. Rev. Stat. § 28-416(13) (Supp. 2015).

A Minnesota appellate court has addressed the logical fallacy of Perry's argument. In *State v. Ortega*,[36] an officer approaching a stopped vehicle smelled burnt marijuana coming from the passenger compartment. The district court found probable cause for the search, based on a 1973 Minnesota Supreme Court case holding the odor of marijuana provides an officer with probable cause to suspect criminal activity.[37] The defendant argued that the case was no longer precedential, because at the time it was decided, possession of any amount of marijuana was a criminal offense, but Minnesota had since changed its laws, and possession of a small amount of marijuana was only a petty misdemeanor. The court reasoned the change in the law was immaterial, because "[t]he probable-cause standard is merely a test to determine objective constitutional reasonableness, and regardless of the quantity of marijuana observed, the presence of any amount logically suggests that there may be more."[38] It held the officer had probable cause to arrest and search the defendant "upon smelling the odor of marijuana emanating from within the vehicle."[39]

We agree with this rationale. Objectively, the smell of burnt marijuana tells a reasonable officer that one or more persons in the vehicle recently possessed and used the drug. The officer need not know whether the amount possessed is more than 1 ounce in order to have probable cause to suspect criminal activity in the vehicle.

[12] Of course, the odor of marijuana in an area will not inevitably provide probable cause to arrest all those in proximity to the odor.[40] Here, the odor is simply one of the

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[36] *State v. Ortega*, 749 N.W.2d 851 (Minn. App. 2008).

[37] See *State v. Wicklund*, 205 N.W.2d 509 (Minn. 1973).

[38] *State v. Ortega, supra* note 36, 749 N.W.2d at 854.

[39] *Id.*

[40] See 2 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 3.6(b) (5th ed. 2012).

factors analyzed under the *Maryland v. Pringle* framework. In addition to the odor of marijuana emanating from the vehicle, the arresting officers knew there were two individuals in the front seat of a vehicle, the passenger was not complying with directions from the officers and was hiding his hands, and a baggie the passenger held in his hand contained a substance that appeared to be crack cocaine. A reasonable officer with knowledge of all of these facts could conclude both occupants of the vehicle had knowledge of the presence of the marijuana and the suspected cocaine and exercised dominion over both, and thus the officer could have probable cause to arrest both occupants for drug possession. We note that probable cause does not require evidence sufficient to convict—only that which would lead to a reasonable inference of guilt.[41] We conclude that on the totality of the facts known to them at the time of the search of Perry's person, the officers had sufficient probable cause, particularized to Perry, to arrest Perry for drug possession.

(b) Search Incident to Arrest

[13] The initial search of Perry's person was done before he was formally arrested. A search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.[42] Here, probable cause existed before the search, and Perry's arrest was made immediately thereafter, making it reasonably contemporaneous with the search. The evidence found during the search was admissible, and the district court properly denied Perry's motion to suppress.

2. Finding of Noncooperation

For the sake of completeness, we note that Perry also assigns as error the district court's finding that he was uncooperative

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[41] See *Maryland v. Pringle, supra* note 14.

[42] *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

during the traffic stop. We review this finding of historical fact for clear error.[43]

The record shows it was the passenger, Devaughn, and not Perry, who was uncooperative with officers and gave a false name. The district court thus clearly erred in finding it was Perry who acted in this manner. This error, however, did not affect the propriety of the court's ultimate holding, which we affirm.

V. CONCLUSION

For the foregoing reasons, we find the district court properly denied Perry's motion to suppress. We affirm his conviction and sentence of 4 years' probation.

Affirmed.

Heavican, C.J., and Miller-Lerman, J., participating on briefs.

McCormack, J., not participating.

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[43] See, *State v. Smith, supra* note 4; *State v. Gorup, supra* note 8, 279 Neb. 841, 782 N.W.2d 16 (2010).

Bryan M., appellant, v. Anne B., appellee, and Adam B., intervenor-appellee.

874 N.W.2d 824

Filed February 12, 2016. No. S-15-075.

1. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law which the Nebraska Supreme Court reviews independently of the lower court's determination.
4. **Paternity: Statutes.** An action to establish paternity is statutory in nature, and the authority for such action must be found in the statute and must be in accordance with the provisions thereof.
5. **Paternity: Guardians and Conservators: Words and Phrases.** In the context of a paternity action, a next friend is one who, in the absence of a guardian, acts for the benefit of an infant or minor child.
6. **Guardians and Conservators.** It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right.
7. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.
8. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.

9. ____: ____: ____. Equitable estoppel is not limited to circumstances of fraud but may also be applied to prevent an inequitable resort to a statute of limitations where the other elements of estoppel are present.
10. **Estoppel: Fraud.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
11. **Words and Phrases.** Constructive knowledge is generally defined as knowledge that one using reasonable care or diligence should have.
12. **Estoppel.** Only reasonably justified reliance will create an estoppel.
13. **Fraud.** An essential element of actionable false representation is justifiable reliance on the representation.
14. **Constitutional Law: Proof.** The burden of demonstrating a constitutional defect rests with the challenger.
15. **Equal Protection.** The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
16. ____. Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest.
17. ____. The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action.
18. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of a controversy.
19. **Standing: Jurisdiction: Appeal and Error.** If the party appealing an issue lacks standing, the court is without jurisdiction to decide the issues in the case.
20. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
21. **Due Process: Notice.** Due process does not guarantee an individual any particular form of state procedure; instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to

be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.

22. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

Appeal from the District Court for Cass County: David K. Arterburn, Judge. Affirmed.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellant.

Adam E. Astley, of Slowiaczek, Albers & Astley, P.C., L.L.O., for appellee.

Julie E. Bear, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for intervenor-appellee.

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

Wright, J.

I. NATURE OF CASE

This is an appeal from the dismissal of a paternity action pursuant to Neb. Rev. Stat. § 43-1411 (Reissue 2008). The biological father brought a paternity action on behalf of himself and as the "next friend" of the minor child. He sought a declaration of paternity and custody of the child, who was born 8 years before the action was filed. He claimed that the statute of limitations barring paternity actions after 4 years should be tolled by the doctrines of fraud and equitable estoppel based on misrepresentations of the mother that he was not the father. He asserts that our holding in *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984), permits him to bring the action as the next friend of the child. And he claims that § 43-1411 is unconstitutional under the Due Process and Equal Protection Clauses of the state and federal Constitutions.

For the reasons stated below, we affirm the order of the district court.

II. SCOPE OF REVIEW

[1-3] A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d. 578 (2015). The constitutionality of a statute is a question of law which we review independently of the lower court's determination. See *Big John's Billiards v. State*, 288 Neb. 938, 852 N.W.2d 727 (2014).

III. FACTS

Appellee, Anne B., and intervenor, Adam B., have been married since May 1999. During the first 5 years of their marriage, Anne and Adam unsuccessfully attempted to conceive a child. Appellant, Bryan M., has been married to his wife for more than 25 years, and they have two children.

In the fall of 2003 until spring 2004, Anne and Bryan engaged in an extramarital affair in which they regularly engaged in sexual intercourse without contraception. During the affair, Anne continued to have regular sexual intercourse with both Bryan and her husband without using contraception. When Anne became pregnant, she broke off her relationship with Bryan. Bryan inquired several times whether he was the father of the child and was told that he was not. After the child, T.B., was born in 2004, Bryan again asked Anne whether he was the biological father. Again, he was told that he was not the father. Since T.B.'s birth in 2004, Adam has raised T.B. with the belief that he is T.B.'s father. Adam has served as T.B.'s father for T.B.'s entire life. Since T.B.'s birth, Bryan's contact with Anne and T.B. has been limited to occasional, unplanned meetings.

In 2012, Anne and Bryan resumed their extramarital affair. When the relationship resumed, Bryan requested a DNA

test to determine whether he is T.B.'s biological father. A DNA test performed at an Omaha, Nebraska, medical center revealed a 99.9-percent chance that Bryan is T.B.'s biological father.

Bryan filed his initial complaint on September 17, 2013, seeking to establish paternity of T.B. and custody. His second amended complaint, as stated by the district court, asserted the following:

> 1. [Bryan] is bringing this action in his own capacity, and Nebraska's four-year Statute of Limitations [provided in § 43-1411] is unconstitutional;
>
> 2. [Bryan] is bringing this action in his own capacity, and the Statute of Limitations should be tolled [based on fraud/deception]; and
>
> 3. [Bryan] is bringing this action both in his individual capacity and "as someone informally acting in the best interest of T.B., but not formally his guardian." The action is also captioned "Bryan . . . , on behalf of himself and as 'next friend' of T.B.["]

Bryan argued that the 4-year statute of limitations should be tolled because Anne told him that he was not the biological father.

The district court rejected Bryan's argument and found that the statute of limitations under § 43-1411 should not be tolled. The court found that Bryan had not been "deceived or hoodwinked into inactivity" by Anne, but simply failed to exercise his rights with due diligence. It found that Bryan originally did not want to be a parent to T.B., because he wanted to preserve his own marriage, and that he knew or should have known that it was impossible for Anne to know with certainty that he was not the father. It also granted Anne's motion to strike Bryan's claims brought as "the next friend" of T.B., because it was not alleged or shown that T.B. was without a guardian, since T.B. was currently living with his biological mother.

On Bryan's and Anne's renewed motions for partial summary judgment, the court found that § 43-1411 did not violate the

Due Process Clauses of the U.S. and Nebraska Constitutions. The court found that the statute permitted sufficient time for parents to assert claims and that the government had a sufficient interest in preventing children from being removed from stable homes after a certain period of time. Moreover, it found that § 43-1411 did not violate Bryan's rights under the Equal Protection Clauses of the U.S. and Nebraska Constitutions. It rejected Bryan's arguments that § 43-1411 impermissibly discriminated against men as opposed to women and found that Bryan lacked the standing to bring the argument that the statute discriminated against children born out of wedlock. Bryan timely appealed.

IV. ASSIGNMENTS OF ERROR

Bryan assigns as error the trial court's finding (1) that Bryan could not file this action derivatively as T.B.'s next friend, (2) that Bryan did not meet his burden of proving equitable estoppel/fraud tolling of the statute of limitations found in § 43-1411, (3) that § 43-1411 is constitutional under the Equal Protection Clauses of the U.S. and Nebraska Constitutions, and (4) that § 43-1411 is constitutional under the Due Process Clauses of the U.S. and Nebraska Constitutions.

V. ANALYSIS

This appeal raises statutory, equitable, and constitutional issues associated with § 43-1411. We consider the statutory question first.

1. Next Friend Argument

Bryan claims that § 43-1411 permits him to bring this action as the "next friend" of T.B. to secure T.B.'s rights. Anne and Adam claim that Bryan may not bring an action as T.B.'s next friend, because he has not shown T.B. is without a guardian. We reject Bryan's claim.

[4] An action to establish paternity is statutory in nature, and the authority for such action must be found in the statute and must be in accordance with the provisions thereof. *County of*

Hall ex rel. Wisely v. McDermott, 204 Neb. 589, 284 N.W.2d 287 (1979). See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006). Summarized in pertinent part, § 43-1411 provides that a paternity action may be instituted by (1) the mother or the alleged father of a child either during pregnancy or within 4 years after the child's birth or (2) the guardian or next friend of such child, or the state, either during pregnancy or within 18 years after the child's birth.

[5,6] Thus, a parent's right to initiate paternity actions under § 43-1411 is barred after 4 years, but actions brought by a guardian or next friend on behalf of children born out of wedlock may be brought within 18 years after the child's birth. In the context of a paternity action, a next friend is one who, in the absence of a guardian, acts for the benefit of an infant or minor child. See *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011). Actions brought by the next friend of the child are causes of action that seek to establish the child's rights rather than those of the parent. See *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007) (quoting *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994)). It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right. *In re Adoption of Amea R., supra*.

Bryan brings this action in his own behalf and as T.B.'s next friend. Since T.B. was in the custody of Anne and Adam, his biological mother and legal father, Bryan did not show that T.B. was without a guardian.

This is not the first time we have considered this type of issue. *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000), involved an action for grandparent visitation rights wherein the grandmother of the minor child brought the action as the child's next friend. Since the minor child lived with his mother, we concluded there was no legal basis, reason, or cause for a "next friend" to institute a paternity action on the

minor child's behalf. The mother and father were the natural guardians of the minor child. We concluded the court correctly dismissed the paternity action, because the grandmother did not dispute that the child lived with his mother.

Bryan relies upon *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984). He claims that this court suggested that parents may use the "next friend" status as a basis for bringing a claim of paternity. In *Doak*, the mother filed a paternity action against the putative father in 1981 and requested that he be declared the father of a child born to her in 1972. The court dismissed the action. In reviewing the constitutionality of Neb. Rev. Stat. § 13-111 (Reissue 1977), the predecessor statute to § 43-1411, we held:

> The clear import of the language of § 13-111 is that the mother's cause of action to establish the paternity of her child in order to recover her damages is barred 4 years after the child's birth. There is, however, no such limitation on a cause of action brought on the child's behalf by a guardian or next friend to establish paternity and secure the child's rights. . . . Accordingly, [the mother's] equal protection and due process arguments [in this case] are misdirected. The dismissal of her petition has no effect upon her child's cause of action.

Doak, 216 Neb. at 334-35, 343 N.W.2d at 753.

Bryan misinterprets *Doak* as an indication that parents may enforce their rights through the guardian or next friend provisions of § 43-1411. And *Doak* is clearly distinguishable from the case at bar. In *Doak*, we considered whether a mother, who had physical care of a child, could prosecute a cause of action as a child's next friend to assert the child's rights. The father sought to prevent that cause of action from proceeding, most likely to avoid paying child support. We held that although the mother was barred from bringing an action to assert her own rights and recover damages after 4 years, she could have prosecuted a cause of action as the child's next friend, because such an action would have been to secure the child's rights and, therefore, would be permitted under the statute.

Bryan argues:

> While the issue here does not relate to [T.B.'s] right to child support from his father, [T.B.] should have the right to an emotional bond with his biological father that is the same as his right to a relationship with the person that is married to his mother at the time of his birth.

Brief for appellant at 21. We disagree. This relationship is not the type contemplated by § 43-1411, nor is it the type of support with which the State has a reasonable interest. Bryan does not cite to any case in which a court in a similar context has interpreted "support" to mean an emotional bond. Taking Bryan's argument to its logical conclusion, a "next friend" under § 43-1411 could bring suit to secure the child's "right to an emotional bond" with the child's biological parent. We reject this argument.

We conclude that Bryan cannot bring this action as the next friend of T.B. under § 43-1411. Bryan admits in the operative pleadings that T.B. is in the care of his biological mother. Thus, applying our holding in *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000), Bryan may not bring the paternity action as T.B.'s "next friend." He has no significant relationship with T.B., and there is no indication that T.B. is without financial support. Bringing this action as T.B.'s next friend is a thinly veiled attempt to bypass the 4-year limitations period in § 43-1411 for actions brought by parents.

2. Equitable Defenses to Statute of Limitations

We next consider Bryan's equitable defenses to the statute of limitations. At the time this action was brought, T.B. was 8 years of age. Bryan clearly failed to bring his action within the limitations period pursuant to § 43-1411. He asserts the limitations period was tolled on the grounds of fraud and equitable estoppel. Bryan argues that Anne, by telling him on several occasions that he was not T.B.'s biological father, committed fraud and is equitably estopped to assert the statute of limitations as a defense.

A claim of equitable estoppel rests in equity, and in reviewing judgments and orders disposing of claims sounding in equity, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court. See *deNourie & Yost Homes, LLC v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014). Thus, we review Bryan's equitable defenses de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, 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. *Id.* For the reasons stated below, we reject Bryan's arguments in equity.

[7-9] Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations. *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015). The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Equitable estoppel is not limited to circumstances of fraud but may also be applied to prevent an inequitable resort to a statute of limitations where the other elements of estoppel are present. *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

[10] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003).

As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Id.*

The district found that Anne made false statements to Bryan, because she could not have known which man was the father of T.B. But it determined that Bryan was relieved to be told he was not the father, because he wished to remain in his marriage. The court concluded Bryan's decision to not timely bring the action was not caused by Anne's statements, but by his desire to conceal the affair from his wife. The court found Bryan could not have reasonably relied on Anne's statements that he was not T.B.'s father, because he knew that they had not used contraceptives during the period in which they regularly engaged in sexual intercourse. The court determined that Bryan failed to exercise his rights within the required time period, which demonstrated a lack of reasonable diligence. We agree.

Our review leads us to conclude that Bryan could not have reasonably and in good faith relied on Anne's statements that he was not T.B.'s father. Bryan had unprotected sexual intercourse with Anne on numerous occasions around the time she became pregnant. He knew that Anne had not conceived a child in the 5 years of marriage prior to the affair. He knew or should have known that Anne's statements were not based on reliable information.

[11,12] We find that Bryan failed to meet his burden to show that he had no knowledge or the means of knowledge of the truth as to the facts in question or constructive knowledge of the facts. Constructive knowledge is generally defined as knowledge that one using reasonable care or diligence should have. *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014). Only reasonably justified reliance will create an

estoppel. *Breslow v. City of Ralston*, 197 Neb. 346, 249 N.W.2d 205 (1977).

Similarly, we reject Bryan's testimony that he did not know about the availability of DNA testing. The availability of DNA testing to determine paternity is common knowledge and accessible to the public, and therefore, we reject Bryan's claim that he was unaware that DNA testing was available to him at the time of T.B.'s birth.

[13] For the same reasons, we reject Bryan's fraud argument. An essential element of actionable false representation is justifiable reliance on the representation. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012). Where a plaintiff fails to use ordinary prudence in relying on a false statement, he or she cannot show that such reliance was justified. See *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009). Had Bryan used ordinary prudence, he would have been able to timely discover that he was T.B.'s biological father.

In the case at bar, the facts closely resemble those in *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012). There, the mother had been in a sexual relationship with two men around the time she became pregnant. The biological father moved away before the child was born, and the second man obtained a decree of paternity. At the time he left town, the biological father did not know that the mother was pregnant or that there was a possibility that he was the father of the child. A decade later, and years after the mother had lost custody of the child to the purported father, the biological father attempted to intervene and assert his rights. We held that the biological father was not entitled to equitable relief, because he did not exercise reasonable diligence to determine whether he was the minor child's father. We stated:

> While [the biological father] slept on his rights, [the purported father] fulfilled the obligations of a father in justifiable reliance on the 2001 paternity decree. [The purported father] was judicially determined to be [the

> minor child's] father, and he developed a parental relationship with her. He exercised his visitation rights when [the child] was in [the mother's] custody, paid child support, and later took custody of [the child] after she was removed from [the mother's] care. [The biological father's] failure to exercise any attempt to discover whether he was the biological father of [the child] prevents him from obtaining equitable relief.

Id. at 949, 814 N.W.2d at 745.

We find that Bryan did nothing to determine whether he was the biological father, despite knowing of the substantial possibility that he was the biological father. Meanwhile, Adam fulfilled all the obligations of a father to T.B. and established a parent-child relationship. The trial court found that under the circumstances, Bryan is not entitled to equitable relief. We agree.

Bryan was not deceived or hoodwinked into inactivity by Anne's actions and statements, thereby preventing him from bringing this action in a timely manner. Rather than diligently and prudently attempting to establish paternity within the first 4 years after T.B.'s birth, he did nothing for 8 years. Consequently, Bryan's claim that he was defrauded has no merit, and he has shown no basis to toll the statute of limitations in § 43-1411.

We do not find persuasive Bryan's claims that this case is similar to *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). *Manker* involved the husband's secretly divorcing his wife after she signed a voluntary appearance and property settlement agreement. Although he filed the paperwork with the court and obtained a dissolution of marriage, the husband told her that he was only considering a divorce and had time to stop it.

The couple continued to hold each other out as husband and wife for 14 years following the dissolution. They cohabitated, they listed each other as spouses and left each other the entirety of their estates in their respective wills, the husband

listed her as his spouse on health insurance forms, and the husband acknowledged a child born during the time period as his son. Because the husband always retrieved the mail, she never received notice that their marriage had been dissolved. Furthermore, he handled the couple's finances. Therefore, nearly all the "joint property" acquired during the 14 years following the dissolution was titled in the husband's name. Upon learning of the dissolution after the husband made suspicious comments, the wife attempted to separate from him. However, the husband convinced her to keep the dissolution a secret to avoid getting into trouble with the Internal Revenue Service and losing his job.

We held that the doctrine of equitable estoppel was necessary to prevent the husband's inequitable resort to a statute of limitations. The husband had repeatedly misrepresented to the wife and others that they remained married. He repeatedly prevented the wife from learning the truth. Upon her learning the truth, the husband convinced her to sit on her rights by causing her to believe that pursuing her rights would cause him to lose his job and the Internal Revenue Service to seize their assets, thereby losing any means of support.

In contrast to *Manker*, in this case, there was not a systematic pattern of fraud. Bryan understood that there was a substantial possibility, if not probability, that he was T.B.'s father. Anne did not know who was the father. At the time of conception, she had unprotected sexual intercourse with both men. Bryan is not permitted to bring this paternity action as T.B.'s next friend, nor do his equitable claims have merit. He has shown no statutory or equitable basis for a reversal of the district court's order.

3. Constitutional Issues

[14] We next turn to Bryan's constitutional challenges to § 43-1411. Bryan challenges § 43-1411 on the basis that it violates the Equal Protection and Due Process Clauses of the U.S. and Nebraska Constitutions. Constitutional interpretation is a question of law on which we are obligated to reach

a conclusion independent of the decision by the trial court. *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). The burden of demonstrating a constitutional defect rests with the challenger. *Coffey v. County of Otoe*, 274 Neb. 796, 743 N.W.2d 632 (2008). A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015).

(a) Equal Protection Challenge

Bryan claims that § 43-1411 violates the Equal Protection Clause because it impermissibly discriminates against natural fathers and children born out of wedlock.

(i) Gender-Based Classification

We have held that parents are the natural guardians of their minor children. *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000). Bryan argues that because natural parentage of a mother is established at birth, but a father's parentage is not, a mother can bring paternity actions on behalf of the child for up to 18 years, whereas fathers have only 4 years.

[15,16] Where a statute is challenged under either the Due Process Clause or the Equal Protection Clause of the state and federal Constitutions, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity. *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013). The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), *disapproved on other grounds, Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[17] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). Absent this threshold showing, one lacks a viable equal protection claim. *Id*. For the purposes of argument, we assume that Bryan has met this requirement.

Once the challenger establishes that he or she is similarly situated to another group, the analysis then focuses on whether the challenger is receiving dissimilar treatment pursuant to the statute at issue as compared to the similarly situated group. *Sherman T. v. Karyn N., supra*. On its face, § 43-1411 treats mothers and putative fathers identically by imposing a 4-year limitations period on paternity actions brought by parents asserting their own rights. Similarly, the statute does not discriminate based on gender in allowing a guardian or next friend to bring an action on behalf of the child.

Our case law shows that § 43-1411 has been invoked to bar paternity actions brought by both men and women after 4 years. More fundamentally, Bryan's argument fails to recognize the distinction between bringing a paternity action to vindicate the parent's right as compared to filing an action to vindicate the rights of the child. See, *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994); *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984).

It is unclear what Bryan believes are the necessary measures that would place mothers and fathers "on a level playing field" in bringing paternity actions. His argument suggests that *any* time limitation on a parent's right to assert his or her right to bring a paternity action is unconstitutional. That notion is patently hostile to the rights of the child and the State's interest in preserving family stability. More fundamentally, it is contrary to our law regarding paternity actions and support. Consequently, we reject Bryan's argument that § 43-1411 impermissibly discriminates against men.

(ii) Discrimination Against Children Born out of Wedlock

[18,19] In addition to gender-based classification, Bryan claims that § 43-1411 impermissibly discriminates against children born out of wedlock. But Bryan lacks standing to raise this issue, because he would be required to do so on behalf of T.B. Standing is the legal or equitable right, title, or interest in the subject matter of a controversy. *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015). If the party appealing an issue lacks standing, the court is without jurisdiction to decide the issues in the case. *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

As the child born out of wedlock, the right and interest in challenging § 43-1411 on that basis belongs to T.B. We have determined that Bryan was not permitted to bring a paternity action on behalf of T.B. or assert T.B.'s rights. Similarly, we find he lacks standing to raise this issue. Regardless, we note that this issue was addressed in our opinion *Doak v. Milbauer, supra* (holding that § 13-111 was constitutional because it did not bar children born out of lawful wedlock from themselves bringing the action after the specified period of limitations).

(b) Due Process Challenge

Bryan argues that § 43-1411 violates his due process rights. He asserts that society has changed a great deal in the last 20 years and that the State no longer has an interest in imposing a limitations period on parents bringing paternity actions. Bryan's arguments seem to allege that § 43-1411 violates his procedural due process rights. We reject Bryan's arguments.

[20-22] Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law. *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). Due process does not guarantee an individual any particular form of state procedure; instead, the requirements of due process are satisfied if a person has

reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it. *In re Interest of S.J.*, 283 Neb. 507, 810 N.W.2d 720 (2012). The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id.*

Bryan bases his argument primarily on the holding in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989). There, the Court upheld a California statute which created a presumption that a husband is the natural father of a child born during a marriage. In *Michael H.*, a putative natural father, whose blood tests indicated a 98.07 percent probability of paternity and who had established a parental relationship with the child, filed an action to establish paternity and a right to visitation. The Court held: (1) The statute creating a presumption that a child born to a married woman living with her husband is the child of the marriage did not violate the putative natural father's procedural due process rights, (2) the statute did not violate the putative natural father's substantive due process rights, (3) the child did not have a due process right to maintain a filial relationship with both the putative natural father and the husband, and (4) the statute did not violate the child's equal protection rights. In reaching its conclusions, the Court stated:

> In *Lehr v. Robertson*, a case involving a natural father's attempt to block his child's adoption by the unwed mother's new husband, we observed that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring," . . . and we assumed that the Constitution might require some protection of that opportunity . . . . Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and

> it is not unconstitutional for the State to give categorical preference to the latter.

Michael H., 491 U.S. at 128-29. Section 43-1411 is substantially less rigid than the California statute. Section 43-1411 imposes a 4-year limitations period, whereas the California statute imposed a 2-year limitations period. Moreover, whereas § 43-1411 allows putative fathers (such as Bryan) to bring paternity actions within that time period, the California statute seemingly barred persons outside the marriage from bringing such actions.

Bryan claims that in contrast to the California statute in *Michael H.*, § 43-1411 does not have a provision allowing for visitation rights for natural fathers if they stood in loco parentis to the child, which, for a variety of reasons, is often not the case. Bryan's reliance upon *Michael H.* is misplaced. Under § 43-1411, the biological parent need not be in loco parentis to the child to bring a paternity action. Instead, the sole requirement is that he or she must bring the action within the time period provided in that statute.

We conducted a due process analysis in *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984), when the mother challenged § 13-111—the predecessor statute to § 43-1411—on equal protection and due process grounds. The mother claimed the 4-year statute of limitations to bring paternity actions was unconstitutional. There, we stated:

> More recently, the U.S. Supreme Court has held that restrictions on support suits by children born out of lawful wedlock will survive equal protection scrutiny to the extent that they are substantially related to a legitimate state interest. However, the period for obtaining parental support must be long enough to provide a reasonable opportunity for those with an interest in such children to bring suit on their behalves. Further, any time limit on that opportunity has to be substantially related to the state's interest in preventing the litigation of stale or fraudulent claims. . . .

> There is, however, a major distinction between the statutes determined to be constitutionally infirm in the above-cited cases and the statute at hand. Those statutes found not to pass constitutional muster purported to bar children born out of lawful wedlock from themselves bringing the action after the specified period of limitations. We do not so read our statute.

Doak, 216 Neb. at 333-34, 343 N.W.2d at 752-53 (citing *Mills v. Habluetzel*, 456 U.S. 91, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982)). We concluded that the statute was constitutional because it provided sufficient time for a natural parent, whether having custody of the child or not, to assert his or her rights. We conclude that § 43-1411 does not violate Bryan's due process rights.

We also reject Bryan's claims that "[o]ur society has changed such that protecting the 'legitimacy' of a child born during a marriage between a man and a woman is no longer a meaningful goal of the state." Brief for appellant at 30. This mischaracterizes the State's interest involved in § 43-1411. Even if protecting legitimacy is no longer important, a conclusion we need not and do not reach, the State certainly has a legitimate interest in protecting children from being removed from their homes and stability after an extended period has passed. See *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012). The blame in failing to timely bring a paternity action rests solely on Bryan.

VI. CONCLUSION

For the reasons stated above, we affirm the order of the district court.

Affirmed.

McCormack, J., not participating.

RGR Company LLC, appellant, v. Lincoln Commission on Human Rights on behalf of Lionel Simeus, appellee.

873 N.W.2d 881

Filed February 12, 2016. No. S-15-076.

1. **Municipal Corporations: Equity: Appeal and Error.** An appeal of a case heard in district court under Neb. Rev. Stat. § 15-1201 et seq. (Reissue 2012) to the appellate court is to be reviewed as in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries 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 conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Civil Rights: Discrimination: Municipal Corporations: Equity: Appeal and Error.** An appeal filed in district court pursuant to Neb. Rev. Stat. § 15-1201 et seq. (Reissue 2012) from an order or decision of a human rights commission of a city of the primary class is to be heard as in equity, and upon appeal to the Nebraska Supreme Court, it is the duty of the court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the district court.
4. **Appeal and Error.** When reviewing an appeal de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue.
5. **Discrimination: Proof.** In a housing discrimination case, a court evaluates the evidence under the three-part burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

6. ____: ____. With the exception of summary judgments, under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), framework, (1) the plaintiff has the burden of establishing a prima facie case of discrimination; (2) if the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action; and (3) if the defendant successfully articulates a legitimate, nondiscriminatory reason for its action, to succeed, the plaintiff must prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but was instead a pretext for discrimination and that discrimination was the real reason.
7. **Discrimination: Intent: Proof.** In a housing discrimination case, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
8. **Discrimination: Proof.** The defendant's responsibility to produce proof of a nondiscriminatory, legitimate justification for its action is not an onerous task; it is a burden of production, not of persuasion.
9. **Discrimination: Proof: Words and Phrases.** The term "pretext" means pretext for discrimination; a defendant's reason for its action cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason.
10. **Discrimination: Proof.** Although strong evidence of a prima facie case of discrimination can be considered to establish pretext, proof of pretext or actual discrimination requires more substantial evidence.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Reversed and remanded with directions.

Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Jeffery R. Kirkpatrick, Lincoln City Attorney, and Jocelyn W. Golden for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

On June 12, 2013, Lionel Simeus filed a complaint against RGR Company LLC (RGR) with the Lincoln Commission on

Human Rights (the Commission) for housing discrimination on the basis of race, nationality, and disability pursuant to 42 U.S.C. § 3604(b) (2012) of the federal Fair Housing Act and Lincoln Mun. Code § 11.06.020(b) (1991). The Commission determined that reasonable cause existed to believe that RGR discriminated against Simeus in the provision of housing on the basis of race and national origin. On October 31, the Commission, on behalf of Simeus, filed a charge of discrimination against RGR. A public hearing was held. On February 27, 2014, the Commission filed an amended final order finding against RGR and awarding various penalties and costs.

RGR appealed to the district court for Lancaster County. On December 23, 2014, the district court affirmed the Commission's amended final order. RGR appeals. For reasons more fully explained below, we determine that the Commission failed to prove that RGR's explanation of its negative treatment of Simeus was a pretext for discrimination and that the Commission did not establish that intentional discrimination was the real reason. Therefore, we reverse the decision of the district court and enter orders accordingly.

STATEMENT OF FACTS

RGR owns a rental property located at 1315 D Street in Lincoln, Nebraska. Ryan Reinke is the sole owner of RGR, as well as various other business entities. There are 12 rental properties in Lincoln that are owned by Reinke or entities owned by Reinke. At the time relevant to this case, 75 tenants lived in the 12 rental properties.

Simeus is a black man from Haiti. On May 27, 2013, Reinke and Simeus met to discuss Simeus' renting an apartment in the building located at 1315 D Street. Simeus entered into a 1-year lease agreement with an agreed monthly rent of $385. The parties disagree about whether Simeus signed a lease. Despite requests from Simeus, Reinke did not provide Simeus with a copy of the lease, and there is not a signed copy of the lease in the record. Simeus resided in the apartment from June 1 through August 7.

Simeus noted that there were repairs that needed to be completed in the apartment. There was a hole in the bedroom wall. There were broken items, including a shower faucet, kitchen cabinets, and a stove with only one functioning burner. Simeus attempted to contact Reinke regarding the repairs by telephone and in person. Reinke did not answer or return Simeus' calls. Simeus stated that on or about June 5, 2013, he approached Reinke while Reinke was in his vehicle outside the apartment building, but instead of talking to Simeus, Reinke rolled up his car window and said, "'That's why I don't want to deal with you foreigners . . . .'" Reinke denies making the statement. However, Reinke acknowledges he rolled up the car window because he was in a conversation on his cell phone.

On June 6, 2013, Reinke gave Simeus a "Fourteen-Day Notice of Termination of Rental Agreement," which stated that Simeus was "in material noncompliance" of his rental agreement for the following reasons: "1. Burning candles, incense, or smoking within the premises[,] 2. Disturbances[,] 3. Argumentative or threatening other tenants[,] 4. Public intoxication."

On June 7, 2013, the police responded to a noise complaint regarding Simeus' apartment. Simeus spoke with the responding officer who asked him to turn his music down, and Simeus complied.

Reinke asserted that he delivered a second 14-day notice to Simeus sometime after June 6, 2013, but a signed copy of the second notice was not offered at the hearing, and a signed copy is not in the record. An unsigned copy of the second notice is in the record, and it stated that Simeus was "in material noncompliance" with the rental agreement for the following reasons: "1. Commons area damage by tenant or guest[,] 2. Replace advertising banner[,] 3. Failure to maintain building thermal efficiency when heat[ing] or cooling apartment." Simeus denied receiving the second notice.

Simeus filed complaints with the Commission on June 12, 2013, and with the U.S. Department of Housing and Urban Development on July 2, alleging that Reinke and RGR committed discriminatory housing practices on the basis of race, national origin, and disability, in violation of § 11.06.020(b) of the Lincoln Municipal Code, which describes acts which are unlawful regarding housing, and 42 U.S.C. § 3604(b) of the federal Fair Housing Act. On June 13, the Commission sent a notice of the filing of the complaint to RGR and Reinke. Reinke refused to claim the certified letter, so it was returned. On June 27, the sheriff served Reinke with the notice.

Angela Lemke, a senior civil rights investigator with the Commission, investigated Simeus' complaint. While the Commission was investigating his complaint, additional incidents occurred. On or about June 17, 2013, Simeus contacted the Lincoln's Building and Safety Department regarding perceived violations of the housing code in his apartment. A housing inspector inspected Simeus' apartment and noted that the leaking bathtub faucet constituted a code violation. The housing inspector sent RGR a letter dated June 17, 2013, which stated that the violation must be repaired by July 3.

On June 26, 2013, Simeus had left his apartment, and when he returned, the electricity was not working in his apartment. He contacted Lemke and notified her that his electricity was not working, and Lemke contacted the Building and Safety Department. A housing inspector from the Building and Safety Department determined that the issue was with the main breaker box in the hallway outside of Simeus' apartment, which was located in a locked closet. It was determined that Simeus' apartment was the only apartment in the building where the electricity was affected.

On June 27, 2013, Reinke entered Simeus' apartment to make repairs. Reinke did not provide Simeus with notice. That night, Simeus had taken medication to help him sleep, and he was asleep when Reinke entered the apartment and

completed the repairs. In an interview with Lemke, Reinke acknowledged that he completed the repairs while Simeus "was 'not alert.'"

On July 9, 2013, Reinke posted a "3 Day Notice of Breach of Lease Agreement" on Simeus' apartment door. The notice stated that Simeus owed $465, which was rent in the amount of $385 and a late fee in the amount of $80. The notice stated that if Simeus did not remedy the noncompliance by July 12, the rental agreement would terminate. Reinke brought an eviction proceeding against Simeus in the district court for Lancaster County in the separate case No. CI 13-8406. Simeus moved out of the apartment on or about August 7 without paying his rent for July.

Based on Lemke's investigation, the Commission determined that reasonable cause existed to believe that a discriminatory housing practice had occurred on the basis of race and national origin. Therefore, on October 31, 2013, the Commission, on behalf of Simeus, issued a "Charge of Discrimination" against RGR, pursuant to Lincoln Mun. Code § 11.02.070 (1996) and rule 2-(6.1a) of the Commission's rules and regulations. The charge alleged, inter alia, that RGR failed to respond to Simeus' requests for repairs in a timely fashion and that when Reinke did complete the repairs, he entered Simeus' apartment without notice and while Simeus was sleeping. The charge stated that timely repairs were made "to units occupied by tenants outside of [Simeus'] race and national origin" and that RGR failed to make timely repairs to an apartment "which houses a Black tenant of Ethiopian descent." Based on these facts, the charge alleged that RGR discriminated against Simeus on the basis of race and national origin.

Neither party elected to have the claims asserted in a civil action, so a public hearing was held before a hearing officer on December 4 and 5, 2013. Simeus, Reinke, and Lemke testified at the hearing. The Commission offered and the hearing officer received 17 exhibits. RGR offered and the hearing officer received 15 exhibits.

The hearing officer's "Findings of Fact and Discussion" were received by the Commission on December 19, 2013. Based on the evidence adduced at the hearing, the hearing officer determined that Reinke discriminated against Simeus on the basis of race or national origin. In making this determination, the hearing officer had found that (1) Reinke failed to make timely repairs to Simeus' apartment; (2) Reinke served upon Simeus a notice to quit the premises only 6 days after Simeus moved into the apartment; (3) Reinke, without notice, entered Simeus' apartment to complete repairs when Simeus was sleeping; and (4) Simeus was the only tenant who lost electricity on June 26, 2013, and "[i]t is more likely than not that . . . Reinke was responsible for the loss of electricity to the Simeus apartment." The hearing officer also noted that there was no evidence that (1) any other tenant had been given a notice to quit the premises after requesting a copy of the lease agreement, (2) Reinke had entered any other apartment to make repairs while the tenant was sleeping, or (3) Reinke had rolled up his car window when any other tenant was speaking to him. The hearing officer therefore determined that RGR and Reinke discriminated against Simeus based on his race or national origin. The hearing officer recommended the following order: that a civil penalty be imposed against Reinke in the amount of $1,000, that Reinke pay Simeus' moving costs in the amount of $100, that Reinke return Simeus' security deposit in the amount of $385, and that RGR file a satisfaction of the judgment against Simeus by Reinke or RGR for the eviction for unpaid rent or costs in the amount of $1,348.62.

On January 30, 2014, the Commission held a meeting at which it discussed, inter alia, the public hearing against RGR. And later on January 30, the Commission filed its "Final Order." The final order largely adopted the hearing officer's findings of fact, and set forth the following findings of fact:

> 1. The property at issue in this case is located at 1315 D Street, in Lincoln, Nebraska. Respondent, RGR . . .

owns the subject property, and Respondent . . . Reinke is the sole owner of RGR . . . .

2. The Complainant . . . Simeus, is a black individual of Haitian descent. Respondent denies having knowledge of the Complainant's national origin. Respondent Reinke testified about the nationality or race of his other tenants, and testified that he believed Complainant Simeus had a speech impediment and not an accent. Based on the record of the hearing, Complainant Simeus speaks English with a Haitian accent.

3. On June 1, 2013, Complainant Simeus moved into 1315 D Street, #6. The monthly rent was $385.

4. On June 5, 2013, Complainant Simeus asked Respondent Reinke for a copy of the lease agreement. Respondent did not provide the lease agreement to Complainant Simeus, and told Complainant Simeus that he was not going to provide him a copy.

5. Numerous attempts were made by Complainant Simeus to contact Respondent Reinke relating to needed repairs in the subject property.

6. After this time, Respondent Reinke stopped communicating with Complainant Simeus, refused to return his phone calls, and rolled up the window of his vehicle when Complainant Simeus tried to speak with him.

7. On June 6, 2013, Respondent Reinke issued a 14 day notice to Complainant Simeus citing his use of candles/smoking, disturbing the peace, argumentative or threatening tenants, and public intoxication. This was issued within six days of the Complainant moving into the subject property citing violations of a lease agreement which was never provided to Complainant Simeus.

8. On June 7, 2013, the Lincoln Police Department was called to 1315 D Street, #6 and an officer was there for seven minutes.

9. On June 12, 2013, Complainant Simeus filed the instant case with the . . . Commission . . . and the

Department of Housing & Urban Development alleging discrimination in housing in violation of the Lincoln Municipal Code and the Federal Fair Housing Act as amended.

10. On or about June 17, 2013, Complainant Simeus contacted the Lincoln Building & Safety Department regarding perceived violations of the housing code at 1315 D Street, #6. An inspection was done that day and a code violation was found.

11. On June 26, 2013, the electricity stopped working in 1315 D Street, #6. This unit was the only unit affected. The electrical service in the building is located behind a locked door. The City Inspector found that the issue stemmed from a breaker box in this locked room.

12. On June 27, 2013, Respondent Reinke entered the rented premises to make requested repairs while Complainant Simeus was sleeping. Respondent Reinke did not give advance notice to Complainant Simeus that he would enter the apartment and make the repairs. He made the repairs while Complainant Simeus was sleeping, twenty[-]seven days after Complainant Simeus began requesting the repairs be completed.

13. On July 9, 2013, Respondent Reinke served on Complainant Simeus a 3 day notice of breach of lease agreement seeking $465.

14. A signed lease agreement was not produced during the hearing, and Respondent Reinke provided no explanation as to why it was not produced except to say that another attorney had possession of it.

15. Complainant Simeus moved from 1315 D Street, #6, after refusing to pay his rent for the month of July 2013.

16. No evidence exists to show that any tenant, other than Complainant Simeus, was given a notice to quit the premises shortly after requesting a copy of the lease agreement.

17. No evidence exists to show that Respondent Reinke entered another tenant's apartment when the tenant was asleep or under the influence of medication.

18. No evidence exists that Respondent Reinke rolled up the car window when any other tenant was speaking to him.

19. Evidence does exist to show that a tenant of Ethiopian descent, residing in #5 of the subject property, has a large hole in the ceiling of his bathroom that has existed for a minimum of several months.

20. Evidence exists to show that the tenant residing in apartment #5 has requested Respondent Reinke [to] fix this hole on at least one occasion. As of the date of the public hearing, the hole had not been repaired.

In the final order, the Commission ordered: a civil penalty against RGR and Reinke in the amount of $2,000, that RGR and Reinke pay Simeus' moving costs in the amount of $100, that RGR and Reinke return Simeus' security deposit in the amount of $385, that RGR file a satisfaction of the judgment against Simeus for the eviction for unpaid rent or costs in the amount of $1,348.62 in separate case No. CI 13-8406, and that RGR and Reinke pay Simeus pain and suffering in the amount of $3,500.

On February 7, 2014, RGR filed a motion for new trial or reconsideration in which it challenged the findings and the award against RGR. On February 27, the Commission filed an amended final order, which amended the original final order by deleting the requirement that Reinke file a satisfaction of judgment in case No. CI 13-8406; all other portions of the original final order remained unchanged.

RGR appealed from the amended final order to the district court. On December 23, 2014, the district court filed an order in which it affirmed the decision of the Commission. The district court stated that after reviewing the record and considering the parties' oral arguments and briefs, it generally gave deference to the credibility determinations of the hearing

officer and the Commission and affirmed the Commission's amended final order.

RGR appeals.

ASSIGNMENTS OF ERROR

RGR claims that the district court erred in numerous respects, including finding that the evidence was sufficient to prove that RGR discriminated against Simeus based on his race and national origin, relying on hearsay evidence, and awarding inappropriate damages. Because our analysis of RGR's first assignment of error regarding the sufficiency of evidence is dispositive, we do not reach RGR's remaining assignments of error. See *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 750, 868 N.W.2d 334, 348 (2015) (stating that "[a]n appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it").

STANDARDS OF REVIEW

[1,2] According to § 11.02.070(j) of the Lincoln Municipal Code, regarding equal opportunity administration, an appeal from an order of the Commission shall be taken to the district court as provided in Neb. Rev. Stat. § 15-1201 et seq. (Reissue 2012). In district court, the case shall be heard as in equity without a jury. See § 15-1205. An appeal of a case heard in district court under § 15-1201 et seq. to the appellate court is to be reviewed as in equity. See, *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994); *American Stores v. Jordan*, 213 Neb. 213, 328 N.W.2d 756 (1982). On appeal from an equity action, an appellate court tries 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 conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005)

(considering appeal in wage claim action filed in district court under § 15-1201 et seq.).

ANALYSIS

Clarifying Standards of Review.

As an initial matter, we note that there appears to be some inconsistency in the appellate briefs regarding the relevant standards of review applicable to an appeal of an order of the Commission. Accordingly, we clarify the correct standards of review.

The standards of review relevant to this case can be found by following the legislative scheme. We begin with § 11.02.070(j) of the Lincoln Municipal Code pertaining to equal opportunity administration, which provides that "orders of the Commission may be appealed to the District Court of Lancaster County as provided by Neb. Rev. Stat. § 15-1201, et seq." Section 15-1201 et seq. generally refers to appeals of orders and decisions from various entities of a city of the primary class. Lincoln is a city of the primary class.

Section 15-1205 provides:

> The district court shall hear the appeal as in equity and without a jury and determine anew all questions raised before the city. The court may reverse or affirm, wholly or partly, or may modify the order or decision brought up for review. Either party may appeal from the decision of the district court to the Court of Appeals.

[3,4] We have previously stated that an appeal filed in district court pursuant to § 15-1201 et seq. from an order or decision of a human rights commission of a city of the primary class is to be heard as in equity, and upon appeal to this court, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the district court. *American Stores, supra*. When reviewing an appeal de novo on the record, we have recently stated that an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. See

In re Claims Against Pierce Elevator, 291 Neb. 798, 868 N.W.2d 781 (2015). See, similarly, *Rauscher, supra*.

Contrary to the standards of review recited immediately above, it appears that the confusion regarding the proper standard of review to be applied by this court in this case results from the citation to decisions which involved appeals of cases which had been filed in district court as petitions in error generally under Neb. Rev. Stat. § 25-1903 (Reissue 2008). In contrast to the de novo on the record standard of review applicable in this case stemming from the filing of this case under § 15-1201 et seq., the standard of review by the appellate courts reviewing a ruling by the district court on a petition in error is a review of the matter to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. See *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011). Such is not the standard of review applicable here.

As ably explained in *Jackson v. Board of Equal. of Omaha*, 10 Neb. App. 330, 630 N.W.2d 680 (2001), where possible, the relevant standard of review should be identified in statutes and applied. Thus, in *Jackson*, the Nebraska Court of Appeals observed that given the statutory framework, the standard of review applicable to an appeal of a city council's special assessment to the district court differed according to whether the city is of the "'metropolitan class'" or "'primary class'"; the former proceeds to a petition in error via statutes commencing with Neb. Rev. Stat. § 14-548 (Reissue 1997) and is reviewed solely on the record before the original tribunal, whereas the latter proceeds via § 15-1205 and is "'heard in the district court as in equity and without a jury.'" 10 Neb. App. at 334, 335, 630 N.W.2d at 684.

In the present case, the language of § 11.02.070(j) of the Lincoln Municipal Code put us on the path to identifying the controlling standard of review. Section 11.02.070(j) specifically provides that "orders of the Commission may be

appealed to the District Court of Lancaster County as provided by Neb. Rev. Stat. § 15-1201, et seq." Section 15-1205 provides that "[t]he district court shall hear the appeal as in equity and without a jury and determine anew all questions raised before the city." Thereafter, this case must be reviewed by this court as an equity action de novo on the record. It is on this basis that we have reappraised the evidence and, as discussed below, reach a different outcome than the lower tribunals.

Merits of the Case and Applicable Framework.

In its first assignment of error, RGR contends that the evidence presented at the public hearing, which served as the trial in this matter, was insufficient to prove that RGR intentionally discriminated against Simeus on the basis of Simeus' race and national origin. We agree with RGR. Because our analysis of RGR's first assignment of error is dispositive, we do not reach RGR's remaining assignments of error. See *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

This case was brought under § 11.06.020 of the Lincoln Municipal Code, which provides that regarding housing "it shall be unlawful to . . . (b) Discriminate against any person in the terms, conditions, privileges of sale or rental of a dwelling, or in the provision of service or facilities in connection therewith, because of race, color, religion, sex, disability, national origin, familial status, handicap, ancestry, or marital status." Section 11.06.020(b) of the Lincoln Municipal Code was modeled after 42 U.S.C. § 3604(b) of the federal Fair Housing Act. Section 3604 of the federal Fair Housing Act provides that "it shall be unlawful . . . (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." We note that Neb. Rev. Stat. § 20-318(2) (Reissue 2012) of the Nebraska

Fair Housing Act is also modeled after § 3604(b) of the federal Fair Housing Act. Therefore, because § 11.06.020(b) of the Lincoln Municipal Code is patterned after § 3604(b) of the federal Fair Housing Act, as is § 20-318(2) of the Nebraska Fair Housing Act, we look to federal decisions regarding the federal Fair Housing Act and Nebraska decisions regarding the Nebraska Fair Housing Act for guidance. See, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

[5,6] In a housing discrimination case, a court evaluates the evidence under the three-part burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, *Ventura, supra* (applying *McDonnell Douglas Corp.* three-part burden-shifting framework in case involving housing discrimination); *Osborn v. Kellogg*, 4 Neb. App. 594, 547 N.W.2d 504 (1996) (applying *McDonnell Douglas Corp.* three-part burden-shifting framework in case involving housing discrimination). Following trial, under the *McDonnell Douglas Corp.* framework, (1) the plaintiff has the burden of establishing a prima facie case of discrimination; (2) if the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action; and (3) if the defendant successfully articulates a legitimate, nondiscriminatory reason for its action, to succeed, the plaintiff must prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but was instead a pretext for discrimination and that discrimination was the real reason. See *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

[7] Regarding the burden of persuasion, the U.S. Supreme Court stated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas*

Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (applying *McDonnell Douglas Corp.* three-part burden-shifting framework in case involving employment discrimination). Thus, we have stated that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Ventura, supra*. See, also, *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014) (applying *McDonnell Douglas Corp.* three-part burden-shifting framework in case involving wrongful termination from employment). The "ultimate question [is] discrimination *vel non*." *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 714, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983).

The Commission's Prima Facie Case.

Under the *McDonnell Douglas Corp.* three-part framework, the Commission, on behalf of Simeus, must first establish a prima facie case of housing discrimination. We determine that the Commission's evidence demonstrated a prima facie case.

The applicable section of the Lincoln Municipal Code describing what acts are unlawful regarding housing is § 11.06.020, entitled "Unlawful Acts Enumerated." As stated above, § 11.06.020 provides that "it shall be unlawful to . . . (b) Discriminate against any person in the terms, conditions, privileges of sale or rental of a dwelling, or in the provision of service or facilities in connection therewith, because of race, color, religion, sex, disability, national origin, familial status, handicap, ancestry, or marital status." Therefore, under § 11.06.020(b) of the Lincoln Municipal Code, in order to establish a prima facie case of housing discrimination, the Commission must demonstrate by a preponderance of evidence that (1) Simeus is a member of one of the protected classes enumerated in § 11.06.020(b); (2) Simeus was discriminated against in the terms, conditions, privileges of sale or rental of a dwelling, or in the provision of service or facilities in

connection therewith, and (3) the discrimination was because of his status as a member of one of the enumerated protected classes. The Commission always retained the ultimate burden of persuading the trier of fact that RGR intentionally discriminated against Simeus. See, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Osborn v. Kellogg*, 4 Neb. App. 594, 547 N.W.2d 504 (1996).

With respect to the first element, the Commission demonstrated that Simeus is a member of two of the protected classes listed in § 11.06.020(b): race and national origin. The parties do not dispute that Simeus is black. Because the evidence presented at the hearing focused on Simeus' national origin, we focus on that protected class. Simeus testified at the hearing that he is from Haiti. The Commission met the first element of the prima facie case.

With respect to the second element, the Commission produced evidence at the hearing which showed that RGR provided inadequate service in connection with Simeus' rental of the apartment. The record shows that Reinke, the sole owner of RGR, refused to provide Simeus with a copy of the lease agreement, despite Simeus' requests for a copy. The record also shows that Reinke was slow in responding to Simeus' requests for repairs to his apartment. Soon after Simeus began his lease on June 1, 2013, Simeus noted that his apartment was in need of repairs. There was a hole in his bedroom wall. There were broken items, including a shower faucet, kitchen cabinets, and a stove with only one functioning burner. Simeus called Reinke regarding the repairs, but Reinke did not return those calls. On or about June 17, Simeus contacted Lincoln's Building and Safety Department regarding the needed repairs. A housing inspector determined that the leaking faucet constituted a code violation, and a letter was sent to RGR stating that the violation must be repaired by July 3.

The evidence shows that on June 27, 2013, Reinke entered Simeus' apartment to make the repairs. He did not provide Simeus with notice. The evidence further shows that Reinke

completed the repairs while Simeus was asleep. In an interview with Lemke, Reinke acknowledged that he completed the repairs while Simeus "was 'not alert.'"

The record also shows that on June 26, 2013, the electricity stopped working in Simeus' apartment and that Simeus' apartment was the only one in which the electricity was affected. A housing inspector from the Building and Safety Department determined that the issue was with the main breaker box located in a locked closet in the hallway outside of Simeus' apartment.

Based on the evidence regarding Reinke's refusal to provide Simeus a copy of the lease, Reinke's delay in responding to Simeus' request for repairs (at least one of which was a code violation), the fact that Reinke entered Simeus' apartment without notice and completed the repairs while Simeus was asleep, and the electricity outage limited to Simeus' apartment, the Commission demonstrated that RGR provided inadequate service to Simeus in connection with his rental of the apartment and established the second element of the prima facie case.

With respect to the third element of the prima facie case, the Commission's evidence adequately showed that RGR's poor provision of service could be viewed as resulting from Simeus' status as a member of a protected class, namely his national origin. Specifically, Simeus testified that he is from Haiti. Simeus further testified at the hearing that on or about June 5, 2013, he approached Reinke, who was sitting in his vehicle outside the apartment building, with the intention of speaking with him. According to Simeus' testimony and as contained in the housing discrimination complaint, instead of talking to Simeus, Reinke rolled up his window and said, "'That's why I don't want to deal with you foreigners . . . .'" There was additional evidence that RGR also failed to make timely repairs to an apartment where a man of Ethiopian descent lived. For purposes of its prima facie case regarding the third element, the Commission adequately showed that the

poor provision of services to Simeus by RGR could be the result of Simeus' national origin. Because the Commission, on behalf of Simeus, demonstrated these three elements, the Commission met its initial burden of establishing a prima facie case of discrimination.

RGR's Legitimate, Nondiscriminatory Reasons.

Because the Commission established a prima facie case of discrimination, under the three-part burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the burden shifted to RGR to articulate some legitimate, nondiscriminatory reasons for its action. We determine that by its evidence, RGR successfully articulated legitimate, nondiscriminatory reasons for its actions.

[8] The defendant's responsibility to produce proof of a nondiscriminatory, legitimate justification for its action is not an onerous task. *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917 (8th Cir. 2014) (stating proposition in case involving retaliatory discharge). It is a burden of production, not of persuasion. *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006) (stating proposition in case involving retaliatory discharge). In order to meet the requisite burden, the defendant need only explain what has been done or produce evidence of a legitimate, nondiscriminatory reason for the action. See, *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014); *Riesen, supra*. Furthermore, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). This is so because the burden-of-production determination necessarily precedes the credibility-assessment stage. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). A failure of production by the defendant occurs when the defendant has failed to introduce evidence which, taken as true, would permit the conclusion

that there was a nondiscriminatory reason for the adverse action. See *id*. But a failure of production at this stage is not because the proffered explanation is "'unworthy of credence.'" 509 U.S. at 517.

At the hearing, Reinke testified that he was aware that Simeus was black when he rented the apartment to him, but he stated that he was unaware that Simeus was foreign born until the complaint was filed in this case. Reinke stated that he did not think Simeus spoke with an accent, which would have indicated to him that Simeus was foreign born, but instead, Reinke testified that he believed that Simeus had a speech impediment.

Reinke testified that the reason he did not provide Simeus with a copy of the signed lease agreement was not based on Simeus' race or national origin. Reinke stated that he did not provide Simeus with a copy of the signed lease agreement because his copy machine was broken, and accordingly, he could not make a copy of the lease for Simeus or any other tenant. Reinke testified that he offered to scan the signed lease agreement and e-mail the copy of it to Simeus, but that he did not do so because Simeus never provided him with an e-mail address.

Reinke testified that the reason he had delayed in making Simeus' requested repairs was not based on Simeus' race or national origin. Reinke explained that he delayed in completing Simeus' repairs because he had a large number of requested repairs that were needed in the apartments he managed, and he had to prioritize how to complete the repairs. Reinke testified that he prioritizes the maintenance requests based on the emergent nature of the repairs needed. Reinke also testified that he was unaware of the leaking faucet in Simeus' apartment until he received the letter from the housing inspector, and accordingly, he was unaware that the faucet needed repair before then.

At the hearing, RGR offered, and the hearing officer received, exhibit 30, which was created for purposes of this

case and consisted of a list of tenants who had outstanding maintenance requests for repairs. Reinke testified that sometimes the maintenance requests take months to complete. Reinke testified that many of the tenants listed on exhibit 30 were Caucasian, and the Commission agreed at the hearing to stipulate that, according to Reinke's opinion, 75 percent of the tenants listed on exhibit 30 were "white." Reinke further stated that he does not answer all of his tenants' calls regarding requests for repairs because he receives such calls "[h]ourly" and he does not "have the physical capacity to sit on the phone for every phone call." RGR also offered, and the hearing officer received, exhibit 34, which was a list created by Reinke for purposes of this case of 24 tenants that RGR rented to who Reinke believed were foreign born.

Reinke testified that the lease agreements he has with his tenants allows him to go into a tenant's apartment without notice in the event the tenant makes a maintenance request for repairs. He further testified that in order to make repairs, he has entered other tenants' apartments, including Caucasian tenants, when the tenants were sleeping. Therefore, Reinke contends that the reason he entered Simeus' apartment without notice and completed the requested repairs while Simeus was asleep was because that is how he generally conducts his business, and not because of Simeus' race or national origin.

Regarding the electricity not operating in Simeus' apartment on June 26, 2013, Reinke testified that on that day, there were maintenance people in Simeus' apartment building, and that Reinke had given them the key to the electrical cabinet in case they needed access to it. Reinke stated that he was not aware that the housing inspector was in the building that day to inspect the electricity issue in Simeus' apartment.

Based on the foregoing reasons that RGR provided for its actions and its evidence contained in the record, we determine that RGR met its burden of production and articulated legitimate, nondiscriminatory reasons for its actions. In this regard, we repeat that the defendant need not persuade the court it was

actually motivated by the proffered reasons. See *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

No Establishment of Pretext or Real Reason Was Intentional Discrimination.

Where the defendant succeeds, as did RGR in this case, in carrying its burden of production, then the *McDonnell Douglas Corp.* framework's presumptions are no longer relevant. See *St. Mary's Honor Center, supra*. Regarding the defendant's articulated explanations and reasons, the U.S. Supreme Court in *St. Mary's Honor Center* has stated that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." 509 U.S. at 515 (emphasis in original). Therefore, the trier of fact proceeds to the third stage in which it is to decide the ultimate question: whether the plaintiff has proved that the defendant intentionally discriminated against him or her because of race or national origin. See *id*. As applied in this case, to succeed on its claim of intentional discrimination, the Commission was required to establish by a preponderance of the evidence that the legitimate reasons offered by RGR were not its true reasons, but pretexts for discrimination, and that Simeus was intentionally discriminated against. See, *St. Mary's Honor Center, supra*; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Following our de novo review of the record, we determine that the Commission did not establish by a preponderance of the evidence that RGR's proffered reasons were pretexts or that Simeus was the victim of intentional discrimination.

[9,10] The term "pretext" means pretext for discrimination. *Osborn v. Kellogg*, 4 Neb. App. 594, 547 N.W.2d 504 (1996). A defendant's reason for its action cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real

reason. *Doe v. Board of Regents*, 287 Neb. 990, 846 N.W.2d 126 (2014) (applying *McDonnell Douglas Corp.* framework to case involving discrimination based on disability). See, also, *Osborn, supra*. The plaintiff must do more than merely discredit the defendant's explanation. We have stated that although strong evidence of a prima facie case of discrimination can also be considered to establish pretext, proof of pretext or actual discrimination requires more substantial evidence. *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014) (applying *McDonnell Douglas Corp.* framework to case involving retaliatory discharge from employment).

In support of its assertion that RGR's proffered reasons were a pretext, the Commission points to the fact that an Ethiopian man living in another of RGR's apartments had a hole in the ceiling of his apartment which was not repaired for "a minimum of several months." The Commission contends that this evidence relating to another foreign-born tenant supports its assertion that RGR's proffered reasons are a pretext and that RGR discriminates in completing repairs based on a tenant's national origin in general and did so as to Simeus in particular.

However, upon our de novo review of the record, the evidence shows that RGR is slow to complete repairs for many tenants and that most notably, its negative treatment is not limited to tenants who are foreign born. At the hearing, RGR offered exhibit 34, in which Reinke listed names of 24 tenants who he believed were foreign born. RGR also offered exhibit 30, in which Reinke listed the tenants who had outstanding maintenance requests for repairs to their apartments. The record demonstrates that while some tenants whose apartments were in need of repairs were foreign born, not all of the tenants were, and that the parties stipulated that approximately 75 percent of the tenants listed on exhibit 30 awaiting repairs were Caucasian. Reinke testified that he prioritizes the requested repairs based on the emergent nature

of the requests. Reinke testified that some of the repairs took months to complete. The fact that the Commission can point to evidence of delayed repairs for one other foreign-born tenant does not dispute or defeat RGR's assertion that it is generally slow to complete many of its tenants' requested repairs, including Caucasian and non-foreign-born tenants. The Commission did not show that RGR's explanation was a pretext for discrimination.

In a further attempt to establish that RGR's proffered reasons are pretexts, the Commission also points to the disputed statement of June 5, 2013. Simeus testified that on June 5, he approached Reinke while Reinke was in his car, and that instead of speaking with Simeus, Reinke rolled up his car window and told Simeus, "'That's why I don't want to deal with you foreigners . . . .'" Reinke testified that he never made this statement. He further testified that he rolled up his car window when Simeus approached him because Reinke was already having a conversation with someone on his cell phone and he wanted to complete that conversation.

We recognize that when reviewing an equity case de novo on the record where evidence is in dispute, we may give weight to the fact that the fact finder heard and observed the witnesses and accepted one version of the facts rather than another. See *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). But such deference is not limitless.

The parties acknowledge that there are credibility issues regarding both Simeus and Reinke. And it is clear from the record that Simeus considered Reinke to be a difficult landlord and that Reinke considered Simeus to be a problematic tenant. Nevertheless, we determine that the disputed statement, whether Reinke stated it or not, did not establish that RGR's proffered reasons for its treatment of Simeus were false or pretexts, or that discrimination was the real reason for its actions.

As outlined above, the record indicates that Reinke is slow to complete all tenants' requested repairs, he enters tenants'

apartments evidently with little or no notice to make repairs, and he sometimes completes the repairs while the tenants are sleeping. The record shows that Reinke's tardy method of making repairs, although negative, was not limited to foreign-born tenants.

We are required to analyze the third stage of the proceedings under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Given the totality of the evidence contained in the record, and applying our correct equity standard of review of de novo upon the record, we determine that the Commission did not prove that RGR's proffered reasons were false, nor did the Commission prove that discrimination was RGR's real reason for its actions. Based on our determinations stated above, we conclude that the district court erred when it affirmed the final amended order of the Commission, and we enter orders as indicated below.

CONCLUSION

In this housing discrimination case, we determine that the district court erred when it affirmed the final amended order of the Commission, which had ruled in favor of the Commission and against RGR. We reverse the decision of the district court and remand the cause to the district court with directions to remand the matter to the Commission with directions that the Commission dismiss the charge brought by the Commission, on behalf of Simeus, against RGR.

Reversed and remanded with directions.

McCormack and Stacy, JJ., not participating.

State of Nebraska, appellee, v. Jeffrey Gilliam, appellant.

874 N.W.2d 48

Filed February 12, 2016. No. S-15-373.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence 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. **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 determination made by the court below.
3. **Prior Convictions: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
5. **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.
6. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Appeal and Error.** To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479,

495 N.W.2d 630 (1993), which describes the three levels, or tiers, of police-citizen encounters.

7. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure**. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.
8. **Police Officers and Sheriffs: Search and Seizure.** A tier-two police-citizen encounter constitutes an investigatory stop as defined by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
9. **Police Officers and Sheriffs: Search and Seizure: Arrests.** A tier-three police-citizen encounter constitutes an arrest. An arrest involves a highly intrusive or lengthy search or detention.
10. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.
11. **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.
12. ____: ____. 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.
13. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A police officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.
14. **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.
15. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.

16. **Drunk Driving: Prior Convictions: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2014), the word "conviction" means a finding of guilt by a jury or a judge, or a judge's acceptance of a plea of guilty or no contest.
17. **Sentences: Prior Convictions: Proof.** In order to prove a prior conviction for purposes of sentence enhancement, the State has the burden to prove the fact of prior convictions by the greater weight of the evidence, and the trial court determines the fact of prior convictions based upon the greater weight of the evidence standard.
18. **Trial: Evidence: Proof.** The greater weight of the evidence requires proof which leads the trier of fact to find that the existence of the contested fact is more likely true than not true.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

Cassel, J.

I. INTRODUCTION

In this direct appeal, Jeffrey Gilliam challenges the district court's denial of his pretrial motion to suppress evidence and the court's use of a conviction from a Missouri court to enhance his sentence for driving under the influence of alcohol (DUI). We reject Gilliam's first argument, because his initial encounter with police fell outside the realm of the Fourth Amendment. And his argument regarding enhancement fails, because a suspended imposition of sentence in the prior Missouri case qualifies as a "prior conviction" under the pertinent statute. We affirm his conviction and sentence.

II. BACKGROUND

Gilliam was arrested for DUI after an encounter with a police officer. An information filed in the district court for

Lancaster County charged Gilliam with DUI and alleged that Gilliam had two prior convictions.

1. Motion to Suppress

Gilliam filed a pretrial motion to suppress all evidence gathered as a result of his encounter with the police officer. He argued that he was seized and that his seizure was unsupported by reasonable suspicion.

(a) Hearing

Officer Brock Wagner of the Lincoln Police Department testified at the suppression hearing. Wagner testified that on May 26, 2013, at approximately 5:39 a.m., he received a report from police dispatch that a white Dodge Ram, license plate No. SYD 417, was parked partially on the curb and partially on the street in the area of Ninth and A Streets. Wagner drove to the area in his marked patrol unit to investigate, but he did not see the reported Dodge Ram when he arrived. He turned onto a different street, where he saw the reported Dodge Ram parked legally on the side of the street. It was running, and its lights were on.

Wagner pulled behind the Dodge Ram and activated his patrol unit's overhead lights. He exited his patrol unit, knocked on the window, and directed Gilliam, who was in the driver's seat, to roll down the window, and Gilliam complied. Wagner observed that Gilliam had a strong odor of alcohol on his breath; watery, bloodshot eyes; and slurred speech. Wagner asked to see Gilliam's driver's license, and Gilliam produced it. Wagner then conducted a DUI investigation and arrested Gilliam for DUI. Wagner testified that he was dressed in his uniform, wearing his badge, and carrying a gun when his encounter with Gilliam occurred.

(b) Order

At the end of the suppression hearing, the district court took the matter under advisement. It later issued a written order overruling Gilliam's motion to suppress. It concluded

that Gilliam's encounter with Wagner did not begin as a seizure; rather, it began as a consensual or "first-tier" encounter that did not implicate Fourth Amendment protections. The district court further concluded that Wagner had reasonable suspicion to expand his initial contact with Gilliam into a DUI investigation.

The district court rejected Gilliam's argument that "'a person in a parked vehicle is seized at the moment when the officer activates the emergency lights.'" It explained that "there are a myriad of circumstances under which police are authorized to use overhead lights—many of which have nothing whatsoever to do with a seizure." And it observed that adopting Gilliam's approach "would have the practical effect of making every police-citizen contact a seizure once overhead lights are activated, regardless of the other circumstances surrounding the contact."

Finally, the district court concluded that Wagner obtained reasonable suspicion to extend the encounter into a DUI investigation when Gilliam rolled down his window. At that point, Wagner observed the strong odor of alcohol and Gilliam's bloodshot eyes and slurred speech, which provided reasonable suspicion of criminal activity.

2. Enhancement

Gilliam proceeded to trial and was convicted by a jury of DUI. An enhancement hearing was held, and the State offered two exhibits: a certified copy of a prior DUI conviction from Nebraska and a certified copy of a document from Missouri titled "JUDGMENT OF COURT UPON PLEA OF GUILTY" (Missouri judgment). The Missouri judgment indicated that in 2004, Gilliam appeared with an attorney and pled guilty to driving while intoxicated (DWI) in a Missouri court. It showed that the judge found a factual basis for Gilliam's plea of guilty, approved it, and accepted it. But it also showed that the imposition of his sentence was suspended and that he was placed on probation for 2 years.

Gilliam did not object to the receipt of the Missouri judgment, but argued that because the suspended imposition of a sentence is not considered a final judgment[1] or a conviction[2] in Missouri, it cannot be considered a prior conviction for the purposes of sentence enhancement under Nebraska law. He asked the court to take judicial notice of the Missouri sentencing statute that authorizes courts to suspend the imposition of a sentence,[3] but he otherwise presented no evidence at the hearing.

The district court concluded that the State had met its initial burden of proving Gilliam's prior Missouri DWI conviction by a preponderance of the evidence. It determined that the Missouri judgment "reflects, with requisite trustworthiness, the Missouri court's acceptance of [Gilliam's] guilty plea to the charge of DWI and the court's act of rendering judgment and disposition thereon." It also found that the Missouri conviction was counseled and that the offense would have been a violation of Nebraska's DUI laws.

The district court noted that once the State had met its burden, the burden shifted to Gilliam to introduce evidence "rebutting the statutory presumption that the Missouri [judgment] is valid for purposes of enhancement." Gilliam presented no evidence. Accordingly, the district court found that Gilliam was convicted of DUI or the equivalent offense on two prior occasions. And it concluded that the prior convictions were valid for the purposes of enhancement. The district court sentenced Gilliam to probation for a period of 36 months. The terms of the probation included a 60-day jail sentence, a fine, and other restrictions.

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[1] See *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993).

[2] *Id.*

[3] Mo. Rev. Stat. § 557.011 (West Cum. Supp. 2016).

Gilliam filed a timely appeal, which we moved to our docket in order to resolve the enhancement issue, which is an issue of first impression.[4]

III. ASSIGNMENTS OF ERROR

Gilliam assigns that the district court erred in (1) overruling his motion to suppress and (2) concluding that his DWI conviction from the State of Missouri was a valid prior conviction for enhancement purposes.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[5] Regarding historical facts, we review the trial court's findings for clear error.[6] But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[7]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[8]

[3] On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence.[9]

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015).

[6] *Id.*

[7] *Id.*

[8] *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013).

[9] *Id.*

V. ANALYSIS

1. Seizure

Gilliam claims that the district court erred when it overruled his motion to suppress the evidence obtained as a result of his encounter with Wagner. He argues that Wagner's activation of his patrol unit's overhead lights was a show of authority that transformed the initial encounter into a seizure for Fourth Amendment purposes. We disagree.

[4,5] 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]

[6] To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*.[12] *Van Ackeren* describes three levels, or tiers, of police-citizen encounters.[13]

[7] The first tier does not implicate the Fourth Amendment. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen.[14] Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.[15]

[8-10] However, second or third tier encounters require constitutional analysis. A tier-two police-citizen encounter

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[10] *State v. Modlin, supra* note 5.

[11] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[12] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[13] See *State v. Wells, supra* note 11.

[14] *Id.*

[15] See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

constitutes an investigatory stop as defined by *Terry v. Ohio*.[16] Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[17] A tier-three police-citizen encounter constitutes an arrest.[18] An arrest involves a highly intrusive or lengthy search or detention.[19] Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[20]

[11-13] 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.[21] 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.[22] We have concluded that a police officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.[23]

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[16] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See *State v. Wells, supra* note 11.

[17] *State v. Wells, supra* note 11.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *State v. Hedgcock, supra* note 15.

[22] *Id.* See *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

[23] *Id.* See *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

The circumstances of the instant case reveal that Wagner was merely questioning Gilliam in a public place. Wagner contacted Gilliam while he was voluntarily parked in a public place in the early morning hours. He approached Gilliam's vehicle alone and on foot. He knocked on the window and asked to see Gilliam's identification. There is no evidence that Wagner displayed his weapon, used a forceful tone of voice, touched Gilliam, or otherwise told Gilliam that he was not free to leave.

Gilliam points to Wagner's activation of his patrol unit's overhead lights as evidence that he was not free to leave. But as the district court observed, there are a variety of reasons that officers may activate their overhead lights. And as the U.S. Court of Appeals for the Seventh Circuit observed in a case with circumstances similar to this one, one reason officers activate their overhead lights before approaching a parked vehicle is "to alert the car's occupants that they [are] going to approach the vehicle."[24] In that similar case, the Seventh Circuit court concluded that where a vehicle was parked and running at night, overhead lights alone were not sufficient to create a seizure. It reasoned that "[w]ithout identifying themselves appropriately to the car's occupants, the officers would have put themselves at risk in approaching a parked car late at night."[25]

Under the circumstances of the instant case, the overhead lights, standing alone, would not have caused a reasonable person to believe that he was not free to leave. A reasonable person, parked on the side of the street at night or in the early morning hours, would understand that there are a variety of reasons an officer may activate his overhead lights before approaching him, including officer safety. Because none of the other circumstances would have made a reasonable person believe that he was not free to leave, we conclude that

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[24] *U.S. v. Clements*, 522 F.3d 790, 794 (7th Cir. 2008).

[25] *Id.* at 794-95.

Gilliam's encounter with Wagner began as a tier-one encounter. Thus, he was not seized when Wagner approached him, and the Fourth Amendment was not implicated.

Gilliam does not challenge the district court's determination that Wagner obtained reasonable suspicion to expand the initial encounter into a DUI investigation when Gilliam opened his window. Therefore, we conclude that the district court did not err in denying Gilliam's motion to suppress.

2. Enhancement

Gilliam claims that the district court erred in using his Missouri DWI conviction to enhance his sentence. He argues that the Missouri judgment does not constitute evidence of a prior conviction for enhancement purposes, because the Missouri Supreme Court has declared that a suspended imposition of sentence does not constitute a "conviction" in Missouri.[26] He also argues that the State did not show that his Missouri DWI conviction was final.

Neb. Rev. Stat. § 60-6,197.03 (Cum. Supp. 2012) delineates the penalties for DUI convictions. Those penalties include enhanced sentences for offenders who have had prior convictions.

The term "prior conviction" is defined by statute.[27] It provides that when a sentence is being imposed for a violation of Nebraska's general prohibition against DUI,[28] prior conviction means "[a]ny conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of" one of Nebraska's DUI statutes.[29] It does not define the word "conviction."

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[26] See *Yale v. City of Independence, supra* note 1.

[27] Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2014).

[28] Neb. Rev. Stat. § 60-6,196 (Reissue 2010).

[29] § 60-6,197.02(1)(a)(i)(C).

[14,15] Before we can review the district court's finding that the State proved Gilliam's prior conviction in Missouri, we must first determine what the word "conviction" means within the phrase, "[a]ny conviction under a law of another state." Statutory language is to be given its plain and ordinary meaning, and this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[30] It is not within the province of this court to read a meaning into a statute that is not warranted by the legislative language.[31]

We often turn to dictionaries to ascertain a word's plain and ordinary meaning.[32] Black's Law Dictionary defines "conviction" as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty . . . ."[33] Webster's Third New International Dictionary defines "conviction" as "the act of proving, finding, or adjudging a person guilty of an offense or crime."[34] These definitions square with our understanding of "conviction" in prior cases. We have consistently stated that "[a] plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of the sentence prescribed by law on a verdict of guilty

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[30] *State v. Taylor, supra* note 8.

[31] *Id.*

[32] See, e.g., *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015) (citing Black's Law Dictionary for plain meaning of "public place"); *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014) (citing Webster's Dictionary for plain meaning of "discontinue"); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004) (citing several dictionaries for plain meaning of "indigent"); *Payless Bldg. Ctr. v. Wilmoth*, 254 Neb. 998, 581 N.W.2d 420 (1998) (citing Webster's Third New International Dictionary for plain meaning of "individual").

[33] Black's Law Dictionary 408 (10th ed. 2014).

[34] Webster's Third New International Dictionary of the English Language, Unabridged 499 (1993).

of the crime charged."[35] We have also stated that "a plea of no contest, when voluntarily entered and accepted by the court, is a conviction, empowering the court to impose the sentence authorized by statute."[36]

[16] We apply the plain and ordinary meaning of the word "conviction" to the statute before us. For the purposes of § 60-6,197.02, the word "conviction" means a finding of guilt by a jury or a judge, or a judge's acceptance of a plea of guilty or no contest.

[17,18] We now review the district court's finding that the State had met its burden of proving Gilliam's prior conviction. In order to prove a prior conviction for purposes of sentence enhancement, the State has the burden to prove the fact of prior convictions by the greater weight of the evidence, and the trial court determines the fact of prior convictions based upon the greater weight of the evidence standard.[37] The greater weight of the evidence requires proof which leads the trier of fact to find that the existence of the contested fact is more likely true than not true.[38] On an appeal of a sentence enhancement hearing, we view and construe the evidence most favorably to the State.[39]

Regarding the process by which the prior conviction must be proved, § 60-6,197.02 provides: "The prosecutor shall present as evidence for purposes of sentence enhancement a

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[35] *Stewart v. Ress*, 164 Neb. 876, 881, 83 N.W.2d 901, 904 (1957). See, also, *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004); *State v. Ondrak*, 212 Neb. 840, 326 N.W.2d 188 (1982); *Taylor v. State*, 159 Neb. 210, 66 N.W.2d 514 (1954). Cf. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

[36] *State v. McKain*, 230 Neb. 817, 818, 434 N.W.2d 10, 11 (1989).

[37] See *State v. Taylor, supra* note 8. See, also, *Flores v. Flores-Guerrero*, 290 Neb. 248, 253, 859 N.W.2d 578, 583 (2015) ("preponderance of the evidence" is equivalent of "'"greater weight"' of the evidence").

[38] See *State v. Taylor, supra* note 8.

[39] *Id*.

court-certified copy or an authenticated copy of a prior conviction in another state. The court-certified or authenticated copy shall be prima facie evidence of such prior conviction."[40] That section also directs that once the prosecutor has presented prima facie evidence, "[t]he 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 to sentencing, and make objections on the record regarding the validity of such prior convictions."[41]

We conclude that the district court's finding was supported by relevant evidence. The State introduced the Missouri judgment, which indicates that Gilliam pled "guilty as charged" to DWI in Missouri and that the judge accepted his plea. Therefore, the Missouri judgment constitutes a certified copy of a prior conviction in another state and is prima facie evidence of the prior conviction. And Gilliam does not claim that the Missouri conviction would not have been a violation of Nebraska's DUI laws. Thus, the State met its burden, and the district court did not err in enhancing Gilliam's sentence.

Gilliam's two arguments that we should reach a contrary conclusion are meritless. First, Gilliam argues that we must analyze Missouri law to determine whether the Missouri judgment constitutes a "conviction under a law of another state" under § 60-6,197.02. We disagree. The meaning of the phrase is plain—it requires a finding of guilt or an acceptance of a guilty or no contest plea under a law of another state. That is satisfied here. The plain terms of the statute do not require an analysis of Missouri law.

And even if we were to examine Missouri law, we would reach the same conclusion. In a Missouri Supreme Court decision,[42] the court addressed the term "conviction" as used in

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[40] § 60-6,197.02(2).

[41] § 60-6,197.02(3).

[42] *Yale v. City of Independence, supra* note 1.

a municipality's employee manual. It was in that context that the court concluded that a suspended imposition of sentence was not a conviction. But the court observed that the Missouri Legislature had provided otherwise in specific instances. And, particularly pertinent here, the court recognized that a specific Missouri statute[43] treated a plea of guilty, finding of guilt, or disposition of suspended imposition of sentence as a "conviction, or 'final disposition,' in alcohol or drug related driving offenses."[44]

A change in Missouri's statutory framework for enhancement of intoxication-related traffic offenses, enacted after the date of Gilliam's conviction, does not change the result. Although Missouri no longer looks to a "conviction" in intoxication-related traffic offenses for purposes of enhancement, it still treats a suspended imposition of sentence as an event qualifying as a necessary predicate for enhancement. The Missouri Legislature treated a suspended imposition of sentence in an intoxication-related traffic offense as a "conviction" sufficient to enhance an offender's sentence for a subsequent intoxication-related traffic offense until 2008. In 2008, it changed the terminology of its enhancement statute.[45] It removed the word "conviction" and substituted definitions employing the phrases "has pleaded guilty to or has been found guilty of" and "intoxication-related traffic offenses."[46] But despite the changes in nomenclature, the current Missouri statute states that a "suspended imposition of sentence" is to be treated as a "prior plea of guilty or finding of guilt."[47] Thus, the effect remains the same—Missouri considers a suspended imposition of sentence for an intoxication-related

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[43] Mo. Rev. Stat. § 577.051.1 (1986).

[44] *Yale v. City of Independence, supra* note 1, 846 S.W.2d at 195.

[45] See H.B. 1715, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

[46] Mo. Rev. Stat. § 577.023 (West 2011).

[47] § 577.023(16).

traffic offense sufficient to enhance a sentence for a subsequent intoxication-related traffic offense. And, ultimately, the question is not whether Missouri would characterize the 2004 event as a "conviction" under its current enhancement statute, but whether it qualifies as a prior conviction under the Nebraska statute. We have already explained why it does, and the change in Missouri's terminology does not affect our conclusion.

Second, Gilliam claims that the State was required to establish that the Missouri judgment was a final conviction. In this argument, he does not rely upon Missouri law, which, as we have noted, does not support his assertion. Rather, he recites that in Nebraska, a judgment is not final until a convicted person is sentenced.[48] And he argues that because the Missouri judgment indicates that his sentence was suspended, the State did not sufficiently prove a final conviction.

Gilliam relies on *State v. Estes*.[49] There, we cited *Nelson v. State*[50] for the following rule: "To constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction relied upon for enhancement must be a final conviction."[51] In *Nelson*, we said: "[W]here the evidence of one of the former violations charged shows that proceedings in error are pending and undisposed of which might result in a reversal of such judgment, such evidence is insufficient and incompetent to establish a former conviction."[52]

The rule pronounced in *Nelson* and repeated in *Estes* applies when the evidence presented by the State shows that a prior conviction is pending on appeal. The record in the

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[48] See *State v. Kaba*, 210 Neb. 503, 315 N.W.2d 456 (1982).

[49] *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991).

[50] *Nelson v. State*, 116 Neb. 219, 216 N.W.2d 556 (1927).

[51] *State v. Estes, supra* note 49, 238 Neb. at 695, 472 N.W.2d at 216.

[52] *Nelson v. State, supra* note 50, 116 Neb. at 221, 216 N.W.2d at 557.

instant case does not indicate that an appeal is pending, and Gilliam does not contend that he has appealed the Missouri conviction. Thus, *Nelson* and *Estes* are inapplicable. The terms of § 60-6,197.02 do not require the prosecution to prove that an appeal is not pending or that the conviction is otherwise final. We will not read into a statute requirements that are not there.

VI. CONCLUSION

We conclude that the district court did not err by overruling Gilliam's motion to suppress. Further, we conclude that the district court did not err in using Gilliam's Missouri conviction to enhance his sentence. Therefore, we affirm.

Affirmed.

Stacy, J., not participating.

Owen L. Doty et al., appellees, v. West Gate Bank, Inc., a Nebraska banking corporation, appellant.

874 N.W.2d 839

Filed February 19, 2016. No. S-14-1060.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and 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.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
5. **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.
6. **Trusts: Deeds: Statutes.** Because trust deeds did not exist at common law, the trust deed statutes are to be strictly construed.
7. **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.

8. **Statutes: Intent.** A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.
9. **Trusts: Deeds: Liens: Security Interests.** Under Neb. Rev. Stat. § 76-1013 (Reissue 2009), an action to recover the balance due upon the obligation for which the trust deed was given as security does not include enforcement of liens upon or security interests in other collateral given to secure the same obligation.
10. **Trusts: Deeds: Limitations of Actions.** The running of the statute of limitations for an action under Neb. Rev. Stat. § 76-1013 (Reissue 2009) does not extinguish the balance due upon the underlying obligation.
11. **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.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded with directions.

Gregory S. Frayser, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Joel G. Lonowski and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellees.

Heavican, C.J., Connolly, Miller-Lerman, and Cassel, JJ., and Bishop, Judge.

Cassel, J.

INTRODUCTION

In this appeal, we are asked to determine whether the 3-month statute of limitations[1] set forth in the Nebraska Trust Deeds Act[2] (Act) bars a bank from foreclosing on the bank's remaining collateral. We conclude that it does not. Our conclusion is consistent with the plain language of the Act, our

[1] See Neb. Rev. Stat. § 76-1013 (Reissue 2009).

[2] Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2009 & Cum. Supp. 2014).

previous interpretations of the same language, and the decisions in other states under similar provisions. We therefore reverse, and remand with directions.

BACKGROUND

Relevant Deeds and Notes

In 2002 and 2003, various members of the Doty family gave three deeds of trust to West Gate Bank, Inc. (Bank), as security for certain loans. Each deed of trust (DOT) conveyed a specific tract of real estate. The parties identify each DOT by the street name where the real estate is located. We follow the same convention. Owen L. Doty and Joy A. Doty executed and delivered the "Starr Street DOT." Owen, Joy, Clifford Doty, and Allison Doty executed and delivered the "Harwood Court DOT." And Ronald L. Doty and Angela J. Doty executed and delivered the "148th Street DOT."

The DOT's also secured future advances given by the Bank to those named in the DOT's. Later, the Bank advanced funds to Owen, Joy, Ronald, and Angela. This advance was documented by promissory note No. 3311257 (Note 257). (From this point forward, we refer to Owen, Joy, Ronald, and Angela collectively as "the Dotys.") The Dotys defaulted on Note 257, and so the Bank exercised its power of sale under the 148th Street DOT and applied the funds generated by the sale to Note 257. An unpaid balance remained on the note. Later, the Dotys brought a declaratory judgment action asking the district court to declare that the Bank was barred by § 76-1013 from recovering any amount still owed under Note 257.

While that action was pending before the district court, two other notes went into default and Owen and Joy sought to refinance the corresponding debts. At first, the Bank refused to release the Starr Street DOT and the Harwood Court DOT, asserting that those DOT's secured the balance remaining under Note 257.

Thereafter, the Dotys and the Bank executed a pledge and security agreement, a substitution of collateral agreement, and

an account control agreement whereby they granted the Bank a security interest in a deposit account. But one provision of the pledge and security agreement provided that "the Debtor disputes that any amount is owed under the Note." After the refinancing was completed, the other two notes were paid in full and the Bank released the Starr Street DOT and the Harwood Court DOT.

At oral argument, the Dotys conceded that if § 76-1013 did not extinguish Note 257, the debt would survive and be enforceable against the substituted collateral. Thus, they agreed that this court needed to focus only on the interpretation of § 76-1013 by the district court.

District Court's Decision

The Dotys and the Bank filed cross-motions for summary judgment in the declaratory judgment action. In November 2014, the district court granted the Dotys' motion and denied the Bank's. It concluded that the Bank was barred by the 3-month statute of limitations in § 76-1013 "from taking any action whatsoever to collect any amounts it believes it is due on Note 257." Section 76-1013 states:

> At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the fair market value thereof at the date of sale, together with interest on such indebtedness from the date of sale, the costs and expenses of exercising the power of sale and of the sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs

> and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale, and in no event shall the amount of said judgment, exclusive of interest from the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured thereby, including said costs and expenses of sale.

The Bank argued that § 76-1013 applies only to deficiency actions, not nonjudicial foreclosures on separate collateral. The district court declined to find a distinction between deficiency actions and nonjudicial foreclosures, concluding that the Bank's argument is "not supported by any meaningful distinction between the two types of actions or the text of Section 76-1013."

The district court also examined the policy behind the Act, which we discussed in *Pantano v. Maryland Plaza Partnership*.[3] It noted that in *Pantano*, we said, "'In the world of deficiency judgments, [§ 76-1013] represents a departure from tradition'" because "'[t]raditionally, the amount of a deficiency judgment was the total indebtedness minus the price paid at public sale.'" This traditional formula benefited creditors, who "'could radically underbid a valuable property, take title, and then sue the debtor for deficiency.'" Section 76-1013 prevents this outcome, because it requires the district court to calculate the deficiency owed based upon the fair market value (hereinafter FMV) of the foreclosed property. Therefore, "'[a] creditor gains no advantage by underbidding . . . .'"

Based upon these statements in *Pantano*, the district court concluded that the *Pantano* court and the Legislature "were clearly concerned with debtors obtaining a credit against their debts for the FMV of property sold under the Act, not just

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[3] *Pantano v. Maryland Plaza Partnership*, 244 Neb. 499, 507 N.W.2d 484 (1993).

the sale price." It declared that if the Bank seeks to recover a deficiency, "regardless of whether that amount is sought against the debtor[s] personally or their property, it must comply with the Act and bring an action so that the process is overseen by the courts and the [Dotys are] given credit for" the FMV of their property.

The district court concluded that because the Bank did not bring an action within the limitations period, "receipt of the proceeds of the trustee's auction constitutes payment in full of Note 257." It reasoned that because 3 months had passed since the sale in this case, "it cannot be judicially determined how much should have been subtracted from Note 257 as a result of the sale." And because "[a] creditor cannot collect an amount of money which cannot be known," the Bank cannot recover any amount owed under Note 257.

The Bank filed a timely appeal, which we moved to our docket.[4]

ASSIGNMENTS OF ERROR

Although the Bank makes numerous assignments of error, we distill and combine them for analysis. Essentially, the Bank assigns that the district court erred in (1) concluding that the Bank was required to seek a deficiency judgment under § 76-1013 before resorting to its remaining collateral and (2) concluding that the debt owed on Note 257 is considered paid in full because the statute of limitations for an action pursuant to § 76-1013 has expired. Although the Bank also assigns that the district court erred in "concluding that each [DOT] is not a separate and distinct contract," we do not reach this issue.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

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.[5] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[6]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

[4] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[8]

ANALYSIS

§ 76-1013 Inapplicable

The Bank admits that it is barred from filing an action for a deficiency judgment by the 3-month statute of limitations in § 76-1013. But it argues that the running of the statute of limitations for a deficiency judgment does not prevent it from resorting to the other collateral securing Note 257. It points to the statute's use of the phrase "an action" and argues that phrase refers only to deficiency actions filed in court. It also cites several cases where we have characterized § 76-1013 as applicable to deficiency actions.

[5,6] We begin by examining the text of § 76-1013. 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

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[5] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015).

[6] *Id.*

[7] *State v. Mendoza-Bautista*, 291 Neb. 876, 869 N.W.2d 339 (2015).

[8] *Board of Trustees v. City of Omaha, supra* note 5.

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] But because the Act made a change in common law, we strictly construe the statutes composing the Act, as have previous courts interpreting the Act.[10] Thus, because trust deeds did not exist at common law, the trust deed statutes are to be strictly construed.[11]

Although we set forth the entire statute above, we reiterate the most relevant portions:

> At any time within three months after any sale of property under a trust deed, . . . an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the [FMV] thereof at the date of sale . . . . Before rendering judgment, the court shall find the [FMV] at the date of sale of the property sold.

By these plain terms, § 76-1013 applies only to "an action" commenced after any sale of property under a trust deed. The statute says nothing about any step that does not constitute "an action."

[7] Thus, we must determine what "an action" means. We make that determination by examining the language of the statute itself. We do not consider a statute's clauses and phrases as detached and isolated expressions.[12] Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.[13]

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[9] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[10] *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

[11] *Id.*

[12] *Fisher v. PayFlex Systems USA, supra* note 9.

[13] *Id.*

Here, § 76-1013 authorizes "an action" and provides that "in such action the complaint shall" be filed with the district court. It then requires the district court to render a judgment. Taken together, these references to a complaint and a judgment clearly convey that "an action" encompasses only suits resting upon a complaint and filed in court. This is particularly true in light of our civil code, which abolished all forms of actions and suits and substituted "but one form of action."[14] The Legislature presumably understood the specific meaning conveyed by its choice of words.[15] And the Legislature's use of this terminology suggests that it did not intend for this provision to govern nonjudicial foreclosures, which require neither a complaint nor a judgment to go forward.

[8] This reading is reinforced by the Act's use of the term "an action" in another provision, which states:

> The *trustee's sale* of property under a trust deed shall be made within the period prescribed in section 25-205 for the *commencement of an action* on the obligation secured by the trust deed unless the beneficiary elects to foreclose a trust deed in the manner provided for by law for the *foreclosure of mortgages* on real estate . . . in which case the statute of limitations for the commencement of *such action* shall be the same as the statute of limitations for mortgages . . . .[16]

This language supports our reading of § 76-1013 in two ways. First, it distinguishes a "trustee's sale" and "an action on the obligation secured by the trust deed." It does not call the trustee's sale "an action on the deed." It calls it a sale. This suggests that the Legislature recognized that a trustee's sale, which is a nonjudicial foreclosure, and "an action" are two different creatures of law. Second, it uses "action" to refer

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[14] Neb. Rev. Stat. § 25-101 (Reissue 2008).

[15] See *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[16] § 76-1015 (emphasis supplied).

to mortgage foreclosure proceedings, which do require court action.[17] Thus, § 76-1015 uses "action" in the same way as § 76-1013—to refer to a civil action in a court of competent jurisdiction.[18] A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.[19]

This reading of § 76-1013 is consistent with our decisions in prior cases. Although we have never addressed whether a nonjudicial foreclosure constitutes "an action" under § 76-1013, we have consistently characterized § 76-1013 as applicable to deficiency actions filed in court. In *Mutual of Omaha Bank v. Murante*,[20] we said that the Act "applies to actions for deficiencies on the obligation for which a [DOT] was given as security." And in *First Nat. Bank of Omaha v. Davey*,[21] we stated that "the language of § 76-1013 demonstrates that the statute's applicability is limited to deficiency actions brought after nonjudicial foreclosure by a trustee."

Finally, decisions from other jurisdictions support our analysis. We discuss two cases in detail, one from Utah and another from California, before summarizing similar decisions from other states.

The Utah decision is particularly applicable, because Utah has a statute very similar to § 76-1013.[22] In *Phillips v. Utah State Credit Union*,[23] a debtor obtained a loan from a lender to purchase certain real property. As security, the debtor gave

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[17] See Neb. Rev. Stat. § 25-2141 (Reissue 2008).

[18] See § 25-101.

[19] *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979).

[20] *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 751, 829 N.W.2d 676, 681 (2013).

[21] *First Nat. Bank of Omaha v. Davey, supra* note 10, 285 Neb. at 843, 830 N.W.2d at 69.

[22] See Utah Code Ann. § 57-1-32 (LexisNexis 2010).

[23] *Phillips v. Utah State Credit Union*, 811 P.2d 174 (Utah 1991).

the lender a note and trust deed to the property. As additional security, the debtor assigned to the lender a note and mortgage which he owned as mortgagee. The debtor defaulted, and the lender sold the real property under the trust deed. After the sale, a balance of $22,566.30 remained.

The debtor later sued the lender under Utah's 3-month statute of limitations provision, seeking a declaration that the lender was prohibited from recovering any portion of the remaining balance. Utah's statute of limitations provision was nearly identical to § 76-1013. It provided, in relevant part:

> "At any time within three months after any sale of property under a trust deed . . . an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed . . . ."[24]

The trial court concluded that because the lender did not bring a deficiency action against the debtor within 3 months, the lender was prohibited from proceeding against the additional security assigned by the debtor.

The Utah Supreme Court reversed. It observed that the lender did not seek a deficiency judgment against the debtor, but, rather, "merely sought to retain its additional security."[25] And it stated that the lender's retention and use of its additional security was not "the type of 'action' against [the debtor] which is prohibited by" the 3-month statute of limitations provision.[26] It concluded:

> [W]here a creditor takes more than one item of security upon an obligation secured by a trust deed, the creditor is not precluded from making use of that additional security

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[24] *Id.* at 176 n.2.

[25] *Id.* at 178.

[26] *Id.*

> merely because the creditor has not sought a deficiency judgment within three months of a nonjudicial sale of one of the items covered by the trust deed property, nor is the creditor required to seek a deficiency judgment . . . in order to maintain its right to the additional security, so long as the security is applied toward the debt owed on the original loan.[27]

The Supreme Court of California also reached the same result under similar facts and a similar statute. In *Dreyfuss v. Union Bank of California*,[28] the debtors defaulted on a loan secured by three separate DOT's covering three parcels of real property. The creditor conducted successive nonjudicial foreclosures on the properties without seeking a judicial determination of the FMV of the properties sold.

The debtors sued, claiming that FMV determinations were required under California's antideficiency provision, which provides in part:

> Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a [DOT] was given as security, following the exercise of the power of sale in such [DOT] the plaintiff shall set forth in his or her complaint the entire amount of the indebtedness which was secured . . . . Before rendering any judgment the court shall find the [FMV] of the real property . . . at the time of sale.[29]

The California Supreme Court concluded that the provision is not implicated "when a creditor merely exercises the right to exhaust all of the real property pledged to secure an obligation."[30] It noted that in the past, it has held that "'[t]he

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[27] *Id.*

[28] *Dreyfuss v. Union Bank of California*, 24 Cal. 4th 400, 11 P.3d 383, 101 Cal. Rptr. 2d 29 (2000).

[29] Cal. Civ. Proc. Code § 580a (West 2011).

[30] *Dreyfuss v. Union Bank of California, supra* note 28, 24 Cal. 4th at 406, 11 P.3d at 386, 101 Cal. Rptr. 2d at 33.

giving of additional security for [a] note gives the right to exhaust such security . . . .'"[31]

Other courts have reached similar results. In *Hull v. Alaska Federal Sav. & Loan Ass'n*,[32] the plaintiff-debtors argued that their lender's retention of pledged savings accounts constituted a "'further action or proceeding,'" which was prohibited under Alaska's antideficiency provision. The Supreme Court of Alaska disagreed, concluding that the "further action or proceeding" language covered only in-court proceedings. It did not bar the retention of additional security pledged on the underlying obligation. Similarly, in *Gardner v. First Heritage Bank*,[33] the Washington Court of Appeals concluded that a lender may foreclose on additional collateral to satisfy a balance owed under a note, despite that state's antideficiency statute. It stated that the lender was "merely exercis[ing] the right to exhaust all of the real property pledged to secure an obligation."[34]

In the case before us, the district court construed "an action" very broadly. It seemed to conclude that a nonjudicial foreclosure constitutes "an action," stating that there is no "meaningful distinction" between deficiency actions and nonjudicial foreclosures in the text of § 76-1013. We disagree.

The plain language used—"an action"—is the language of a legal suit, not nonjudicial foreclosure. In a broad colloquial sense, a nonjudicial foreclosure might be characterized as an "action."[35] But this meaning would clearly conflict with

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[31] *Id.* at 409, 11 P.3d at 388, 101 Cal. Rptr. 2d at 35 (quoting *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955)).

[32] *Hull v. Alaska Federal Sav. & Loan Ass'n*, 658 P.2d 122, 124 (Alaska 1983).

[33] *Gardner v. First Heritage Bank*, 175 Wash. App. 650, 303 P.3d 1065 (2013).

[34] *Id.* at 668, 303 P.3d at 1074.

[35] See, e.g., Black's Law Dictionary 35 (10th ed. 2014) (defining "action" as "[t]he process of doing something").

the statute's plain terms. An appellate court attempts to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.[36]

[9] Thus, we hold that under § 76-1013, an action to recover the balance due upon the obligation for which the trust deed was given as security does not include enforcement of liens upon or security interests in other collateral given to secure the same obligation. Accordingly, § 76-1013 does not govern the Bank's right to exercise its powers of sale under the other DOT's or the other collateral which was substituted by agreement. It necessarily follows that § 76-1013's requirement of an FMV determination is inapplicable. The Bank may collect from the Bank's additional collateral without bringing an action for a deficiency under § 76-1013.

We agree with the district court that the Act's terms reflect the Legislature's concern that debtors receive credit for the FMV of their property. But the Legislature did not include a provision that requires an FMV determination in a situation such as this, where a lender pursues successive nonjudicial foreclosures of trust deeds given to secure the same debt. We must give effect to the statute's plain terms, and we will not read into the Act requirements that are not there.[37]

Enforceable Debt

The district court held that the Dotys' obligation on Note 257 was paid in full. It reasoned that the Bank was required to get an FMV determination under § 76-1013 before executing on its additional collateral. And because the Bank did not do so, according to the district court, the amount owed on the debt cannot be determined.

As we explained above, the Bank was not required to obtain an FMV determination, because § 76-1013 does not apply to subsequent nonjudicial foreclosures against other collateral

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[36] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[37] See *State v. Frederick*, 291 Neb. 243, 864 N.W.2d 681 (2015).

given to secure the same obligation. Therefore, the FMV determination requirement is irrelevant here, and the district court's reasoning is erroneous.

With the correct understanding in mind, we must decide whether the running of the statute of limitations on a personal deficiency action renders the underlying debt paid in full or otherwise unenforceable. We conclude that it does not.

We first turn to our interpretation of § 76-1013 in *Mutual of Omaha Bank v. Murante*.[38] There, a lender sought to recover from a guarantor, even though § 76-1013 prohibited it from recovering against the debtors. We stated that where the statute of limitations in § 76-1013 has expired, "[t]he debt as evidenced by the notes has not been extinguished."[39] We also quoted our opinion in *Department of Banking v. Keeley*,[40] where we said: "'If the principal obligation is not void . . . but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor,'" the guarantor will not be able to defeat the action.[41] We concluded that the lender could recover the debt from the guarantor.

We note also that we have reached the same conclusion in the area of mortgages. We stated in 1901 that "[t]he right to foreclose [a] mortgage exists after the note it was given to secure is barred by the statute of limitations."[42] More recently, in 1971, we affirmed that a lender may foreclose on a mortgage, even though the statute of limitations on the promissory note has expired.[43]

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[38] *Mutual of Omaha Bank v. Murante, supra* note 20.

[39] *Id.* at 753, 829 N.W.2d at 682.

[40] *Department of Banking v. Keeley*, 183 Neb. 370, 160 N.W.2d 206 (1968).

[41] *Mutual of Omaha Bank v. Murante, supra* note 20, 285 Neb. at 753, 829 N.W.2d at 682 (quoting *Department of Banking v. Keeley, supra* note 40).

[42] *Omaha Savings Bank v. Simeral*, 61 Neb. 741, 743, 86 N.W. 470, 471 (1901).

[43] *J. I. Case Credit Corp. v. Thompson*, 187 Neb. 626, 193 N.W.2d 283 (1971).

Our approach appears to be the majority one. According to Williston on Contracts, "most courts have held that the statute of limitations merely bars the remedy of the creditor or other plaintiff but does not totally discharge the right."[44] Under this majority approach, "the creditor remains entitled after the statute has run to use any other means of collecting its debt than a direct right of action. Therefore, any security by way of lien or mortgage may be utilized to collect or recover on the claim."[45]

[10] Consistent with *Mutual of Omaha Bank v. Murante*,[46] we conclude that the running of the statute of limitations for an action under § 76-1013 does not extinguish the balance due upon the underlying obligation. Accordingly, we conclude that the balance due on Note 257 was not void, extinguished, or considered paid in full. Instead, the running of the statute of limitations under § 76-1013 merely rendered the debt unenforceable in a personal deficiency action. The debt still exists, and the Bank may enforce it by collecting from the Bank's remaining collateral.

Separate and Distinct Contracts

[11] The Bank assigns that the district court erred in "concluding that each deed of trust is not a separate and distinct contract." We need not reach this issue, because it is not necessary to our resolution of this appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[47]

CONCLUSION

For the reasons discussed above, we conclude that although the district court correctly determined that § 76-1013 precludes

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[44] 31 Samuel Williston, A Treatise on the Law of Contracts § 79:3 at 259 (Richard A. Lord ed., 4th ed. 2004).

[45] *Id.* at 260-61.

[46] *Mutual of Omaha Bank v. Murante, supra* note 20.

[47] *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015).

the Bank from bringing a personal deficiency action against the Dotys for the balance owed under Note 257, it incorrectly determined that § 76-1013 applies to successive foreclosures on remaining collateral. Therefore, the district court erred in granting the Dotys' motion for summary judgment and in denying the Bank's. Accordingly, we reverse, and remand with directions to the district court to grant the Bank's motion for summary judgment.

Reversed and remanded with directions.

Wright, McCormack, and Stacy, JJ., not participating.

In re Interest of Tavian B., a child under 18 years of age. State of Nebraska, appellee, v. Joseph B., appellant, and Oglala Sioux Tribe, intervenor-appellee.

874 N.W.2d 456

Filed February 19, 2016. No. S-15-129.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court under the Indian Child Welfare Act is reviewed for an abuse of discretion.
2. **Constitutional Law: Due Process: Appeal and Error.** Procedural due process is a question of law, which is reviewed independently of the lower court's ruling.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, which results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition.
4. **Indian Child Welfare Act: Jurisdiction: Good Cause: Proof.** At a hearing on a motion to transfer a proceeding to tribal court, the party opposing the transfer has the burden of establishing that good cause not to transfer exists.
5. **Indian Child Welfare Act: Intent.** The Indian Child Welfare Act is intended to promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in adoptive homes or institutions which will reflect the unique values of Indian culture.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Reversed and remanded with directions.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Lory Pasold for appellee.

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

Wright, J.

NATURE OF CASE

Tavian B. was found to be a child who lacks proper parental care by reason of the fault or habits of his parents and to be in a situation dangerous to life or limb or injurious to his health or morals. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Approximately 16 months later, the State of Nebraska moved to terminate the parental rights of both parents. The father then filed a motion to transfer jurisdiction to the Oglala Sioux Tribal Juvenile Court (tribal court) pursuant to the federal Indian Child Welfare Act of 1978 (ICWA). See 25 U.S.C. § 1901 et seq. (2012).

Prior to the juvenile court's ruling on the father's motion to transfer, the State withdrew its motion to terminate parental rights. The court found that good cause existed to deny the request to transfer jurisdiction to the tribal court, because the proceedings were in "an advanced stage." The father appeals the juvenile court's order overruling his motion to transfer.

For the reasons stated below, we reverse the judgment of the juvenile court and remand the cause with directions.

SCOPE OF REVIEW

[1] A denial of a transfer to tribal court under ICWA is reviewed for an abuse of discretion. *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

[2] Procedural due process is a question of law, which is reviewed independently of the lower court's ruling. See *In re Interest of Landon H.*, 287 Neb. 105, 841 N.W.2d 369 (2013).

FACTS

On May 16, 2013, the State filed a petition in the separate juvenile court of Lancaster County. It alleged that Tavian was a child who lacked proper parental care by reason of the faults or habits of his parents, Joseph B. (Appellant) and Tera B., and that he was in a situation dangerous to life or limb or injurious to his health or morals. See § 43-247(3)(a). On July 3, the juvenile court placed Tavian in the custody of the Department of Health and Human Services. Pursuant to ICWA, an "Affidavit and Notice" of the proceedings was delivered by registered mail to the Oglala Sioux Tribe (Tribe) and received on August 19.

On October 29, 2014, the State moved to terminate the parental rights of Appellant and Tera. Until that time, the goal of the proceedings in the juvenile court and the placement with the Department of Health and Human Services was reunification with the parents. Both parents denied the allegations in the motion on November 14. The Tribe received notice of the motion for termination of parental rights on November 21.

At a December 12, 2014, review hearing, Appellant testified that he had "just been accepted" and enrolled as a member of the Tribe, but had not received documentation from the Tribe verifying his enrollment. Immediately after the hearing, the Tribe moved to intervene, alleging that Tavian was an Indian child as defined by ICWA. Appellant orally moved to transfer the case to tribal court. The Tribe had not moved to transfer jurisdiction, but the tribal court had filed an order accepting jurisdiction. The juvenile court overruled Appellant's motion to transfer the case, because neither Appellant nor the Tribe had provided documentation verifying tribal enrollment or other evidence showing that ICWA applied to the case.

On December 16, 2014, Appellant filed a subsequent motion to transfer jurisdiction to the tribal court. At a hearing on January 6, 2015, certificates of tribal enrollment for Appellant and Tavian were received by the juvenile court. After the court

found that the provisions of ICWA applied to the case, the State requested and was given leave to withdraw its motion to terminate parental rights. The matter was continued for further hearing until 2 days later.

On January 7, 2015, the State filed an objection to the transfer, stating:

> COMES NOW, [a] Deputy County Attorney for Lancaster County, Nebraska, and objects to the transfer of the proceedings in this case to the [tribal court] because good cause exists to deny such transfer pursuant to Neb. Rev. Stat. [§] 43-1504(2).
>
> The State further requests the Court [set] this matter for hearing to determine whether good cause exists.

Relying on *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), the juvenile court concluded that good cause existed to overrule the motion because the proceedings were at an advanced stage. Appellant appeals the overruling of his motion to transfer jurisdiction to the tribal court.

ASSIGNMENTS OF ERROR

Appellant assigns, summarized and consolidated, that the juvenile court erred in finding good cause to deny his motion to transfer based on the advanced stage of the proceeding. Appellant also claims that his due process rights were violated by the court's making findings based on matters outside the scope of the record and not providing Appellant an opportunity to dispute and rebut such evidence.

ANALYSIS

[3] The issue is whether the juvenile court abused its discretion in denying Appellant's motion to transfer the proceeding to tribal court. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, which results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for

disposition. See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

We apply ICWA to the case at bar. Neb. Rev. Stat. § 43-1504(2) (Reissue 2008) governs motions to transfer jurisdiction to tribal courts under ICWA. At the time this case commenced, § 43-1504 provided:

> (2) In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

(Emphasis supplied.)

[4] At a hearing on a motion to transfer a proceeding to tribal court, the party opposing the transfer has the burden of establishing that good cause not to transfer exists. *In re Interest of Zylena R. & Adrionna R., supra*. In *In re Interest of Zylena R. & Adrionna R.*, we held that a proceeding for termination of parental rights should be regarded as a separate and distinct proceeding from foster care placement. In the case at bar, the Tribe accepted jurisdiction and neither parent objected to the transfer. Thus, absent the State's showing of good cause, the juvenile court was required to transfer the proceeding to tribal court.

The juvenile court found that the State had met its burden of showing good cause because the proceeding was at an advanced stage. It reasoned that usually, the date for determining whether the case was at an advanced stage would be the date of the filing of a motion to terminate parental rights. Because the State withdrew its motion for termination of parental rights on January 6, 2015, the court concluded that May 16, 2013, was the date of the State's petition for adjudication.

Using May 16, 2013, as the starting date, it concluded that the proceeding was at an advanced stage.

The juvenile court expressed concern that an Indian parent could play "an ICWA trump card at the eleventh hour" to transfer the case to tribal court. But we point out that the State's dismissal of its motion to terminate parental rights to avoid a transfer leaves an Indian child suspended in uncertainty. If the State sought a termination of parental rights, the party seeking transfer could file a new motion to transfer and the State could again dismiss the termination proceeding. The juvenile court's conclusion that the matter was in an advanced stage stemmed from the State's voluntary dismissal of the termination proceeding.

Good cause to overrule Appellant's motion to transfer to tribal court is not defined in ICWA. But the guidelines published by the Bureau of Indian Affairs (BIA guidelines) provide a basis for determining what constitutes good cause to deny motions to transfer. Previously, this court and other courts have looked to the BIA guidelines in making such determinations. See, *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds*, *In re Interest of Zylena R. & Adrionna R., supra*. See, also, *People ex rel. T.I.*, 707 N.W.2d 826 (S.D. 2005); *In re Adoption of S.W.*, 41 P.3d 1003 (Okla. Civ. App. 2001); *In re A.P.*, 25 Kan. App. 2d 268, 961 P.2d 706 (1998). The BIA guidelines provide guidance to state courts and child welfare agencies implementing ICWA and promote compliance with ICWA's stated goals by providing a framework and best practices for compliance.

At the time of the juvenile court ruling, the BIA guidelines provided that good cause not to transfer may exist if the proceeding was "at an advanced stage" when the petition to transfer was received and the petitioner failed to "file the petition promptly" after receiving notice. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg.

67,584, 67,591, C.3(b)(i) (Nov. 26, 1979) (not codified). While this appeal was pending, the BIA guidelines were amended. They now provide that in determining whether good cause exists to deny a motion to transfer to tribal court, the state court may not consider whether the case is at an advanced stage. See Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,149 and 10,156 (Feb. 25, 2015) (not codified). This amendment compels us to reconsider our prior adherence to the advanced stage of the proceedings as a basis for good cause, and on which the juvenile court relied in denying the transfer.

The BIA guidelines state that there may be valid reasons for waiting to transfer a proceeding until it reaches an advanced stage. A tribe might decline to intervene during foster care placement proceedings when the goal is reunification with the parents, whereas the tribe would likely be much more concerned with removal of Indian children in termination proceedings. The BIA guidelines note that denial of motions to transfer because a proceeding is at an advanced stage undermines the presumption of tribal jurisdiction over proceedings involving Indian children not residing or domiciled on the reservation. We note that ICWA seeks to protect not only the rights of the Indian child as an Indian, but also the rights of Indian communities and tribes in retaining Indian children.

In our consideration of whether good cause existed to overrule the motion to transfer, we find the amended BIA guidelines persuasive and instructive. The BIA guidelines were amended during this appeal, and we find them applicable to the case at bar. We hold that a determination that the proceeding is at an advanced stage is no longer a valid basis for finding good cause to deny a motion to transfer jurisdiction to a tribal court. We conclude that the overruling of the motion to transfer denied Appellant a just result.

Also before this court is the State's argument that the best interests of the child should be a basis for determining good

cause to deny a transfer to tribal court. It urges us to reconsider our holding *In re Interest of Zylena R. & Adrionna R., supra*, that the best interests of an Indian child may not be considered when determining whether good cause exists to deny transfer to a tribal court. It argues that courts in at least nine states have addressed the issue in favor of best interests, finding it a relevant consideration in assessing good cause. These courts have found that where ICWA left the meaning of "good cause" unexplained, its purpose and legislative history suggest the relevance of the child's best interests. *Id.*

The State directs our attention to a recent decision by the U.S. Supreme Court in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013). The Court stated:

> [ICWA] was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the [South Carolina] Supreme Court's reading, [ICWA] would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read [25 U.S.C.] §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision *and the child's best interests*.

Adoptive Couple, 570 U.S. at 655-56 (emphasis supplied).

We decline the State's invitation to change our holding in *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), for several reasons. First, we note that the amended BIA guidelines expressly provide that it is inappropriate for state courts to conduct an independent analysis of the best interests of the Indian child in determining placement preferences. While this preclusion of a best interests analysis did not specifically refer to transfers of cases to tribal courts, the BIA guidelines further state that whenever a parent or tribe

seeks to transfer the case to tribal court, it is presumptively in the best interests of the Indian child to transfer the case to the jurisdiction of the Indian tribe.

Second, we find that the context of the U.S. Supreme Court's statement in *Adoptive Couple v. Baby Girl, supra*, did not indicate that the Court intended to impose the best interests standard on motions to transfer.

[5] Third, allowing the state court to determine the best interests of the Indian child undermines the purpose of ICWA. ICWA is intended to promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in adoptive homes or institutions which will reflect the unique values of Indian culture. In *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. at 852, 825 N.W.2d at 186 (quoting *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989)), we stated:

> Permitting a state court to deny a motion to transfer based upon its perception of the best interests of the child negates the concept of "presumptively tribal jurisdiction" over Indian children who do not reside on a reservation and undermines the federal policy established by ICWA of ensuring that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"

Finally, preclusion of a separate best interests analysis by state courts does not suggest that the best interests of the child are ignored altogether. To the contrary, the best interests of the Indian child are considered regardless of which court decides the matter. We discussed this point in *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. at 852, 825 N.W.2d at 186, stating:

> The reality is that both a juvenile court applying Nebraska law and a tribal court proceeding under ICWA must act in

> the best interests of an Indian child over whom they have jurisdiction. The question before a state court considering a motion to transfer to tribal court is simply which tribunal should make that decision. . . . Stated another way, recognizing best interests as "good cause" for denying transfer permits state courts to decide that it is not in the best interests of Indian children to have a tribal court determine what is in their best interests. By enacting ICWA, Congress clearly stated otherwise.

For the above reasons, we decline to reconsider our holding in *In re Interest of Zylena R. & Adrionna R., supra*, that the best interests of the Indian child is not a basis for good cause to deny a transfer of the case to tribal court. Because we have determined that the State did not show good cause to deny Appellant's motion to transfer, we need not review Appellant's claim that the juvenile court and the State violated his due process rights in denying his motion.

Because the State did not meet its burden of establishing good cause to deny transfer to tribal court, the juvenile court abused its discretion in denying Appellant's motion to transfer.

CONCLUSION

For the reasons stated above, we reverse the judgment of the juvenile court that overruled Appellant's motion to transfer the proceeding to tribal court and we remand the cause with directions to transfer the matter to tribal court.

Reversed and remanded with directions.

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

We held in *In re Interest of Zylena R. & Adrionna R.*[1] that the advanced stage of an Indian child custody proceeding could be good cause to deny a motion to transfer

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[1] *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

to tribal court. Our holding was based in part on nonbinding guidelines published in 1979 by the Bureau of Indian Affairs (BIA).[2] Based on this precedent, the State argued below that the proceeding was at an advanced stage, and the juvenile court found this was good cause to deny the motion to transfer.

Today, in reliance on significant changes made in 2015 to the 1979 version of the guidelines (1979 BIA guidelines),[3] we now conclude courts may no longer rely upon a determination that a case is at an advanced stage as good cause to deny a motion to transfer to tribal court. While I concur that the mere advanced stage of the proceeding cannot constitute good cause to deny a transfer to tribal court, I write separately to clarify why we rely on the amended guidelines (2015 BIA guidelines) and to set out what I think is the proper standard of review under the circumstances. And because I respectfully disagree with the majority on the appropriate disposition of this case, I write separately to explain why I think the proper disposition would be to vacate the order and remand the cause for further proceedings applying the new law we announce today.

ROLE OF BIA'S GUIDELINES

The majority finds the 2015 BIA guidelines are "persuasive and instructive" on what constitutes good cause, and, on the facts of this case, I agree. But because the BIA's guidelines are nonbinding[4] and do not have the force of federal regulations, it is appropriate to explain why we find the guidelines instructive, and clarify why we are, in this case, relying on the 2015 BIA guidelines to change established law.

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[2] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 to 67,595 (Nov. 26, 1979) (not codified).

[3] Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 to 10,159 (Feb. 25, 2015) (not codified).

[4] See, e.g., *In re Interest of Zylena R. & Adrionna R., supra* note 1.

As the majority recognizes, the BIA's guidelines are designed to promote compliance with the stated goals of the federal Indian Child Welfare Act of 1978 (ICWA)[5] and are intended to provide a framework of best practices for state agencies and courts.[6] But the advisory guidelines are simply the Department of the Interior's interpretation of certain provisions of ICWA.[7] In other words, the guidelines are interpretive rather than legislative, and we are under no obligation to follow the guidelines if we conclude they are not in accord with the language or intent of ICWA on a particular point.[8]

The guidelines were first published in 1979 and were not amended until 2015. The 2015 BIA guidelines, which became effective February 25, 2015, attempt to respond to national developments in ICWA jurisprudence.[9] While the 2015 BIA guidelines are instructive, it is important to emphasize that this court does not change its jurisprudence simply because an executive agency has made amendments to nonbinding guidelines. Rather, this court should determine whether to follow the 2015 BIA guidelines on a particular issue only after carefully considering them and judicially determining they are in accord with both ICWA and the Nebraska Indian Child Welfare Act (NICWA)[10] on that issue.

On the issue of the advanced stage of the proceedings, I note there is no language in ICWA or NICWA which expressly or impliedly limits the timeframe for making a motion to transfer to a tribal court. And it is significant that with the enactment of 2015 Neb. Laws, L.B. 566, the Legislature

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[5] See 25 U.S.C. § 1901 et seq. (2012).

[6] See 2015 BIA guidelines, *supra* note 3, 80 Fed. Reg. 10,146-147, summary.

[7] See 1979 BIA guidelines, *supra* note 2, 44 Fed. Reg. 67,584, introduction.

[8] *Id*. (noting states "are free to act contrary to what the Department [of the Interior] has said if they are convinced that the Department's guidelines are not required by the statute itself").

[9] See 2015 BIA guidelines, *supra* note 3, 80 Fed. Reg. 10,146, summary.

[10] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008 & Supp. 2015).

amended NICWA in several respects, one of which was to expressly recognize that Indian tribes have a "continuing and compelling" governmental interest in an Indian child.[11] Particularly given the Legislature's strong language, I think it is apparent that denying a transfer merely because the proceedings are at an advanced stage when the motion is made would frustrate the purpose underlying ICWA and NICWA, and would undermine the presumption of tribal jurisdiction inherent in ICWA.[12] But I leave for another day the question of whether the advanced stage of proceedings, if coupled with other compelling circumstances properly considered under ICWA and NICWA, can constitute good cause for denying a transfer.

Because the 2015 BIA guidelines' interpretation is more consistent with the language and intent of ICWA and NICWA on the advanced stage issue than was our precedent to the contrary, I agree that the mere advanced stage of the proceeding cannot provide good cause to deny a motion to transfer to tribal court. And because the advanced stage of the proceeding was the sole basis for the juvenile court's denial of the transfer to tribal court, I agree the juvenile court's decision cannot be upheld.

STANDARD OF REVIEW AND APPROPRIATE DISPOSITION

At the time the motion to transfer was tried and decided, settled Nebraska law recognized the advanced stage of the proceeding as a ground for a finding of good cause to deny transfer.[13] Nevertheless, the majority finds the juvenile court abused its discretion by finding the proceedings were at an advanced stage and there was good cause to deny the transfer. In essence, the majority finds the juvenile court abused its

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[11] See § 43-1502 (Supp. 2015).

[12] See 2015 BIA guidelines, *supra* note 3, 80 Fed. Reg. 10,149.

[13] See *In re Interest of Zylena R. & Adrionna R., supra* note 1.

discretion by failing to anticipate we would make a change in the substantive law. I think this analysis is imprecise and unfair to the trial court.

I have great difficulty with the conclusion that the juvenile court abused its discretion by applying settled law to the matter before it. Because we have resolved this appeal based on principles of statutory interpretation, rather than by an analysis of the court's factual findings, I respectfully suggest the more appropriate standard of review would be that which we apply when reviewing questions of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[14] We have applied this standard of review quite recently in a case where we were called upon to consider the meaning of the phrase "'for good cause shown,'" a phrase which appeared in a statute but was undefined by the Legislature.[15] There, we determined under the circumstances that our first task was to independently determine the meaning of "good cause shown" and, after we defined the term in light of the entire statutory scheme, we then reviewed the trial court's factual findings for clear error.[16]

Here, were we to use the standard of review we typically apply when reviewing questions of law, I think the disposition of this case would be quite different. Rather than reversing the juvenile court's order for an abuse of discretion and remanding the cause with directions to grant the transfer, we instead would vacate the juvenile court's order denying the transfer and remand the cause for further proceedings under the new rule announced today.

Vacating and remanding for further proceedings would give the parties, and the trial court, the opportunity to apply the law

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[14] *Pettit v. Nebraska Dept. of Corr. Servs.*, 291 Neb. 513, 867 N.W.2d 553 (2015).

[15] *Id.* at 518, 867 N.W.2d at 557.

[16] *Pettit, supra* note 14.

we have announced today to the specific facts of this case. I think simply remanding the cause with directions to grant the motion to transfer after announcing a significant substantive change in the law unfairly limits the proceedings on an issue of critical importance to the parties.

ISSUES ON REMAND: QUANTUM OF PROOF, GOOD CAUSE, AND BEST INTERESTS

Because I think the proper disposition would be to vacate, and remand for further proceedings, I take this opportunity to address several aspects of our ICWA/NICWA jurisprudence likely to arise on remand.[17]

Quantum of Proof

We have been clear that the party opposing a motion to transfer has the burden of proving good cause not to transfer,[18] but we have never specified the quantum of proof which must be met. Adopting a quantum of proof would provide a clear and consistent standard against which to determine when good cause has been proved. I would join the consensus of jurisdictions that have required good cause under ICWA to be proved by clear and convincing evidence.[19] I note this heightened quantum of proof is expressly relied upon elsewhere in NICWA when referencing good cause[20] and is consistent with

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[17] See, *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007); *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

[18] *In re Interest of Zylena R. & Adrionna R., supra* note 1.

[19] See, e.g., *Thompson v. Dept. of Family Services*, 62 Va. App. 350, 747 S.E.2d 838 (2013); *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In re A.P.*, 25 Kan. App. 2d 268, 961 P.2d 706 (1998); *Matter of M.E.M.*, 195 Mont. 329, 635 P.2d 1313 (1981).

[20] See § 43-1508(4) (Supp. 2015).

the statutory preference for tribal jurisdiction under ICWA and NICWA.[21]

Good Cause

By choosing not to statutorily define "good cause" in the context of transfers under ICWA and NICWA, Congress and the Nebraska Legislature have left to state courts the primary responsibility for interpreting the term. This is not a simple task.

In the past, we have been called upon to interpret the undefined phrase "good cause" in statutory contexts outside ICWA, and we have recognized the complicated nature of such an exercise.[22] We have defined good cause, in the context of a statute dealing with probate, as "a logical reason or legal ground, based on fact or law" and emphasized that the meaning of good cause is to be determined "in light of all of the surrounding circumstances."[23] In the context of a criminal case considering an extension of time to prepare a bill of exceptions for good cause shown, we defined good cause as the intervention of something beyond the control of the litigant.[24] We also have cited to Webster's Third New International Dictionary to define good cause as "'a cause or reason sufficient in law; one that is based on equity or justice or that would motivate a reasonable man under all the circumstances.'"[25] Most recently,

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[21] See 25 U.S.C. § 1911(b) ("the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe"). Accord § 43-1504 (Supp. 2015).

[22] *Pettit, supra* note 14, 291 Neb. at 519, 867 N.W.2d at 558 (recognizing it is more complicated than it may seem to define good cause, because it "surely depends upon the factual circumstances").

[23] *In re Estate of Christensen*, 221 Neb. 872, 874-75, 381 N.W.2d 163, 165 (1986).

[24] *Bryant v. State*, 153 Neb. 490, 45 N.W.2d 169 (1950).

[25] *In re Estate of Christensen, supra* note 23, 221 Neb. at 874, 381 N.W.2d at 165 (emphasis omitted); *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979).

we examined the entirety of the relevant statute in determining the meaning of the phrase "good cause."[26]

Based on the foregoing, I would hold that good cause to deny a transfer under ICWA and NICWA means a compelling reason, based in law or fact, which is not contrary to the provisions or purposes of ICWA and NICWA and is sufficient to overcome the strong presumption of tribal jurisdiction. And I think having a general definition of good cause in the context of transfers would assist litigants and courts in analyzing factual situations not otherwise addressed in BIA's guidelines.

Historically, when interpreting good cause under ICWA, we have relied primarily on BIA's guidelines, rather than applying more traditional rules of statutory construction. But continued reliance on BIA's guidelines is problematic, because the 2015 BIA guidelines do not undertake to define good cause, and instead focus exclusively on identifying that which is *not* good cause. This has not always been the case.

Under the 1979 BIA guidelines, good cause to deny a transfer was recognized under four specific scenarios: (1) the proceeding was at an advanced stage when the motion to transfer was filed; (2) the Indian child was over 12 years of age and objected to the transfer; (3) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or (4) the parents of a child over 5 years of age are not available, and the child has had little or no contact with the child's tribe or members of the child's tribe.[27] The 1979 BIA guidelines specifically noted that the third scenario, undue hardship, was included because 25 U.S.C. § 1911(b) of ICWA was "'intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to [e]nsure that the rights

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[26] *Pettit, supra* note 14.

[27] 1979 BIA guidelines, *supra* note 2, 44 Fed. Reg. 67,591, C.3(b)(i) through (iv).

of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.'"[28]

For reasons which are not clear, the 2015 BIA guidelines omit all four of the good cause factors identified in the 1979 BIA guidelines, and instead list only those things the BIA has determined courts may *not* consider in determining whether good cause exists.[29] As for what may still constitute good cause under ICWA, the 2015 BIA guidelines merely recite that good cause may be found if "the State court otherwise determines that good cause exists."[30]

The 2015 BIA guidelines explain why some of the 1979 good cause factors were omitted (including the factor regarding advanced proceedings)[31] but are silent regarding why two of the 1979 factors (the factor addressing the preference of an Indian child over age 12, and the factor addressing undue hardship) were omitted from the 2015 BIA guidelines. Because there was no explanation given for omitting these factors, it is not possible to judicially determine whether the BIA's rationale for omitting these factors is in accord with ICWA and NICWA. But certainly, the lack of guidance from the Department of the Interior on this issue should not preclude state courts from considering whether these remain viable factors when determining good cause under ICWA and NICWA. And something must constitute good cause to deny a transfer to tribal court, because both ICWA and NICWA expressly authorize it:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to

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[28] *Id.*, 67,591, C.3, commentary.

[29] 2015 BIA guidelines, *supra* note 3, 80 Fed. Reg. 10,156, C.3(c).

[30] See *id.*, 10,149.

[31] See *id.*

> the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.[32]

Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature.[33] Recognizing this, we must look beyond the notable silence of the 2015 BIA guidelines in order to determine and give effect to the good cause language in ICWA and NICWA.

In determining whether there is good cause to deny a transfer, I think it remains appropriate for courts to consider whether the evidence necessary to decide the case could be adequately presented in the tribal court without undue hardship to the parties or the witnesses. I note the 1979 BIA guidelines addressed this specifically:

> Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included [as a good cause factor] on the strength of the section-by-section analysis in the House Report on [ICWA], which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to [e]nsure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.[34]

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[32] 25 U.S.C. § 1911(b). Accord § 43-1504(2).

[33] *Pettit, supra* note 14; *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[34] 1979 BIA guidelines, *supra* note 2, 44 Fed. Reg. 67,591, C.3, commentary.

The 1979 BIA guidelines went on to observe that "[a]pplication of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation."[35] It was suggested that problems with an inconvenient forum might be alleviated by "having the court come to the witnesses" or requiring the "tribal court meet in the city where the family lived."[36]

I find persuasive the rationale provided in the comments to the 1979 BIA guidelines that the undue burden factor is actually a modified forum non conveniens analysis, and I note that prior to the 2015 BIA guidelines, Nebraska recognized this as a valid factor in the good cause analysis.[37] I see no principled basis under the operative statutes or our jurisprudence to depart from that precedent. When determining whether the doctrine of forum non conveniens should be invoked, we have said the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through the compulsory process.[38] Particular factors to consider in ICWA and NICWA cases may include whether alternative methods of participation, such as by telephone or videoconferencing, are available.[39] I note the juvenile court in this case made specific reference in its order to the fact that the tribal court was more than 430 miles from Lincoln, Nebraska.

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[35] *Id.*

[36] *Id.*

[37] See *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[38] See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds, In re Interest of Zylena R. & Adrionna R., supra* note 1.

[39] See 2015 BIA guidelines, *supra* note 3, 80 Fed. Reg. 10,156, C.1(d). See, also, *In re Spears*, 309 Mich. App. 658, 872 N.W.2d 852 (2015).

By specifically mentioning forum non conveniens, I do not mean to suggest it is the only "good cause" factor which remains viable in the wake of the 2015 BIA guidelines. I note that when the Legislature amended NICWA in 2015, it added both a definition and a standard of proof for "good cause" in the context of placement preferences for Indian children:

> Good cause to deviate from the placement preferences in subsections (1) through (3) of this section includes: (a) The request of the biological parents or the Indian child when the Indian child is at least twelve years of age; (b) the extraordinary physical or emotional needs of the Indian child as established by testimony of a qualified expert witness; or (c) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria. The burden of establishing the existence of good cause to deviate from the placement preferences and order shall be by clear and convincing evidence on the party urging that the preferences not be followed.[40]

This new definition of good cause appears instructive on the related task of determining good cause to deny a transfer request and illustrates several possible factors supporting a good cause finding which the Legislature has concluded are not contrary to the provisions or purpose of ICWA and NICWA.

Finally, because "best interests" is addressed in the majority opinion, I write separately to suggest that recent legislative amendments to NICWA undermine our holding in *In re Interest of Zylena R. & Adrionna R.*,[41] that state courts may not consider the best interests of an Indian child in deciding whether there is good cause to deny a transfer to tribal court.

L.B. 566 made significant amendments to NICWA, including expanding the stated purpose of NICWA to recognize the

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[40] § 43-1508(4).

[41] *In re Interest of Zylena R. & Adrionna R., supra* note 1.

state's commitment to "protecting the essential tribal relations and best interests of an Indian child by promoting practices consistent with [ICWA]"[42] and adding a new definition of "best interests of the Indian child":

> (2) Best interests of the Indian child shall include:
>
> (a) Using practices in compliance with [ICWA], [NICWA], and other applicable laws that are designed to prevent the Indian child's voluntary or involuntary out-of-home placement; and
>
> (b) Whenever an out-of-home placement is necessary, placing the child, to the greatest extent possible, in a foster home, adoptive placement, or other type of custodial placement that reflects the unique values of the Indian child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe or tribes and tribal community.[43]

It is significant that the Nebraska Legislature undertook to define "best interests of the Indian child" under NICWA and that it did so in a manner which does not prohibit consideration of best interests altogether, but, rather, narrows the traditional concept of best interests to reconcile it with the important policy goals and procedural protections afforded by ICWA and NICWA.

As such, on the issue of whether some inquiry into an Indian child's best interests is permitted when determining whether there is good cause to deny a transfer, I read the recent amendments to NICWA as indicating that consideration of best interests need not be categorically excluded, but must be narrowly applied in a manner that is consistent with the provisions and promotes the goals of ICWA and NICWA. Because I think these recent legislative amendments to NICWA compel us to reconsider the breadth of our holding in *In re Interest of*

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[42] § 43-1502.

[43] § 43-1503(2) (Supp. 2015).

Zylena R. & Adrionna R., I cannot agree with the majority's broad statement that "the best interests of the Indian child is not a basis for good cause to deny a transfer of the case to tribal court."

In summary, I agree with the majority that the mere advanced stage of the proceeding should no longer be good cause to deny a motion to transfer to tribal court. But because we announce a significant change in the law today, I respectfully disagree with the majority's disposition of this case, and suggest the better disposition would be to vacate, and remand for further proceedings, and in doing so, I would provide further guidance on the applicable standard of review, the appropriate quantum of proof, and the proper parameters of good cause to deny a transfer under ICWA and NICWA. For these reasons, I both concur and dissent in the opinion of the court.

Heavican, C.J., and Cassel, J., join in this concurrence and dissent.

Kimberly L. Stevens, now known as Kimberly L. Moore, appellant, v. Michael W. Stevens, appellee, and State of Nebraska, intervenor-appellee.

874 N.W.2d 453

Filed February 19, 2016. No. S-15-219.

1. **Jurisdiction.** Jurisdiction is a question of law.
2. **Judgments: Appeal and Error.** An appellate court resolves questions of law independently of the conclusion reached by the lower court.
3. **Jurisdiction: Appeal and Error.** An appellate court has the duty to determine whether it has jurisdiction before reaching the legal issues presented for review.
4. **Judgments: Jurisdiction: Appeal and Error.** Orders which specify that a trial court will or will not exercise its jurisdiction based on future action or inaction by a party are conditional and therefore not appealable.
5. **Judgments: Final Orders: Appeal and Error.** Conditional orders do not automatically become appealable on the occurrence of the specified conditions, but they can operate if other conditions have been met, at which time the court may make a final order.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Appeal dismissed.

Phillip G. Wright for appellant.

Kevin F. Duffy and Marc B. Delman, Deputy Sarpy County Attorneys, and Andrew T. Erickson, Senior Certified Law Student, for intervenor-appellee.

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

Connolly, J.

SUMMARY

After Michael W. Stevens became disabled, the child support referee recommended that the court reduce his child support payments. The court adopted the recommendations "subject to the right of rehearing reserved in the parties if exception(s) be duly taken within fourteen (14) days," in which case "this Order shall be stayed until further Order of the Court." Kimberly L. Stevens, now known as Kimberly L. Moore, the custodial parent, appeals. The order from which Kimberly appeals was conditional and therefore not final. We dismiss her appeal for lack of jurisdiction.

BACKGROUND

In 2003, the court dissolved Kimberly and Michael's marriage. It awarded Kimberly custody of the minor children and ordered Michael to pay child support.

In 2014, the State, as intervenor, filed a complaint to modify the child support order in the decree. It alleged that Michael's monthly income had materially decreased.

The court referred the matter to a referee, who held a hearing. On February 17, 2015, the referee filed a report recommending that the court decrease Michael's support obligation. On the same day, the court entered an order purporting to approve the recommendations contingent on neither party's filing exceptions during the next 2 weeks. The February 17 order provides:

> It is ordered that the referee recommendations are adopted by the Court as its Order, subject to the right of rehearing reserved in the parties if exception(s) be duly taken within fourteen (14) days from this date (Neb. Ct. R. §4-110). In the event that an exception is duly taken this Order shall be stayed until further Order of the Court.

Kimberly appeals from the February 17, 2015, order.

ASSIGNMENTS OF ERROR

Kimberly argues that the court did not have jurisdiction over the State's complaint to modify, because there was a

preexisting support order. She assigns that if the court did have jurisdiction, it erred by (1) miscalculating Michael's support obligation, (2) finding that there was a material change of circumstances, (3) "[r]etroactively waiving [Michael's] child support arrearage," (4) delegating judicial power to the referee, and (5) crediting Michael with "Social Security benefits that may become due."

STANDARD OF REVIEW

[1,2] Jurisdiction is a question of law.[1] We resolve questions of law independently of the conclusion reached by the lower court.[2]

ANALYSIS

[3] We begin by testing our jurisdiction over this appeal. An appellate court has the duty to determine whether it has jurisdiction before reaching the legal issues presented for review.[3] Kimberly argues that the district court lacked jurisdiction because there was a preexisting support order. But we identify another jurisdictional problem that is dispositive: The order from which Kimberly appeals is conditional and therefore not final.

[4,5] Orders which specify that a trial court will or will not exercise its jurisdiction based on future action or inaction by a party are conditional and therefore not appealable.[4] Such conditional orders have no effect as a final order from which a party can appeal.[5] Conditional orders do not automatically become appealable on the occurrence of the specified

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[1] *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015).

[2] *Id.*

[3] *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

[4] See, *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000); *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999); *Kroll v. Department of Motor Vehicles*, 256 Neb. 548, 590 N.W.2d 861 (1999).

[5] *Custom Fabricators v. Lenarduzzi, supra* note 4.

conditions.[6] But they can operate if other conditions have been met, at which time the court may make a final order.[7]

Here, the court conditioned its February 17, 2015, order "subject to the right of rehearing reserved in the parties if exception(s) be duly taken within fourteen (14) days from this date," in which case "this Order shall be stayed until further Order of the Court." When the court made the February 17 order, it was conditional on the future action or inaction of the parties. It therefore failed to operate in the present and was not a final, appealable order.[8] The court entered no order after February 17. So we lack jurisdiction.[9]

Under Neb. Rev. Stat. § 43-1613 (Reissue 2008), the parties had the "right to take exceptions to the findings and recommendations made by the referee and to have a further hearing before such court for final disposition." Our rules give parties 14 days to take exceptions.[10] Here, the court purported to adopt the referee's report as its order on the same day the referee filed her report, conditioned on neither party's filing exceptions. We note that, alternatively, the court could have waited 14 days after the referee filed her report to see if either party filed exceptions before adopting the referee's recommendations as its order.

CONCLUSION

The court conditioned the order from which Kimberly appeals on the parties' not filing exceptions to the referee's report within 14 days. The order was conditional on the future action or inaction of the parties and was therefore not a final, appealable order. We dismiss the appeal.

Appeal dismissed.

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[6] See *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[7] See *id.*

[8] See *State ex rel. Stenberg v. Moore, supra* note 4.

[9] See *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

[10] Neb. Ct. R. § 4-110.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Patricia Geringer, respondent.

874 N.W.2d 300

Filed February 19, 2016. No. S-16-019.

Original action. Judgment of disbarment.

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

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Patricia Geringer, on January 7, 2016. The court accepts respondent's voluntary surrender of her license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 19, 1983. On September 1, 2015, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent in case No. S-15-801. The formal charges consisted of three counts against respondent that generally involved trust account violations and falsifying documents. The formal charges alleged that by her actions, respondent violated her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and several of the Nebraska Court Rules of Professional Conduct. On

December 1, respondent filed an answer to the formal charges in which she denied allegations of fact set forth in the formal charges. On December 15, a referee was appointed.

On January 7, 2016, respondent filed a voluntary surrender of license, in which she stated that she freely and voluntarily waived her right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented 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 her license to practice law and knowingly does not challenge or contest the truth of the allegations made against her. Further, respondent has waived all proceedings against her 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 freely, knowingly, and voluntarily admitted that she does not contest the allegations being made against her. The court accepts respondent's voluntary surrender of her license to practice law, finds that respondent

should be disbarred, and hereby orders her 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, she 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. 2014) 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.

State of Nebraska, appellee, v. Eric M. Henry, appellant.

875 N.W.2d 374

Filed February 26, 2016. No. S-14-519.

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. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the appellate court will uphold the trial court's findings of fact unless they are clearly wrong, but will reach a conclusion independent of that reached by the trial court with regard to questions of law.
3. **Pretrial Procedure: Appeal and Error.** Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.
4. ____: ____. The decision of the trial court granting or denying a motion for a bill of particulars requested by the accused will not be reversed by the appellate court in the absence of an abuse of discretion on the part of the trial court in making its adjudication.
5. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.
6. **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.
7. **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.

8. **Trial: Juries: Evidence.** A trial court does not have discretion to submit testimony materials to the jury for unsupervised review, but the trial court has broad discretion to submit to the jury nontestimonial exhibits, in particular, those constituting substantive evidence of the defendant's guilt.
9. **Witnesses.** The manner in which a witness may be examined is within the sound discretion of the court.
10. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that a questioned jury instruction prejudiced him or otherwise adversely affected his substantial rights.
11. **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.
12. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
13. **Pretrial Procedure: Evidence.** In the absence of any discovery motion under Neb. Rev. Stat. § 29-1913 (Reissue 2008), there is no discovery order, and without a discovery order, there can be no violation requiring suppression of the evidence.
14. ____: ____. Where the State in good faith destroys evidence before a defense discovery motion under Neb. Rev. Stat. § 29-1913(1) (Reissue 2008) can be made, a district court is not obliged to suppress the State's tests or analyses under § 29-1913(2) without any motion for discovery under § 29-1913(1).
15. **Motions to Suppress.** A suppression motion cannot serve as a substitute for a discovery motion.
16. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
17. **Criminal Law: Robbery.** It is not necessary to a charge of robbery to name the alleged victim.
18. **Rules of Evidence.** Generally, the foundation for the admissibility of text messages has two components: (1) whether the text messages were accurately transcribed and (2) who actually sent the text messages.
19. **Rules of Evidence: Proof.** The proponent of text messages is not required to conclusively prove who authored the messages; the possibility of an alteration or misuse by another generally goes to weight, not admissibility.

20. **Trial: Hearsay: Testimony: Evidence.** It is generally sufficient to make a general hearsay objection to a specific statement, but a general hearsay objection to the entirety of a witness' testimony or to multiple statements in an exhibit, each admissible or objectionable under differing theories, is not usually sufficient to preserve the hearsay objection.
21. **Trial: Evidence: Appeal and Error.** Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objections and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.
22. **Trial: Evidence: Presumptions.** Once the proponent of evidence shows that the proposed evidence is relevant and competent, it is presumptively admissible.
23. **Trial: Hearsay: Evidence: Proof.** It is the party objecting to the evidence as hearsay who bears the burden of production and persuasion that the objected-to evidence is in fact hearsay.
24. ____: ____: ____: ____. Once the opponent demonstrates the evidence is hearsay, the burden shifts to the proponent to lay the foundation for one of the exceptions to the hearsay rule.
25. **Trial: Evidence.** Regardless of whether the proponent or the trial court articulated no theory or the wrong theory of admissibility, an appellate court may affirm the ultimate correctness of the trial court's admission of the evidence under any theory supported by the record, so long as both parties had a fair opportunity to develop the record and the circumstances otherwise would make it fair to do so.
26. **Conspiracy: Hearsay: Rules of Evidence.** The rule that a statement by a coconspirator is not hearsay if made during the course and in furtherance of a conspiracy is construed broadly in favor of admissibility.
27. **Conspiracy.** A conspiracy is ongoing until the central purposes of the conspiracy have either failed or been achieved.
28. ____. There is no talismanic formula for ascertaining when a coconspirator's statements are in furtherance of the conspiracy; a statement need not be necessary or even important to the conspiracy, as long as it can be said to advance the goals of the conspiracy as opposed to thwarting its purpose.
29. ____. The definitional exclusion to the hearsay rule applies to the coverup or concealment of the conspiracy that occurs while the conspiracy is ongoing, just as it would to any other part of the conspiracy.
30. ____. When a conspiracy involves a sequence of objectives, concealment is usually an integral part thereof.
31. **Conspiracy: Proof: Presumptions.** Upon proof of participation in a conspiracy, a conspirator's continuing participation is presumed

unless the conspirator demonstrates affirmative withdrawal from the conspiracy.

32. **Conspiracy.** To withdraw from a conspiracy such that statements of a coconspirator are inadmissible, the coconspirator must do more than ceasing, however definitively, to participate; rather, the coconspirator must make an affirmative action either by making a clean breast to the authorities or by communicating abandonment in a manner calculated to reach coconspirators, and must not resume participation in the conspiracy.
33. **Trial: Juries: Verdicts: Appeal and Error.** Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
34. **Trial: Evidence: Words and Phrases.** The "rule of completeness" states that an opponent may require one introducing part of a writing or statement to introduce any part which ought in fairness to be considered with the part introduced.
35. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.

Appeal from the District Court for Platte County: Robert R. Steinke, Judge. Affirmed.

Mark M. Sipple and Erik C. Klutman, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

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

Wright, J.

I. NATURE OF CASE

Eric M. Henry was convicted of felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery for his involvement in the stabbing death of Steven T. Jorgensen. He was sentenced to consecutive terms of life imprisonment, 40 to 50 years' imprisonment, and 10 to 20 years' imprisonment, respectively.

On appeal, Henry assigns error to the overruling of various pretrial motions, including a motion in limine, a motion for a bill of particulars, and a motion to sever. He also challenges the admission and handling of certain evidence and the giving of an instruction. We affirm.

II. BACKGROUND

1. Criminal Charges

On December 20, 2013, Henry was charged by amended information with four counts. Count I alleged that he committed the first degree murder of Jorgensen "in the perpetration of or attempt to perpetrate a robbery." Count II charged use of a deadly weapon to commit a felony. Count III charged possession of a deadly weapon (brass or iron knuckles) by a prohibited person. Count IV charged criminal conspiracy to commit robbery. Specifically, count IV alleged that

> on or about May 17 or May 18, 2013, in Platte County, Nebraska, . . . Henry, with the intent to promote or facilitate the commission of felony robbery, did agree with one or more persons to engage in the result specified by the definition of the offense of robbery, and he or another person with whom he conspired committed an overt act in pursuance of the conspiracy, including at least one of the following overt acts:
>
> 1) Transported or aided the transporting of Quentin Critser from Lincoln to Platte County;
>
> 2) Attempted to obtain a gun;
>
> 3) Gave iron or brass knuckles to Quentin Critser; or
>
> 4) Went to the residence of a potential robbery victim or victims[.]

Henry moved for a bill of particulars stating "with precision and specificity the name of the 'potential robbery victim or victims' as set forth in Count IV of its Amended Information." The district court overruled the motion, after which Henry moved to sever count IV from the other counts. The motion to sever was also overruled.

2. Motion in Limine

Prior to trial, Henry filed a motion in limine challenging the admissibility of any evidence of the autopsy performed on Jorgensen's body, including any testimony of Dr. Robert Bowen, the pathologist. Bowen had performed an autopsy on Jorgensen's body on May 23, 2013. On May 24, the county attorney for Platte County, Nebraska, had authorized, at the request of Jorgensen's family, the release of Jorgensen's body for cremation.

Henry alleged that it would be a violation of due process and Neb. Rev. Stat. § 29-1913 (Reissue 2008) to permit the State to adduce evidence derived from examining and testing the body, because it had been destroyed before Henry had the opportunity to have it independently examined or tested. He claimed that in releasing the body for cremation, the Platte County Attorney had acted intentionally but not in bad faith.

Aside from photographs and the autopsy results, several tissue samples were apparently retained. Fingerprints were also taken, Jorgensen's clothing and a gag were collected, swabs and clippings from his fingernails were taken, and hairs were collected. However, a full accounting of what body parts or samples may have been retained was not given.

Henry did not file a motion under § 29-1913(1) asking the court to make available to the defense the evidence necessary to make tests or analyses of "ballistics, firearms identification, fingerprints, blood, semen, or other stains" like those conducted by the prosecution. Henry did not advise the prosecution that he wished the body preserved for an independent autopsy, because the body was cremated prior to bringing charges against Henry. The district court overruled Henry's pretrial motion in limine.

3. Jury Trial

The jury trial of Henry took place over 7 trial days. The parties stipulated that Henry had been convicted of a felony in 2007. They also stipulated that Jorgensen's DNA was the only DNA identified on any of the items seized from the crime

scene, including the knife in Jorgensen's throat and the gag in his mouth. These items were tested for fingerprints, but they yielded no identifiable prints.

(a) Discovery of Jorgensen

Officer Dale Ciboron testified that he and two other officers with the police department in Columbus, Nebraska, discovered Jorgensen's body after being dispatched to Jorgensen's house for a welfare check on May 22, 2013. Jorgensen had not reported to work for several days. Jorgensen's supervisor testified that he last saw Jorgensen at work on May 17 and that the date was a payday. Jorgensen did not show up at work as expected on either Saturday or Monday.

Upon entering Jorgensen's house, Ciboron found Jorgensen's body on the floor between the kitchen and the living room area. The house was in disarray. There was a knife protruding from Jorgensen's neck, and a gag in his mouth. Ciboron described dried blood on Jorgensen's head.

Three officers with the Columbus Police Department arrived at the scene to investigate shortly after Ciboron. They testified that Jorgensen's body had started to decompose. One officer testified that based on her observations of decay and lividity, Jorgensen had been dead "for several days." Bloodstains were found throughout the house, including the couch, the floor, a door, baseboards, and the kitchen water faucet. Another officer explained that the blood had soaked through the carpet and padding to the wood floor underneath.

A video and photographs of the scene and Jorgensen's body were entered into evidence without objection. Jorgensen's head and chest appeared covered in blood, and the photographs show numerous apparent stab wounds to the chest, arms, hands, and neck.

(b) Bowen

Prior to Bowen's testimony, Henry renewed his motion in limine, objecting to "the entirety of the testimony." Exhibits to be offered into evidence during Bowen's testimony were

not explicitly referenced in Henry's renewed objection. Henry again stated that he made no claim that the State acted in bad faith in releasing Jorgensen's body for cremation.

The prosecution noted that the autopsy report, photographs, and "[t]issue slides" had been made available to Henry for independent examination by an independent pathologist appointed for Henry. Henry explained that he did not have an expert who would testify differently as to Jorgensen's cause of death, and Henry did not appear to contest the time of death. Nevertheless, Henry stated that there were "issues." Henry never elaborated on what those issues were.

The district court overruled the renewed motion and allowed Bowen to testify. In denying the motion, the court noted that the body was cremated pursuant to a request by Jorgensen's family and that the detailed autopsy results, photographs, and tissue samples were available for examination by Henry's own pathologist. The court also noted that Henry did not contest, based on either Bowen's examination or his pathologist's review, Jorgensen's cause of death.

Bowen testified that the autopsy revealed 14 stab wounds on Jorgensen's neck, chest, and abdomen, and numerous "blunt force injuries" from being struck. There were lacerations on the back of Jorgensen's head consistent with being hit with brass knuckles. Bowen determined Jorgensen had died through a combination of blood loss and collapsed lungs, after receiving stab wounds to the chest, and that his death was a homicide. Bowen testified that Jorgensen had died somewhere between 24 hours and 4 days before the autopsy, which was performed on May 23, 2013.

Due to the decomposition, Bowen was unable to remove blood from the body, but he was able to test the decomposition fluid found in the chest. Bowen testified that decomposition fluid is more difficult to interpret than blood. On cross-examination, Bowen admitted that tests of samples or specimens of Jorgensen's organs, such as his brain, kidney, or liver, would have probably been more accurate.

The tests of the decomposition fluid indicated there was a significant amount of methamphetamine in Jorgensen's body at the time of death. Nevertheless, it was Bowen's opinion that the cause of death was not methamphetamine. Bowen explained that there was extensive hemorrhaging in the body that could not have occurred if Jorgensen had first died of methamphetamine.

During Bowen's testimony, a wound chart showing 14 stab wounds on Jorgensen's neck, chest, and abdomen was entered into evidence after Henry's counsel expressly stated he had no objection. In addition, 14 autopsy photographs prepared by Bowen were entered into evidence, again after Henry's counsel stated there was no objection. The autopsy report was not proffered.

(c) Benson

Vanessa Benson testified that on May 28, 2013, she informed the police department in Lincoln, Nebraska, that she suspected her boyfriend, Quentin Critser, had been involved in Jorgensen's death. Critser was staying with Benson and was a friend of Henry's. She reported that from May 16 to 18, Critser had been in Columbus with Henry and a woman by the name of Kimberly Henderson. On May 16, Henry and Henderson came to her apartment in Lincoln to pick up Critser. Based largely on text messages that Critser sent from Benson's cell phone to Henry, Benson knew that Henry and Critser planned to commit a robbery in Columbus. Benson was upset about this, and she and Critser fought.

Critser returned on May 18, 2013, after stopping first in Grand Island, Nebraska. Benson testified that after Critser returned from Columbus, he had Jorgensen's debit card and keys. Benson saw Critser dispose of the keys in a drainage ditch. Benson testified that she led the police to where Critser had hidden Jorgensen's debit card outside of her apartment building. Benson testified without objection that Henry had texted her several times asking her why she did not like him. She never responded.

(d) Critser

Critser was a witness against Henry as part of his plea agreement. Critser testified that he met Henry while they were both incarcerated for previous convictions and that they developed a friendship after their release. In May 2013, Critser and Henry lived in Lincoln and Columbus, respectively. They kept in touch mainly via text messages.

Critser did not have his own cell phone and used Benson's cell phone to send messages to Henry. Critser testified that Henry had his own cell phone and that the number associated with Henry's cell phone was programmed into Benson's cell phone under the name "E."

Critser testified that in May 2013, Benson's cell phone received a series of text messages from Henry asking Critser to come to Columbus for the purpose of "[c]ommit[ting] a crime of some sort" to obtain between $3,000 to $10,000.

Critser stated that he had no doubt the messages were from Henry. They showed up on Benson's cell phone as being sent from "E," and Critser could also tell the texts were from Henry by the context and because he knew how Henry talked. Critser also explained that he did not communicate with anyone else who lived in Columbus.

Pursuant to the plan developed by Critser and Henry, on May 16, 2013, Henry and Henderson picked up Critser in Lincoln and took him back to Columbus. Critser described without objection that he and Benson argued before he left. Benson did not want Critser to participate in the robbery and said that he was not welcome to come back if he did.

Critser testified that during the drive to Columbus, he and Henry discussed their plans to rob a drug dealer named "Tony." Critser also testified that he and Henry "were off and on talking about [the robbery of Tony] the whole time" they were in Columbus. While Critser was in Columbus with Henry, he used Henry's cell phone to stay in touch with Benson.

Critser said that he, Henry, and Henderson spent much of the evening of May 16, 2013, looking for a gun for Henry to use

in the robbery of Tony. Sometime on May 17, Henry found a gun for sale by a man called "Cowboy," but he needed money to buy it. Critser testified that he tried to convince Henry that they could rob Tony without a gun, but Henry was "adamant about having a gun to do it."

Because Jorgensen owed Henry money and because Henderson knew that Jorgensen would get paid that day, a plan developed "to go over there and collect some money" in order to buy the gun they would use to rob Tony. Critser had been aware that Henry had "fronted some people in Columbus some meth and they owed him money and he wanted me to come beat them up," but he did not know if one of those people was Jorgensen.

Critser testified that around 6 p.m. on May 17, 2013, he, Henry, and Henderson went to Jorgensen's house. Soon after they got there, a fight broke out between Jorgensen and Henry. Critser joined the fight, punching Jorgensen in the head with brass knuckles and choking Jorgensen until he passed out. At that point, Henry ordered Critser to tie Jorgensen's feet together and then go into another room. Critser complied.

After Critser left the room, Henry was alone with Jorgensen for some period of time. At some point, Henderson left. When the State attempted to adduce testimony as to what conversations took place before Henderson left, Henry objected on hearsay grounds. During a discussion outside the presence of the jury, Henry stated that he understood the State's conspirator exclusion to the hearsay rule, but that there was only evidence of a conspiracy to rob Tony, not Jorgensen. The State responded that the conspirators were robbing Jorgensen in order to buy a gun with which to rob Tony, and so it was all in furtherance of the same conspiracy. The court overruled the objection and found that the coconspirator exclusion to the hearsay rule set forth in Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2008) applied. Critser thereafter testified that Henderson said she was leaving to withdraw money from Jorgensen's account with his debit card and that she would be right back.

Henderson returned from the automatic teller machine (ATM) approximately 10 to 15 minutes later. Henderson and Critser joined Henry in the kitchen. Henderson said she had withdrawn $100.

Critser testified that at that time, he witnessed Henry "stab[] Jorgensen in the neck five times." Critser testified that Henry threatened him when Critser "freaked out" about the stabbing, and Critser assured Henry that "you ain't got nothing to worry about." They wiped things down to remove possible fingerprints and left.

The day after the murder, May 18, 2013, Henry and Critser continued to discuss trying to obtain a gun. While taking Critser back to Lincoln, they looked for, but were unable to obtain, a gun in Grand Island. Critser testified that he did not explicitly agree with Henry's plan to go immediately back to Columbus to rob Tony. Still, Critser told Henry that he had a "buddy" he could ask about getting a gun.

During the journey through Grand Island and then to Lincoln, Critser mentioned to Henry the knife left in Jorgensen's neck. Without objection, Critser testified that he and Henry discussed what to do about the knife. Henry determined that he must go back and retrieve the knife, apparently because no one had wiped fingerprints off of it. Critser was going to give Henry the keys to Jorgensen's house that were in the bag containing their bloodstained clothing.

Critser testified that when they arrived in Lincoln, Henry tried unsuccessfully to withdraw money from Jorgensen's debit card at an ATM that did not have video surveillance. Henry left Lincoln, leaving Critser in possession of Jorgensen's debit card. He directed Critser to try after midnight to withdraw money from the account. Critser was also left with a bookbag containing their bloodstained clothes and the keys to Jorgensen's house. Henry told Critser to get rid of the clothes. Henry planned on retrieving the keys, but forgot to do so.

On May 19, 2013, Critser attempted to withdraw cash with Jorgensen's debit card, but was unsuccessful. Later that same

day, Critser tried again to withdraw money with the debit card, but was unsuccessful. Critser testified that he hid Jorgensen's debit card in the bushes outside Benson's apartment and put the clothes in a Dumpster. He eventually threw the keys down different sewers in Lincoln. Critser testified that he did not actively look for a gun.

(e) Henderson

Henderson also testified against Henry as part of a plea agreement. Henderson's testimony regarding certain details about the events in Columbus differed from Critser's testimony, but she testified to the same general sequence of events: driving to Columbus with Henry to pick up Critser; planning to rob Tony; looking for a gun to use in the robbery; going to Jorgensen's house to obtain money on May 17, 2013; and fighting Jorgensen.

Henderson testified that while Jorgensen was still alive, Henry and Critser extracted Jorgensen's personal identification number from him, and Henry told her to take Jorgensen's debit card to an ATM to make sure it worked. She withdrew $100. Henderson testified that she witnessed Henry stab Jorgensen in the chest multiple times. Henderson admitted that she was the person who stabbed Jorgensen in the neck and left the knife there. Sometime after killing Jorgensen, she saw that Henry had obtained a gun.

(f) ATM Withdrawals and Discovery of Jorgensen's Possessions

The investigating officers obtained Jorgensen's bank records, which showed that on May 17, 2013, at 5:33 p.m., a $400 withdrawal was made and at 8:44 p.m., a $100 withdrawal was made from a Columbus ATM. The receipt for the $400 withdrawal was found in Jorgensen's vehicle, and video confirmed Jorgensen made that withdrawal. But video footage of the $100 withdrawal shows a woman believed to be Henderson making the withdrawal.

Officers found Jorgensen's debit card where Benson reported it to be near her apartment. Another officer retrieved Jorgensen's keys in a storm drain in Lincoln.

(g) Text Messages

The State entered into evidence text messages between Benson's cell phones and Henry's alleged cell phone. It offered the exhibits containing the text messages after the testimony of Benson, the witness who found what was purported to be Henry's cell phone abandoned at a post office, and the forensic investigators who extracted the text messages from the cell phones.

Benson had testified that at the time of the murder, she had a different cell phone from a second one she later obtained. She stated that while Critser was in Columbus, he communicated with Benson through the number that Critser had been texting to before he left, which she understood to be Henry's cell phone. At one point, Benson called that number and Henry answered. She testified that Henry then handed the cell phone to Critser.

Corey Weinmaster, the police officer who conducted the forensic examination of Benson's old cell phone, testified that around the time of Jorgensen's death, numerous text messages were exchanged between Benson's old cell phone and cell phone number 402-367-8802. The cell phone with the 402-367-8802 number was found abandoned at the Columbus post office after one of the persons interviewed by investigating officers suggested they look there. An employee of the post office stated that the last number dialed from the 402-367-8802 number was a contact labeled "Cowboy." She called that number, and a man saying his name was "Cowboy" claimed ownership of the cell phone.

The parties stipulated that stored text messages had been retrieved from Benson's old cell phone and from the cell phone with the 402-367-8802 number. They stipulated that the cell phones were in the same condition when examined

as when retrieved by law enforcement. Through forensic examination, each message offered into evidence identified the sending cell phone number, receiving number, date, time, and content.

Exhibit 84 was a chart that was prepared by Weinmaster. It included the contents of the text messages sent between Benson's old cell phone and the 402-367-8802 number. These messages were dated between May 15 and 25, 2013.

Exhibit 86 was a chart prepared by Angela Bell, the State Patrol officer who conducted the forensic examination of the cell phone with the 402-367-8802 number. Although Bell retrieved all the text messages stored on the cell phone, exhibit 86 purportedly contained only those text messages sent between the 402-367-8802 number and Benson's new cell phone. These messages were dated between May 20 and 22, 2013. For reasons that are not fully explained by the record, all of the messages in exhibit 86 are also found within exhibit 84.

Exhibits 83 and 90 were received into evidence for foundational purposes only and were never seen by the jury. Exhibit 83 was a printout of the contents of every text message retrieved from Benson's old cell phone. These messages were dated between December 31, 2012, and May 29, 2013. Exhibit 90 contained two compact discs. The first disc was the digital version of exhibit 83. The second disc was the digital version of exhibit 84.

Weinmaster and Bell confirmed that they had prepared the exhibits and explained how they retrieved the text messages from the cell phones.

Benson was specifically asked to look at exhibit 84, and she confirmed that the text messages shown in the exhibit were the messages that she saw between Critser and Henry regarding the plans for a robbery in Columbus.

Henry elicited testimony from Weinmaster and Bell that they could not be sure who was actually typing the text messages from someone's cell phone. Moreover, certain programs

could allow someone to send a text message from one cell phone but make it appear that the message had been sent from another cell phone.

Henry objected to all text message evidence in its entirety. He asserted there was a lack of foundation establishing that the texts were in fact between Henry and Benson's cell phones and to the extent they were "going to start putting names on phones." And, principally, Henry argued that the State could not verify who sent the text messages.

Henry also made a generalized hearsay objection to all the text messages, but there was no discussion on the record as to what particular statements Henry contended were inadmissible under such objection or why. At one point, Henry's counsel said his objection was "still . . . foundation and hearsay based on the fact that [Bell] cannot identify what phone, if it's even a correct number, that this comes from at this time or who sent it." The district court overruled Henry's objections to the exhibits.

Later, at the time of Critser's testimony, Henry further objected to the text messages based on the rule of completeness. Though he had not raised such a specific objection prior to the exhibits' admission, Henry had previously argued that if any text messages were to be deemed admissible, exhibit 83 was the more "appropriate" exhibit to go to the jury, because it did not have labels of names of cell phones and it contained all the text messages. Henry also objected to Critser's testimony referencing the text messages, on the grounds of foundation, hearsay, and the rule of completeness. None of the objections were discussed. The objections were generally overruled.

The State used the text messages extensively in its examination of Critser. And, during his testimony, Critser generally recognized that the text messages accurately represented his communications with Henry regarding the plan to rob Tony and the attempts to cover up the murder of Jorgensen. Critser interpreted some of the slang and code words found in the messages for the jury.

In the text messages sent before Jorgensen's murder, Henry and Critser discussed the planned robbery; the need to obtain a gun, because the intended robbery victim also had a gun; and the arrangements to pick up Critser. After Jorgensen's murder, Henry and Critser discussed via text messages the need to either hide the keys to Jorgensen's house or retrieve them in order to enter Jorgensen's house and remove the knife from Jorgensen's body, Critser's suggestion that Henry burn Jorgensen's house down, Critser's communication to Henry that he had taken care of "'the bag'" containing bloodstained clothing, Critser's complaints about whether he was going to get any money, Henry's suggestion that Critser keep trying to withdraw money using Jorgensen's debit card, whether Critser had been able to get the "'thing'" from his "'homi'" (which Critser explained referred to getting a gun), and Henry's assurances that he was working on getting Critser money. There was also entered into evidence several text messages between Critser and Benson concerning their argument about Critser's leaving with Henry to commit a robbery.

Henry cross-examined Critser extensively about how he could be certain the text messages were in fact from Henry. Critser confirmed that there was no doubt in his mind that the text messages coming from cell phone number 402-367-8802 came from Henry.

(h) Condreay

The State called Cory Condreay to testify regarding several statements Henry made after Jorgensen's death. Condreay was present at the house where Henry, Critser, and Henderson stayed the night following the murder. Condreay testified without objection that Henry told Condreay (1) that Henry, Critser, and Henderson had gone to Jorgensen's "to rob him of his ATM card on his payday"; (2) that they "beat [Jorgensen] so bad that he was speaking incoherently"; and (3) that at some point during the fight, Henry stabbed and killed Jorgensen.

One to three days later, Condreay drove with Henry to Jorgensen's house, because Henry wanted to break into the house and extract the knife from Jorgensen's body. But Condreay refused to try to break down the door of the house, even when Henry threatened Condreay with a gun that Henry had apparently recently acquired from "Cowboy." Henry was never able to gain entry into Jorgensen's house.

4. Verdict and Sentencing

At the conclusion of trial, the jury returned verdicts of guilty on the counts of felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. The jury found Henry not guilty of possession of a deadly weapon by a prohibited person. On April 16, 2014, the district court entered judgment in accordance with the verdicts.

Henry filed a motion for new trial. He alleged irregularity in the proceedings and insufficiency of the evidence. He also alleged that the district court had erred in failing to exclude Bowen's testimony, in allowing evidence of the text messages without proper foundation, in permitting exhibits 84 and 86 to go to the jury room, and in instructing the jury.

On May 20, 2014, the district court overruled Henry's motion for new trial. The court sentenced him to life imprisonment on the felony murder conviction, 40 to 50 years' imprisonment on the use conviction, and 10 to 20 years' imprisonment on the conspiracy conviction. The court ordered the sentences to be served consecutively. Henry appeals.

III. ASSIGNMENTS OF ERROR

Henry assigns, restated and consolidated, that the district court erred in (1) giving jury instruction No. 2; (2) overruling his motion in limine and allowing the State's pathologist to testify to the results of the autopsy at trial; (3) overruling his motion for a bill of particulars; (4) failing to sustain his motion to sever; (5) failing to sustain his motion for new trial; (6) admitting exhibits 83, 84, and 86; (7) allowing exhibits 84 and 86 to go to the jury room; (8) allowing the State to make

an assumption during questioning that Henry was sending certain text messages; and (9) allowing the State's witnesses to speculate as to what certain text messages meant.

IV. 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] In determining the correctness of a trial court's ruling on a motion to suppress, the appellate court will uphold the trial court's findings of fact unless they are clearly wrong, but will reach a conclusion independent of that reached by the trial court with regard to questions of law.[2]

[3] Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.[3]

[4] The decision of the trial court granting or denying a motion for a bill of particulars requested by the accused will not be reversed by the appellate court in the absence of an abuse of discretion on the part of the trial court in making its adjudication.[4]

[5] A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown, and an appellate court will find such an abuse only where the denial caused the defendant substantial prejudice amounting to a miscarriage of justice.[5]

[6,7] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the

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[1] *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

[2] See *State v. Shurter*, 238 Neb. 54, 468 N.W.2d 628 (1991).

[3] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[4] See Annot., 5 A.L.R.2d 444 (1949).

[5] See *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[6] 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.[7]

[8] A trial court does not have discretion to submit testimony materials to the jury for unsupervised review, but the trial court has broad discretion to submit to the jury nontestimonial exhibits, in particular, those constituting substantive evidence of the defendant's guilt.[8]

[9] The manner in which a witness may be examined is within the sound discretion of the court.[9]

V. ANALYSIS

1. Assignment of Error No. 1

Henry assigns that the district court erred in giving jury instruction No. 2, which was based on NJI2d Crim. 9.2. It stated as follows:

> As I told you at the beginning of the trial, this is a criminal case in which the State of Nebraska has charged [Henry] with the following four crimes: felony murder; use of a deadly weapon to commit a felony; possession of a deadly weapon by a prohibited person; and criminal conspiracy to commit robbery. The fact that the State has brought these charges is not evidence of anything. The charges are simply an accusation, nothing more.
>
> [Henry] has pleaded not guilty. He is presumed to be innocent. That means you must find him not guilty unless and until you decide that the State has proved him guilty beyond a reasonable doubt.

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[6] *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

[7] *Id.*

[8] *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

[9] *Ederer v. Van Sant*, 184 Neb. 774, 172 N.W.2d 96 (1969).

Henry argues that jury instruction No. 2 was prejudicial and violated his due process rights, because the words "'and until'" in the last sentence "presume[d] a finding of guilty."[10] He does not object to any other language in the instruction.

[10,11] In considering the propriety of giving jury instruction No. 2, we apply well-known principles of law. The appellant has the burden to show that a questioned jury instruction prejudiced him or otherwise adversely affected his substantial rights.[11] 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.[12]

In the instant case, when read as a whole, the jury instructions correctly stated the law regarding the presumption of innocence, adequately covered the issue, and were not misleading. Jury instruction No. 2 clearly stated that Henry was "presumed to be innocent" and that the jury was required to find him not guilty "unless" the State proved him guilty beyond a reasonable doubt. These statements were not negated by the inclusion of the words "and until," nor did such words create confusion. To the contrary, the U.S. Supreme Court has employed the phrase "unless and until" when explaining the presumption of innocence.[13] In light of this fact, we reject Henry's argument that the words "and until" created a presumption of guilt or otherwise made jury instruction No. 2 improper. This assignment of error lacks merit.

2. Assignment of Error No. 2

Henry assigns that the district court erred in allowing Bowen, who performed the autopsy of Jorgensen's body, to

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[10] Brief for appellant at 31.

[11] *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015).

[12] *Id.*

[13] See *Clark v. Arizona*, 548 U.S. 735, 766, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006).

testify at the trial. Henry challenges Bowen's testimony only on the ground that it was inadmissible under § 29-1913. Henry argues that because the body was cremated, evidence of the autopsy and cause of death should not have been admitted at trial. In addition, Henry refers to the "graphic and gruesome" photographs that were received into evidence during Bowen's testimony.[14]

(a) Statutory Scheme

Section 29-1913 provides as follows:

> (1) When in any felony prosecution or any prosecution for a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, the evidence of the prosecuting authority consists of *scientific tests or analyses of ballistics, firearms identification, fingerprints, blood, semen, or other stains, upon motion of the defendant* the court where the case is to be tried *may order* the prosecuting attorney to make available to the defense *such evidence* necessary to allow the defense to conduct *like tests or analyses with its own experts*. . . .
>
> (2) If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority *shall* not be admitted into evidence.

(Emphasis supplied.)

Section 29-1913 is part of a series of discovery statutes. The principal and broader discovery statute, Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2014) provides that the defendant may request an order permitting the defendant to inspect and copy, among other things, the "results and reports of

[14] Brief for appellant at 34.

physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case." Under § 29-1912(2), the court "may" issue such a discovery order considering, in the exercise of its discretion, several listed factors. Neb. Rev. Stat. § 29-1919 (Reissue 2008) provides that if a party fails to comply with a court's order pursuant to Neb. Rev. Stat. §§ 29-1912 to 29-1921 (Reissue 2008 & Cum. Supp. 2014), the court "may," "[p]rohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed"[15] or issue such other order as it deems just under the circumstances.[16]

Section 29-1913 is unique insofar as it contains both discretionary elements and matters of right. From the plain usage of the term "may," whether to grant the requested discovery order under § 29-1913(1) is a matter of discretion, just as any other order of discovery under § 29-1912.[17] But, unlike the "may" language of § 29-1919, which applies generally to failure to comply with discovery orders, § 29-1913 states that the court "shall" not admit the prosecuting authority's tests or analyses described in subsection (1), "[i]f the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests . . . ."[18] Under this plain language, exclusion of the described tests or analyses is a mandatory sanction for violation of the discovery order issued under § 29-1913, in the event of unavailability due to neglect or intentional alteration as described in the statute.

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[15] § 29-1919(3).

[16] § 29-1919(4).

[17] See, *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014); *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008); *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

[18] § 29-1913(2).

(b) Plain Language of § 29-1913 Does Not Include Testing of Bodies

The State argues that § 29-1913 is plainly limited to "scientific tests or analyses of ballistics, firearms identification, fingerprints, blood, semen, or other stains," and does not apply to the testing of bodies. We agree that the plain language of § 29-1913 does not encompass the testing of bodies, as such.

We have little case law discussing § 29-1913. What case law we have almost exclusively concerns tests of blood, which are encompassed by the plain language of the statute.[19]

Henry points out that in *State v. Brodrick*,[20] we applied § 29-1913 to the analysis of a drug tablet, which is not an item listed in the statute. We held that the court erred in denying the defendant's motion to suppress the testimony of the chemist who determined that a tablet consisted of a controlled substance. Prior to the motion to suppress, the defendant had moved for a discovery order to permit him to have an independent analysis conducted on the tablet.[21] But the tablet had been discarded by the chemist, despite the fact that the chemist had been asked by the county attorney to preserve part of the tablet if possible. It was undisputed that it would have been possible to preserve the tablet. We concluded that the destruction of the tablet constituted neglect under § 29-1913.

In contrast to *Brodrick*, however, in *State v. Batchelor*,[22] we conducted our analysis under §§ 29-1912 and 29-1919 to determine whether a chemical test of a tablet should have been suppressed. We found that where the evidence was conflicting as to whether the chemist could have preserved the tablet determined to be a controlled substance, the trial

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[19] See, *State v. Peterson*, 242 Neb. 286, 494 N.W.2d 551 (1993); *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989).

[20] *State v. Brodrick*, 190 Neb. 19, 205 N.W.2d 660 (1973). See, also, *State v. Batchelor*, 191 Neb. 148, 214 N.W.2d 276 (1974).

[21] *State v. Brodrick, supra* note 20.

[22] *State v. Batchelor, supra* note 20.

court did not abuse its discretion in denying the motion to suppress.[23]

In *State v. Davlin*,[24] we expressed doubt as to whether a victim's larynx, extracted during an autopsy of the victim's body, fell within the purview of § 29-1913. In a case where the victim's cause of death was at issue, the defendant had sought suppression of the victim's autopsy, because the State had lost the victim's larynx after the autopsy was conducted. But we held that by not properly objecting below, the defendant in *Davlin* had waived any issue under § 29-1913.

We also noted in dicta that while the defendant sought to exclude the entirety of the autopsy evidence, the statutory language clearly refers to exclusion of "tests or analyses" performed on the evidence that is unavailable to the defense.[25] We said that "even if the unavailable evidence . . . was within the scope of § 29-1913," the remedy would be exclusion of the tests or analyses of the unavailable evidence, not of the entire autopsy.[26]

We explained that "[t]he effect of § 29-1913(2) is to level the playing field when evidence is unavailable and prevent the prosecuting authority from making use of evidence that was not available to the defense."[27] And the tests or analyses presented by the State at trial did not rely on the missing larynx. The pathologist determined the victim's cause of death by relying on blood tests and the examination of body parts other than the larynx.[28]

[12] We will not read into a statute a meaning that is not there,[29] and there are logical reasons the Legislature would

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[23] *Id.* See, also, *State v. Peterson, supra* note 19.

[24] *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[25] *Id.* at 298, 639 N.W.2d at 646.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

have intended the tests or analyses encompassed by § 29-1913 to be limited to tests or analyses of "ballistics, firearms identification, fingerprints, blood, semen, or other stains." Particularly, there are reasons why the Legislature would not have intended this statute to apply to bodies.

Unlike other evidence, a person's body is uniquely connected to the emotional feelings of the deceased's relatives, who wish to dispose of their loved one's remains as they see fit, rather than preserve them for duplicative tests or analyses.[30] Cremation of a body may be an "intentional alteration by representatives of the prosecuting authority,"[31] but considerations are at play in doing so at the behest of the victim's family, which considerations are not present with "ballistics, firearms identification, fingerprints, blood, semen, or other stains."[32]

Also, unlike "ballistics, firearms identification, fingerprints, blood, semen, or other stains," a body will naturally deteriorate and is difficult to preserve as a whole unit. Conservation should be required only of those individual body parts or samples that the State intends to offer tests of and that are capable of being specially preserved in order to retest or reanalyze them in a manner similar to those items listed by the statute. Most of such parts or samples, of course, actually are "fingerprints, blood, semen, or other stains."

(c) Mandatory Suppression Is Not Triggered Absent Discovery Motion

[13] But even if § 29-1913 were to apply to a body or any of its parts that are not "fingerprints, blood, semen, or other stains," we agree with the State that there was no obligation for the district court to suppress the evidence without a motion by Henry that the specific evidence be made available to conduct like tests or analyses. For, in the absence of any discovery

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[30] See *People v. Vick*, 11 Cal. App. 3d 1058, 90 Cal. Rptr. 236 (1970).

[31] See § 29-1913(2).

[32] See § 29-1913(1).

motion under § 29-1913(1), there is no discovery order, and without a discovery order, there can be no violation requiring suppression of the evidence.

We can find no case wherein we have reached a holding under § 29-1913, and the defendant had failed to file a motion under § 29-1913(1) to make available to the defense the evidence necessary to conduct like tests or analyses. To the contrary, in cases decided under § 29-1913, the defendant's motion for discovery of the relevant evidence and the corresponding discovery order is explicitly noted in our analysis.[33]

Indeed, in *State v. Tanner*,[34] we said that because the defendant failed to demand that the blood sample be produced, which was allegedly coagulated and untestable for unknown reasons, the defendant waived production of the sample and the corresponding sanctions under § 29-1913(2).

In *Batchelor*,[35] decided under §§ 29-1912 and 29-1919, we similarly found decisive that the defendant failed to specifically request discovery of a graph produced as part of the chemical testing, which the State had failed to preserve. We explained that the defendant could not obtain suppression of the chemical test based on the destruction of a graph that was not subject to a discovery motion.[36]

Henry argues that a motion for discovery under § 29-1913(1) would have been futile, because Jorgensen's body had been cremated before Henry was charged with the murder and appointed an attorney. Since it would have been impossible for the State to comply with any discovery order issued in response to a motion under § 29-1913(1), Henry argues that a motion under § 29-1913(1) was not a necessary prerequisite to the mandatory sanctions under § 29-1913(2).

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[33] See, *State v. Peterson, supra* note 19; *State v. Tanner, supra* note 19; *State v. Brodrick, supra* note 20. But see *State v. Davlin, supra* note 24.

[34] *State v. Tanner, supra* note 19.

[35] *State v. Batchelor, supra* note 20.

[36] *Id.*

[14] We find no merit to Henry's futility argument. Section 29-1913(1) plainly states that a discovery order may be issued "upon motion of the defendant." We will not conclude that because the State in good faith destroyed evidence before a defense discovery motion under § 29-1913 could be made, the district court was obliged to suppress the State's tests or analyses under § 29-1913(2) without any motion for discovery under § 29-1913(1).

Without a discovery motion under § 29-1913(1), the trial court cannot know the precise issue presented and make the necessary factual findings in determining whether an order of discovery should be granted. And, without a proper discovery order and a claim of the violation of such order being brought to the court's attention, the court cannot properly determine whether the evidence subject to the order was, in fact, unavailable and whether it was unavailable due to neglect or intentional alteration.

[15] Simply put, the mandatory sanction of suppression provided for under § 29-1913(2) cannot be triggered unless these discretionary determinations have first been made upon a proper motion. Thus, a discovery motion under § 29-1913(1) is a prerequisite for sanctions under § 29-1913(2). A suppression motion cannot serve as a substitute for a discovery motion.[37]

(d) Trial Court Did Not Abuse Its Discretion in Denying Motion to Suppress

Particularly here, without a proper discovery motion under § 29-1913(1), the court and the State were left to guess what similar tests Henry wished his experts to conduct. Henry sought to suppress all evidence derived from the autopsy, but without an appropriate motion, it was unclear what tests Henry sought to retest or reanalyze, or whether some individual body part or fluid was Henry's real object.

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[37] See *id.*

It was unclear whether Henry contested Jorgensen's cause of death. The ultimate scientific analysis entered into evidence as a result of the autopsy was that Jorgensen died of multiple stab wounds. Henry did not contest that Jorgensen was stabbed multiple times or that he bled profusely as a result. And these facts were confirmed by the testimony of the officers who arrived at the scene and by the photographs they took. In denying Henry's motion under § 29-1913(1), the court noted that after having appointed Henry an independent pathologist and given full access to Bowen's report, the autopsy photographs, and any evidence retained by Bowen as a result of the autopsy, Henry did not contest Jorgensen's cause of death.

Henry failed to explain how reanalysis of Jorgensen's body could have led to a different determination. Henry's pathologist certainly did not indicate that the absence of the body hindered the pathologist's determination of cause of death. While there was methamphetamine found in Jorgensen's decomposition fluids, the State pathologist's determination of Jorgensen's cause of death did not depend on the chemical tests of the decomposition fluids. Rather, Bowen determined that based on the amount of hemorrhaging from the stab wounds, Jorgensen was alive at the time he was stabbed and that therefore, he did not die from methamphetamine.

Having concluded that the mandatory sanctions of § 29-1913(2) were not triggered, Henry's motion to suppress was a matter within the court's discretion.[38] Henry failed to provide sufficient grounds upon which we could conclude that the district court abused its discretion in denying the motion to suppress. We find no merit to Henry's second assignment of error.

3. Assignment of Error No. 3

Henry assigns that the district court erred in overruling his motion for a bill of particulars by which he sought to know

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[38] See *State v. Henderson, supra* note 3.

the names of the "'potential robbery victim or victims'" mentioned in count IV of the amended information. He argues that without identifying the victim or victims, the language of the information was not sufficient to charge him with conspiracy to commit robbery. We do not agree.

[16] We have stated that where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.[39] Neb. Rev. Stat. § 28-202(1) (Reissue 2008), which defines criminal conspiracy, states:

> A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

Significantly, this definition refers to the conduct and result "specified by the definition of the offense" to which the persons have conspired to commit, but it does not mention the identity of the victim of the underlying offense.[40]

[17] We additionally note that this court has established that it is not necessary to a charge of robbery to name the alleged victim.[41] In *State v. Smith*,[42] we specifically rejected the argument that the charge for robbery in an information was insufficient because it failed to indicate the victim of the alleged robbery. Therefore, in order to allege the existence of an

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[39] See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[40] See *id.*

[41] See, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Nicholson*, 183 Neb. 834, 164 N.W.2d 652 (1969).

[42] *State v. Smith, supra* note 41.

agreement to commit robbery, it was not necessary to identify the alleged victim or victims of such robbery.[43]

In the instant case, count IV of the amended information used the language of § 28-202(1) to charge Henry with criminal conspiracy to commit robbery. It alleged that "with the intent to promote or facilitate the commission of felony robbery," he "agree[d] with one or more persons to engage in the result specified by the definition of the offense of robbery" and that "he or another person with whom he conspired committed an overt act in pursuance of the conspiracy." This language corresponded to that of § 28-202(1) and was thus sufficient to charge Henry with criminal conspiracy to commit robbery.[44] The district court did not err in overruling Henry's motion for a bill of particulars.

4. Assignment of Error No. 4

Henry assigns that the district court erred in overruling his motion to sever count IV from the other three counts for trial. The joinder or separation of charges for trial is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2008), 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.
>
> . . . .
>
> (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,

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[43] *Id.*

[44] See *State v. Davlin, supra* note 39.

informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Under § 29-2002, whether offenses were properly joined involves a two-stage analysis in which we first determine whether the offenses were related and joinable and then determine whether an otherwise proper joinder was prejudicial to the defendant.[45]

(a) Offenses Properly Joinable

The first question is whether count IV, which alleged a conspiracy to commit robbery, was properly joinable with counts I, II, and III, which related to Jorgensen's murder. Offenses are properly joinable under § 29-2002(1) if they "'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.'"[46]

Henry argues that count IV "was completely separate and apart from the other counts of the Information," because it related to the conspiracy to rob a person named "Tony" and not to Jorgensen.[47] But the testimony at trial established that Jorgensen's murder and the conspiracy to rob Tony were not unrelated but were in fact "connected together" and "parts of a common scheme or plan."[48] Critser testified that they went to Jorgensen's house in order to obtain the money they needed to buy a gun to use in the robbery of Tony. In other words, the plan to go to Jorgensen's house developed from the conspiracy to rob Tony. Accordingly, count IV was properly joinable with counts I, II, and III.

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[45] See *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014), *cert. denied* 574 U.S. 1197, 135 S. Ct. 1505, 191 L. Ed. 2d 442 (2015).

[46] *Id.* at 830, 852 N.W.2d at 316. See, also, *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[47] Brief for appellant at 43.

[48] See § 29-2002(1).

(b) Joinder Not Prejudicial

Even if offenses are properly joinable, § 29-2002(3) provides that severance may be granted if the joinder would be prejudicial. A defendant opposing joinder of charges has the burden of proving prejudice.[49]

Henry argues that he was prejudiced by having count IV tried with the other counts for only one reason: It allowed the State to adduce evidence that would not have been relevant in a separate trial on counts I, II, and III, namely, the text messages. But this claim is not supported by the facts. The plan to go to Jorgensen's developed from the conspiracy to rob Tony, which itself developed by text message and in-person conversations. Thus, even though the text messages do not mention Jorgensen, they would have been relevant in a separate trial of counts I, II, and III. The joinder of offenses did not prejudice Henry by allowing for the introduction of the text messages.

Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant.[50] Henry has failed to establish that he was prejudiced by the otherwise proper joinder of count IV to the other offenses. We thus conclude that the district court did not err in overruling his motion to sever.

5. Assignment of Error No. 5

Henry assigns, but does not argue, that the district court erred in failing to grant a new trial. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[51] Therefore, we do not consider this assignment of error.

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[49] See *State v. Knutson, supra* note 45.

[50] *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009).

[51] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

6. Assignment of Error No. 6

Henry assigns that the district court erred in admitting exhibits 83, 84, and 86. He does not appear to challenge exhibit 90. Exhibit 90 was admitted for foundational purposes only, and it was never seen by the jury. Exhibit 83 is simply a printout of the first compact disc of exhibit 90, and it was likewise entered into evidence for foundational purposes only. Because it was never seen by the jury and it does not affect our analysis of the admissibility of exhibits 84 and 86, we will not address whether the court erred in "admitting" exhibit 83.

(a) Foundation

[18] Henry objected to the exhibits principally on the ground of foundation, and that is his principal argument on appeal. A growing body of case law has developed concerning the admissibility of text messages.[52] Generally, the foundation for the admissibility of text messages has two components: (1) whether the text messages were accurately transcribed and (2) who actually sent the text messages.[53]

Henry did not seem to dispute at trial that the text messages were accurately transcribed from the cell phone numbers identified in the exhibits, other than to the extent he asserted "text spoofing" could misidentify the sending cell phone number. We find the testimony of Bell and Weinmaster was sufficient to authenticate the exhibits under Neb. Rev. Stat. § 27-901 (Reissue 2008) as accurate transcriptions of the text messages from the two cell phones examined. We find no merit to Henry's argument that there was insufficient authentication of the exhibits, because Bell and Weinmaster were "only

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[52] See, *U.S. v. Barnes*, 803 F.3d 209 (5th Cir. 2015); *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014); *State v. Koch*, 157 Idaho 89, 334 P.3d 280 (2014); *State v. Otkovic*, 322 P.3d 746 (Utah App. 2014); *Gulley v. State*, 2012 Ark. 368, 423 S.W.3d 569 (Oct. 4, 2012); *State v. Thompson*, 777 N.W.2d 617 (N.D. 2010); *State v. Franklin*, 280 Kan. 337, 121 P.3d 447 (2005); Annot., 34 A.L.R.6th 253 (2008).

[53] See *State v. Thompson, supra* note 52.

familiar with one phone and one phone number and had no actual knowledge of what the other phone or phone number contained."[54]

Henry claims there was not sufficient foundation that he in fact sent the text messages attributed to him. Specifically, Henry points out the lack of evidence that he was the record owner of the cell phone corresponding to the number 402-367-8802 and the facts that the cell phone corresponding to that number was found in a post office dropbox and that a person named "Cowboy" claimed ownership of the cell phone. Further, Henry points out that a sender of a text message can, through "text spoofing," make it appear that the text message was sent from one cell phone number when it was actually sent from another number.

[19] In similar cases, testimony concerning context or familiarity with the manner of communication of the purported sender is sufficient foundation for the identity of the sender of the message.[55] Such testimony is typically in combination with testimony that the cell phone number belonged to or was regularly utilized by the alleged sender.[56] The proponent of the text messages is not required to conclusively prove who authored the messages.[57] The possibility of an alteration or misuse by another generally goes to weight, not admissibility.[58]

Despite the fact that the cell phone was found in a post office and there was no record ownership established, there was testimony at trial identifying Henry as the regular user of the cell phone number in question. Critser testified that he had programmed that number under the name "E." Benson

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[54] Brief for appellant at 47.

[55] See, e.g., *State v. Franklin, supra* note 52.

[56] See, *U.S. v. Barnes, supra* note 52; *State v. Koch, supra* note 52; *State v. Otkovic, supra* note 52; *Gulley v. State, supra* note 52; *State v. Blake*, 2012 Ohio 3124, 974 N.E.2d 730 (2012).

[57] See *State v. Elseman, supra* note 52.

[58] See *id.*

testified that Henry answered when she called that number. Furthermore, the identity of Henry as the sender of the messages was sufficiently established through Critser's testimony that he knew the messages were from Henry by their context and familiarity with how Henry talked.

The district court did not abuse its discretion in overruling Henry's foundation objections to the text messages.

(b) Hearsay

Henry also asserts that the text messages were inadmissible hearsay. Our analysis of this assertion is complicated by the fact that Henry made just one general hearsay objection to the exhibits as a whole without any discussion of what particular statements were inadmissible under such objection and why. It was unclear whether Henry even drew any meaningful distinction between his foundation and his hearsay objections. Thus, the parties and the court did not discuss Henry's hearsay objection, and the court generally overruled the hearsay objection without elaboration and without making any explicit findings of fact.

[20,21] It is generally sufficient to make a general hearsay objection to a specific statement, but a general hearsay objection to the entirety of a witness' testimony or to multiple statements in an exhibit, each admissible or objectionable under differing theories, is not usually sufficient to preserve the hearsay objection.[59] Rather, the opponent to the evidence must identify which statements are objectionable as inadmissible hearsay.[60]

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[59] See, *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749; *McMartin v. State*, 95 Neb. 292, 145 N.W. 695 (1914); *Moyer v. State*, 948 S.W.2d 525 (Tex. App. 1997); *Thompson v. State*, 589 So. 2d 1013 (Fla. App. 1991); *State v. Brown*, 310 Or. 347, 800 P.2d 259 (1990); *Jackson v. State*, 213 Ga. 275, 98 S.E.2d 571 (1957).

[60] See, *McMartin v. State, supra* note 59; *Moyer v. State, supra* note 59; *Thompson v. State, supra* note 59; *State v. Brown, supra* note 59; *Jackson v. State, supra* note 59.

Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objections and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.[61]

[22-24] Once the proponent of evidence shows that the proposed evidence is relevant and competent, it is presumptively admissible.[62] It is the party objecting to the evidence as hearsay who bears the burden of production and persuasion that the objected-to evidence is in fact hearsay.[63] Once the opponent demonstrates the evidence is hearsay, the burden shifts to the proponent to lay the foundation for one of the exceptions to the hearsay rule.[64] Neither the trial court nor the appellate court are obliged to sort the statements out on the opponent's behalf.[65] And where the reason for the trial court's overruling of a hearsay objection is left at large, arguably, it is the opponent's burden to demand an explanatory ruling.[66]

[25] Henry's hearsay objection was thus arguably waived. But we conclude, in any case, that the text messages were properly admitted into evidence. Regardless of whether the proponent or the trial court articulated no theory or the wrong theory of admissibility, an appellate court may affirm the

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[61] *State v. Gutierrez, supra* note 59.

[62] See, Neb. Rev. Stat. § 27-402 (Reissue 2008); G. Michael Fenner, *Evidence Review: The Past Year in the Eighth Circuit, Plus Daubert*, 28 Creighton L. Rev. 611 (1995).

[63] G. Michael Fenner, The Hearsay Rule 58 (2003).

[64] See, e.g., *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); *American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534 (7th Cir. 1999); *U.S. v. Samaniego*, 187 F.3d 1222 (10th Cir. 1999); *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995).

[65] See, *McMartin v. State, supra* note 59; *Moyer v. State, supra* note 59; *Thompson v. State, supra* note 59; *State v. Brown, supra* note 59; *Jackson v. State, supra* note 59.

[66] See *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933).

ultimate correctness of the trial court's admission of the evidence under any theory supported by the record, so long as both parties had a fair opportunity to develop the record and the circumstances otherwise would make it fair to do so.[67]

In *United States v. Rosenstein*,[68] the court accordingly affirmed the admission of evidence under the coconspirator exclusion to the hearsay rule, even though the evidence was admitted at trial under the business records exception. The court rejected the opponent's argument that admission of the evidence could not be affirmed on appeal under the coconspirator exclusion because the trial court failed to make at trial the requisite foundational findings that the statements were in furtherance of a conspiracy. The court said that it would make a post hoc determination on appeal of whether the record supported the exclusion.[69] It found that doing so did not in any way impinge upon any jury function.[70] The court explained that no unfairness results under circumstances where the evidence is deemed on appeal admissible for the truth of the matter asserted, because no different or other limiting instruction would have been necessary to explain to a jury its limited purpose.[71]

We conclude that the record supports the admissibility of the text messages in light of the hearsay rule and that it is fair to affirm the admission of the text messages under theories that neither the State nor the court articulated below—in large part due to the vagueness of Henry's objection. Specifically, for the reasons that follow, we conclude that the text messages by Henry are admissions by a party opponent and that the text messages from Critser are statements of a coconspirator. As

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[67] See, *U.S. v. Paulino*, 13 F.3d 20 (1st Cir. 1994); *U.S. v. Williams*, 837 F.2d 1009 (11th Cir. 1988); *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[68] *United States v. Rosenstein, supra* note 67.

[69] *Id.*

[70] *Id.* Compare *Shepard v. United States, supra* note 66.

[71] See *United States v. Rosenstein, supra* note 67.

for the remaining text messages between Benson and Critser, if inadmissible hearsay, we conclude the admission of those text messages was harmless.

(i) Henry's Statements

The State argues that the text messages sent by Henry were admissible under § 27-801(4)(b)(i), because they are statements of a party opponent. We agree. These text messages were "offered against" Henry and contained "his own statement[s]."[72] As such, under § 27-801(4)(b)(i), they were not hearsay.

(ii) Critser's Statements to Henry

We conclude that Critser's statements to Henry were admissible as nonhearsay under the coconspirator exclusion to the hearsay rule. The coconspirator exclusion, found in § 27-801, provides: "(4) A statement is not hearsay if . . . (b) [t]he statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The coconspirator exclusion is another kind of "admissions" nonhearsay, attributable to the principal as an agent.[73] Under § 27-801(4)(b)(v), statements offered against a party that are made by a coconspirator of the party during the course of and in furtherance of the conspiracy are not hearsay and are admissible.

[26] The rule that a statement by a coconspirator is not hearsay if made during the course and in furtherance of a conspiracy is construed broadly in favor of admissibility.[74] The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another, but it also "requires an 'overt act.'"[75]

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[72] See § 27-801(4)(b)(i).

[73] See David F. Binder, Hearsay Handbook, 4th § 35:9 (2015-16 ed.).

[74] *U.S. v. McMurray*, 34 F.3d 1405 (8th Cir. 1994).

[75] *State v. Hansen*, 252 Neb. 489, 500, 562 N.W.2d 840, 849 (1997).

[27,28] A conspiracy is ongoing until the central purposes of the conspiracy have either failed or been achieved.[76] There is no talismanic formula for ascertaining when a coconspirator's statements are in furtherance of the conspiracy; a statement need not be necessary or even important to the conspiracy, as long as it can be said to advance the goals of the conspiracy as opposed to thwarting its purpose.[77] But if the statements are merely idle chatter, took place after the conspiracy ended, or are merely narrative of past events, they are not admissible.[78]

Ideally, the trial court would make a finding that there was a conspiracy and that the statements admitted under the coconspirator exclusion were in the course and in furtherance of the conspiracy.[79] Obviously, that foundational finding was not made here, because the court did not articulate this theory of admissibility in overruling Henry's generalized hearsay objection. Nevertheless, we note that in a slightly different context, when Henry objected on hearsay grounds to Critser's testimony about what Henderson said at Jorgensen's house, the court found that the coconspirator exclusion to the hearsay rule set forth in § 27-801(4)(b) applied. Henry even seemed to concede at that time the existence of a conspiracy to rob Tony; he merely contested whether there was a conspiracy to rob or murder Jorgensen.

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[76] See *id*. See, also, e.g., *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

[77] See, e.g., *U.S. v. Martinez-Medina*, 279 F.3d 105 (1st Cir. 2002); *U.S. v. LiCausi*, 167 F.3d 36 (1st Cir. 1999).

[78] See, *State v. Gutierrez, supra* note 59; *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977).

[79] See, *U.S. v. Wright*, 932 F.2d 868 (10th Cir. 1991), *overruled on other grounds, U.S. v. Flowers*, 464 F.3d 1127 (10th Cir. 2006); *United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984); *State v. Alvarez*, 820 N.W.2d 601 (Minn. App. 2012). See, also, *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

In any event, the testimony of Critser, Henderson, and Benson sufficiently established that Critser, Henderson, and Henry were conspiring to rob Tony. Although much of this foundational testimony was adduced after exhibits 84 and 86 were entered into evidence, a correct evidentiary ruling will not be reversed simply because the foundational proof came at the wrong time.[80] And there is no bright-line requirement that the independent evidence of a conspiracy must precede the admission of coconspirator statements.[81]

a. May 15 and 16

The text messages sent on May 15 and 16, 2013, were part of the text message conversation during which Critser and Henry first conceived of their plan to commit a robbery. By the fifth text message of this conversation, Henry had proposed that Critser come to Columbus to help Henry commit a robbery, and by the sixth, Critser had agreed. Over the remaining text messages in the conversation, they made arrangements for Henry to pick up Critser and discussed finding a gun. These text messages were clearly sent during the course and in furtherance of the conspiracy.

b. May 19 to 25

The text messages written by Critser between May 19 and 25, 2013, were part of an ongoing conversation with Henry about covering up their involvement in Jorgensen's murder.

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[80] See, *U.S. v. Williams, supra* note 67; *State v. Alvarez, supra* note 79.

[81] See, *State v. Gutierrez, supra* note 59; *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Conn*, 12 Neb. App. 635, 685 N.W.2d 357 (2004). See, also, e.g., *United States v. Fleishman*, 684 F.2d 1329 (9th Cir. 1982); *United States v. Clark*, 649 F.2d 534 (7th Cir. 1981); *United States v. Vargas-Rios*, 607 F.2d 831 (9th Cir. 1979); *United States v. Nelson*, 603 F.2d 42 (8th Cir. 1979); *State v. Thompson*, 273 Minn. 1, 139 N.W.2d 490 (1966); 6 Michael H. Graham, Handbook of Federal Evidence § 801:25 (7th ed. 2012 & Supp. 2016).

In these messages, Critser discussed (1) the proceeds from the murder; (2) disposing of Jorgensen's keys and the clothes they had worn during the murder; (3) getting rid of any fingerprints at the scene of the murder, either by breaking into Jorgensen's house or by burning it down; (4) being scared of getting caught; (5) looking for a gun; and (6) meeting up with Henry. These were also in the course and in furtherance of the conspiracy to rob Tony.

[29] The definitional exclusion to the hearsay rule applies to the coverup or concealment of the conspiracy that occurs while the conspiracy is ongoing, just as it would to any other part of the conspiracy.[82] Also, "[a] conspiracy to obtain money illegally does not end until the money is obtained or the conspirators have stopped trying to obtain it."[83]

The conspiracy to rob Tony was still ongoing at the time Henry sent the text messages between May 19 and 25, 2013. The central purpose of the conspiracy to rob Tony had not been achieved. Neither had the conspiracy been abandoned or defeated at the time of the statements concerning concealment of evidence linked to Jorgensen's murder. To the contrary, after Jorgensen's murder, Henry continued to pursue and eventually obtain a gun with which to rob Tony, and he continued to try to make arrangements to get Critser to return to Columbus.

[30] The statements between May 19 and 25, 2013, relating directly to the concealment of Jorgensen's murder, were in furtherance of this ongoing conspiracy to rob Tony. Whether it was the conspirators' original plan to murder Jorgensen, Jorgensen was murdered during the conspirators' attempt to get money from Jorgensen in order to buy a gun with which to rob Tony. And covering up the murder of Jorgensen was in furtherance of the ongoing conspiracy to rob Tony, because,

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[82] Fenner, *supra* note 63, p. 102.

[83] Binder, *supra* note 73, § 35:13 at 996.

if the conspirators were caught for the murder of Jorgensen, then they would not be able to rob Tony.[84] When a conspiracy involves a sequence of objectives, concealment is usually an integral part thereof.[85]

[31,32] While a conspirator's statements during an ongoing conspiracy will not be in furtherance of the conspiracy if made after the conspirator's withdrawal from the conspiracy, Critser did not withdraw from the conspiracy before making the statements between May 19 and 25, 2013.[86] Upon proof of participation in a conspiracy, a conspirator's continuing participation is presumed unless the conspirator demonstrates affirmative withdrawal from the conspiracy.[87] And to withdraw from a conspiracy such that statements of a coconspirator are inadmissible, the coconspirator must do more than ceasing, however definitively, to participate.[88] Rather, the coconspirator must make an affirmative action either by making a clean breast to the authorities or by communicating abandonment in a manner calculated to reach coconspirators, and must not resume participation in the conspiracy.[89]

Although Critser indicated at trial that he had no real intention of returning to Columbus to carry out the robbery of Tony, he did not affirmatively communicate his abandonment of the conspiracy to Henry or Henderson. To the contrary, Critser

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[84] See, e.g., *U.S. v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996); *United States v. Pecora*, 798 F.2d 614 (3d Cir. 1986); *United States v. Del Valle*, 587 F.2d 699 (5th Cir. 1979); *Neal v. State*, 104 Neb. 56, 175 N.W. 669 (1919); *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976).

[85] See *United States v. Del Valle, supra* note 84.

[86] See, e.g., *U.S. v. Zizzo*, 120 F.3d 1338 (7th Cir. 1997).

[87] *U.S. v. Patel*, 879 F.2d 292 (7th Cir. 1989); *United States v. Gibbs*, 739 F.2d 838 (3d Cir. 1984); *United States v. Basey*, 613 F.2d 198 (9th Cir. 1979); 29A Am. Jur. 2d *Evidence* § 853 (2008).

[88] See, *U.S. v. Robinson*, 390 F.3d 853 (6th Cir. 2004); *U.S. v. Zarnes*, 33 F.3d 1454 (7th Cir. 1994); *U.S. v. Patel, supra* note 87.

[89] *U.S. v. Hubbard*, 22 F.3d 1410 (7th Cir. 1994); *U.S. v. Patel, supra* note 87.

complained of not having received any money, indicated his willingness to try to obtain a gun with which to rob Tony, and indicated he would return to Columbus to carry out the robbery of Tony.

The text messages sent by Critser between May 19 and 25, 2013, were made during the course of and in furtherance of the conspiracy.

(iii) Statements Between Benson and Critser

Because Benson was not part of the conspiracy to rob Tony, the messages between Benson and Critser do not fall under the exclusion found in § 27-801(4)(b)(v).[90] No other exclusion or exception would appear to apply to these statements to make them admissible for the truth of the matters asserted. But we find their admission harmless.

[33] Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.[91] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered was surely unattributable to the error.[92] Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.[93]

The majority of the text messages sent between Critser and Benson concerned the argument they had before Critser left for Columbus. Benson and Critser had a text message conversation during which she stated, "I am pissed that you're leaving

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[90] See Fenner, *supra* note 63, p. 97.

[91] *State v. Lavalleur*, 289 Neb. 102, 853 N.W.2d 203 (2014).

[92] *Id.*

[93] *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014).

to go to commit crimes" and "your friend needs to learn some damn respect. This isn't his apartment to leave his trash around. That really pissed me off."

We find the admission of these text messages harmless, because they were cumulative not only to the text messages properly admitted but also to Benson's and Critser's testimony. Benson testified without objection (1) that she was "kind of upset" about Critser's letting Henry into her apartment and (2) that when Critser left on May 16, 2013, she believed he was going "[t]o go rob people for money and drugs." Critser similarly testified about the argument he had with Benson.

The remaining text messages entered into evidence contained statements about matters completely unrelated to this case, such as Benson's daughter's birthday and Benson's purchases at a discount store. These messages concerning matters unrelated to the case could not have materially influenced the jury in reaching its verdict.

(c) Rule of Completeness

[34] Finally, Henry asserts that exhibits 84 and 86 were inadmissible under the rule of completeness.[94] Henry's objection that the exhibits were inadmissible under the rule of completeness, to the extent it was timely made below, has no merit. The "'rule of completeness'" states that an opponent may require one introducing part of a writing or statement to introduce any part which ought in fairness to be considered with the part introduced.[95] We find no merit to any contention that the relevant text messages lacked proper context or were somehow incomplete without text messages sent to and from persons unrelated to the case and pertaining to unrelated matters simply because all the messages were extracted during the same forensic examination of the cell phones and placed in the same documents prepared by the examiners.

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[94] *Id.*

[95] *State v. Manchester*, 213 Neb. 670, 679, 331 N.W.2d 776, 782 (1983).

7. Assignment of Error No. 7

Henry next assigns that the district court erred in allowing exhibits 84 and 86 to go to the jury room. His argument on this assignment of error encompasses exhibit 84 but not exhibit 86. As such, our review necessarily will be limited to exhibit 84.[96]

This court has previously noted that, generally, a trial court does not have discretion to submit testimony materials to the jury for unsupervised review, but that the trial court has broad discretion to submit to the jury nontestimonial exhibits, in particular, those constituting substantive evidence of the defendant's guilt.[97]

Within this context, we have concluded that testimony materials include "live testimony at trial by oral examination or by some substitute for live testimony, including but not limited to, affidavit, deposition, or video recording of an examination conducted prior to the time of trial for use at trial."[98] Conversely, we have found that transcripts of online conversations "were not testimonial material but instead were substantive evidence of [the defendant's] guilt," because the transcripts proved that the defendant had used a computer to communicate with a person he believed to be under 16 years of age and that he had offered to engage in sexual activity with that person, both of which were elements of the crime charged.[99]

Similar to the transcripts of online conversations, exhibit 84 was a nontestimonial exhibit that contained substantive evidence of Henry's guilt. The exhibit was not prepared or offered as live testimony or as a substitute for live testimony. Nor was it transformed into a form of testimonial evidence by the fact that the State used the exhibit during its direct examination of Critser. Wholly apart from the testimony adduced at trial, the

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[96] See *State v. Cook, supra* note 51.

[97] *State v. Castaneda, supra* note 8.

[98] *State v. Vandever*, 287 Neb. 807, 816-17, 844 N.W.2d 783, 790 (2014).

[99] *State v. Pischel*, 277 Neb. 412, 427-28, 762 N.W.2d 595, 607 (2009).

text messages in exhibit 84 were proof that Henry agreed with another person (Critser) to engage in robbery in Columbus. Exhibit 84 thus constituted substantive evidence of one of the crimes charged.

Because exhibit 84 was a nontestimonial exhibit that contained substantive evidence of Henry's guilt, the district court had broad discretion to submit it to the jury for use during deliberations.[100] We conclude that the court did not abuse its discretion by doing so, and we reject this assignment of error.

8. Assignments of Error Nos. 8 and 9

We address Henry's final two assignments of error together, because they both relate to the State's questioning of Critser regarding exhibit 84. During this questioning, the State referred to the cell phone with the 402-367-8802 number as being Henry's cell phone and the text messages sent from that number as being from Henry. Moreover, much of the direct examination of Critser consisted of the State's either asking Critser to read text messages from the exhibit and explain what he understood them to mean or restating the content of text messages within questions.

Henry argues that the district court erred in allowing the State to ask questions which "contained the assumption that the message was from . . . Henry and not simply from a number."[101] The manner in which a witness may be examined is within the sound discretion of the court.[102] We do not find that the district court abused its discretion in permitting the State to refer to the text messages as being from Henry. As discussed, the State's evidence supported the inference that Henry was the person sending the text messages. Additionally, Henry had the opportunity to thoroughly cross-examine Critser and the State's other witnesses on the topic of who used the

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[100] See *State v. Castaneda, supra* note 8.

[101] Brief for appellant at 55.

[102] *Ederer v. Van Sant, supra* note 9.

cell phone found at the post office and whether the messages received on Benson's cell phone could falsely identify the sending number. Through such questioning, Henry reiterated that the State and its witnesses were only assuming, and could not be sure, that Henry sent the text messages.

[35] Henry also assigned that the district court erred in allowing the State to ask Critser what he understood the text messages to mean. However, Henry does not argue this assignment of error in his brief. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[103]

Even if Henry had preserved this issue for appeal by arguing it in his brief, we would not find that the district court abused its discretion in allowing the State to ask Critser what he understood the text messages to mean. The State established that Critser was qualified to give such testimony through its evidence (1) that Critser had "known [Henry] for quite a while" and was familiar with "how he talks" and (2) that Critser was familiar with the terminology of "the criminal world" from his time in prison. Moreover, Critser's explanation of the text messages was undoubtedly both relevant and helpful to the jury, given that the text messages contained numerous abbreviations and terms that may not have been familiar to the average person. We also note that Henry was allowed to thoroughly cross-examine Critser on the content of the text messages. For these reasons, we find no abuse of discretion in allowing the State to ask Critser about the meaning of the text messages.

VI. CONCLUSION

Finding no merit to Henry's assignments of error, we affirm the judgment below.

Affirmed.

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[103] *State v. Cook, supra* note 51.

Opal Lowman and David Lowman, appellants, v. State Farm Mutual Automobile Insurance Company, appellee.

874 N.W.2d 470

Filed February 26, 2016. No. S-14-823.

1. **Verdicts: Juries: Appeal and Error.** A jury's verdict may not be set aside unless clearly wrong, and a jury verdict is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.
2. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.

Appeal from the District Court for Douglas County: Joseph S. Troia, Judge. Affirmed.

Ronald J. Palagi and Donna S. Colley for appellants.

Paul M. Shotkoski and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellee.

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

Heavican, C.J.

INTRODUCTION

Opal Lowman and her husband, David Lowman, sued State Farm Mutual Automobile Insurance Company (State Farm) for injuries Opal suffered in an automobile accident. The jury entered a verdict for the Lowmans, but awarded no damages. The Lowmans appeal. We affirm.

FACTUAL BACKGROUND

Opal was injured in an automobile accident on May 8, 2010, when a vehicle driven by Carla Gibbs collided with Lowman's vehicle. On November 9, 2012, the Lowmans filed an amended complaint against State Farm, seeking damages for Opal's injuries. State Farm provided the Lowmans' underinsured motorist coverage.

Prior to trial, State Farm admitted that Gibbs was negligent. The matter went to trial on the question of causation and damages. At trial, Lowman withdrew her claim for loss of earning capacity and admitted that all of her medical bills had been paid. The Lowmans' counsel argued only that Opal was entitled to damages for pain and suffering.

The matter was submitted to the jury. The jury was instructed that in order to recover, the Lowmans must prove that the accident was the proximate cause of "some damage" to Opal and David, and the nature and extent of that damage. The instruction continued:

> If the Plaintiffs [the Lowmans] have met their burden of proof, then your verdict must be for the Plaintiffs, and you should complete Verdict Form No. 1.
>
> If the Plaintiffs have not met their burden of proof, then your verdict must be for the Defendant [State Farm] and you should complete Verdict Form No. 1.

The jury was provided with only one verdict form. This form, as provided to the jury, was preprinted with the following language: "We, the jury, duly impaneled and sworn in the above-entitled cause, do find for the said Plaintiffs and award damages in the amount of $____."

On May 6, 2014, after deliberating, the jury returned a verdict for the Lowmans in the amount of $0. The Lowmans subsequently filed a motion for new trial on May 15. That motion was overruled.

The Lowmans appeal.

ASSIGNMENTS OF ERROR

On appeal, the Lowmans assign that the district court erred in (1) receiving the jury's verdict in favor of them but awarding them $0, and in rendering judgment for them, and (2) denying the motion for new trial.

STANDARD OF REVIEW

[1,2] A jury's verdict may not be set aside unless clearly wrong, and a jury verdict is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.[1] On appeal, the fact finder's determination of damages is given great deference.[2]

ANALYSIS

The primary issue presented by this appeal is whether the jury verdict in favor of a plaintiff can be sustained where the jury awarded a plaintiff no money damages. We conclude that on these facts, such a verdict can be sustained.

We first addressed this basic issue in *Ambrozi v. Fry*,[3] wherein the jury returned a verdict for the plaintiff but awarded "'$ none'" in damages. The trial court sent the verdict back, informing the jury that if it found for the plaintiff, it must award some damages. The jury accordingly awarded $75. The plaintiff then sought a new trial, which was granted. The defendant appealed, arguing that the trial court erred in sending the verdict back and instead should have considered the verdict to be one for the defendant.

We disagreed. We first concluded that it was clear the jury intended to find for the plaintiff and award no damages and that it was proper for the court to seek to have that verdict corrected. We ultimately affirmed the grant of the new trial,

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[1] See *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[2] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[3] *Ambrozi v. Fry*, 158 Neb. 18, 19, 62 N.W.2d 259, 261 (1954).

but that was based on our determination that the plaintiff clearly suffered more than $75 in injuries and that the jury's award was inadequate.

We revisited the issue in *Bushey v. French*,[4] wherein the jury found for the plaintiff, but awarded "'$ No Money.'" The trial court then entered a judgment for the defendant, and the plaintiff appealed. Relying on Neb. Rev. Stat. § 25-1119 (Reissue 1956), which provided that "[w]hen . . . either party is entitled to recover money . . . the jury . . . must assess the amount of recovery," as well as cases from other jurisdictions, we held that a verdict finding for the plaintiff but awarding no damages "confers no authority to enter a judgment upon it."[5]

The Nebraska Court of Appeals also addressed this issue in *Swiercek v. McDaniel*.[6] In that case, as with the others, a verdict was entered for the plaintiff for $0. The plaintiff sought a new trial on the grounds that the verdict was "clearly against the weight and reasonableness of the evidence and disproportionate to the injuries proved."[7] That request was denied, and the plaintiff appealed.

On appeal, the Court of Appeals noted that "negligence on the part of [the defendant] was established as a matter of law. However, [the plaintiff] must still prove that this negligence on the part of [the defendant] proximately caused the damages alleged to have been sustained by him."[8] The Court of Appeals continued:

> [T]he intent of the jury here is unmistakable—its decision was that [the plaintiff] have nothing from [the defendant]. Next, this is not a case where the question

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[4] *Bushey v. French*, 171 Neb. 809, 810, 108 N.W.2d 237, 238 (1961).

[5] *Id.* (citing *Klein v. Miller*, 159 Or. 27, 77 P.2d 1103 (1938)).

[6] *Swiercek v. McDaniel*, No. A-93-1059, 1995 WL 640419 (Neb. App. Oct. 31, 1995) (not designated for permanent publication).

[7] *Id.* at *5.

[8] *Id.*

> of liability was for the jury, and [the plaintiff] adduced undisputed evidence of damages for injuries sustained. In such a case, a verdict for plaintiff in the amount of $0 is contrary to the law and a nullity. . . . Here, the question of liability was directed in favor of [the plaintiff] with the only issue for the jury being whether [the plaintiff] suffered any injury or damage. The jury could have found all of [the plaintiff's] injuries were attributed to his preexisting conditions. It was not unreasonable for the jury to have concluded that it must find "for" [the plaintiff], even though it found he was entitled to zero damages.[9]

The rule in Nebraska, as set forth by *Bushey v. French*,[10] is that a verdict for a plaintiff but awarding no damages is no verdict at all. The reason that such a verdict is generally no verdict at all is that it does not allow a court to determine what the jury meant by its verdict.

But in this case, like *Swiercek v. McDaniel*,[11] when one examines how this case was tried, it is clear what the jury meant by its verdict.

At trial, the Lowmans sought compensation only for Opal's pain and suffering, telling the jury that "[t]here is no claim . . . for past or future medical bills because those will be paid by other sources. . . . And there's going to be no claim for lost wages." The Lowmans' counsel informed the jury that if it did not find that Opal was entitled to damages for her pain and suffering, then it should award her nothing, stating, "If you think [Opal] is exaggerating, there should be no verdict. If you think she's a liar, a cheat and a fraud, there should be no verdict." The jury was then instructed that it could find for the Lowmans or for State Farm.

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[9] *Id.* at *8.

[10] *Bushey v. French, supra* note 4.

[11] *Swiercek v. McDaniel, supra* note 6.

The verdict for the Lowmans makes sense because it was not disputed that the accident itself was caused by Gibbs' tortious conduct. The jury's award of no damages makes sense because the Lowmans told the jury not to award Opal anything if it did not believe that she suffered compensable damages for pain and suffering caused by the accident. This conclusion is supported by evidence presented at trial.

On these facts, it was not error for the district court to enter judgment on the jury's verdict. For these reasons, the district court also did not err in denying the Lowmans' motion for new trial. Lowman's argument on appeal is without merit.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Cassel, J., concurring.

I write separately only to suggest that trial judges should provide one or more verdict forms which precisely correspond to the effect-of-findings jury instruction. In the case before us, no objection was made to the instruction or the verdict form. No error is assigned to either of them on appeal. But if the verdict form had been tailored to the instruction, I doubt that this appeal would have been taken.

The court's opinion, with which I fully agree, sets forth the verbatim language of the effect-of-findings instruction. The instruction permitted a verdict for the plaintiffs or a verdict for the defendant. In either event, the jury was directed to the same verdict form.

But the verdict form did not precisely adhere to the language of the effect-of-findings instruction. As the court's opinion recites, the form consisted of a single sentence finding for the plaintiffs and awarding damages in an amount left blank. Thus, the verdict form provided the jury with the means of precisely recording only one of the options authorized by the instruction.

The problem could have been avoided easily in either of two ways. One way would have been to use two verdict forms. But even if only one verdict form was to be used, the same result could have been achieved. The single form could have provided two choices, each with a box or blank to be checked by the jury to indicate its choice. One choice could have been a sentence employing the language used in the instant case. The other choice could have been language specific to a verdict for the defendant. Either approach would have tailored the verdict form or forms to the effect-of-findings instruction, and likely avoided an appeal.

Marilyn Waldron, appellant, v. Lancaster County Deputy Sheriff James Roark, individually and in his official capacity, appellee.

874 N.W.2d 850

Filed February 26, 2016. No. S-15-144.

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 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. **Constitutional Law: Actions.** A civil remedy is provided under 42 U.S.C. § 1983 (2012) for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law.
4. ____: ____. In order to assert a claim under 42 U.S.C. § 1983 (2012), the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was committed by a person acting under color of state law.
5. **Constitutional Law: Search and Seizure.** The right to be free from unlawful entry of one's residence is a constitutional right of the highest magnitude, and the overriding respect for the sanctity of the home has been embedded in the traditions of the United States since the nation's origins.
6. **Constitutional Law: Search and Seizure: Warrants: Probable Cause.** For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

7. **Warrants.** The manner in which a warrant is executed is subject to later judicial review as to its reasonableness.
8. **Constitutional Law: Search and Seizure.** The common-law knock-and-announce principle forms a part of a Fourth Amendment inquiry into reasonableness.
9. ____: ____. Absent countervailing circumstances, the Fourth Amendment to the U.S. Constitution requires that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling.
10. ____: ____. The common-law principle of announcement is embedded in Anglo-American law and, therefore, is an element of the reasonableness inquiry under the Fourth Amendment.
11. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, a court's effort to give content to this term may be guided by the meaning ascribed to it by the framers of the amendment. An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.
12. **Police Officers and Sheriffs: Arrests.** It is an affirmative defense to the offense of resisting arrest if the peace officer involved was out of uniform and did not identify himself or herself as a peace officer by showing his or her credentials to the person whose arrest is attempted.
13. **Police Officers and Sheriffs: Warrants.** It is not necessary for police officers to knock and announce their presence when executing a warrant when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile.
14. **Search and Seizure.** In determining whether an individual search or seizure is reasonable, courts evaluate the totality of the circumstances.
15. **Police Officers and Sheriffs: Warrantless Searches.** Exigency determinations are generally fact intensive.
16. **Warrantless Searches.** In a criminal case, the factual determination whether exigent circumstances existed to excuse a warrantless arrest is a question for the court; when the issue arises in a civil damage suit, it is properly submitted to the jury providing, given the evidence on the matter, there is room for a difference of opinion.
17. ____. In the context of a civil suit, whether exigent circumstances existed is guided by examination of the exigent circumstances exception in criminal cases.
18. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** A claim that law enforcement officers used excessive force to

effect a seizure is governed by the Fourth Amendment's "reasonableness" standard.

19. ____: ____: ____. Determinations of the reasonableness of a particular use of force under the Fourth Amendment involves careful attention to the facts and circumstances of each particular case.
20. ____: ____: ____. In determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment, a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.
21. **Police Officers and Sheriffs: Arrests: Words and Phrases.** "Reasonable force" which may be used by an officer making an arrest is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would deem necessary under the circumstances.
22. **Police Officers and Sheriffs: Arrests.** The inquiry into the reasonableness of a use of force assesses reasonableness at the moment of the use of force, as judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.
23. **Search and Seizure: Police Officers and Sheriffs.** An illegal search does not justify the use of force in resisting an officer.
24. **Summary Judgment.** On a motion for summary judgment, the question is not how the factual issues are to be decided but whether any real issue of material fact exists.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded for further proceedings.

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Richard C. Grabow and David A. Derbin, Deputy Lancaster County Attorneys, for appellee.

Wright, Connolly, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

This action was brought pursuant to 42 U.S.C. § 1983 (2012). Appellant, Marilyn Waldron, filed an appeal from the

district court's order granting summary judgment to appellee, Lancaster County Deputy Sheriff James Roark. Waldron was a 78-year-old woman who sustained injuries when Roark and his partner, Deputy Sheriff Amanda May, entered Waldron's home to serve an arrest warrant on her grandson, Steven Copple. The officers were not uniformed and drove an unmarked vehicle.

Waldron claimed the deputies did not display badges and did not present a warrant upon demand before or after using force to enter her home. She claimed that Roark forcefully placed her in handcuffs, which caused injuries, including a torn rotator cuff. Waldron claimed that the entry was in violation of the Fourth Amendment and that Roark used excessive force. The district court found that as a matter of law, the deputies' entry was proper, that Waldron obstructed the work of the deputies, and that Roark's use of force was objectively reasonable.

For the reasons stated below, we reverse the order of the district court granting summary judgment and remand the cause for further proceedings.

BACKGROUND

The parties' characterizations of the facts of this case differ substantially, but in reviewing orders granting summary judgment, we consider the facts in the light most favorable to the nonmoving party.[1] Consequently, the following facts are set forth in a light most favorable to Waldron:

On the evening of February 22, 2012, Roark and May went to Waldron's home to serve an arrest warrant on Copple for failure to appear at sentencing for a misdemeanor charge of disturbing the peace. Copple had prior police contacts, which included at least one weapons charge. Additionally, there was at least some indication that Copple may have had a desire for a "suicide by cop." The severity of the prior weapons charge and the context of the information concerning

[1] *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015).

Copple's possible desire for a "suicide by cop" are unclear from the record.

Copple lived with Waldron at all relevant times. Waldron's husband, now deceased, was a retired captain with the Nebraska State Patrol and had instructed her to never allow a person claiming to be law enforcement into the home without a badge or a warrant. Roark and May were both dressed in plain clothes at the time. Roark was dressed in jeans, a sweatshirt, and a ball cap. May wore jeans and a nonuniform shirt. Neither deputy had a badge displayed. The deputies drove an unmarked vehicle.

Upon arriving at Waldron's home, Roark observed Copple's vehicle near the house. As Roark approached the home, he observed a young male he identified as Copple inside the house and proceeded to the front door. May went to the rear of the house to ensure Copple did not flee out the back door. Roark rang the doorbell. Waldron went to the door and began opening it cautiously. As Waldron began to open the door, Roark forced the door open and pushed his way past Waldron. When he entered the home, Roark stated that he was a deputy sheriff and demanded to know where Copple was located. Waldron demanded to see a warrant. Roark ignored Waldron's requests and did not present a warrant or display his badge.

Once inside the house, believing Copple had fled toward the basement, Roark and May drew their service weapons and ran toward the basement stairs. Roark encountered a young male, later identified as a friend of Copple who was visiting him, sitting in the basement. Roark testified that the individual was very cooperative and provided Roark information regarding Copple's whereabouts. May ordered Waldron to stay in the kitchen and not follow Roark to the basement. Despite this instruction and May's attempts to block Waldron from doing so, Waldron proceeded to the basement, following Roark. Waldron continued to yell at the officers and threatened to call the police on Roark and May, who had not shown identification as police officers.

Once Waldron was in the basement, Roark threw Waldron to the ground, breaking her glasses. Once on the ground, Roark placed his knee into Waldron's back and pulled her right arm back, causing her substantial pain. Waldron resisted Roark's attempts to place her in handcuffs by keeping her arm stiff. She told Roark that she had surgery on her right shoulder and did not want to be placed in handcuffs because of the pain it caused. After being restrained, Waldron slipped one of her hands out of the handcuffs due to the pain. Roark again placed Waldron in handcuffs, and at some point, she fell onto a couch and then to the floor. Waldron continued to resist being placed in handcuffs by keeping her arms stiff. Waldron sustained bruises to her hands and legs and experienced a great deal of pain in her shoulders. Waldron testified that during this time, the deputies had still not displayed either a badge or a warrant.

Uniformed Lincoln Police Department officers arrived to assist, and Copple was subsequently located in the house and arrested. Waldron admitted to one of the uniformed officers that she had not been compliant with Roark and May because she "'did not know who they were.'" One of the officers asked Roark whether he had a copy of the warrant, to which Roark responded that he did not have the warrant but that he knew one existed. Waldron was then transported to the Lancaster County jail, where she was lodged after being charged with obstructing government operations and resisting arrest. The resisting arrest charge was later amended to false reporting. Waldron successfully completed a pretrial diversion program, and the charges were dismissed without prejudice. Waldron has no additional criminal history or arrests.

On September 18, 2013, Waldron filed this action pursuant to 42 U.S.C. § 1983 against Roark in his individual and official capacities. She claimed that Roark's actions violated her civil rights under the 4th and 14th Amendments. Waldron claimed that Roark's actions constituted an unlawful entry into her home. Moreover, Waldron claimed Roark used excessive force

to restrain her. Waldron alleged that she sustained physical injuries to her neck, back, and shoulders, requiring treatment, including a torn left rotator cuff.

Roark denied the allegations in the complaint. He asserted the affirmative defense of qualified immunity and argued that Waldron's claims were barred by her participation in pretrial diversion for the offenses of false reporting and obstructing government operations.

On February 13, 2015, the district court granted summary judgment to Roark. The court stated that it was viewing the record and "drawing all reasonable inferences in the light most favorable to [Waldron], while simultaneously viewing the facts from the perspective of a reasonable law enforcement officer on the scene." In considering Waldron's Fourth Amendment argument, the court cited *Payton v. New York*,[2] stating, "When the police enter the home of the person they wish to arrest, the arrest warrant suffices for entry if 'there is reason to believe the suspect is within.'" The court noted that Roark had a warrant for Copple's arrest and observed Copple inside the house as he approached and that, therefore, he had reason to believe Copple was in the home despite Waldron's statements to the contrary.

The district court found that Roark possessed an arrest warrant for Copple, observed Copple in the window, and saw Copple go to the basement. It found that the exigent circumstances doctrine applied, because once Copple was aware of the deputies' presence, Roark had a realistic expectation that any delay in entry might result in Copple's arming himself, becoming a threat, destroying evidence, or simply escaping. Thus, even absent a warrant, the court found the circumstances justified the deputies' entry.

In considering the issue of whether Roark used excessive force, the district court concluded as a matter of law that

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[2] *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

Roark's use of force was objectively reasonable. It found that the undisputed facts showed Waldron was uncooperative by impeding Roark's entrance, failing to obey directives, following deputies to the basement, and physically resisting being handcuffed. The court also noted that an unknown third party (Copple's friend) was present and that the deputies knew Copple had prior contact with law enforcement that included weapons offenses.

The district court did not address the issue of whether Roark was entitled to qualified immunity or whether Waldron's claims were barred by her participation in pretrial diversion.

ASSIGNMENT OF ERROR

Waldron assigns that the district court erred in granting summary judgment in favor of Roark.

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 the facts and that the moving party is entitled to judgment as a matter of law.[3] 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.[4]

ANALYSIS

Viewing the evidence in a light most favorable to Waldron, we must determine if there is a material issue of fact whether Roark's entry into Waldron's home violated her Fourth Amendment right to be free from unreasonable searches and seizures and whether the district court erred in finding,

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[3] *Melanie M. v. Winterer, supra* note 1.

[4] *Id.*

as a matter of law, that Roark's use of force was objectively reasonable.

[3,4] A civil remedy is provided under 42 U.S.C. § 1983 for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law.[5] In order to assert a claim under § 1983, the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was committed by a person acting under color of state law.[6] Here, Waldron alleged that her Fourth Amendment rights were violated by Roark's unlawful entry into her home. Furthermore, she alleged that Roark, while acting under color of state law, violated her 4th and 14th Amendment rights to be free from excessive force. She alleged Roark was acting in the scope and course of his employment as a deputy with the Lancaster County Sheriff's Department.

The question is whether the facts viewed most favorably to Waldron create an issue of fact whether Roark's conduct in serving the misdemeanor arrest warrant was objectively reasonable. In granting summary judgment in favor of Roark, the court found that Roark's entry into Waldron's home was proper pursuant to the arrest warrant for Copple and, even absent the warrant, was justified by the exigent circumstances exception to the warrant requirement. Furthermore, the district court found that as a matter of law, Roark's use of force to arrest Waldron was objectively reasonable.

Roark's Entry Into Home

We first consider if there was a question of fact whether Roark's entry into Waldron's home violated her rights under the Fourth Amendment.

[5-7] The U.S. Supreme Court has noted that the right to be free from unlawful entry of one's residence is a constitutional

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[5] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

[6] See *id.*

right of the highest magnitude and that "the overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic."[7] For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.[8] However, the manner in which a warrant is executed is subject to later judicial review as to its reasonableness.[9]

The district court concluded that Roark's entry was justified because he had a valid arrest warrant for Copple and reason to believe he resided at Waldron's home. Waldron does not contest the validity of the arrest warrant for failure to appear for sentencing on a misdemeanor disturbing the peace conviction. Nor does she argue that the deputies lacked reason to believe Copple resided at Waldron's home and was present there on the date and time in question. In general, Roark was authorized to enter Waldron's home under the U.S. Supreme Court's holding in *Payton v. New York*[10] for the purpose of effecting the arrest of Copple. But this does not end the analysis. While an officer may be permitted to enter the home under the rule in *Payton*, the Fourth Amendment is also concerned with the manner of the entry. Officers are required to take additional steps before entering the home for the purpose of executing a warrant.

The execution of arrest warrants in Nebraska is governed by Neb. Rev. Stat. § 29-411 (Reissue 2008), which in relevant part provides:

> In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized

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[7] *Payton v. New York, supra* note 2, 445 U.S. at 601.

[8] *Payton v. New York, supra* note 2.

[9] *Dalia v. United States*, 441 U.S. 238, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979).

[10] *Payton v. New York, supra* note 2.

> to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, *if, after notice of his office and purpose, he is refused admittance* . . . .

(Emphasis supplied.)

[8,9] This statute codifies the common-law requirement of knocking and announcing when serving an arrest warrant prior to breaking into a person's dwelling.[11] This requirement recognizes the deep privacy and personal integrity interests people have in their home. We have held that the common-law knock-and-announce principle forms a part of a Fourth Amendment inquiry into reasonableness.[12] An officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Fourth Amendment.[13] Absent countervailing circumstances, the Fourth Amendment to the U.S. Constitution requires that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling.[14] This would apply equally to the execution of an arrest warrant.

[10,11] The U.S. Supreme Court, in *Wilson v. Arkansas*,[15] has similarly held that the common-law principle of announcement is embedded in Anglo-American law and, therefore, is an element of the reasonableness inquiry under the Fourth Amendment. The Court held that the manner of an officer's entry into a dwelling to execute a warrant was among the factors to be considered in assessing the reasonableness of a search or seizure, stating:

> "Although the underlying command of the Fourth Amendment is always that searches and seizures be

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[11] *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008).

[12] *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

[13] *Id.*

[14] *State v. Ramirez, supra* note 11.

[15] *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995).

> reasonable," . . . our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment. An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.[16]

Years later, in *Hudson v. Michigan*,[17] the Court further articulated the practicalities for requiring officials to knock and announce their presence. There, the Court noted:

> One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. . . . Another interest is the protection of property. . . . The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." . . . And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police.[18]

Thus, the knock-and-announce requirement serves to protect the safety of police officers by preventing the occupant from taking defensive measures against a perceived unlawful intruder.[19] Moreover, it protects occupants of the home from similarly being harmed by officers who react to measures of self-defense against perceived intruders. This practical consideration is particularly acute in the case at bar, because

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[16] *Id.*, 514 U.S. at 931 (citation omitted).

[17] *Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006).

[18] *Id.*, 547 U.S. at 594 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997)) (citations omitted).

[19] *U.S. v. Sargent*, 319 F.3d 4 (1st Cir. 2003).

Roark and May were not in uniform, did not display badges or the warrant, demanded entry into Waldron's home, and displayed weapons.

Viewing the facts in the light most favorable to Waldron, we consider if there was a question of fact whether Roark provided proper notice of his office or purpose and displayed his badge or the warrant. The question is whether Roark complied with the knock-and-announce requirement of the Fourth Amendment and § 29-411. Roark and May drove an unmarked vehicle to Waldron's home. They were not in uniform, and Waldron testified that they failed to display anything that identified them as law enforcement officials. She testified that upon the doorbell ringing, she opened the door cautiously and Roark immediately began to force his way into her home. After forcing his way into the home, Roark stated that he was a sheriff's deputy and demanded to know where Copple was located. Roark drew his service weapon and began searching the home. At no point before or after their entry did they produce a copy of the warrant or show their badges as Waldron demanded.

Roark argues that his statement identifying himself as a sheriff's deputy was sufficient to announce his office and purpose. But given the facts of this case when considered most favorably to Waldron, we disagree. Roark was dressed in jeans, a sweatshirt, and a ball cap and did not show his badge. Instead, he displayed a weapon upon entry into Waldron's home. Although a misdemeanor warrant existed for Copple, Roark failed to produce a copy of the warrant before or after his forced entry into the home.

[12] Waldron could have reasonably believed that Roark was an unknown male forcing his way into her home claiming to be a law enforcement officer. And without some official display of authority, a jury could find that Roark did not properly announce his entry. Indeed, the Legislature has recognized that it is an affirmative defense to the offense of resisting arrest if the peace officer involved was out of

uniform and did not identify himself or herself as a peace officer by showing his or her credentials to the person whose arrest is attempted.[20]

The district court, citing to *Payton v. New York*,[21] correctly concluded that when the police enter the home of the person they wish to arrest, the arrest warrant suffices for entry if there is reason to believe the subject of the warrant is within. But it incorrectly suggested that *Payton* created a blanket rule allowing police to force entry into homes to serve warrants immediately, thus bypassing the common-law knock-and-announce requirement. The Court's subsequent holdings, as well as § 29-411, make clear that the manner of serving the warrant is relevant to the determination of reasonableness under the Fourth Amendment.

Roark cites to the Eighth Circuit's holding in *U.S. v. Mendoza*,[22] wherein the court concluded that once a door is opened, the knock-and-announce rule is vitiated. In *Mendoza*, the court found that officials did not violate the knock-and-announce rule when they entered a dwelling without a door. The court concluded that knocking on an open or missing door was futile. But *Mendoza* examined whether officials were required to "knock" on an open or nonexistent door. Here, there was clearly a door and no doubt that Roark "knocked" (rang the doorbell) and that Waldron answered the door. Moreover, whereas the officers in *Mendoza* were dressed in "raid gear" (vests and jackets with the word "Police" conspicuously displayed),[23] Roark was not in uniform and did not display a badge or warrant, and he immediately forced his way into the home as Waldron opened the door. Regardless of the "knocking" portion of the rule, the

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[20] Neb. Rev. Stat. § 28-904 (Reissue 2008); *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985).

[21] *Payton v. New York, supra* note 2.

[22] *U.S. v. Mendoza*, 281 F.3d 712 (8th Cir. 2002).

[23] *Id.* at 714.

facts construed most favorably to Waldron establish a material issue of fact whether Roark "announced" his office in a proper manner. Roark misconstrues *Mendoza* to suggest that once a door is open, an officer can enter in any manner he or she desires. We find that there was a question of fact as to whether Roark properly displayed notice of his office or authority.

Exigent Circumstances

[13] Roark's failure to knock and announce his office and purpose may have been reasonable if exigent circumstances existed at the time of his entry. The U.S. Supreme Court has held that it is not necessary for police officers to knock and announce their presence when executing a warrant when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile.[24] If circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in.[25] Police must have a reasonable suspicion under the particular circumstances that one of the grounds for failing to knock and announce their presence before executing a warrant exists, and this showing is not high.[26] We examine this issue next.

[14-16] In determining whether an individual search or seizure is reasonable, courts evaluate the "totality of [the] circumstances."[27] Exigency determinations are generally fact intensive.[28] The Sixth Circuit has held:

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[24] *Hudson v. Michigan, supra* note 17.

[25] *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003).

[26] *Hudson v. Michigan, supra* note 17.

[27] *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696 (2013).

[28] See *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

> "Although, in a motion to suppress evidence in a criminal case, the factual determination whether exigent circumstances existed to excuse a warrantless arrest is a question for the court, *when the issue arises in a civil damage suit it is properly submitted to the jury providing, given the evidence on the matter, there is room for a difference of opinion*."[29]

[17] In the context of a civil suit, whether exigent circumstances existed is guided by examination of the exigent circumstances exception in criminal cases. Several commonly recognized categories include: (1) "hot pursuit" of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to an occupant.[30]

The district court determined that the undisputed facts showed that exigent circumstances existed to permit the deputies' entry even had no warrant existed. The court found that the deputies had a realistic expectation that any delay in their entry might result in Copple's arming himself, becoming a threat, destroying evidence, or simply escaping. But the officers were at Waldron's home to arrest Copple for failure to appear at sentencing for a misdemeanor disturbing the peace charge. Consequently, the officers could not have been concerned with destruction of evidence. Nor were they in hot pursuit of Copple. May was watching the back door of the home to prevent Copple from fleeing undetected. The only possible exigency would have been that Copple posed a threat to the safety of the deputies or the public.

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[29] *Carlson v. Fewins*, 801 F.3d 668, 676 (6th Cir. 2015) (emphasis in original).

[30] *State v. Eberly, supra* note 28.

The Eighth Circuit's decision in *U.S. v. Lucht*[31] provides us guidance on this issue. There, the Eighth Circuit determined that failure to observe the knock-and-announce requirement required that evidence be suppressed. The officer assumed a particular situation was high risk because the Emergency Response Unit (ERU), a tactical police unit, was tasked with executing the search warrant. In that case, the officer leading the ERU into the home knew the occupant was a suspected member of the Hell's Angels with antipolice sentiments and likely had access to weapons in the home. The trial court found that exigent circumstances existed so as to render the knock-and-announce requirement a useless gesture. The Eighth Circuit reversed, stating:

> We appreciate the fact that [the officer] assumed this was a high risk situation because ERU was employed. However, a decision to force entry cannot rest on an assumption. It requires consideration of the particular facts and circumstances surrounding the execution of the warrant. Here, ERU was not in a dangerous tactical situation. They did not hear or see anything to indicate they were in danger or that evidence was being destroyed. [The officer] knew that there was a likelihood that there were weapons in the house, but he had no information indicating that [the suspect] was considered dangerous or violent or might be inclined to use the weapons against them. [The officer's] belief that [the suspect] had a propensity for anti-police sentiments was not based on any particularized knowledge.[32]

Given the Eighth Circuit's reasoning in *Lucht*, we find there was a material issue of fact whether exigent circumstances existed in attempting to arrest Copple.

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[31] *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1994).

[32] *Id.* at 551 (citation omitted).

Excessive Force

We next consider Waldron's claim that Roark used excessive force to arrest her.

[18-20] The district court concluded as a matter of law that Roark's use of force was objectively reasonable. We consider whether there was a material issue of fact whether Roark's use of force was reasonable. A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard.[33] Determinations of the reasonableness of a particular use of force under the Fourth Amendment involves "careful attention to the facts and circumstances of each particular case."[34] In determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment, we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.[35]

[21,22] "Reasonable force" which may be used by an officer making an arrest is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would deem necessary under the circumstances.[36] The inquiry assesses reasonableness at the moment of the use of force, as judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[37] This allows for the fact that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and

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[33] *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014).

[34] *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

[35] *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014).

[36] *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981).

[37] *Graham v. Connor, supra* note 34.

rapidly evolving—about the amount of force that is necessary in a particular situation."[38] Some relevant but nonexhaustive factors considered by courts in determining the reasonableness of force include "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"[39]

The district court concluded that the undisputed facts showed that Waldron was uncooperative with Roark and May. The court noted that Waldron disregarded directives given to her, fought being restrained, and even slipped out of the handcuffs placed on her. The court stated, "This was all being done at a time where the officers were in pursuit of Copple, an unknown third party had made an appearance, and the officers knew that Copple had previous law enforcement contacts including weapons offenses." The court concluded that Waldron's actions diverted the deputies' attentions, which increased the risk to the deputies. The district court further suggested, if not concluded, that Roark had probable cause to arrest Waldron for obstruction of government operations and resisting arrest.

While a jury may accept Roark's testimony over Waldron's or make factual findings identical to the district court, we are obliged to view the facts most favorably to Waldron and give her all reasonable inferences of those facts. Accepting Waldron's testimony, at the time she was being "uncooperative," was failing to "comply with directives," and "fought being restrained," unknown persons had forced their way into her home and displayed weapons. The undisputed facts show that neither Roark nor May was in uniform. According to Waldron, as she opened the door to her home, Roark began forcing his way into the home and did not display a badge or

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[38] *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014).

[39] *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009) (quoting *Graham v. Connor, supra* note 34).

warrant upon demand. Under such circumstances, a reasonable homeowner might understandably be uncooperative and resist being restrained. Given Waldron was married to a law enforcement official for nearly 50 years, a jury might infer that she would have been cooperative had she known Roark was a sheriff's deputy.

Roark argues that he had the authority to restrain Waldron and place her under arrest for multiple misdemeanors. Under Neb. Rev. Stat. § 29-404.02(1)(b) (Reissue 2008), a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a misdemeanor in the presence of the officer. Among the misdemeanors alleged were violations of Neb. Rev. Stat. § 28-907(1) (Reissue 2008) and Lincoln Mun. Code § 9.08.040 (2016) (intentionally false reporting by stating that Copple was not home), Neb. Rev. Stat. § 28-901 (Reissue 2008) (obstructing government operations), and § 28-904 (resisting arrest). The district court supported this view, stating, "[Waldron] knew, at some point, that Deputy Roark and Deputy May were there to arrest her grandson. She knew they were officers of the law and she knew she was obstructing the execution of the warrant."

[23] It is true that under no circumstances should a person resist arrest by officers, regardless of the lawfulness of the arrest. This court has held that an illegal search does not justify the use of force in resisting an officer.[40] The Legislature has codified this rule.[41] But this rule applies *when the actor knows* that he or she is being arrested by a peace officer. Presumably, a person knows he or she is being arrested once law enforcement identification or other conspicuous indicators of official status are displayed. It is an affirmative defense to prosecution for resisting arrest if the peace officer involved is out of uniform and did not identify himself or herself as a peace officer

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[40] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[41] See Neb. Rev. Stat. § 28-1409(2) (Reissue 2008).

by showing his or her credentials to the person whose arrest is attempted.[42]

Given the facts viewed most favorably to Waldron, we question how she would know "at some point" that Roark and May were sheriff's deputies if they were not in uniform and did not display their badges or the arrest warrant. Once *uniformed* officers arrived on the scene, there is no evidence suggesting that Waldron continued to be uncooperative. Roark testified that Waldron, while demanding he and May leave her home immediately, yelled that she was going to call the police.

The district court did not find that Waldron was physically threatening or interfering with the deputies, but only that she was yelling at them and at Copple. The court instead found that she presented a danger to the deputies by distracting their attention. She yelled at Roark and May and demanded that they show either a badge or warrant, or leave her home. The Eighth Circuit has held, "'[T]he use of any force by officers simply because a suspect is argumentative, contentious, or vituperative' is not to be condoned."[43] Force can be used only to overcome physical resistance or threatened force.[44] May stated that they "just put [Waldron] into custody to keep her safe and . . . away from any problem."

Both the district court and Roark also discuss the presence at the scene of the arrest of a young adult male, who was later determined to be Copple's friend, as a justification for Roark's actions. But there is no indication whatsoever that this individual was uncooperative or threatening or otherwise presented a danger to the deputies. The record suggests the opposite is true. Waldron and Roark each testified that the individual was cooperating with the deputies by giving

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[42] § 28-904; *State v. Daniels, supra* note 20.

[43] *Bauer v. Norris*, 713 F.2d 408, 412 (8th Cir. 1983) (quoting *Agee v. Hickman*, 490 F.2d 210 (8th Cir. 1974)).

[44] *Id.*

them information concerning Copple's whereabouts. Roark testified that he had asked the individual to show his hands to determine he was not a threat and that he was "cooperating the whole time," remaining seated with his hands visible, and providing the deputies with information as to Copple's whereabouts. Regardless, it is unclear how any lack of cooperation by Copple's friend would justify the use of force against Waldron.

At the time of the incident, Waldron was 78 years old, was approximately 5 feet 1 inch tall, and weighed approximately 145 pounds. She had recently had surgery on her shoulder and had limited mobility of her arm. She had previously suffered a stroke. Waldron alleged Roark threw her to the ground, causing Waldron to break her glasses and bruise her face, hands, and legs. He pressed his knee into her back, pulling her arms forcefully behind her as he did so. Waldron informed Roark of her recent shoulder surgery and the pain his actions were causing to her shoulder. Once Waldron slipped out of the handcuffs due to the pain, Roark again pulled her arms behind her back and placed her in the handcuffs.

Waldron testified that once uniformed officers arrived on the scene, one officer removed the handcuffs. When Roark observed her without handcuffs, he insisted that she be placed in handcuffs again, despite her cooperation at that point and the presence of uniformed officers on the scene who had found and arrested Copple. Another officer on the scene requested that Roark cuff her in the front rather than forcing her arms behind her back due to Waldron's pain. Waldron alleged that as a result of Roark's use of force, she sustained considerable bruising to her legs and hands. She claimed she suffered a full thickness tear of the rotator cuff in her shoulder. She received treatment for pain in her neck, back, and shoulders. A medical report indicates she experiences constant pain in her shoulder.

[24] On a motion for summary judgment, the question is not how the factual issues are to be decided but whether any

real issue of material fact exists.[45] Considering the totality of the circumstances and accepting the facts in the light most favorable to Waldron and granting her all reasonable inferences therefrom, there is a material question of fact whether Roark's entry into her home was unreasonable and whether the force he used was excessive.

CONCLUSION

For the reasons stated above, we reverse the order of the district court granting summary judgment in favor of Roark and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

Heavican, C.J., and Miller-Lerman, J., participating on briefs.

McCormack, J., not participating.

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[45] *Gonzalez v. Union Pacific RR. Co., ante* p. 281, 872 N.W.2d 579 (2015).

In re Conservatorship of Genevieve Franke, deceased. Laurie Berggren, appellee, v. Genevieve Franke, deceased, appellant, and John Franke, appellee.

875 N.W.2d 408

Filed March 4, 2016. No. S-14-959.

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. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
4. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
5. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
6. **Actions: Parties: Death: Abatement, Survival, and Revival: Appeal and Error.** The statutory provisions regarding abatement and revivor of actions apply to cases in which a party dies pending an appeal.
7. ____: ____: ____: ____: ____. Whether a party's death abates an appeal or cause of action presents a question of law.
8. **Statutes.** Statutory interpretation presents a question of law.
9. **Abatement, Survival, and Revival: Words and Phrases.** The term "abatement" can refer to the extinguishment of a cause of action or the equitable suspension of suit for the lack of proper parties.
10. **Abatement, Survival, and Revival: Moot Question: Appeal and Error.** An abatement can refer to the extinguishment of an appeal only when the legal right being appealed has become moot because of a party's death while the appeal was pending.

11. **Actions: Parties: Death: Abatement, Survival, and Revival**. Even if a party's death does not abate a cause of action, a substitution of parties may be required before the action or proceeding can continue.
12. ____: ____: ____: ____. Neb. Rev. Stat. § 25-322 (Reissue 2008) abrogates the common-law rule that all pending personal actions permanently abate on the death of a sole plaintiff or defendant, regardless of whether the cause of action on which it was based survived.
13. ____: ____: ____: ____. Under Neb. Rev. Stat. § 25-322 (Reissue 2008), a court may allow an action to continue after a party's death through a transfer of interests, if the cause of action survives the party's death.
14. **Actions: Parties: Death.** A deceased person cannot maintain a right of action against another or defend a legal interest in an action or proceeding.
15. **Attorney and Client: Death.** Although an attorney of a deceased client may have a duty to protect the client's interests by alerting a legal representative of his or her pending claim, absent a contractual agreement to the contrary, an attorney's representation of a client generally ends upon the death of that client.
16. **Actions: Parties: Death: Abatement, Survival, and Revival.** A deceased party's representative or successor in interest must either seek a conditional order of revival under chapter 25, article 14, of the Nebraska Revised Statutes or seek a court's substitution order under Neb. Rev. Stat. § 25-322 (Reissue 2008) before an action or proceeding can continue.
17. **Actions: Attorney and Client.** An attorney's unauthorized actions on the part of a deceased client are a nullity. So, unless a deceased client's legal representative or the client's contractual agreement authorizes the attorney to take or continue an action for the client, an attorney cannot take any further valid action in the matter.
18. **Guardians and Conservators: Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 30-1601(2) (Cum. Supp. 2014), a protected person's close family members have the right to appeal from a final order in a conservatorship proceeding if they filed an objection and the county court appointed a conservator.
19. **Actions: Parties: Death: Abatement, Survival, and Revival.** When a party dies pending an appeal, the general rule is that the death does not abate the cause of action or affect the underlying judgment.
20. **Estates: Guardians and Conservators.** A protected person's death terminates a conservator's authority and responsibility as conservator but does not affect the conservator's liability for acts taken before the death or the conservator's obligation to account for the protected person's funds and assets.

21. **Actions: Guardians and Conservators: Abatement, Survival, and Revival: Appeal and Error.** A protected person's death pending an appeal from a conservatorship proceeding does not abate the cause of action or affect the underlying orders appointing a conservator.

Appeal from the County Court for Hall County: Arthur S. Wetzel, Judge. Appeal dismissed.

Jordan W. Adam, of Fraser Stryker, P.C., L.L.O., for appellant.

Susan M. Koenig, of Mayer, Burns, Koenig & Janulewicz, for appellee Laurie Berggren.

Robert A. Mooney, of Gross & Welch, P.C., L.L.O., for appellee John Franke.

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

Connolly, J.

SUMMARY

This appeal involves a dispute between Genevieve Franke's children regarding the county court's appointment of a conservator for her. Genevieve has since died. Genevieve's daughter, Laurie Berggren, sought the conservatorship after Genevieve agreed to sell her farmland to her son John Franke at a price below its fair market value.

Genevieve appealed from the court's appointment of Cornerstone Bank as her permanent conservator. John also appealed. But before the parties filed briefs, Genevieve's attorney filed a suggestion of death with the Nebraska Court of Appeals stating that Genevieve had died on December 31, 2014.

This appeal presents four issues. First, does Genevieve's attorney have standing to continue representing a deceased client in an appeal without authorization from Genevieve's legal representative? Second, does John have standing to appeal from the county court's appointment of a permanent conservator?

Third, if John does have standing, does Genevieve's death abate his appeal? And fourth, does Genevieve's death abate the cause of action and require this court to vacate the county court's orders appointing a conservator?

We reach the following conclusions:

- Genevieve's attorney has no standing to represent her in this court after her death.
- Under the Nebraska Probate Code, John had standing to appeal from the county court's appointment of a conservator because he objected to the proceeding and asked for an evidentiary hearing. But his standing on appeal is limited to whether Genevieve was in need of a conservator.
- Genevieve's death has abated John's appeal because her competency and need for a conservator are moot issues.
- Genevieve's death does not require us to remand the case with directions to the county court to vacate its order. We conclude that an abatement of an appeal in a conservatorship proceeding does not affect the validity of the final judgment or order from which a party or statutorily authorized person has appealed.

BACKGROUND

Before Genevieve's death in 2014 at the age of 90, she had been a resident of a nursing home since November 2011. The catalyst for this dispute involved Genevieve's agreement to sell her farmland to John in 2013. According to John, in April 2013, he learned that some other farmland near his own property, which he had wanted to buy, would soon be auctioned. He asked Laurie if Genevieve had $400,000 to $500,000 to purchase it, and Laurie said Genevieve did not have enough liquid assets to do so. But Laurie, who took care of Genevieve's finances, authorized the bank to release Genevieve's financial information to John. He learned that Genevieve had $580,000 in investments and $780,000 in certificates of deposit. John drove Genevieve out to the property for viewing; he said that she authorized him to purchase it.

John said that he then met with Genevieve's accountant and attorney. The accountant told him that Genevieve wanted to purchase the land for him. They arranged for the purchase to be an asset of Genevieve's trust and limited the purchase price to $10,000 per acre of cropland. The plan called for John and his wife to make payments to the trust for the property. But for unexplained reasons, John did not purchase the property. He said that the irrigated cropland sold for about $7,500 to $7,800 per acre.

Before the auction, John had learned that under Genevieve's estate plan, at her death, he would have the first option to buy her property at its appraised value. But he said that he could not profitably farm the property if he had to buy it at its fair market value. He said that he was upset he could not buy the auctioned property near his own farm. So after the auction, but before Genevieve's death, he had multiple conversations with her about his purchasing her farmland, an asset of her trust. He said that Genevieve agreed to sell him her farmland and that her neighbor, who was John's close friend and Genevieve's tenant farmer, recommended the purchase price. John proposed to purchase Genevieve's property for about $3,600 to $3,700 per acre. In November 2013, Genevieve's "good quality irrigated" farmland, about 153 acres, was appraised at $1,653,000. The appraiser believed that the property's value in April 2013 would have been about the same.

Genevieve's longtime attorney and accountant were concerned Genevieve did not understand that there were tax consequences to this sale, that the proposed purchase price was well below the property's fair market value, and that the proposed sale was inconsistent with her continually expressed desire to treat her children equally. In June 2013, Laurie petitioned for the appointment of a conservator. John objected and requested an evidentiary hearing. The court appointed Laurie as Genevieve's temporary conservator with the limited duty to prevent the sale of the farm and preserve Genevieve's assets pending further order. After an evidentiary

hearing, it appointed Cornerstone Bank as Genevieve's permanent conservator.

As noted, before the parties filed briefs, Genevieve's attorney filed a suggestion of death with the Court of Appeals stating that Genevieve had died on December 31, 2014. The Court of Appeals then issued an order for the parties to show cause why the appeal should not be dismissed as moot. Genevieve's attorney, Laurie, and John all filed responses to this order. Laurie responded that the action was not moot because a conservator has continuing duties for the estate even after a protected person dies and because Genevieve's children still have an interest in a decision on her competency. Laurie stated that the "administration and ultimately the distribution of [Genevieve's] assets remain[] at issue."

Genevieve—not her personal representative—sought an order (through her attorney of record) to dismiss the appeal as moot *and* to vacate the county court's order appointing a permanent conservator. Two days later, John moved for an order reviving the appeal. Alternatively, he sought an order concluding that (1) the appeal was not moot but only abated by Genevieve's death and (2) the abatement required the county court to vacate all its previous orders in the proceeding. John claimed the right to file this motion as a person interested in Genevieve's conservatorship and as her successor in interest. We overruled both of these motions without prejudice and granted John's petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

In Genevieve's appellate brief, her attorney assigned that the court erred in finding that she had mental or physical disabilities that rendered her unable to manage her property. Although John appealed also, he is designated an appellee and did not assign errors. In his brief, he has not argued that we should allow him to revive Genevieve's appeal, so we treat that request as abandoned. But he argues that because the conservatorship cause of action abated upon Genevieve's death,

this court should dismiss her appeal and remand the cause with directions for the county court to vacate all its orders in the proceeding.

STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in the county court.[1] 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]

[3-8] But we independently review questions of law decided by a lower court.[3] A jurisdictional issue that does not involve a factual dispute presents a question of law.[4] And standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[5] The statutory provisions regarding abatement and revivor of actions apply to cases in which a party dies pending an appeal.[6] Whether a party's death abates an appeal or cause of action presents a question of law.[7] Also, statutory interpretation presents a question of law.[8]

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[1] *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015).

[2] *Id.*

[3] *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

[4] See *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[5] *In re Guardianship & Conservatorship of Barnhart, supra* note 1.

[6] See, *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006); *Long v. Krause*, 104 Neb. 599, 178 N.W. 188 (1920); *Sheibley v. Nelson*, 83 Neb. 501, 119 N.W. 1124 (1909).

[7] See, e.g., *Sherman v. Neth*, 283 Neb. 895, 813 N.W.2d 501 (2012); *Bullock v. J.B.*, 272 Neb. 738, 725 N.W.2d 401 (2006); *Schumacher, supra* note 6; *Sheibley, supra* note 6.

[8] See *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015).

ANALYSIS

[9] The term "abatement" can have more than one meaning in law. It can refer to the extinguishment of a cause of action or the equitable suspension of suit for the lack of proper parties:

> [T]here is a distinction between the use of the word "abatement" in common law, where it means an entire overthrow or destruction of a suit, and in equity courts, where abatement may indicate rather a temporary suspension of further proceedings in the suit because of want of proper parties.[9]

[10] Additionally, as we explain later, an abatement can refer to the extinguishment of an appeal only when the legal right being appealed has become moot because of a party's death while the appeal was pending. This appeal raises the issue whether a protected person's death pending an appeal from a conservatorship appointment abates only the appeal or the entire cause of action. John argues that it abates the entire cause of action, which means that we must vacate the lower court's orders. But first, we consider the standing of Genevieve's attorney to continue her appeal.

Genevieve's Appeal

After Genevieve's attorney filed a suggestion of death, he filed an appellant's brief on her behalf. He argues that because the conservatorship proceedings involved purely personal rights, Genevieve's appeal is moot due to her death and should be dismissed. Yet, he asks this court to vacate the county court's conservatorship orders. He notes that some courts have held that when a party who has been adjudicated

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[9] *In re Estate of Samson*, 142 Neb. 556, 561, 7 N.W.2d 60, 62 (1942) (superseded by statute as stated in *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010)). See, also, *Fox v. Abbott*, 12 Neb. 328, 11 N.W. 303 (1882); Black's Law Dictionary 3 (10th ed. 2014).

as mentally incompetent dies during the pendency of an appeal, the abatement of the appeal requires the lower court's orders to be vacated. Despite his claim that the issue is moot, he also argues that the evidence was insufficient to show Genevieve needed a conservator. We conclude that Genevieve's attorney lacks standing to seek any relief on her behalf.

[11-13] Even if a party's death does not abate a cause of action, a substitution of parties may be required before the action or proceeding can continue. Neb. Rev. Stat. § 25-322 (Reissue 2008) abrogates the common-law rule that "all pending personal actions permanently abate on the death of a sole plaintiff or defendant, regardless of whether the cause of action on which it was based survived."[10] But under § 25-322, a court may allow an action to continue after a party's death through a transfer of interests, if the cause of action survives the party's death:

> An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In the case of the death or other disability of a party, the court may allow the action to continue by or against his or her representative or successor in interest. In case of any other 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.

[14-16] Through § 25-322, the Legislature anticipated that a substitution of a legal representative or successor in interest is required when a party dies, before the action can continue. This substitution is required because a deceased person cannot maintain a right of action against another[11] or defend a legal interest in an action or proceeding.[12] Although an attorney of a

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[10] See 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 44 at 129 (2005).

[11] See Neb. Rev. Stat. § 25-1410 (Reissue 2008).

[12] See Neb. Rev. Stat. § 25-1411 (Reissue 2008).

deceased client may have a duty to protect the client's interests by alerting a legal representative of his or her pending claim, absent a contractual agreement to the contrary, an attorney's representation of a client generally ends upon the death of that client.[13] And a deceased party's representative or successor in interest must either seek a conditional order of revival under chapter 25, article 14, of the Nebraska Revised Statutes or seek a court's substitution order under § 25-322 before an action or proceeding can continue.[14]

[17] In short, even if a legal right is not abated by a party's death, Nebraska's abatement laws would require a suspension of an action or proceeding until an appropriate representative is substituted by court order through one of the statutory procedures. An attorney's unauthorized actions on the part of a deceased client are a nullity.[15] So, unless a deceased client's legal representative or the client's contractual agreement authorizes the attorney to take or continue an action for the client, an attorney cannot take any further valid action in the matter.[16]

Here, even if the legal right that Genevieve had defended (her competency to manage her own affairs) were not abated by her death, her appeal could only be continued by someone statutorily authorized to represent her interests. Her attorney is not her personal representative or her successor in interest. He stated at oral argument that a county court in a separate trust proceeding authorized him to continue this appeal. But he has not asked us to take judicial notice of such order or explained the legal grounds for the purported authorization. He has not

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[13] See, *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004); *Long, supra* note 6.

[14] See *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007).

[15] See *Long, supra* note 6.

[16] See, *id.*; *Schaeffler v. Deych*, 38 So. 3d 796 (Fla. App. 2010); 7A C.J.S. *Attorney & Client* § 335 (2015).

claimed an interest in this action or shown that Genevieve contractually authorized him to continue her appeal even if she died. We conclude that Genevieve's attorney has no authority to continue her appeal and no interest in the litigation. Accordingly, he lacked standing to file a brief and seek relief for her. So we dismiss Genevieve's appeal.

John's Appeal

In contrast to Genevieve's attorney, her son John has standing to appeal the court's appointment of a conservator. Under Neb. Rev. Stat. § 30-1601(2) (Cum. Supp. 2014), an appeal from a probate matter "may be taken by any party and may also be taken by any person against whom a final judgment or final order may be made *or* who may be affected thereby." The statute sets forth the requirements for filing an appeal in the alternative. So § 30-1601(2) gives John standing to appeal if he had an interest that was affected by the order *or* if the order was final with regard to any objections he raised. But because § 30-1601(2) directly refers to a final order, he still must show that the order affected a substantial right.

John must show that the order affected a substantial right because proceedings initiated to appoint a guardian of a person alleged to be incapacitated and to appoint a conservator are special proceedings.[17] And under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order in a special proceeding is final only if it affects a substantial right. But under § 25-1902, we have held that an order that disposes of every issue before a court is necessarily a final order.[18]

[18] The conservatorship statutes do not explicitly authorize any person to object to a conservator appointment. But as relevant here, they do require notice of a petition for a conservator to the subject's adult children and a hearing

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[17] See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

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

before making an appointment.[19] And this court has previously decided appeals from family members who objected to a conservatorship appointment.[20] So, under our implicit interpretation of § 30-1601(2), a protected person's close family members have the right to appeal from a final order in a conservatorship proceeding if they filed an objection and the county court appointed a conservator. Although John is not a party, the right to appeal under § 30-1601(2) is not limited to parties. John filed an objection and requested an evidentiary hearing. So, under the probate code's generous appeal statute, he is a person against whom a final order was entered and has the right to appeal.

Nonetheless, John only has standing to address the sole issue resolved in the final order, which is Genevieve's need for a conservator. But that issue is mooted by her death. Although all the appellate attorneys asserted at oral argument that there is a separate, pending trust proceeding, neither party has asked us to take judicial notice of a proceeding that shows the issue of Genevieve's competency is not moot. Because the issue appealed is moot, we conclude that Genevieve's death has abated John's appeal.[21] He does not dispute that point. But he argues that the abatement on appeal requires us to vacate the county court's previous orders appointing a conservator. Not so.

There is a distinction between a party's death that abates an appeal and a party's death that abates a cause of action. But courts have not always been clear on this point. In early cases, if an appeal called for a trial de novo, perfecting the appeal vacated the judgment, or the judgment was treated as

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[19] See Neb. Rev. Stat. §§ 30-2630 to 30-2635 (Reissue 2008 & Cum. Supp. 2014).

[20] See, e.g., *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006); *Winters v. Lange*, 197 Neb. 157, 247 N.W.2d 617 (1976).

[21] See *Sherman, supra* note 7, citing 4 C.J.S. *Appeal and Error* § 343 (2007).

interlocutory. But if review was sought through a writ of error, the judgment was not vacated; it was suspended.[22] So a party's death pending a writ of error proceeding did not vacate or annul the judgment reviewed. Unless the judgment was reversed on appeal, it remained in effect and was res judicata between the parties.[23] Over time, however, this distinction was lost and considerable confusion developed whether a party's death pending an appeal abated the appeal or the entire action.[24] Our case law illustrates this point.

For example, in 1927, we considered a case in which a husband died pending a wife's appeal of a marital dissolution decree.[25] At that time, our review of a dissolution decree was a trial de novo and a divorce precluded a spouse from taking insurance benefits from a former spouse. We stated that the decree was interlocutory—i.e., not final until we issued a decision—and concluded that the husband's death had abated the action and annulled the judgment, as if he had died before the trial court entered the decree. So the wife was not precluded from taking the husband's insurance benefits.

But we no longer treat marital dissolution decrees as interlocutory or review them in a trial de novo. If an order or decree were not final, we would dismiss the appeal for lack of jurisdiction.[26] And our disposition in a later case dealing with the same issue showed that we concluded the party's death pending his appeal abated the appeal, not the action.

Specifically, in 1945, we again considered a case in which a husband died pending appeal from a marital dissolution

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[22] See, *In re Estate of Marsh*, 145 Neb. 559, 17 N.W.2d 471 (1945); Annot., 148 A.L.R. 1111 (1944).

[23] See, 148 A.L.R., *supra* note 22; *Green v. Watkins*, 19 U.S. (6 Wheat.) 260, 5 L. Ed. 256 (1821).

[24] See 148 A.L.R., *supra* note 22; Annot., 33 A.L.R.4th 47, § 2[b] (1984).

[25] See *Westphalen v. Westphalen*, 115 Neb. 217, 212 N.W. 429 (1927).

[26] See, e.g., *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984).

decree.[27] There, we denied a special administrator's motion on appeal to revive the husband's appeal for review of the decree's requirement that he pay alimony. We repeated the rule that a dissolution decree was interlocutory. And we concluded that the death of one of the parties destroys the subject matter of the decree, including matters of alimony and property rights, which we described as only incidental to the main object of the action. But despite this broad language that the *action* was extinguished, we only denied the motion for revivor and dismissed the appeal. We did not hold that the decree was annulled, nor did we remand the cause for the lower court to vacate its decree. So, our disposition showed that the appeal was abated—not the action.

Later, our disposition in another case dealing with a party's death pending appeal from a probate judgment similarly showed that the party's death abated only the appeal. There, a surviving spouse appealed from an order denying him a statutory allowance, a homestead exemption, and the decedent's personal property, but he died pending appeal. We decided the case after the Legislature had amended the probate statutes to allow a surviving spouse's petition for allowances or an elective share to survive the surviving spouse's death,[28] but the parties apparently did not raise the statute. We concluded that the asserted rights did not survive the appellant's death: "[T]he rights in question, being personal to the surviving spouse, terminated upon his death as did the cause of action. . . . It is fundamental that when a party to a pending suit dies and the right is personal in nature, the right dies with the person."[29] But our statement that the cause of action terminated with the appellant's death clearly meant that the

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[27] See *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945).

[28] See *In re Estate of Stephenson, supra* note 9.

[29] *Jacobson v. Nemesio*, 204 Neb. 180, 183, 281 N.W.2d 552, 554 (1979) (superseded by statute as stated in *In re Estate of Stephenson, supra* note 9).

cause of action died from that point forward; i.e., his death abated the appeal. The abatement obviously did not extinguish the entire action or annul the order denying his asserted legal rights.

It is true that in *Sherman v. Neth*,[30] we determined that because a party's death pending appeal from an administrative license revocation abated the appeal, we should vacate the proceedings in the lower court. John relies on *Sherman* and a 1939 Missouri conservatorship case.[31] The Missouri case was one of the cases that we cited in *Sherman* to show courts will sometimes vacate a lower court's judgment if the right asserted on appeal was strictly personal. John also cites another Missouri case and a New York case.[32] In those cases, the court held that a protected person's death pending appeal from a mental incompetency order abates not just the appeal but the cause of action. But we decline to extend *Sherman* or to follow the cases that John cites for three reasons.

First, in *Sherman*, we were clearly concerned that the Court of Appeals had already issued a decision on a new question of law that we could not review—because we concluded that applying the public interest exception was inappropriate in that circumstance. So our inability to review the Court of Appeals' precedent was a unique circumstance that is not presented here. The county court's orders are not precedent for any other court, and final orders and judgments have no preclusive effect if appellate review of them is denied as a matter of law.[33]

[19] Second, in modern decisions by state courts explicitly deciding the effect of a party's death pending an appeal,

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[30] *Sherman, supra* note 7.

[31] See *Gee v. Bess*, 132 S.W.2d 242 (Mo. App. 1939).

[32] See, *Moberly v. Powell and Walker*, 229 Mo. App. 857, 86 S.W.2d 383 (1935); *Matter of Thomas v. Baumeister*, 21 N.Y.2d 720, 234 N.E.2d 705 (1967).

[33] See Restatement (Second) of Judgments § 28(1) (1982).

the general rule is that the death does not abate the cause of action or affect the underlying judgment.[34] These courts have frequently reasoned that under the doctrine of merger, an action does not abate when a party dies after the final judgment. Under that doctrine, a cause of action merges into the final judgment, thus extinguishing the cause of action and barring a subsequent action for the same cause.[35] And some of our case law is consistent with the rule that a party's death pending appeal does not abate the cause of action or affect the final judgment.

Third, unlike the license revocation issue appealed in *Sherman*, the legal right at stake in a conservatorship appeal is not solely the protected person's status. Vacating the county court's orders could leave a conservator exposed to liability. And the conservatorship cases from other jurisdictions that John cites were decided before the Legislature enacted the Nebraska Probate Code in 1974.[36]

[20] We have stated that a protected person's death terminates a conservator's authority and responsibility as conservator but does not affect the conservator's liability for acts taken before the death or the conservator's obligation to account for the protected person's funds and assets.[37] And those continuing

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[34] See, e.g., *Kaufman v. Kaufman*, 22 So. 3d 458 (Ala. Civ. App. 2007); *Variety Children's Hospital, Inc. v. Perkins*, 382 So. 2d 331 (Fla. App. 1980); *Tunnell v. Edwardsville Intelligencer*, 43 Ill. 2d 239, 252 N.E.2d 538 (1969); *Goldstein v. Feeley*, 299 S.W.3d 549 (Ky. 2009); *Simpson v. Strong*, 234 S.W.3d 567 (Mo. App. 2007); *Acito v. Acito*, 72 A.D.3d 493, 898 N.Y.S.2d 133 (2010); *Albrecht v. Albrecht*, 856 N.W.2d 755 (N.D. 2014); *Black v. Black*, 673 S.W.2d 269 (Tex. App. 1984); *Gordon v. Hillman*, 102 Wash. 411, 173 P. 22 (1918); 1 C.J.S. *Abatement and Revival* § 139 (2005); 1 Am. Jur. 2d, *supra* note 10, § 58. But see *Panter v. Panter*, 499 A.2d 1233 (Me. 1985).

[35] See 46 Am. Jur. 2d *Judgments* §§ 451 and 452 (2006).

[36] See *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

[37] See *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

obligations mean that a conservator could also be liable for actions taken after a protected person's death. Under Neb. Rev. Stat. § 30-2654(e) (Reissue 2008), a conservator has the duty to wind up the conservatorship and deliver the estate to an appointed personal representative.

A conservator's potential liability exists because title to both real and personal property passes immediately upon death to a decedent's devisees or heirs, subject to administration, allowances, and a surviving spouse's elective share.[38] Additionally, the Nebraska Probate Code authorizes nontestamentary, nonprobate transfers on death, including transfers through trusts.[39] So a conservator could take actions that directly conflict with the interests of heirs, devisees, and beneficiaries of nontestamentary transfers. This could happen, for example, if a conservator takes or retains property of the protected person to pay for administration costs or attorney fees during the conservatorship.[40]

But if the death of a protected person pending an appeal rendered a conservator's appointment void, by what authority would the conservator have acted before or after the protected person's death? Concluding that the death abated the action ab initio would call into question the conservator's actions and create unnecessary disputes and litigation. So here, there is good reason to follow the general rule that a party's death after a final judgment does not extinguish the cause of action or affect the underlying judgment.

[21] Finally, although the parties here have failed to show that this appeal is not moot, we recognize that conservatorship proceedings for elderly persons are frequently prompted by the elderly person's land or financial transactions that

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[38] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[39] *In re Estate of Chrisp, supra* note 36; 1993 Neb. Laws, L.B. 250.

[40] See, e.g., *Naito v. Naito*, 125 Or. App. 231, 864 P.2d 1346 (1993); *In re Estate of Briley*, 16 Kan. App. 2d 546, 825 P.2d 1181 (1992).

threaten the person's well-being or affect his or her heirs or family members who have contributed to the assets.[41] As stated, dismissing an appeal as moot because of the protected person's death pending appeal would not render the conservatorship order conclusive in another action. But the interests of judicial economy would often be better served by deciding an appeal from a final adjudication of incompetency if the parties showed that the issue was not moot. So, we hold that a protected person's death pending an appeal from a conservatorship proceeding does not abate the cause of action or affect the underlying orders appointing a conservator.

But because Genevieve's competency is a moot issue, her death extinguishes this appeal.

CONCLUSION

We conclude that after Genevieve's death pending her appeal, her appeal could be continued only by someone statutorily authorized to represent her interests. Because her attorney has not shown any interest in the litigation or authorization to continue her appeal, he lacks standing to seek any relief on her behalf. We therefore dismiss Genevieve's appeal.

We conclude that Genevieve's son John has standing under § 30-1601(2) to appeal from the county court's appointment of a conservator for Genevieve because he filed an objection and asked for an evidentiary hearing. His standing on appeal is limited, however, to challenging the court's finding that Genevieve was in need of a conservator. That issue is abated by Genevieve's death.

But Genevieve's death abates only John's appeal. It does not abate the cause of action or affect the validity of the county court's orders appointing a conservator.

Appeal dismissed.

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[41] See, e.g., 6 Causes of Action 2d 625, § 7 (1994).

State of Nebraska, appellee, v. Steven R. Braesch, appellant.

874 N.W.2d 874

Filed March 4, 2016. No. S-14-1091.

1. **Jury Trials: Waiver: Appeal and Error.** An appellate court reviews a trial court's ruling on a request to withdraw a defendant's waiver of a jury trial for abuse of discretion.
2. **Motions for New Trial: Appeal and Error.** An appellate court reviews a trial court's order denying a motion for a new trial for abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Jury Trials: Waiver.** Whether to waive a jury trial is a basic trial decision for which the defendant has the ultimate authority.
5. ____: ____. To waive the right to trial by jury, a defendant must be advised of the right to a jury trial, must personally waive that right, and must do so either in writing or in open court for the record. And a defendant must waive the right to a jury trial knowingly, intelligently, and voluntarily.
6. **Judges.** A defendant has the right to an impartial judge but does not have the right to have his or her case heard before any particular judge.
7. **Jury Trials: Waiver.** After a defendant validly waives his or her right to a jury trial, the defendant has no absolute right to withdraw the waiver. Whether to permit a defendant to withdraw a valid waiver of the right to a jury trial falls within the trial court's discretion.
8. ____: ____. Absent a showing of good cause for a delay, a trial court does not abuse its discretion in overruling a motion to withdraw a waiver of a jury trial that is not made until the eve of trial.

9. **Jury Trials: Waiver: Appeal and Error.** Absent plain error, when a party knows of a circumstance that purportedly affected the party's decision to validly waive a jury trial but does not raise the matter until after the trial, an appellate court will not consider a challenge on appeal to a trial court's refusal to grant a new trial on that ground.
10. **Trial: Expert Witnesses: Appeal and Error.** Whether a trial court can decide that an expert opinion is unreliable after admitting it into evidence is a procedural issue that an appellate court decides de novo.
11. ____: ____: ____. An appellate court reviews a trial court's ruling to admit or exclude an expert's testimony for abuse of discretion.
12. **Trial: Expert Witnesses.** Before admitting expert opinion testimony under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert.
13. ____: ____. Under the framework established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), if an expert's opinion involves scientific or specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable). It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.
14. ____: ____. The requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), do not preclude a court presiding over a bench trial from admitting an expert's opinion subject to the court's later determination that the opinion is unreliable and should not be credited.
15. **Expert Witnesses.** To be admissible, an expert's opinion must be based on good grounds, not mere subjective belief or unsupported speculation.
16. **Trial: Expert Witnesses.** A trial court should not require absolute certainty in an expert's opinion, but it has discretion to exclude expert testimony if an analytical gap between the data and the proffered opinion is too great.
17. ____: ____. A trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.

18. **Expert Witnesses.** Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their opinions by following an accepted method or procedure as it is practiced by others in their field.
19. **Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to support a 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.

Appeal from the District Court for Sarpy County: Max Kelch, Judge. Affirmed.

James Martin Davis, of Davis Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

Connolly, J.

I. SUMMARY

On July 13, 2013, the appellant, Steven R. Braesch, shot and killed his father, William Braesch (William), in the sight of Braesch's three nieces. The State claimed his three nieces were within the line of fire. After a bench trial, the court convicted Braesch of first degree murder, using a firearm to commit a felony, and three counts of negligent child abuse. In a motion for a new trial, he claimed that the reassignment of his bench trial to a new judge was an irregularity in the proceedings. Braesch contends that the court erred in failing to conclude that his waiver of a jury trial was invalid because he would not have waived this right with any other judge presiding. Additionally, Braesch argues that the court erred in excluding his expert's opinion regarding his mental state when he killed William and finding the evidence sufficient to support his first degree murder conviction.

Finding no reversible error, we affirm.

II. BACKGROUND

Braesch's mother, Virginia Braesch (Virginia), testified that Braesch moved away from home in the 1990's but moved back into his parents' home in Gretna, Nebraska, about a year or two before the murder. He was staying in the basement. About 6 weeks before the murder, Braesch had told Virginia that he had AIDS. She said that "off and on," he would lie in bed sick, "like depression or something," but that he would also "be really high and all happy." She and William had decided to ask him to move out because of his moods. She knew that Braesch took many medications, because they were delivered to the house or would come in the mail. She also went with him to Mexico so that he could buy injectable steroids.

On July 13, 2013, William and Virginia's three granddaughters, Braesch's nieces, were at the house for a visit. The oldest one was age 7, and the younger twins were age 5. Virginia said that Braesch had been sick in bed for 6 days and appeared to be depressed. When Virginia took her granddaughters to the basement to trim their hair, Braesch came out of his room angry about the noise. After Virginia took the girls back upstairs, Braesch scared her by cornering her in the bathroom and yelling at her. She walked out of the house and met William in the garage. She asked William to call the 911 emergency dispatch service, but he did not. That confrontation occurred at about 10:30 a.m. Virginia and William took their granddaughters to a wedding and reception later that day and did not return home until about 7:30 p.m.

Virginia began putting some groceries away and making a salad in the kitchen, while William went to change clothes to finish some chores. From where Virginia was working in the kitchen, she could see into the dining room and an enclosed porch that was attached to and mostly open to the back dining room wall. As William was headed to the garage door off the enclosed porch, Braesch came up from the basement stairs off the dining room. William told Braesch that he wanted him to move out of the house within 30 days. Virginia said there was

no physical conflict and Braesch never said a word. She said that Braesch went downstairs to "cool off" and that William just looked at her and shook his head. Braesch immediately came back up from the basement with a gun; Virginia said he reappeared in a matter of seconds. He shot William while William was standing beside the garage door in the enclosed porch. The granddaughters were sitting in a hot tub less than 10 feet from a sliding glass door on the back wall of the enclosed porch.

Virginia did not see a gun because it happened so quickly. But she heard a gunshot and saw that William was in pain. She ran through the living room and out the front door. She got in their car and locked the doors because by then, she could see Braesch on the front deck. He did not have a gun then, but he "didn't look right" to her. She drove to a neighbor's house and asked him to call 911. Within a few minutes, the neighbor led sheriff's officers to the house and saw Braesch sitting outside with his three nieces beside him. Braesch complied with the officers' commands and was arrested without incident.

One of the granddaughters testified. While she was in the hot tub, she could see through the sliding glass door and saw Braesch shooting William. She said that they were yelling at each other about moving and that then Braesch pushed William down and started shooting him. She saw William on the ground beside the sliding glass door. After waiting a few minutes, she climbed over him to look for Virginia in the house. She did not see Virginia in the house when Braesch was shooting William.

Officers found a lever-action, .22-caliber rifle on the dining room table and William's body beside the sliding glass door. "Lever action" means that after every shot, "the action of the rifle has to be manually cycled in order to eject the spent cartridge and feed a new one into the chamber." But numerous rounds can be fired in a matter of seconds.

Crime scene investigators found seven shell casings: one in the dining room and the rest on or around William's body in

the enclosed porch area. The parties stipulated that the casings were fired from the gun that the officers found. An investigator who attended the autopsy testified that she collected five bullets or bullet fragments from five different areas of the body: the abdomen, the right collarbone, the lower spine, the right frontal lobe of the brain, and two from the left scalp. The autopsy report stated that the scalp wounds had gray-black particulate material around the entrances, indicating that William was shot in the head from close range.

1. Evidence of Braesch's Mental State From His Telephone Calls

After officers arrested Braesch, he made two telephone calls from jail that an officer recorded. On July 19, 2013, 6 days after the homicide, Braesch called Virginia. During the conversation, he discussed an insanity defense and told her that "there was nothing premeditated" about the homicide. This colloquy followed:

> Virginia: No. Well, there was. You know what they're going to say?
>
> Braesch: But Mom, before that day, before 5 minutes before it happened, before 2 minutes before it happened, I never gave it a thought—of killing dad.
>
> Virginia: Never?
>
> Braesch: Never.
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> Virginia: Never have you?
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> Braesch: I have. Once before, like 6 months ago. Six months ago, yeah. . . . But 6 months ago, I didn't even know how to load a gun.

In a telephone call to a friend on July 22, 2013, Braesch again denied killing William with premeditation:

> Everybody is saying that first degree murder will be pretty tough to— There was honestly nothing premeditated about this. My mom and I were arguing and my dad got in the middle of it. And he was in the wrong place at

> the wrong time. I mean I didn't go to work on Wednesday, Thursday, Friday. I was feeling really lousy.

But later in the conversation, Braesch admitted to going downstairs to get a loaded gun:

> The thing is, the gun, the gun was loaded. We always keep that gun loaded to kill the cats. . . . I ran downstairs, I grabbed the gun that was loaded. It took seconds. I didn't— They think that I loaded the gun, which is not true . . . . There shouldn't be any indication of that. Because it's not true . . . .

2. Court's Findings

At the close of the State's evidence, the court overruled Braesch's motion for a directed verdict. During the court's findings from the bench after the trial, it concluded that Braesch's expert's opinion of his mental state when he killed William was not credible. It found Braesch guilty of the charged crimes. Later, it overruled Braesch's motion for a new trial. It rejected his arguments that his waiver of a jury trial was invalid and that the evidence was insufficient to support his convictions on the charges of first degree murder and the three counts of negligent child abuse.

After issuing this order, the court sentenced Braesch to life imprisonment for the murder conviction; 10 years' imprisonment for the use of a firearm conviction, to be served consecutively to the life imprisonment sentence; and aggregate concurrent sentences of 1 year's imprisonment for the negligent child abuse convictions, to be served consecutively to the 10-year sentence for use of a firearm.

III. ASSIGNMENTS OF ERROR

Braesch assigns that the court erred in (1) failing to conclude that he did not voluntarily and intelligently waive his right to a jury trial or consent to a trial before Judge Max Kelch; (2) excluding his expert witness' opinion that his bipolar symptoms, combined with his recent history of abusing

several substances, interfered with his ability to form volitional intent; and (3) failing to find that the evidence was insufficient to prove beyond a reasonable doubt that he killed William with deliberate and premeditated malice.

IV. ANALYSIS

1. Reassignment of the Case to a New Judge Was Not a Denial of Braesch's Right to a Jury Trial or an Abuse of Discretion

(a) Additional Facts

As relevant to the issues raised on appeal, Braesch sought a new trial for two reasons: (1) The evidence was insufficient to support the first degree murder conviction, and (2) an irregularity in the proceedings occurred. In support of his irregularity claim, Braesch alleged that he had waived his right to a jury trial, believing that the trial judge would be Judge William B. Zastera. Instead, his case was reassigned to Judge Kelch. Braesch claimed that because of confusion over who would be the assigned judge, he could not move to withdraw his plea and "was therefore prevented from having a fair trial."

The court allowed the parties to submit affidavits regarding the alleged irregularity in the proceedings. One of Braesch's trial attorneys, who had withdrawn from representing Braesch before the motion for a new trial was heard, stated in an affidavit that Judge Zastera's assignment to Braesch's case was an important consideration in advising him to waive his right to a jury trial.

The record shows that Braesch waived his right to a jury trial on April 10, 2014. Judge Zastera set the trial date for July 15. But on June 23, Judge Kelch was assigned to a pretrial hearing because Judge Zastera had a medical emergency. At the June 24 hearing, Judge Kelch informed the parties that because of Judge Zastera's medical emergency, the case had been transferred to him. Braesch and his two attorneys

were present at this hearing. At some unstated time, the parties had a conference with Judges Kelch and Zastera about Judge Zastera's possibly still hearing the case. But on July 2, Braesch's attorney "was again informed" that Judge Kelch would preside.

Braesch did not move to withdraw his plea before the bench trial began on July 15, 2014, with Judge Kelch presiding. Braesch stated that he thought the case would be reassigned to Judge Zastera when he returned to the bench and did not learn until the day before his trial that Judge Zastera was ill again. Braesch said that he would not have waived his right to a jury trial if he had known Judge Kelch would preside and that he waived his right solely because he believed that Judge Zastera would preside. Braesch's trial attorney stated that this sequence of events unfairly limited the time Braesch had to consider the procedural complexities of asking the court to withdraw his waiver and decide whether to do so.

Judge Kelch concluded that Braesch had failed to show any prejudice resulting from the transfer. Instead, he concluded that Braesch's desire for a particular judge was only an attempt to gain a tactical advantage and not a reason to grant a new trial. He further concluded that Braesch had failed to show a valid reason for not moving to vacate the waiver.

(b) Parties' Contentions

Braesch contends that it would be naive not to recognize that a defendant's decision whether to waive a jury trial is influenced by the judge assigned to his case. So he argues that the last-minute reassignment of his case to a judge with whom he was unfamiliar should be a sufficient reason to conclude that he did not freely, voluntarily, and intelligently waive his right to a jury trial.

The State argues that a motion for a new trial is not the proper vehicle for attempting to withdraw a waiver of a jury trial. Because Braesch did not claim he would not have waived his right to a jury trial unless Judge Zastera presided until after

he was convicted, the State argues that he had waived any challenge to the validity of his plea on this ground.

(c) Standard of Review

[1-3] We review a trial court's ruling on a request to withdraw a defendant's waiver of a jury trial for abuse of discretion.[1] We also review a trial court's order denying a motion for a new trial for abuse of discretion.[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.[3]

(d) Analysis

[4,5] Whether to waive a jury trial is a basic trial decision for which the defendant has the ultimate authority.[4] To waive the right to trial by jury, a defendant must be advised of the right to a jury trial, must personally waive that right, and must do so either in writing or in open court for the record.[5] And a defendant must waive the right to a jury trial knowingly, intelligently, and voluntarily.[6]

[6] But Braesch cites no authority for his implicit argument that a defendant's waiver of a jury trial is ineffective if the defendant is not informed that his or her case could be reassigned to a different judge. To the contrary, we have held that a

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[1] See, *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988); *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984).

[2] See, *State v. Tolbert*, 288 Neb. 732, 851 N.W.2d 74 (2014); *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

[3] *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

[4] See *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[5] *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995).

[6] See *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981).

defendant has the right to an impartial judge but does not have the right to have his or her case heard before any particular judge.[7] Braesch did not claim that Judge Kelch was biased, and he does not argue on appeal that the reassignment prejudiced him. Nor does the court's colloquy with Braesch show that Judge Zastera led Braesch to believe his bench trial would be heard only by him if he waived a jury trial.[8] We have reviewed Braesch's waiver of his right to a jury trial and conclude that it was valid.

[7] After a defendant validly waives his or her right to a jury trial, the defendant has no absolute right to withdraw the waiver. Whether to permit a defendant to withdraw a valid waiver of the right to a jury trial falls within the trial court's discretion.[9]

[8] Some of our cases illustrate that absent a showing of good cause for a delay, a trial court does not abuse its discretion in overruling a motion to withdraw a waiver of a jury trial that is not made until the eve of trial.[10] And many courts have held that a request to withdraw a valid waiver of a jury trial after a trial has commenced is ordinarily untimely.[11]

But we have not set an absolute time limit for a defendant to request a withdrawal of his or her waiver. And our decision in *State v. Halsey*[12] suggests that in limited circumstances, such a request might be appropriate after a trial commences. But even in *Halsey*, we found no abuse of discretion in the court's denial of a new trial. We reached this decision in part because the defendant did not move to withdraw his waiver of a jury

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[7] See *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

[8] See *Fitzgerald v. Withrow*, 292 F.3d 500 (6th Cir. 2002).

[9] See *Zemunski, supra* note 1.

[10] See, *Kaba, supra* note 1; *Sutton v. State*, 163 Neb. 524, 80 N.W.2d 475 (1957).

[11] See 3 Charles E. Torcia, Wharton's Criminal Procedure § 389 (13th ed. 1991) (citing cases).

[12] *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989).

trial or ask for a mistrial until after the trial—instead of when he first became aware of the claimed circumstance that supported his motion to withdraw the waiver.

We recognize that an assigned judge is a factor that defense attorneys may take into consideration when advising their clients whether they should waive a jury trial.[13] But we need not consider the circumstances under which a change in the presiding judge could warrant allowing a defendant to withdraw a waiver of the right to a jury trial. Braesch has not shown good cause for not moving to withdraw his waiver before the trial began.

As stated, Judge Kelch first informed Braesch and his attorneys that the case had been reassigned to him 21 days before the trial was scheduled to begin. Thirteen days before trial, Braesch's attorney was again informed that Judge Kelch would preside. Even if Braesch mistakenly thought that his case might still be reassigned to Judge Zastera again, his attorney knew otherwise. And his attorney did not allege that she failed to discuss this information with Braesch. Braesch admits that he minimally knew the day before trial that Judge Zastera would not preside. Yet, he did nothing to timely assert a claim that he would not have agreed to waive his right to a jury trial with any judge presiding besides Judge Zastera.

[9] We have often held that a party who knows of judicial conduct that is purportedly improper cannot gamble on a favorable result without raising the matter and then complain that the claimed error caused an unfavorable outcome.[14] The same reasoning applies here. Absent plain error, when a party knows of a circumstance that purportedly affected the party's decision to validly waive a jury trial but does not raise the matter until after the trial, we will not consider a challenge on appeal to a trial court's refusal to grant a new trial on that ground. The

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[13] 6 Wayne R. LaFave et al., Criminal Procedure § 22.1(h) (4th ed. 2015).

[14] See, e.g., *State v. Schreiner*, 276 Neb. 393, 418, 754 N.W.2d 742, 762 (2008).

court's refusal to grant a new trial because of the reassignment of judges was not plain error.

2. Court Did Not Err in Concluding That Braesch's Expert's Opinion Was Unreliable at the Close of Evidence

(a) Additional Facts

Braesch's only witness was Kirk Newring, Ph.D., a psychologist. Newring testified as an expert about Braesch's mental state on the day of the murder. Newring based his opinion on his review of the following information: (1) sheriff officer reports, including statements of the witnesses and officers; (2) the coroner and autopsy reports; (3) interviews with Braesch, Virginia, the principal of the high school that Braesch attended 25 years earlier, and Braesch's work supervisor; (4) pharmacy records of Braesch's prescribed medications; and (5) Braesch's requests for leave from work.

Newring spoke to Braesch in jail in May 2014 for about 2 hours, and he advised Braesch that if he made any incriminating statements, Newring might have to disclose them. He relied in part on Braesch's statements that while in jail, he had been prescribed Depakote, a mood stabilizer, and was subject to suicide precautions. But he did not review any jail records to confirm the prescription, to learn why it was prescribed, or to review Braesch's conduct in jail. Newring said he did not perform any psychological testing because it was so long after the homicide that testing might not have been informative of Braesch's mental state on the day of the killing. He did not contact any of Braesch's health care providers or counselors because he did not have permission to do so. He stated that Braesch had worked for the same employer for 15 years, had been a supervisor, and was considered a good employee—apart from some attendance problems. If a mental health care provider approved his request for leave, he was approved to take leave for depression.

Newring opined, within a reasonable degree of psychological certainty, that Braesch "met [the] diagnostic criteria" for bipolar I disorder, for substance abuse disorders, and for an anxiety disorder. When Newring was asked if he had an opinion whether Braesch's ability to form volitional intent on July 13, 2013, was compromised, the State objected and moved to voir dire. Newring confirmed that his opinion of Braesch's mental state was based in part on Braesch's voluntary use of the following substances in the weeks leading up to the homicide: Xanax, methamphetamine, alcohol, cocaine, and marijuana. The State then moved to exclude his opinion.

The State argued that to the extent Newring relied on Braesch's voluntary use of intoxicating substances, his opinion was invalid under Neb. Rev. Stat. § 29-122 (Cum. Supp. 2014). Apart from limited exceptions, that statute excludes evidence of intoxication as a defense to a criminal charge or to show that a defendant did not have the requisite mental state. Additionally, the State argued that because Newring did not have a juris doctorate, he lacked the qualifications to opine about legal conclusions. Braesch responded that Newring was not giving a legal opinion and that Newring's opinion about Braesch's substance abuse was only part of his diagnosis.

The court concluded that § 29-122 did not permit a voluntary intoxication defense and that no exception applied. It also concluded that Braesch had failed to show Newring had any understanding of the legal meaning of intent. But it permitted Braesch to reframe his question to exclude any reference to voluntary intoxication.

Newring then testified that he had prepared separate opinions on the effect of Braesch's mental health disorders on his intent. He said that his primary concern was Braesch's bipolar I disorder and believed that Braesch's substance abuse was caused by his bipolar I disorder. When asked for his opinion regarding the impact of Braesch's bipolar I disorder on his volitional intent, the State again objected and asked to voir

dire. Newring conceded that his opinion was partially based on Braesch's impaired decisionmaking and that his substance abuse was a possible contributing factor. He conceded that he did not have a toxicology report to verify Braesch's statements about the substances he had allegedly ingested and that his opinion about Braesch's substance abuse disorders rested on Braesch's self-reporting.

The State renewed its statutory and foundation objections. The court overruled the objections, concluding that the issue was whether to give any weight and credibility to Newring's opinions, an issue that it would decide at the end of the trial. Newring then opined that "separate and distinct" from Braesch's abuse of drugs, his bipolar I disorder "limited his ability to effectively regulate his behavior on that day; that he was experiencing bipolar symptoms, and that limited his ability to make good decisions that day." Newring further stated that with Braesch's reported substance abuse, his impaired decisionmaking "would have been even worse," but that "even without the substance abuse, [his] opinion would probably be the same."

(b) Court's Findings

In closing argument, Braesch's attorney argued that the evidence showed only a sudden quarrel homicide. The next day, the court stated its findings from the bench.

The court stated that Newring was certainly qualified to perform mental health examinations. But it concluded that Newring's opinion regarding Braesch's ability to form the intent to kill on the day of the homicide was not credible for several reasons.

First, the court noted that Newring's opinion rested on Braesch's self-reported problems and that Newring had not obtained Braesch's medical records or other evidence to corroborate his statements. Second, Newring never explained how his mental health principles, even if they involved intent, related to requirements of Nebraska's homicide statutes. Third,

Newring did not explain the scientific methodology he used to retroactively diagnose Braesch's mental health on the day of the homicide. Specifically, Newring did not explain how Braesch's actions of retrieving a loaded rifle and shooting William five times without further confrontation showed Newring that Braesch was impaired by mental health problems. Nor did Newring attempt to reconcile Braesch's homicidal conduct with evidence that he was not out of control immediately after killing William and was cooperative with law enforcement. Finally, Newring did not explain whether his methodology for determining that Braesch's diagnosis was peer reviewed and how the underlying principles applied to the facts of the case.

(c) Parties' Contentions

Braesch contends that the court erred in excluding Newring's opinion of how Braesch's bipolar I and anxiety disorders, combined with his recent substance abuse, had affected his mental state on the day of the homicide. He argues that the Legislature's enactment of § 29-122 in 2011 did not change the common law on whether intoxication is relevant to show a defendant did not form specific intent to commit a crime. So he contends that his expert properly considered the combined effect of his bipolar disorder and substance abuse. He contends that the court further erred in admitting Newring's testimony but nonetheless concluding that his opinion was not credible. He argues that the court committed plain error by failing to consider evidence that it had already determined was admissible in its role as the gatekeeper of scientific or specialized evidence.

The State points out that Newring specifically stated that his opinion would be the same even without consideration of Braesch's substance abuse. So it contends that Newring's opinion regarding Braesch's substance abuse added nothing to Newring's opinion of Braesch's mental state on the day of the homicide. The State contends that his opinion

regarding substance abuse lacked a sufficient factual basis because Newring did not state (1) what substances he believed Braesch had ingested or (2) how much he had ingested or when he had done so. Finally, the State contends that Newring's opinion that Braesch's substance abuse had impaired his decisionmaking was insufficient because the evidence showed that he was not wholly deprived of reason because of drug use.

(d) Standard of Review

[10,11] Whether a trial court can decide that an expert opinion is unreliable after admitting it into evidence is a procedural issue that we decide de novo.[15] We review a trial court's ruling to admit or exclude an expert's testimony for abuse of discretion.[16]

(e) Analysis

(i) The Court Properly Determined the Expert's Opinion Was Unreliable After Admitting His Testimony

We first address Braesch's argument that under the *Daubert*/*Schafersman*[17] requirements, it was plain error for the trial judge, sitting as the fact finder, to reject an expert's opinion as unreliable when it has already admitted the opinion into evidence. We disagree.

[12,13] Before admitting expert opinion testimony under Neb. Evid. R. 702,[18] a trial court must determine whether the expert's knowledge, skill, experience, training, and education

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[15] See *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[16] See, *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[17] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[18] See Neb. Rev. Stat. § 27-702 (Reissue 2008).

qualify the witness as an expert.[19] Under our *Daubert*/*Schafersman* framework,[20] if an expert's opinion involves scientific or specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable). It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.[21]

But in a bench trial, a trial court is not required to conclusively determine whether an expert's opinion is reliable before admitting the expert's testimony. We have previously considered this issue. In *Fickle v. State*,[22] we determined that the trial court in a bench trial had not abdicated its gatekeeping function or abused its discretion in allowing an expert to testify, subject to the opponent's opportunity to object to the testimony as necessary. We explained that a "trial court may not abdicate its gatekeeping duty . . . in a bench trial, but the court is afforded more flexibility in performing this function."[23] Other courts have similarly concluded that in a bench trial, a court has discretion to admit a qualified expert's opinion even if its admissibility is questionable. The court can then decide after hearing further evidence whether the opinion meets reliability standards and should be credited in deciding disputed questions of fact.[24] We cited some of these cases in *Fickle*.

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[19] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[20] See *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014).

[21] See *id.*

[22] *Fickle, supra* note 15.

[23] *Id*. at 1006, 735 N.W.2d at 770.

[24] See, e.g., *U.S. v. Brown*, 279 F. Supp. 2d 1238 (S.D. Ala. 2003), *affirmed* 415 F.3d 1257 (11th Cir. 2005), citing *Gonzales v. National Bd. of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000) (Gilman, J., dissenting); *Ekotek Site PRP Committee v. Self*, 1 F. Supp. 2d 1282 (D. Utah 1998); *Bradley v. Brown*, 852 F. Supp. 690 (N.D. Ind. 1994), *affirmed* 42 F.3d 434 (7th Cir. 1994); *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky. 2004).

[14] Here, the court reasonably concluded that Newring was qualified to testify as an expert on Braesch's mental state. But requiring the parties to conduct a separate evidentiary hearing on the reliability of an expert's opinion before allowing the expert to testify is unnecessary in a bench trial. In a bench trial, the court is not shielding the jury from unreliable evidence. Instead, the court must fulfill its gatekeeper duty *and* decide the ultimate issues of fact in the trial. So we now reiterate the rule applied in *Fickle*: The *Daubert*/*Schafersman* requirements do not preclude a court presiding over a bench trial from admitting an expert's opinion subject to the court's later determination that the opinion is unreliable and should not be credited. Accordingly, the question is whether the court properly concluded that Newring's opinion was not credible.

(ii) Expert's Methodology Was Unreliable

As stated, Braesch contends that the court erred in excluding Newring's opinion of how Braesch's active bipolar I and anxiety disorders, *combined with* his recent substance abuse, had affected his mental state on the day of the homicide. But the record supports the State's argument that Newring conceded that even without considering Braesch's substance abuse, his opinion would be the same. According to Newring, Braesch's substance abuse would have only contributed to the effects of his bipolar I disorder. So there are two primary questions: (1) whether Newring reliably opined that Braesch was experiencing bipolar I symptoms on the day of the homicide, which symptoms limited his ability to effectively regulate his behavior and make good decisions, and (2) whether the fact finder could have properly applied his reasoning and opinion to the facts of the case.[25]

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[25] See *Herrera, supra* note 20.

[15,16] To be admissible, an expert's opinion must be based on good grounds, not mere subjective belief or unsupported speculation.[26] A trial court should not require absolute certainty in an expert's opinion, but it has discretion to exclude expert testimony if an analytical gap between the data and the proffered opinion is too great.[27]

[17,18] A trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.[28] Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their opinions by following an accepted method or procedure as it is practiced by others in their field.[29]

Regarding the reliability of Newring's methodology, the court correctly concluded that the evidence failed to establish that Newring reliably determined that Braesch was experiencing the effects of bipolar I symptoms on the day of the homicide. Although Newring provided the sources of information that he relied on, he did not explain the information that he obtained from those sources which led to his opinion. For example, he did not state that any of the medications that Braesch was taking when he killed William were for a

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[26] *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[27] See *id.*

[28] See *Casillas, supra* note 19.

[29] See *King, supra* note 26.

bipolar I disorder, and he did not consult Braesch's mental health care providers.

Newring also did not explain whether Braesch would have experienced the effects of his bipolar I disorder continually or whether any of the medications Braesch was taking would have diminished those symptoms. Most important, he did not explain what observable effects of a bipolar I disorder led him to believe that Braesch was experiencing those symptoms on the day of the homicide and how he knew that Braesch had a limited ability to regulate his behavior and make good decisions. And no methodology evidence established that subsequent psychological testing would have been irrelevant to whether Braesch was suffering from bipolar I disorder on the day of the killing.

These omissions are not insignificant when a person has been charged with murder. Because Newring had warned Braesch that he might have to report any incriminating statements, Braesch was unlikely to have reported an intent to kill William. And because Braesch had reason to falsify or exaggerate his bipolar symptoms on the day of the homicide, the court was justifiably concerned that Newring appeared to have primarily relied on Braesch's self-reporting of symptoms. Finally, assuming that Newring followed an established methodology for retroactively diagnosing Braesch's mental health disorders, he did not explain those methodologies or show whether they had been peer reviewed or followed by other professionals in his field.

We agree with the court that Braesch's evidence failed to establish the reliability of Newring's methodology in determining that Braesch was actively suffering from bipolar I symptoms on July 13, 2013. In sum, no evidence established a recognized methodology for retroactively diagnosing a bipolar I disorder. And assuming that a recognized methodology exists, Newring provided no specific data that supported his opinion. The court properly exercised its discretion in finding the analytical gap between the data and Newring's opinion

was too great. As stated, the evidence of Braesch's substance abuse was relevant only as a contributing factor to the symptoms of bipolar I disorder. So it would not have changed the court's finding that the underlying bipolar diagnosis itself was unreliable.

(iii) Court Could Not Apply the Expert's Opinion to the Facts

Regarding the court's ability to apply Newring's opinion and reasoning to the facts of the case, the defect is different but similarly serious. On appeal, Braesch argues that Newring was prepared to testify that Braesch's substance abuse disorder, combined with his bipolar I and anxiety disorders, prevented him from forming the "premeditated volitional intent" required for first degree murder.[30] But the record does not support this claim.

As stated, Newring testified that even without considering Braesch's substance abuse, his opinion of Braesch's mental state on the day of the homicide would have been the same. No offer of proof contradicted that statement. And Newring's opinion was that Braesch's bipolar I disorder limited his ability to make good decisions and effectively regulate his behavior on the day of the homicide. Newring did not opine that Braesch did not intend to kill William or that he could not have formed the specific intent to do so because of his bipolar I symptoms. Nor did he opine that Braesch's bipolar I disorder prevented him from deliberating or premeditating the killing of William.

But to prove first degree murder, the State must show that a defendant killed another person purposely and did so with deliberate and premeditated malice.[31] And to be applicable to these facts, Newring's opinion needed to show whether

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[30] Brief for appellant at 29.

[31] See *State v. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015).

Braesch could have deliberated and premeditated the killing as we have defined these terms.

Specifically, the deliberation element means not suddenly or rashly, and requires the State to prove that the defendant considered the probable consequences of his act before committing it.[32] The premeditation element requires the State to prove that a defendant formed the intent to kill a victim before doing so, but no particular length of time for premeditation is required. It is sufficient if an intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.[33] But Newring's opinion that Braesch's bipolar I disorder limited his ability to effectively regulate his behavior was too vague to assist the fact finder in determining whether Braesch deliberated or premeditated the killing. The court did not err in concluding that Newring's testimony failed to show how Braesch's impaired decisionmaking, even if true, prevented him from forming the statutory mental state for first degree murder.

3. Evidence Was Sufficient to Prove Beyond a Reasonable Doubt That Braesch Killed William With Deliberate and Premeditated Malice

(a) Court's Findings

In stating its findings from the bench, the court also set out its factual findings in determining that the State had met its burden to prove Braesch committed first degree murder beyond a reasonable doubt. It stated that despite removing himself from William's presence by going to the basement, Braesch did not leave the house or stay in the basement. Instead, the court found that Braesch had admitted going to the basement to get a gun and that he had done so intentionally and purposefully to kill William. Braesch's intent to kill William was shown by

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[32] See *id.*

[33] See *id.*

evidence that upon coming up the stairs, he immediately shot William, and that he had then shot William five more times, including shooting him twice in the head at close range. The court stated, "One does not place a deadly weapon next to the human head and pull the trigger, cock the rifle and pull the trigger again without the intent to kill. Additionally, [Braesch] repeated this process at least five times . . . ." The court also found that Braesch was not out of control because he had not shot anyone else.

The court also concluded that the facts of the case did not show a sudden quarrel provocation that would cause a normal person to lose control. It concluded that Braesch had formed the intent and design to kill William, without legal justification, before doing so.

(b) Standard of Review

[19] When reviewing the sufficiency of the evidence to support a 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.[34]

(c) Resolution

Braesch contends that even without considering his expert's testimony, the evidence was insufficient to prove that he killed William with deliberate and premeditated malice. He argues that the evidence at most showed an impulsive, rash act. Under our standard of review, however, a rational fact finder could have found otherwise. This assignment of error is without merit.

V. CONCLUSION

We conclude that Braesch's waiver of his right to a jury trial was valid despite the court's later reassignment of Braesch's

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[34] *State v. Irish, ante* p. 513, 873 N.W.2d 161 (2016).

bench trial from Judge Zastera to Judge Kelch. Although the court had discretion to consider his request to withdraw his jury trial waiver, Braesch has waived any challenge on appeal to the court's ruling on this issue by not raising the matter until after the trial was over. Finding no plain error in the ruling, we affirm.

We conclude that in a bench trial, a trial court can properly admit an expert's opinion but reserve ruling on its reliability until the close of evidence. Under that procedure, the court did not err in concluding that the opinion of Braesch's psychological expert on his mental state the day he killed William was unreliable. The evidence failed to establish a recognized methodology for retroactively diagnosing Braesch's mental health or identify the data upon which the expert relied. Additionally, the expert failed to explain how his diagnosis, even if reliable, related to the mental state required for first degree murder.

Finally, we conclude that the court did not err in concluding that the evidence was sufficient to prove beyond a reasonable doubt that Braesch killed William with deliberate and premeditated malice.

Affirmed.

James McCoolidge, appellant,
v. Daniel Oyvetsky et al.,
appellees.

874 N.W.2d 892

Filed March 4, 2016. No. S-14-1135.

1. **Trial: 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, which an appellate court will not disturb unless clearly wrong.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law.
3. **Uniform Commercial Code: Breach of Warranty.** The seller breaches the warranty of title in Neb. U.C.C. § 2-312 (Reissue 2001) if there is a substantial cloud or shadow over the title, even if no third party has come forward with a superior claim.
4. ____: ____. A seller breaches the warranty of title in Neb. U.C.C. § 2-312 (Reissue 2001) by delivering a defective certificate of title to the buyer.
5. **Uniform Commercial Code: Breach of Warranty: Damages: Proof.** Buyers asserting a breach of warranty under the Uniform Commercial Code must not only prove the warranty and breach thereof, but also the cause of their loss and the extent of their damages.
6. ____: ____: ____: ____. Buyers asserting a breach of warranty under the Uniform Commercial Code do not have to prove damages with mathematical certainty, but the evidence must be sufficient to allow the trier of fact to estimate the actual damages with reasonable certainty.
7. **Uniform Commercial Code: Damages.** If the buyer accepts defective goods, damages are measured under Neb. U.C.C. § 2-714 (Reissue 2001).
8. **Uniform Commercial Code: Damages: Proof.** The existence of "special circumstances" under Neb. U.C.C. § 2-714 (Reissue 2001) is not a

precondition to a buyer's recovery of incidental and consequential damages under Neb. U.C.C. § 2-715 (Reissue 2001).

9. **Motor Vehicles: Damages.** The reasonable value of the loss of use of a motor vehicle is generally the fair rental value of a like vehicle for a reasonable length of time or the amount actually paid, whichever is less.
10. **Motor Vehicles: Breach of Warranty: Damages: Time.** The period for which the buyer of a motor vehicle can recover loss of use damages should generally correspond to the length of time that the buyer would have used the vehicle but for the breach of warranty.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Thomas M. White, C. Thomas White, and Amy S. Jorgensen, of White & Jorgensen, for appellant.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Travelers Casualty and Surety Company of America.

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

Connolly, J.

SUMMARY

James McCoolidge bought a used automobile over the Internet and had trouble registering the certificate of title in Nebraska. He sued the man with whom he directly dealt, a dealership in Tennessee, and an insurer that had issued a surety bond to the dealership. The trial court concluded that although the sellers initially breached the warranty of title, McCoolidge had not proved the damages he suffered from the delay in obtaining good title. McCoolidge appeals, arguing that even if he could register a certificate of title, other problems remained. We conclude that McCoolidge did not prove his damages and therefore affirm the court's judgment for the defendants.

BACKGROUND

McCoolidge's Employment

Before multiple sclerosis forced him to retire, McCoolidge worked as an automobile mechanic and salesperson. He was a "part owner" of Cars on Keystone, a used car dealership, and held a sales license in that capacity.

Thomas Monteith, an accountant, testified that he was the "owner" of Cars on Keystone, which was the trade name of Classic Auto Rental Service, LLC. Monteith explained that McCoolidge had a "profit interest" in the dealership, meaning that "if it makes money, he gets a percentage, if it loses, I get the loss since I am funding the company." The articles of organization for Classic Auto Rental Service identify two members: McCoolidge and Monteith Brothers, Inc.

Monteith did not take an active role in Cars on Keystone. He said that McCoolidge took "care of anything" and that the "only thing I see is the bank statement." No one else was involved in the business. Cars on Keystone was defunct by the time of trial.

Purchase of the Automobile

Because of the progressive nature of multiple sclerosis, McCoolidge wanted a vehicle that could accommodate a person in a wheelchair. He found a vehicle "sitting at a salvage yard" with a "motorized ramp and other accessories necessary to convert a Honda Element into a handicapped-accessible vehicle." He had the opportunity to remove the equipment at no cost. Having found the equipment, McCoolidge searched for a suitable vehicle in which to install it.

In March 2011, McCoolidge saw a 2008 Honda Element with structural damage (Element) advertised in an online auction. He contacted the seller, who identified himself as Daniel Oyvetsky. According to McCoolidge, Oyvetsky said that he was selling the Element for Car and Truck Center L.L.C., a licensed dealer in Nashville, Tennessee. McCoolidge verified

Oyvetsky's representation by calling Car and Truck Center and speaking with Alexander Davidoff.

When the auction closed without a buyer, Oyvetsky reached out to McCoolidge. McCoolidge agreed to buy the Element for $7,500 and transferred the purchase price to a PayPal account associated with Oyvetsky or Car and Truck Center.

McCoolidge instructed Oyvetsky and Car and Truck Center to assign the title to Cars on Keystone. McCoolidge explained that he wanted the title assigned to the dealership because it would give him more time to register the certificate of title in Nebraska and because he wanted to use the dealership's facilities to repair the Element. He expected that Cars on Keystone would transfer title to him once the repairs were finished.

About a week after the purchase, McCoolidge received the Element followed by a certificate of title. McCoolidge, however, had trouble registering the certificate. He spoke to Oyvetsky, who was unable or unwilling to solve the problem. McCoolidge said he also spoke with Davidoff, who "didn't want anything to do with it."

In July 2011, McCoolidge filed a complaint against Car and Truck Center with the Tennessee Motor Vehicle Commission. He told the commission that Car and Truck Center had not provided him with a valid certificate of title. McCoolidge acknowledged that he received a certificate of title which "my DMV said . . . might be ok," but he was "not comfortable with might."

In an affidavit, Davidoff stated that he bought the Element from "W. McInnis" in September 2010 and asked Oyvetsky to advertise the vehicle. Davidoff said he shipped the Element to McCoolidge, but a problem arose because it "was title[d] to [a] Lease Company and not McInnis." Davidoff stated that McCoolidge had "pulled back 4000.^{00} of the 7500.^{00} paid" and that Davidoff would not send the correct certificate of title to McCoolidge until he returned the money.

At trial, Davidoff denied buying or selling the Element. Rather, he "sen[t] title to Car of Keystone in the favor and the

request for . . . Oyvetsky." Davidoff said he told the Tennessee Motor Vehicle Commission that "the previous owner of this Element came from a leasing company and did not transfer the vehicle to his name." He said that the "previous owner" was "Veritas Video." Davidoff said that the "owner" when McCoolidge bought the Element was Igor Tavakalov.

Tavakalov testified that he "bought [the Element], but never registered it on my name." He said the "previous owner" was "McGinnis and Veritas," with "McGinnis" being a natural person who owned a "production company" called Veritas.

Certificates of Title

There are numerous certificates of the title issued by the State of Tennessee in the record, some of which appear to be copies of the same certificate. The dates on which McCoolidge received the various certificates are less than clear.

One of the certificates states that title is vested in "HONDA LEASE TRUST." On the reverse, Honda Lease Trust assigned title to "VERITAS F AND VIDEO, WILLIAM W MCINNES," who reassigned title to Car and Truck Center, which reassigned title to Cars on Keystone.

Other certificates state that title is vested in "VERITAS F AND VIDEO" and "WILLIAM W MCINNIS," with various permutations of assignments and reassignments on the reverse. For example, on the reverse of one certificate, "Veritas Film & Video" assigned title to Car and Truck Center, which reassigned title to Cars on Keystone. On the reverse of another, "William W. McInnes" assigned title to Cars on Keystone. On the reverse of yet another certificate, "Veritas F & Video" and "William W. McInnes" assigned title to Cars on Keystone.

McCoolidge testified that he never received "clear" or "usable" title. He believed he needed a certificate that "showed transfer from the lessor and Honda into Car and Truck, Inc. and then to Cars on Keystone." Later, he testified that the title should be "declared up from Veritas Video to Cars and Truck and then to Cars on Keystone." Later yet, McCoolidge

testified that the problem, as he saw it, was that title was "still assigned" to Veritas Video, an entity with which McCoolidge had no relationship. But he had "no idea" whether Veritas Video was "one of the reasons for kind of the missing link in the chain of title." McCoolidge said he never received a bill of sale, although, when asked about "Cars on Keystone on a bill of sale or an actual purchase agreement," he said "[t]here was one tendered but then thrown away because there was no title . . . ."

In his deposition, McCoolidge testified that he had received a certificate of title that he could have registered in Nebraska. Shown one of the certificates and asked if it was "good title," McCoolidge answered: "It's — according to Douglas County, with a valid vehicle inspection, which the [vehicle identification number] matches the title, it would transfer into the State of Nebraska as a valid Nebraska title." He had shown the certificate to the Nebraska Department of Motor Vehicles, and "[t]hey said it looks to be transferrable in its form." But McCoolidge said he would not register the title "until this is settled," because he had "no idea which way this is going to go." His attorney explained that he could "get a title issued," but that he preferred to "present it to the court and have the court tell us what should be done."

McCoolidge reviewed his deposition testimony during his cross-examination at trial. He said: "I've seen several titles in reference to this, and I don't remember which title. But if I was presented with a title that was transferable, it's possible. If it was transferable, I told you the truth. It would be transferable." But on redirect, McCoolidge said the Department of Motor Vehicles rejected the certificate of title that the attorney representing the insurer "was talking to [McCoolidge] about earlier that he said, as far as you know, you thought it was good."

Damages

McCoolidge testified that he repaired the structural damage to the Element "almost immediately" because he "had

everything lined up." He estimated he spent nearly $8,000 on repairs.

McCoolidge never drove the Element. He bought two other automobiles that he used for transportation after he bought the Element, paying a total of $5,000 or $6,000. He did not rent a vehicle.

McCoolidge did not remove the motorized ramp from the salvaged vehicle. He explained that he could have removed the equipment but "let it go" because he did not feel that he owned the Element. He thought the forgone equipment was worth "[t]housands."

McCoolidge stored the Element at Cars on Keystone until July 2012, when he moved it to the garage at his residence. McCoolidge never paid to store the Element but testified that Monteith sent him a bill for storage fees. He produced a May 2011 bill from "Classic Auto Rental & Repair Services"—which he said was Cars on Keystone's "parent company"—stating that the "Unit Price" for "Store inside facility" was $30 per day. He said that "Douglas County" charges $45 per day to store towed vehicles.

Monteith was unaware of any storage fees at Cars on Keystone and had never seen a bill for the Element. He testified that he did not know if McCoolidge kept the Element at Cars on Keystone, because "I haven't been in the building for two years." Asked about McCoolidge's reference to a "parent company" that "wants to charge a lot of storage," Monteith said "[t]here is no parent company that I know of." If someone charged for storage at Cars on Keystone, Monteith said it would have been McCoolidge.

Procedural Background

In 2011, McCoolidge sued Oyvetsky, Car and Truck Center, and Travelers Casualty and Surety Company of America. The insurance company had issued a surety bond to Car and Truck Center for the "protection of any person who suffers loss because of . . . [t]he dealer's failure to deliver in conjunction

with the sale of a vehicle a valid vehicle title certificate free and clear of any prior owner's interests . . . ."

McCoolidge accused the defendants of failing to deliver "clear title" for the Element. He claimed the following damages: (1) storage costs; (2) loss of use; (3) repair costs "wasted in light of the defective title"; and (4) "[c]ost of cover in the attempt to obtain a clear title."

In 2014, the court entered a judgment for the defendants. It found that McCoolidge initially contracted with Oyvetsky, but that Car and Truck Center "inserted itself into the transaction to become a party to the contract," thus triggering the protection of the surety bond. In the court's findings of fact section, it stated that McCoolidge "admitted that he was presented with a title that he could use to register the [Element], but was waiting for the resolution of this lawsuit to do so."

The court concluded that the defendants initially breached the warranty of title in Neb. U.C.C. § 2-312 (Reissue 2001), but that McCoolidge eventually "received good title in 2011, sometime after May and before [his] deposition." McCoolidge could recover damages caused by the delay but had failed to prove them. For example, the court explained that McCoolidge was "entitled to the difference in value of the [Element] with good title compared to what he received, but there is no evidence of that amount in the record." As to McCoolidge's request for storage costs, loss of use, repair costs, and cover costs, the court found that any such expenses were not "'directly attributable'" to the defendants' breach.

McCoolidge appeals.

ASSIGNMENTS OF ERROR

McCoolidge assigns, consolidated, that the court erred by (1) determining that he received "good title" despite the absence of a bill of sale or "other supporting documentation" and the presence on the certificate of title of a "third party who was a complete stranger to the transaction" and (2) determining that he failed to prove damages.

STANDARD OF REVIEW

[1,2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb unless clearly wrong.[1] We independently review questions of law.[2]

ANALYSIS

The district court determined that the sellers stood in breach of the warranty of title until they delivered a certificate of title to McCoolidge "sometime in 2011" that he could register in Nebraska. McCoolidge argues that, despite receiving a registrable certificate of title, he still did not have good title because he lacked a "bill of sale or other customary documentation" and the certificate "name[d] a third party to the transaction."[3]

Two legislative enactments are particularly relevant to the sale of automobiles. The first is article 2 of the Uniform Commercial Code, which governs the sale of "goods," including automobiles.[4] The second is the Motor Vehicle Certificate of Title Act.[5] We consider article 2 "concurrently with the certificate of title act."[6]

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[1] *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015). See, also, *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981); *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973).

[2] See *Timberlake v. Douglas County, supra* note 1.

[3] Brief for appellant at 8, 9.

[4] See, Neb. U.C.C. § 2-102 (Reissue 2001); *Worley v. Schaefer*, 228 Neb. 484, 423 N.W.2d 748 (1988); *Dugdale of Nebraska v. First State Bank,* 227 Neb. 729, 420 N.W.2d 273 (1988), *overruled in part on other grounds, Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). See, also, Annot., 47 A.L.R.5th 677 (1997).

[5] See Neb. Rev. Stat. §§ 60-101 to 60-197 (Reissue 2010, Cum. Supp. 2014 & Supp. 2015).

[6] See *Dugdale of Nebraska v. First State Bank, supra* note 4, 227 Neb. at 734, 420 N.W.2d at 277.

The district court determined that the sellers initially breached the warranty of title in § 2-312(1). That section provides:

> [T]here is in a contract for sale a warranty by the seller that
>
> (a) the title conveyed shall be good, and its transfer rightful; and
>
> (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

[3] The seller breaches the warranty of title in § 2-312 if there is a substantial cloud or shadow over the title, even if no third party has come forward with a superior claim.[7] Section 2-312(1)(a) guarantees the buyer "a good, clean, title transferred to him or her also in a rightful manner so that he or she will not be exposed to a lawsuit in order to protect it."[8]

McCoolidge directs us to § 60-140 of the Motor Vehicle Certificate of Title Act, which we have referred to as an "invalidating provision."[9] Section 60-140(1) provides:

> [N]o person acquiring a vehicle from the owner thereof, whether such owner is a manufacturer, importer, dealer, or entity or person, shall acquire any right, title, claim, or interest in or to such vehicle until the acquiring person

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[7] See, *Saber v. Dan Angelone Chevrolet, Inc.*, 811 A.2d 644 (R.I. 2002); *Colton v. Decker*, 540 N.W.2d 172 (S.D. 1995); *Maroone Chevrolet, Inc. v. Nordstrom*, 587 So. 2d 514 (Fla. App. 1991); *U-J Chevrolet Co., Inc. v. Marcus*, 460 So. 2d 1341 (Ala. Civ. App. 1984); *City Car Sales, Inc. v. McAlpin*, 380 So. 2d 865 (Ala. Civ. App. 1979); *Ricklefs v. Clemens*, 216 Kan. 128, 531 P.2d 94 (1975); 77A C.J.S. *Sales* § 458 (2008). But see, *C.F. Sales, Inc. v. Amfert, Inc.*, 344 N.W.2d 543 (Iowa 1983); *Skates v. Lippert*, 595 S.W.2d 22 (Mo. App. 1979).

[8] § 2-312, comment 1. See, also, *Stauffer v. Benson*, 288 Neb. 683, 850 N.W.2d 759 (2014); *Obermiller v. Baasch*, 284 Neb. 542, 823 N.W.2d 162 (2012).

[9] *Worley v. Schaefer, supra* note 4, 228 Neb. at 489, 423 N.W.2d at 751 (citing former Neb. Rev. Stat. § 60-105 (Reissue 1984)).

> has had delivered to him or her physical possession of such vehicle and (a) a certificate of title or a duly executed manufacturer's or importer's certificate with such assignments as are necessary to show title in the purchaser, (b) a written instrument as required by section 60-1417, (c) an affidavit and notarized bill of sale as provided in section 60-142.01, or (d) a bill of sale for a parts vehicle as required by section 60-142.

Other relevant sections of the Motor Vehicle Certificate of Title Act include § 60-139, which prohibits a purchaser from possessing a "certificate of title which does not contain such assignments as are necessary to show title in the purchaser or transferee." One who operates a motor vehicle for which a certificate of title is required without having such a certificate is guilty of a misdemeanor under § 60-180.

We note that the Motor Vehicle Certificate of Title Act is the exclusive method of transferring title to a vehicle, but it is not conclusive of ownership.[10] Between the buyer and seller of a motor vehicle, the certificate of title is only prima facie evidence of ownership.[11] If the seller wrongly refuses to deliver a valid certificate, Neb. U.C.C. § 2-401 (Cum. Supp. 2014) dictates when title passes.[12]

[4] Here, the court determined that the sellers initially breached the warranty of title by failing to deliver a certificate that McCoolidge could register. Neither Oyvetsky nor Car and Truck Center challenge this conclusion. A seller breaches the warranty of title in § 2-312 by delivering a defective certificate of title to the buyer.[13] We agree with the court that the sellers breached the warranty of title by failing to provide

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[10] *Hanson v. General Motors Corp.*, 241 Neb. 81, 486 N.W.2d 223 (1992).

[11] *Id.*; *Alford v. Neal*, 229 Neb. 67, 425 N.W.2d 325 (1988).

[12] *Alford v. Neal, supra* note 11.

[13] See, *Jefferson v. Jones*, 286 Md. 544, 408 A.2d 1036 (1979); 67A Am. Jur. 2d *Sales* § 710 (2014).

McCoolidge with the documentation necessary to complete one of the titling methods in § 60-140.

But the court determined that the sellers gave McCoolidge a registrable certificate sometime in 2011. McCoolidge, the court stated, could have registered one of the certificates in Nebraska but abstained from doing so because he wanted to wait for the outcome of this litigation.

McCoolidge contends that "[t]he fact that [he] was eventually provided with a document which he could register in Nebraska does not cure the earlier breach."[14] "The ability to register a vehicle," McCoolidge asserts, "is not even remotely the same as 'good title . . . .'"[15] He identifies two defects that remained despite his ability to register the certificate of title: (1) the lack of a bill of sale or similar documentation and (2) the presence on the certificate of title of a third party who was "a complete stranger to the transaction."[16]

[5,6] McCoolidge is correct that the buyer's ability to obtain a certificate of title stating that he is the owner is not always dispositive in warranty of title cases.[17] But we need not decide whether a shadow remained over McCoolidge's title, because he failed to show what damages, if any, he incurred from the alleged breach. Buyers asserting a breach of warranty under the Uniform Commercial Code must not only prove the warranty and breach thereof, but also the cause of their loss and the extent of their damages.[18] They do not have to prove damages with mathematical certainty, but the evidence must be

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[14] Reply brief for appellant at 2.

[15] *Id.*

[16] Brief for appellant at 5.

[17] See, *Colton v. Decker, supra* note 7; *Jefferson v. Jones, supra* note 13; 1 James J. White et al., Uniform Commercial Code § 10:41 (6th ed. 2012).

[18] See *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 305 N.W.2d 896 (1981).

sufficient to allow the trier of fact to estimate the actual damages with reasonable certainty.[19]

[7] If the buyer accepts defective goods, damages are measured under Neb. U.C.C. § 2-714 (Reissue 2001). The court determined that the measure of damages in § 2-714(2) applied, thus implicitly finding that McCoolidge had accepted the Element—although he clearly never accepted the sufficiency of any of the certificates of title. The record supports a finding that McCoolidge did not effectively reject the Element.[20] For example, McCoolidge testified that he never tried to "just send [the Element] back." Furthermore, he did not allege in his complaint that he rejected or revoked his acceptance of the Element and he never claimed that he was entitled to recover the purchase price.[21]

As with other breaches of warranty, § 2-714 is the usual starting place for measuring damages for breach of the warranty of title.[22] Section 2-714 provides:

> (1) Where the buyer has accepted goods and given notification [of the breach to the seller] he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

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[19] *Id.*

[20] See Neb. U.C.C. §§ 2-602 and 2-606(1)(b) (Reissue 2001).

[21] See Neb. U.C.C. § 2-711(1) (Reissue 2001).

[22] See *Metalcraft, Inc. v. Pratt*, 65 Md. App. 281, 500 A.2d 329 (1985).

> (3) In a proper case[,] any incidental and consequential damages under the next section may also be recovered.

We have referred to the difference between the value of the goods as accepted and the value as warranted under § 2-714(2) as "'the keystone for computing buyer's damages.'"[23]

McCoolidge established the purchase price of the Element, which is strong evidence of its value as warranted.[24] For the value as accepted, McCoolidge argues that the Element "has absolutely no value to [him] without a clear chain of ownership and good title."[25] Some breaches of the warranty of title may render the value of the accepted goods zero.[26] But McCoolidge did not show that the Element was worthless to him, at least after he received a certificate of title that he could register in Nebraska. He presented no evidence whatsoever of how the lack of a bill of sale and the presence of a "third party" on the certificate of title affected the value of the Element.

Similarly, the court did not err by denying McCoolidge damages for the money he spent repairing the Element's structural damage. McCoolidge argues that because he "has not and will not receive good title, the repairs were wasted on a vehicle that he cannot use."[27] If a buyer repairs a motor vehicle without good title, courts generally consider repairs as evidence of the vehicle's value under a temporally modified calculation of diminution in value under § 2-714(2).[28]

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[23] *Settell's, Inc. v. Pitney Bowes, Inc., supra* note 18, 209 Neb. at 30, 305 N.W.2d at 898.

[24] See *id*.

[25] Reply brief for appellant at 7.

[26] 1 White et al., *supra* note 17, § 10:45.

[27] Reply brief for appellant at 9.

[28] See, *Schneidt v. Absey Motors, Inc.*, 248 N.W.2d 792 (N.D. 1976); *Ricklefs v. Clemens, supra* note 7; Annot., 94 A.L.R.3d 583 (1979). See, also, *Marino v. Perna*, 165 Misc. 2d 504, 629 N.Y.S.2d 669 (N.Y. Civ. 1995).

But, as noted, McCoolidge did not show how the alleged title defects affected the Element's value. Courts may invoke the "special circumstances" exception in § 2-714(2) to award repair costs as damages.[29] Here, though, the court found there were not special circumstances, and that finding was not clearly wrong.[30]

[8] In addition to damages under § 2-714(2), a buyer may also recover incidental and consequential damages.[31] The existence of "special circumstances" under § 2-714(2) is not a precondition to a buyer's recovery of incidental and consequential damages.[32] Courts invoke the "special circumstances" exception to award damages for repair or replacement costs[33] or, more commonly in warranty of title cases, to shift the valuation date under § 2-714(2) from "the time . . . of acceptance" to the date on which the buyer's possession of the automobile was interrupted because of a title defect.[34] Section 2-714(3) states that a buyer can recover incidental and consequential damages in a "proper case." Such damages are proper when the buyer meets the requirements of Neb. U.C.C. § 2-715 (Reissue 2001).[35]

The recovery of incidental and consequential damages is governed by § 2-715, which provides:

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[29] See 1 Roy Ryden Anderson, Damages Under the Uniform Commercial Code § 10:10 (2015-16 ed.). See, also, *Hillcrest County Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990).

[30] See *Hillcrest County Club v. N.D. Judds Co., supra* note 29.

[31] *Miller v. Stan Ortmeier Constr. Co.*, 229 Neb. 259, 426 N.W.2d 272 (1988).

[32] 1 Anderson, *supra* note 29, § 10:13.

[33] See *id.*, § 10:10.

[34] See, *Marino v. Perna, supra* note 28; *U-J Chevrolet Co., Inc. v. Marcus, supra* note 7; *Schneidt v. Absey Motors, Inc., supra* note 28; *Ricklefs v. Clemens, supra* note 7; 1 Anderson, *supra* note 29, § 10:12; 1 White et al., *supra* note 17, § 11:5 n.3. But see *Masoud v. Ban Credit Service Agency*, 128 Misc. 2d 642, 494 N.Y.S.2d 598 (N.Y. Sup. 1985).

[35] See 1 Anderson, *supra* note 29, § 10:13.

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

McCoolidge argues that he should receive damages for storing the Element. Incidental damages include the cost of storing defective goods.[36] But McCoolidge did not actually pay to store the Element, and Monteith's testimony suggests that he is under no obligation to do so. McCoolidge responds that the absence of actual expenses is "irrelevant as he forfeited the benefit of the space used for storage" and that he is "entitled to the reasonable value of storing the vehicle."[37] Any loss sustained by Cars on Keystone from storing the Element was sustained by the corporate entity doing business as Cars on Keystone.[38] McCoolidge did not show how such a loss affected his "profit interest" in the company. As to the period during which McCoolidge stored the Element at his personal residence, the court could find that evidence of the cost of

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[36] 2 Roy Ryden Anderson, Damages Under the Uniform Commercial Code § 11:6 (2015-16 ed.).

[37] Brief for appellant at 10.

[38] See *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

storing a vehicle at Cars on Keystone or the county impound lot did not reflect McCoolidge's actual loss.

McCoolidge also argues that uncertainty about the Element's title caused him to lose access to a free motorized wheelchair ramp. Such a loss would be an item of consequential damages.[39] Under § 2-715(2)(a), the buyer cannot recover consequential damages if he could have reasonably prevented the loss by cover or otherwise. Here, the court found that McCoolidge could have stored the equipment until he received good title. Furthermore, the buyer must make his particular needs generally known to the seller to charge the seller with knowledge under § 2-715(2)(a).[40] McCoolidge testified that he told Oyvetsky that he had multiple sclerosis and "that's why I wanted a Honda Element." But there is no evidence that McCoolidge made known to the sellers that he had time-sensitive access to free accessibility equipment.

[9] McCoolidge also claims damages for the loss of use of the Element. Loss of use is another example of consequential damages.[41] We have said that the reasonable value of the loss of use of a motor vehicle is generally the fair rental value of a like vehicle for a reasonable length of time or the amount actually paid, whichever is less.[42]

McCoolidge's failure to actually rent another vehicle is not necessarily fatal to his claim for loss of use damages. Most courts award loss of use damages even if the plaintiff did

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[39] See *Adams v. American Cyanamid Co.*, 1 Neb. App. 337, 498 N.W.2d 577 (1992).

[40] See § 2-715, comment 3.

[41] See, *World Enterprises, Inc. v. Midcoast Aviation*, 713 S.W.2d 606 (Mo. App. 1986); 2 Anderson, *supra* note 36, § 11:33. But see *Midwest Mobile Diagnostic Imaging v. Dynamics Corp.*, 965 F. Supp. 1003 (W.D. Mich. 1997).

[42] See, *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986); *Rose v. United States Nat. Bank*, 218 Neb. 97, 352 N.W.2d 594 (1984); *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 283 N.W.2d 45 (1979).

not actually rent a substitute chattel,[43] at least if the chattel was for personal use.[44] Those who lack the means to rent a vehicle may nevertheless be inconvenienced and should not be barred from recovering damages because of their financial circumstances.[45]

[10] But McCoolidge could only recover damages for loss of use for "a reasonable length of time."[46] A reasonable length of time depends on the facts of the case,[47] but should generally correspond to the length of time the buyer would have used the vehicle but for the breach of warranty.[48] McCoolidge bought the Element knowing that repairs were necessary because the roof was "caved in." He also planned to install a motorized wheelchair ramp. He did not show how long the Element would have been inoperable because of the expected repairs and modifications, apart from the difficulties

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[43] *Warren v. Heartland Auto. Services, Inc.*, 36 Kan. App. 2d 758, 144 P.3d 73 (2006); *Castillo v. Atlanta Cas. Co.*, 939 P.2d 1204 (Utah App. 1997); *United Truck Rental v. Kleenco Corp.*, 84 Haw. 86, 929 P.2d 99 (1996); *Cress v. Scott*, 117 N.M. 3, 868 P.2d 648 (1994); *Camaraza v. Bellavia Buick Corp.*, 216 N.J. Super. 263, 523 A.2d 669 (1987); *Francis v. Steve Johnson Pontiac-GMC-Jeep*, 724 P.2d 84 (Colo. App. 1986); *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115 (Tex. 1984); *Mountain View Coach v Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (N.Y. Sup. 1984); *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71 (Minn. 1981); *Meakin v. Dreier*, 209 So. 2d 252 (Fla. App. 1968); Annot., 18 A.L.R.3d 497, § 13 (1968). See, also, 2 Anderson, *supra* note 36, § 11:33. But see *Winchester v. McCulloch Bros. Garage*, 388 So. 2d 927 (Ala. 1980).

[44] See *PurCo Fleet Services, Inc. v. Koenig*, 240 P.3d 435 (Colo. App. 2010).

[45] See *United Truck Rental v. Kleenco Corp., supra* note 43; *Luna v. North Star Dodge Sales, Inc., supra* note 43.

[46] *Rose v. United States Nat. Bank, supra* note 42, 218 Neb. at 100, 352 N.W.2d at 597. Accord *Husebo v. Ambrosia, Ltd., supra* note 42.

[47] See *Husebo v. Ambrosia, Ltd., supra* note 42.

[48] See, *Warren v. Heartland Auto. Services, Inc., supra* note 43; *Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981); 18 A.L.R.3d, *supra* note 43, § 18.

caused by the lack of good title. McCoolidge did not have to prove the exact date on which he would have begun to drive the Element if the sellers gave him satisfactory title,[49] but awarding loss of use damages on the record before us would require speculation.

Finally, McCoolidge argues that he is entitled to the costs he incurred "in an attempt to obtain a clear title."[50] He does not explain what these costs were, and after reviewing the record, we do not think that the amount of such costs would have been apparent to the court.

CONCLUSION

The court determined that the sellers breached the warranty of title by failing to deliver a registrable certificate of title to McCoolidge. Even after he received a registrable certificate, McCoolidge claims that the lack of a bill of sale and the presence of a "third party" on the certificate cast a shadow on his title. But McCoolidge did not prove the damages he suffered from these defects. We therefore affirm the court's judgment for the defendants.

Affirmed.

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[49] See *Settell's, Inc. v. Pitney Bowes, Inc.*, *supra* note 18.

[50] Brief for appellant at 11.

Kristina A. Scheele, appellant, v. Darrell Rains et al., appellees.

874 N.W.2d 867

Filed March 4, 2016. No. S-15-130.

1. **Directed Verdict: Evidence.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
2. **Directed Verdict: Appeal and Error.** In reviewing a directed verdict, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
5. **Negligence: Evidence.** The violation of a regulation or statute is not negligence per se, but may be evidence of negligence to be considered with all the other evidence in the case.
6. **Appeal and Error: Words and Phrases.** Plain error is error uncomplained of at trial and is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Gage County: Daniel E. Bryan, Jr., Judge. Affirmed.

Peter C. Wegman, Mark R. Richardson, and Sheila A. Bentzen, of Rembolt Ludtke, L.L.P., for appellant.

Stephen S. Gealy and Noah J. Heflin, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees Delles Carrier, Inc., and Frank G. Lukach.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Darrell Rains.

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

Heavican, C.J.

I. INTRODUCTION

Kristina A. Scheele sued Darrell Rains; Delles Carrier, Inc. (Delles); Frank G. Lukach; Sentry Insurance; and the Evangelical Lutheran Good Samaritan Society (Good Samaritan) for injuries she sustained in an automobile accident with a semi-trailer truck driven by Lukach. Following a trial, the jury found for the defendants. Scheele appeals. We affirm.

II. BACKGROUND

1. Procedural Background

Scheele filed suit against Rains, Delles, Lukach, Sentry Insurance, and Good Samaritan for negligence. Sentry Insurance and Good Samaritan were included for workers' compensation subrogation purposes. Following a jury trial, special verdict forms were returned, finding that Scheele had not met her burden of proof as to the negligence of either Rains or Delles and Lukach.

2. Accident

The facts of this case are largely undisputed. Rains owns land along Highway 77 south of Beatrice, Nebraska. As it adjoins Rains' land, Highway 77 is a two-lane highway, with one northbound lane and one southbound lane. Rains was required, per the federal Conservation Reserve Program, to burn the vegetation off this field every 3 years.

The prescribed burn on this field and one other field was done on April 9, 2012. Rains first burned a nearby field, which was not located directly along Highway 77, during the morning of April 9. That burn went off without incident, but the burning of the second field did not.

The fire on the second field was set around 2:45 p.m. and initially burned as planned. But at some point, the wind shifted and smoke began to blow across Highway 77. Unable to control the fire, Rains called the fire department at approximately 3:19 p.m.

Meanwhile, Scheele had been in Beatrice on a work errand and was driving south on Highway 77, returning to her job at Good Samaritan in Wymore, Nebraska, when she came upon smoke that had drifted across the roadway from Rains' fire. Scheele was driving a 2004 Dodge Durango. She entered the smoke and testified that after doing so, the smoke became very thick. She slowed her speed, but drove on until she was forced to stop by a car ahead of her, which had come to a standstill. Scheele testified that she could see only the brake lights of the car ahead of her. She further testified that smoke was coming into her vehicle through the vehicle's vents and that she was afraid she was going to die.

Scheele testified that she wanted to get out of the smoke, but could not move because the car ahead of her had stopped. According to Scheele's testimony, she considered and rejected both backing up—because she knew there were cars behind her—and going onto the shoulder at her right—because she was afraid there would be flames there. Instead, Scheele inched slowly into the northbound lane to pass the car ahead of her. Scheele testified that she saw an oncoming vehicle and tried to edge back into the southbound lane, but collided with the car ahead of her before also colliding with a semi-trailer truck pulling an oversized load that was headed north in the northbound lane of traffic.

Scheele suffered injuries in the accident, including facial lacerations, a facial fracture, rib fractures, clavicle fractures,

and "pneumothorax." Scheele also suffered a closed head injury with a concussion, which ultimately evolved into a diagnosis of traumatic brain injury with "acquired attention deficit disorder."

3. Preparations for Setting Fire

Rains testified in detail regarding his preparations for setting the prescribed burn. Prior to the burn, Rains' son, Howard Rains (Howard), submitted a prescribed burn management plan to the U.S. Department of Agriculture Natural Resources Conservation Service. On the day of the burn, Rains obtained burn permits for each field from Bradley Robinson, the fire chief of the volunteer fire department in Blue Springs, Nebraska.

Prior to the burn, Rains cut a 30-foot strip of grass on the east and south sides of the field, essentially creating a firebreak. The grass was not raked, because Rains had not done so on prior burns and did not feel raking was necessary.

Rains, Howard, and Howard's 15-year-old son were going to handle the burn. It is undisputed that all three were present at the first burn, but that Howard was not present when the second fire was set. Rather, Howard was at the first field making sure that the fire there was fully extinguished. All three had cell phones to communicate. On hand were two all-terrain vehicles with 30- to 40-gallon water tanks and a tractor with a 100-gallon water tank. The three were also equipped with flat dirt shovels, rakes, and pitchforks. Rains had a bucket with water and a gunnysack to be used to smother flames if necessary. The backup plan was to call the fire department if the fire got out of control.

Rains testified that he decided to burn the fields on April 9, 2012, because it was a "nice day" without wind. He based this decision on personal observation and experience and from watching a televised weather report. Rains testified that Howard was checking the weather conditions throughout the day via an application on his cell phone. Howard also testified that he used his cell phone to check weather conditions.

Robinson testified that he checked the weather conditions using an online weather service before issuing the burn permits. Robinson also asked Rains to call him before burning the second field. Rains and Robinson both testified that Rains made this telephone call and that Robinson gave him permission to burn the second field. Robinson testified that he did so after again checking the weather conditions using an online weather service. On cross-examination, Robinson testified that he felt that he might not have had all the relevant facts and that he might not have issued the burn permits had he known a number of things.

Among the many issues Scheele had with the second burn was the issue of the relative humidity on April 9, 2012. Rains' burn plan indicated that a controlled burn should be done when the relative humidity was greater than 25 percent, but the relative humidity on April 9 never rose above 21 percent. Also at issue was the timing of the fire. The preprinted language on the burn plan noted that the optimum time to conduct a controlled burn was between 10 a.m. and 2 p.m., but this fire was not set until nearly 3 p.m. Scheele also contends that Rains did not have enough water on hand and that three people were insufficient to handle the burn when one of those persons was only 15 years of age and another was not present for the entire burn.

4. Delles and Lukach

Lukach was the driver of the semi-trailer truck that collided with Scheele. At the time of the accident, he was driving an oversized load. In the investigation following the accident, Lukach was ticketed with several violations of the Federal Motor Carrier Safety Regulations, including not having proper warning flags for his load, having an inoperable electric horn, and driving when he did not have at least a half-mile of visibility.

Lukach testified that when he entered the smoke, he could see through it, but the smoke became more dense as he drove

on. As the smoke became dense, Lukach slowed down. Lukach testified that once he realized how thick the smoke was, he decided that he could not safely stop and so he continued through the smoke.

There is some dispute as to how fast Lukach was going. Lukach told the sheriff's deputy investigating the accident that he was "going about 50," but testified at trial that he meant 50 kilometers, or approximately 30 miles per hour. Lukach testified that he is Canadian and was shaken following the accident, so he did not convert his speed from the metric system. Lukach also testified that he could not have been going 50 miles per hour, because he downshifted his truck when he entered the smoke and could not have gone that fast after downshifting.

5. Corrected Jury Instruction

Following the presentation of evidence and closing arguments, the jury was instructed. The case was submitted to the jury at 12:20 p.m. on January 16, 2015. At 2:56 p.m., proceedings were held in chambers because of an error in the instructions dealing with contributory negligence. Counsel had not previously objected to this error.

Specifically, the jury had been instructed that "[i]f you find that both the Plaintiff Scheele and Defendant Rains and/or Defendant Delles/Lukach were negligent and that the negligence of Plaintiff Scheele was equal to or greater than the negligence of *either* Defendant Rains and/or Defendant Delles/Lukach, then Plaintiff Scheele will not be allowed to recover." (Emphasis supplied.)

But at a hearing held after the case was submitted to the jury, the parties agreed that the instruction should have provided that "[i]f you find that both Plaintiff Scheele and Defendant Rains and/or Defendant Delles/Lukach were negligent and that the negligence of Plaintiff Scheele was equal to or greater than the *combined* negligence of Defendant Rains and Defendant Delles/Lukach, then Plaintiff Scheele will not be allowed to recover." (Emphasis supplied.)

All counsel agreed to the change, and at 3:04 p.m., the correct instruction was read to the jury by the court, without counsel present. The jury was given a copy of the corrected language. The jury continued deliberations at 3:05 p.m., and returned with a verdict for the defendants at 3:34 p.m.

III. ASSIGNMENTS OF ERROR

On appeal, Scheele assigns that the district court erred in (1) not entering a directed verdict for her and (2) giving conflicting versions of instruction No. 2.

IV. STANDARD OF REVIEW

[1,2] A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[1] In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[2]

[3] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[3]

[4] Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.[4]

V. ANALYSIS

1. Directed Verdict

(a) Rains

Scheele assigns that the district court erred in not granting her a directed verdict as to Rains' negligence. She argues that

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[1] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[2] *Id.*

[3] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[4] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

Rains' action in starting the fire was negligent as a matter of law and suggests, without using this terminology, that Rains' failure to strictly comply with the burn management plan was negligence per se.

A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence.[5] In reviewing that determination, we give the nonmoving party, here Rains, the benefit of every controverted fact and all reasonable inferences from the evidence.[6]

[5] We first reject any contention that Rains' actions constituted negligence per se. This court has concluded on various occasions that the violation of a regulation or statute is not negligence per se, but may be evidence of negligence to be considered with all the other evidence in the case.[7] Thus, the fact that Rains did not comply with all aspects of the burn plan might be evidence of negligence, but is not in itself negligence.

And we cannot conclude that the district court erred in not directing a verdict in Scheele's favor with regard to Rains' alleged negligence. There was evidence that Robinson, the fire chief, gave Rains the go-ahead to set the fire which eventually led to the accident. There was other evidence that Rains filled out a burn plan and obtained a burn permit as required and that he and Howard were checking the weather. According to the evidence presented, Rains had done this before. He had created a firebreak near Highway 77. Three people were on hand, either onsite or nearby, to help handle the fire. Water and other fire suppression tools were available. Cell phones were available to contact the fire department, and once the fire was considered out-of-control, the fire department was contacted.

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[5] *Id.*

[6] See *Balames v. Ginn, supra* note 1.

[7] See, *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006); *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989).

We agree that in this case, there was evidence to support the conclusion that Rains acted reasonably and there was evidence to support the opposite conclusion. In sum, reasonable minds could differ. But Rains must be given the benefit of every controverted fact and all reasonable inferences from the evidence. When we do so, we must conclude that it was not error for the district court to decline to direct a verdict and instead allow the jury to decide the issue.

(b) Delles and Lukach

Nor did the district court err in not directing a verdict for Scheele against Delles and Lukach. Scheele argues that Lukach was negligent as a matter of law, and suggests that his "failure to stop, use extreme caution, or even slow down, so that he could come to a safe stop indisputably breached the duties he owed under Nebraska law, the Trip Permit, and [Federal Motor Carrier Safety] regulations."[8]

As noted above, we have held that the violation of a regulation or statute is not negligence per se, but may be evidence of negligence to be considered with all the other evidence in the case.[9] Given this, the fact that Lukach was found to have violated Federal Motor Carrier Safety Regulations should be considered along with the other evidence of negligence presented at trial.

And when we consider that evidence, and give Lukach the benefit of every controverted fact and all reasonable inferences from the evidence, we cannot conclude that a directed verdict was warranted. According to his testimony, when Lukach entered the smoke, he had the requisite visibility. Other evidence showed that Lukach kept his truck as far right as possible and slowed down to a speed of 30 miles per hour.

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[8] Brief for appellant at 22.

[9] *Orduna v. Total Constr. Servs., supra* note 7; *Raben v. Dittenber, supra* note 7.

Again, while there was evidence that Lukach violated regulations, there was other evidence that under the circumstances, his actions were reasonable. Determination of such a factual dispute is not appropriate for resolution by directed verdict, and the district court did not err in declining to grant one for Scheele.

Scheele's first assignment of error is without merit.

2. Jury Instruction

[6] In her second assignment of error, Scheele assigns that the district court erred when it gave conflicting versions of instruction No. 2 to the jury. Because Scheele failed to object to the giving of the instruction, we review for plain error.[10] Plain error is error uncomplained of at trial and is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[11] Scheele's argument is without merit.

We first note that Scheele relies on case law, including *Kaspar v. Schack*,[12] and *Krepcik v. Interstate Transit Lines*.[13] In both of these cases, the instructions as originally read to the jury included two separate, but conflicting, instructions. We held that "an instruction which misstates the law upon a vital issue is not cured by another which states the law correctly."[14]

In this case, though, the incorrect instruction was discovered after it was given, but before the jury returned with a verdict. The record shows that the parties agreed on a corrected instruction and that the jury was so instructed. Unlike *Krepcik*,

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[10] See *United Gen. Title Ins. Co. v. Malone, supra* note 4.

[11] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[12] *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976).

[13] *Krepcik v. Interstate Transit Lines*, 153 Neb. 98, 43 N.W.2d 609 (1950).

[14] *Kaspar v. Schack, supra* note 12, 195 Neb. at 220, 237 N.W.2d at 417. Accord *Krepcik v. Interstate Transit Lines, supra* note 13.

the jury was not presented with conflicting instructions and left to sort them out; rather, one incorrect instruction was replaced with a correct version.

Scheele's argument also fails because she cannot show, on these facts, that she was prejudiced by the giving of the incorrect instruction. The instruction in question regarded comparative negligence, but the jury found that Scheele did not meet her burden of proof as to the negligence of either Rains or Delles and Lukach. As such, the jury did not reach the question of Scheele's negligence.

This case is similar to *Bunnell v. Burlington Northern RR. Co.*[15] In *Bunnell*, the jury returned a special verdict for the defendant employer and the plaintiff employee appealed, alleging that the contributory negligence instruction was incorrect. We held that assuming the instruction was incorrect, it was harmless, because the jury never reached the issue of contributory negligence. And in this case, too, the jury returned special verdict forms for Rains and for Delles and Lukach, finding that Scheele failed to meet her burden of proof. Hence, any error by the court in giving an incorrect instruction was harmless.

Scheele's second assignment of error is without merit.

VI. CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

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[15] *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

HEADNOTES
Contained in this Volume