THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 21, 2016 and MARCH 9, 2017

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXCV

PEGGY POLACEK
OFFICIAL REPORTER

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

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Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice

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Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
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David K. Arterburn	Papillion
George A. Thompson	Papillion
Michael A. Smith	Plattsmouth

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Susan I. Strong	Lincoln
Darla S. Ideus	Lincoln
Kevin R. McManaman	Lincoln

Fourth District

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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

Fifth District

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

Judges in District	*City*
Robert R. Steinke	Columbus
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JUDICIAL DISTRICTS AND DISTRICT JUDGES

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Judges in District	*City*
John E. Samson	Blair
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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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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*
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James E. Doyle IV	Lexington
David Urbom	McCook
Richard A. Birch	North Platte

Twelfth District

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Leo Dobrovolny	Gering
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Travis P. O'Gorman	Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

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Linda A. Bauer	Fairbury

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Todd J. Hutton	Papillion
Stefanie A. Martinez	Papillion

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Timothy C. Phillips	Lincoln
Thomas W. Fox	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
Thomas E. Zimmerman	Lincoln
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Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey Marcuzzo	Omaha
Craig Q. McDermott	Omaha
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Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
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Stephanie R. Hansen	Omaha

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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

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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

Tenth District

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Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

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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
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Vernon Daniels	Omaha

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

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Admitted Since the Publication of Volume 294

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Jeffrey Garth Baxter
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Michael F. Steve
Emily Adrianne Stork
Phillip Christopher Thompson
Amanda Lee Tobey
Patrick Thomas Vint

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No. A-15-1165: **State v. Dubas**. Petition of appellant for further review denied on December 22, 2016.

Nos. A-15-1170 through A-15-1172: **In re Interest of Cristalyla C. et al**. Petitions of appellant for further review denied on November 1, 2016.

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No. A-15-1200: **In re Interest of Willie G. et al**. Petition of appellant for further review denied on January 9, 2017.

No. A-16-030: **In re Interest of Julia D**. Petition of appellant for further review denied on November 14, 2016.

No. A-16-044: **State v. Smith**. Petition of appellant pro se for further review denied on November 22, 2016.

No. A-16-070: **Jacob v. Department of Corr. Servs**. Petition of appellant for further review denied on February 21, 2017.

No. A-16-073: **In re Interest of Alexander Z**. Petition of appellant for further review denied on January 10, 2017.

No. A-16-080: **Campbell v. Gage**. Petition of appellant for further review denied on February 10, 2017.

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No. A-16-189: **In re Interest of Angeleah M. & Ava M**. Petition of appellant for further review denied on December 9, 2016.

No. A-16-224: **State v. Garibo**. Petition of appellant for further review denied on January 4, 2017, for failure to file brief in support. See § 2-102(F)(1).

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No. A-16-275: **In re Interest of Aaliyah G. et al**. Petition of appellant for further review denied on January 4, 2017.

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No. A-16-488: **State v. Eigsti**. Petition of appellant for further review denied on October 18, 2016.

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No. A-16-707: **State v. Castonguay**. Petition of appellant for further review denied on November 21, 2016.

No. A-16-735: **State v. Fisher**. Petition of appellant for further review denied on January 11, 2017.

No. A-16-744: **State v. Swenson**. Petition of appellant for further review denied on February 22, 2017.

No. A-16-834: **Tyler v. City of Omaha**. Petition of appellant for further review denied on January 4, 2017. See § 2-102(F)(1).

No. A-16-837: **Valentine v. Gerber**. Petition of appellant for further review denied on November 28, 2016.

No. A-16-922: **State v. Tyler**. Petition of appellant for further review denied on December 12, 2016, as untimely. See § 2-102(F)(1).

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295 Nebraska Reports
STATE v. MARTINEZ
Cite as 295 Neb. 1

State of Nebraska, appellee, v. Larry G. Martinez, appellant.

886 N.W.2d 256

Filed October 21, 2016. No. S-15-881.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **Criminal Law: Appeal and Error.** In a criminal case, an appellate court reviews findings of fact for clear error.
3. **Mental Competency: Appeal and Error.** The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
4. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
5. **Jury Instructions: Judgments: Appeal and Error.** 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.
6. **Pretrial Procedure: Rules of Evidence.** In a criminal case, the Nebraska rules of evidence do not apply at suppression hearings.
7. **Mental Competency: Trial.** The test of mental competency to stand trial is whether the defendant now has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.

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

Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Heavican, C.J.

INTRODUCTION

Larry G. Martinez was convicted of first degree murder and use of a weapon to commit a felony. He was sentenced to life imprisonment for the murder conviction and an additional 10 to 50 years' imprisonment for the use conviction, with credit for 1,149 days' time served. Martinez appeals. Primarily at issue are whether Martinez' statements to law enforcement should be suppressed as a result of Martinez' hearing impairment and whether Martinez was competent to stand trial. We affirm.

FACTUAL BACKGROUND

Martinez was romantically involved with the victim, Mandy Kershman. The record shows that this relationship was tumultuous, with the couple fighting often. About a week prior to the murder, Martinez told one of his roommates that he was "going to kill that fucking bitch," referring to Kershman.

On July 18, 2012, at approximately 4:50 p.m., Kershman was shot and killed while sitting on the couch at a friend's home. The cause of death was a single gunshot wound to her chest.

At the time of the shooting, Kershman was alone in the living room; her friend, Leland Blake, was on the computer in the next room. Blake testified that Kershman had told him Martinez was planning to come over and that immediately prior to the shooting, Blake heard Martinez' voice in the next room with Kershman. Blake testified that Kershman

and Martinez were engaged in some type of verbal altercation. Moments later Blake heard gunshots, and upon entering the living room Blake found Kershman dead on the couch. Through the window, Blake saw Martinez entering his vehicle and driving away.

Martinez was subsequently located and questioned about the shooting. During the course of that interview, Martinez admitted that he shot Kershman and told law enforcement where to find the weapon. In addition, Martinez admitted to one of his roommates that he shot Kershman. A gun was located in Martinez' house in the place he had indicated. That weapon was consistent with the type of weapon used to shoot Kershman. Because of the type of weapon used, it was not possible to conclusively find that the gun found in Martinez' home was the murder weapon. Martinez was arrested and eventually charged with first degree murder.

Martinez filed a motion to suppress the statements he made to law enforcement. He argued that he suffered from a hearing impairment, that under Neb. Rev. Stat. § 20-152 (Reissue 2012) he was entitled to an interpreter, and that failure to provide an interpreter required that the statements obtained in the absence of the interpreter should be suppressed.

On the motion to suppress, two experts, including one retained by the State, testified by deposition that Martinez suffered from a hearing impairment. Lay witnesses, including Martinez' relatives and friends, testified as to their observations when communicating with Martinez. The officers and other individuals involved in Martinez' police interview and subsequent incarceration were also questioned as to their observations of Martinez' ability to communicate. The general consensus from those witnesses was that no one was aware that Martinez suffered from any hearing impairment; however, the State does not otherwise contest that Martinez is, in fact, hearing impaired. Following this hearing, the motion to suppress was denied.

Martinez' defense at trial was that he shot Kershman during a sudden quarrel and, thus, was guilty of manslaughter. Evidence of Kershman and Martinez' relationship was offered. Of most import to Martinez' defense was a text message Kershman sent to Martinez shortly before the murder, wherein Kershman told Martinez that she "want[ed] a man to take care of me and not bitch about there [sic] money." Following a jury trial, however, Martinez was convicted of first degree murder and use of a weapon to commit a felony.

After trial, but prior to sentencing, Martinez' counsel sought to have Martinez examined for competency. A hearing was held at which two defense experts testified that Martinez was incompetent and that because Martinez' incompetency was based upon his intellectual functioning, it was unlikely that his competency could be restored. A witness for the State testified that Martinez was competent. In addition, the State offered the testimony of several lay witnesses who testified as to their observations and interactions with Martinez. The district court found Martinez to be competent, and he was sentenced to life imprisonment for the murder conviction, plus an additional 10 to 50 years' imprisonment for the use of a weapon conviction.

Martinez appeals.

ASSIGNMENTS OF ERROR

On appeal, Martinez assigns, restated and consolidated, that the district court erred in (1) denying his motion to suppress his statements made to law enforcement, (2) finding him competent to stand trial, and (3) instructing the jury with regard to sudden quarrel manslaughter.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[1]

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[1] *State v. Raatz*, 294 Neb. 852, 885 N.W.2d 38 (2016).

[2] In a criminal case, an appellate court reviews findings of fact for clear error.[2]

[3] The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[3]

[4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[4]

[5] 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.[5]

ANALYSIS

Motion to Suppress

In his first assignment of error, Martinez argues that the district court erred in denying his motion to suppress statements made to law enforcement, because those statements were made without the presence or assistance of an interpreter, to which Martinez claims he was entitled by virtue of § 20-152. In connection with this assignment of error, Martinez also argues that the district court erred in admitting layperson testimony at the suppression hearing and violated Neb. Const. art. II, § 1.

Section 20-152 provides:

> Whenever a deaf or hard of hearing person is arrested and taken into custody for an alleged violation of state law or local ordinance, the appointing authority shall

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[2] See *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016).

[3] *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

[4] *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015).

[5] *State v. Rask*, 294 Neb. 612, 883 N.W.2d 688 (2016).

> procure a licensed interpreter for any interrogation, warning, notification of rights, or taking of a statement, unless otherwise waived. No arrested deaf or hard of hearing person otherwise eligible for release shall be held in custody solely to await the arrival of a licensed interpreter. A licensed interpreter shall be provided as soon as possible. No written or oral answer, statement, or admission made by a deaf or hard of hearing person in reply to a question of any law enforcement officer or any other person having a prosecutorial function may be used against the deaf or hard of hearing person in any criminal proceeding unless (1) the statement was made or elicited through a licensed interpreter and was made knowingly, voluntarily, and intelligently or (2) the deaf or hard of hearing person waives his or her right to an interpreter and the waiver and statement were made knowingly, voluntarily, and intelligently. The right of a deaf or hard of hearing person to an interpreter may be waived only in writing. The failure to provide a licensed interpreter pursuant to this section shall not be a defense to prosecution for the violation for which the deaf or hard of hearing person was arrested.

A "deaf or hard of hearing person" is defined in Neb. Rev. Stat. § 20-151(3) (Supp. 2015) as

> a person whose hearing impairment, with or without amplification, is so severe that he or she may have difficulty in auditorily processing spoken language without the use of an interpreter or a person with a fluctuating or permanent hearing loss which may adversely affect the ability to understand spoken language without the use of an interpreter or other auxiliary aid.

In its order, the district court found that Martinez was not "deaf or hard of hearing" for purposes of the statute. On appeal, Martinez argues that he has been diagnosed with a hearing impairment by two audiologists and that his impairment meets the definition of "deaf or hard of hearing" under the statute.

The State agrees that Martinez has a hearing impairment, but contends that the record shows that Martinez does not meet the definition under the statute because he does not have difficulty auditorily processing or understanding spoken language without an interpreter.

Before addressing the underlying question, we address Martinez' contention that the district court erred in allowing lay witnesses to testify about Martinez' hearing. Martinez asserts that § 20-152 operates technically and that only the testimony of an audiologist suffices to show a hearing loss. Martinez then argues that lay testimony is "inappropriate, irrelevant, confusing, and ultimately inadmissible under Neb. Rev. Stat. §§ 27-104, 401, 403, 602 and 701."[6]

Martinez cites to no case law to support the assertion that lay testimony is inadmissible. Other jurisdictions have permitted the offering of such testimony of evidence tending to either show or not show that a defendant is deaf or hard of hearing.[7]

Moreover, we note that the witnesses in question did not testify as to Martinez' ability to hear, but, rather, testified only to their own perception of whether Martinez was able to communicate with them without using an interpreter. As discussed below, this is relevant to the question of whether Martinez was deaf or hard of hearing for purposes of the statute.

[6] Finally, we note that in a criminal case, the rules of evidence do not apply at suppression hearings.[8] As such, we find that the district court did not abuse its discretion in admitting lay witness testimony.

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[6] Brief for appellant at 8.

[7] See, *State v. Kail*, 760 N.W.2d 16 (Minn. App. 2009); *Hollaman v. State*, 312 Ark. 48, 846 S.W.2d 663 (1993). See, also, *People v. Demann*, No. 268657, 2007 WL 2404534 (Mich. App. Aug. 23, 2007) (unpublished opinion).

[8] See *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

We turn to the underlying question of whether the district court erred in finding that Martinez was not deaf or hard of hearing for purposes of § 20-152. Under that statute, a deaf or hard of hearing person is defined as someone whose hearing impairment is so severe that the use of an interpreter or other auxiliary aid is necessary to process or understand spoken language. The district court found Martinez did not meet this definition.

A review of the DVD of the interview with law enforcement shows that Martinez, who was not wearing hearing aids at the time, had no trouble following along, conversing, and engaging in the interview. Throughout the 25-minute interview, Martinez tracked questions and answered appropriately. He never indicated that he had any trouble hearing the officers.

On the few occasions that Martinez answered in a way that suggested he did not understand, the question was repeated, and Martinez then appropriately responded. The interviewing officer would often repeat back Martinez' answer, and Martinez would confirm that that was what he had said. The interview DVD also shows that Martinez corrected the officers when they misstated what he had said. And the DVD shows that Martinez gave more than "yes" or "no" answers and on a few occasions offered unsolicited, but on topic, statements.

In addition to responding to the interviewing officer, Martinez is seen on the DVD responding to the other officer who was in the room and sitting off to one side. According to the officers' testimonies, Martinez followed all verbal commands given during his arrest, even those made when Martinez was turned away from the officer. This supports the finding that Martinez was not deaf or hard of hearing as defined by the statute.

Evidence from other witnesses also supports the finding that Martinez did not need an interpreter or auxiliary aid to process or understand spoken language. Most people who

testified had no idea that Martinez suffered from a hearing impairment. The district court's findings regarding Martinez' ability to process and understand spoken language without an interpreter were not clearly erroneous. As such, the district court did not err in denying the motion to suppress.

Having concluded that the district court did not err in finding that Martinez was not deaf or hard of hearing under the statute, we also reject Martinez' assertion that the district court's adoption of a new standard violated the separation of powers clause of the Nebraska Constitution.

Martinez' first assignment of error is without merit.

Competency

In his second assignment of error, Martinez assigns that the district court erred in finding that he was competent. He also argues that the district court erred in admitting the testimony of lay witnesses at this hearing.

Neb. Rev. Stat. § 29-1823(1) (Reissue 2008) states in part that "[i]f at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused."

The procedural posture of this case is unusual in that Martinez' competency was not challenged until after his conviction, but before his sentencing. However, there is no dispute that the court can determine Martinez' competency at any time, including after trial but prior to final judgment, and that, in fact, it is the obligation of the court to do so.[9]

[7] This court will affirm the district court's decision if there is sufficient evidence to support its finding. The test of mental competency to stand trial is whether the defendant

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[9] See, *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *U.S. v. Arenburg*, 605 F.3d 164 (2d Cir. 2010). See, also, 21 Am. Jur. 2d *Criminal Law* § 90 (2016).

now has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[10]

As an initial matter, Martinez argues—as he did with respect to the denial of his motion to suppress—that the district court erred in admitting the testimony of lay witnesses on the issue of his competency. But the record is clear that these witnesses did not testify as to Martinez' competency, but, rather, testified as to their interactions with and observations of Martinez. This evidence is admissible to rebut or corroborate the testimony of the expert witnesses relating to Martinez' competency. The district court did not abuse its discretion in allowing this testimony.

We turn to our review of the district court's determination regarding competency. In this case, two experts testified that Martinez was not competent. The first, Dr. Linda Hunter, was originally retained to conduct IQ testing to assist with sentencing. Hunter determined that Martinez' full scale IQ was 57, with a verbal IQ of 55, and a performance IQ of 64. Hunter also performed other testing which suggested that Martinez had "significant issues in his cognitive ability," with an extremely low range of intellectual functioning.

Hunter was present for the entirety of the competency hearing and eventually reviewed outside materials, including letters and prison kites authored by Martinez. Hunter testified on rebuttal that the additional evidence did not change her opinion. In addition, Hunter indicated that because Martinez' incompetency was based upon his intellectual functioning, it was not likely that Martinez could be restored to competency. Hunter also testified that she did not believe Martinez was malingering.

Dr. Y. Scott Moore also testified that he believed Martinez was not competent and that it was not likely that Martinez

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[10] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

could be restored to competency due to the nature of his incompetency. Moore administered no standardized tests during his evaluation, but did review the testing done by Hunter. Moore reviewed a partial transcript of the trial and some evidence presented at trial. Moore testified that he was concerned that Martinez was not able to answer many of his questions. Moore testified that Martinez could have been malingering but that he did not believe that this was so. Moore also asserted that he was able to "look [Martinez] in the eyes" to see if he was telling the truth. Moore testified that he relied on answers provided by Martinez and did not investigate those answers further. Moore reviewed the evidence presented at the competency hearing and testified on rebuttal that it did not change his opinion that Martinez was not competent.

Dr. Carl Greiner testified for the State. Greiner testified that it was his opinion that Martinez was malingering and that he was competent to stand trial. Greiner testified that prior to his evaluation of Martinez, he reviewed materials, including Hunter's evaluations and letters and prison kites written by Martinez; Martinez' employment, personal, medical, and criminal history; and the events surrounding Kershman's death. Greiner indicated that it was his opinion that Martinez was deliberately underperforming during his examination and that the extrinsic evidence supported the conclusion that Martinez understood the legal process.

In addition to the experts, several lay witnesses testified as to their observations about Martinez that might reflect upon his competency. The evidence presented showed that Martinez had been employed most recently as janitorial staff at both a fast-food restaurant and a grocery store. Martinez had held other, labor-intensive jobs in his adult life. One of those jobs required a "license" obtained through testing with the employer to drive a certain type of equipment. Martinez also obtained a driver's license, although the record reflects that it did take him several attempts to pass that examination.

Following his arrest for Kershman's murder, Martinez was found to be an insulin-dependent diabetic; nurses at the Diagnostic and Evaluation Center (D&E) where Martinez was confined pending trial and sentencing testified as to his ability to manage his condition, including monitoring his own blood sugars by taking his own blood sample, reviewing those results, and determining what additional dosage was required beyond his maintenance dose. Martinez was taught this upon his arrival at D&E, and witnesses testified that he was able to accept and retain instruction on this matter after only a few times. In custody, Martinez has also sought assistance as required for repairs relating to his eyeglasses and hearing aids.

Other witnesses from D&E testified that Martinez was quiet, polite, and respectful, with one witness even describing Martinez as an ideal inmate. Martinez was presentable in clothing and attire, and was where he should be when he should be there. Martinez maintained employment as a cleanup porter at D&E and trained new hires.

One witness from D&E described an incident where Martinez discussed that a hearing had been canceled due to a personal matter involving his attorney. The record shows Martinez was aware of how long he has been in custody. The record also shows that Martinez engaged in allowed social activities at D&E, including playing cards and a least looking at books, newspapers, and magazines. There was some evidence, in the form of letters and prison kites written by Martinez, to suggest that Martinez could read and write at a level more advanced than he admitted to during his competency evaluations. Though counsel suggested that Martinez might have had help writing the letters and prison kites, there was no evidence offered to show that was the case.

Another witness was Martinez' ex-wife, who testified that when married to Martinez, Martinez appeared to compile sports statistics and do the accompanying arithmetic. Martinez' ex-wife also testified that she once filed for a

protection order against Martinez and that he appeared in court on the matter. Martinez also had a criminal record with a prior conviction and incarceration for a felony, but there was no indication that his competency was challenged at any point in the past.

A finding of competency will be upheld if there is sufficient evidence to support it. In this case, Greiner testified that Martinez was competent. Other witnesses testified as to Martinez' interactions with them, further suggesting competency. This evidence was sufficient for Martinez to be found competent. Martinez' second assignment of error is without merit.

Jury Instructions

In his third assignment of error, Martinez argues that the district court erred in its instructions regarding the definition of the term "deliberation" and erred in not instructing the jury that as an element of first degree murder, the State must disprove that Martinez acted on a sudden quarrel.

Specifically, Martinez notes that this court held in *State v. Hinrichsen*[11]:

> 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."

Accordingly, Martinez argues that the jury should have been instructed that in addition to meaning "'not suddenly or rashly,'" "'an act is not deliberate if it is the result of sudden quarrel provocation.'"[12]

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[11] *State v. Hinrichsen*, 292 Neb. 611, 636, 877 N.W.2d 211, 228 (2016).

[12] Brief for appellant at 8.

Martinez argues that *Hinrichsen* created a new rule and that the district court's error in the instructions is plain error. We disagree. We specifically noted in *Hinrichsen* that the jury instructions as given were not reversible error, but the additional instruction might be a "better practice" going forward. And we cannot fault the district court for not complying with our "better practice" when this case was tried almost 2 years before our decision in *Hinrichsen*.

For the same reason—that the jury instructions in *Hinrichsen* were not reversible error—we conclude that Martinez' argument with respect to the elements of first degree murder are without merit. We note, though, that the jury was instructed in the definition of "Sudden Quarrel" that "[p]rovocation . . . negates malice," another issue in *Hinrichsen*.

There is no merit to Martinez' third assignment of error.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Clarence W. Devney, appellee, v. Elizabeth A. Devney, appellant.

886 N.W.2d 61

Filed October 21, 2016. No. S-15-937.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **Divorce: Appeal and Error.** In actions for dissolution of marriage, 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. This standard of review applies to the trial court's determinations regarding division of property.
3. **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.
4. **Statutes.** Statutes which effect a change in the common law are to be strictly construed.
5. **Contracts: Marriage.** All postnuptial agreements were void at common law.
6. **Estates: Divorce: Property Settlement Agreements: Waiver.** The language of Neb. Rev. Stat. § 30-2316(d) (Reissue 2008) contemplates the waiving of the spouse's rights of inheritance only. It makes no reference to agreements allocating property rights upon separation or divorce.
7. **Divorce: Property Settlement Agreements.** An agreement between a husband and wife concerning the disposition of their property, not made in connection with the separation of the parties or the dissolution of their marriage, is not binding upon the courts during a later dissolution proceeding under Neb. Rev. Stat. § 42-366 (Reissue 2008).
8. **Marriage: Property Settlement Agreements: Public Policy.** Postnuptial property agreements are against the public policy of Nebraska because of the deleterious effect such agreements have on marriages.

9. **Marriage: Property Settlement Agreements: Statutes.** Nebraska has no statutory authority supporting property agreements postnuptially.
10. **Marriage: Property Settlement Agreements: Public Policy.** Postnuptial property agreements are void as statutorily unauthorized, and such agreements both were prohibited under common law and violate the public policy of Nebraska.
11. **Contracts: Public Policy.** Any contract which is clearly contrary to public policy is void.
12. **Courts: Divorce: Property Settlement Agreements: Appeal and Error.** A district court abuses its discretion by relying exclusively on void portions of an agreement to make property distributions in a dissolution proceeding, such reliance being clearly untenable.

Appeal from the District Court for Saunders County: Mary C. Gilbride, Judge. Vacated in part, and in part reversed and remanded with direction.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Frederick D. Stehlik and Zachary W. Lutz-Priefert, of Gross & Welch, P.C., L.L.O., for appellee.

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

Funke, J.

NATURE OF CASE

This matter commenced as a petition for dissolution of marriage between Clarence W. Devney and Elizabeth A. Devney. The district court dissolved the marriage between the parties and divided the parties' assets and debts. In doing so, the district court found that a postnuptial property agreement entered into by the parties was valid and enforceable and that the division of the marital estate was fair and reasonable. Elizabeth appeals from both of these findings.

The main issue presented is whether a property agreement in a postnuptial agreement that was not attendant upon the spouses' separation or divorce is valid in Nebraska.

We conclude that such property agreements remain void in Nebraska. Accordingly, the district court erred in enforcing the property agreement provision of the parties' postnuptial agreement. For the reasons set forth herein, we reverse in part, and vacate in part, the judgment of the trial court and remand the cause with direction.

BACKGROUND

Clarence and Elizabeth were married in August 1998. No children were born of their marriage, but each party had children from previous marriages, all of whom have reached the age of majority. Clarence commenced a marital dissolution proceeding in April 2014. After a trial, the court issued its decree in September 2015.

At trial, Clarence sought to enforce the parties' postnuptial agreement. Clarence and Elizabeth executed the postnuptial agreement in January 1999, 5 months after their marriage. The parties had discussed a prenuptial agreement with Clarence's attorney to protect the interests of their children from previous marriages but failed to execute one before the marriage. Instead, the parties included a clause in the postnuptial agreement stating that the agreement was effective as of August 1998 and enforceable as if it were a prenuptial agreement.

The parties created the postnuptial agreement to address "the disposition of their respective assets upon the death of either party or in the event that the parties should terminate their marriage." In the event of Clarence's death, Elizabeth waived her statutory rights in his estate, such as homestead allowances, exempt property, family allowances, and the right of election of her statutory share of Clarence's augmented estate; but she was entitled to receive the marital residence and the residuary of Clarence's estate, excluding specific legacies in his will. In the event of Elizabeth's death, Clarence waived his statutory rights in her estate as well, but was entitled to receive the residuary of her estate, excluding specific legacies in her will.

If the marriage were dissolved, each party waived and relinquished all interest in the other spouse's premarital property, identified in exhibits A and B of the postnuptial agreement. Elizabeth was entitled to 50 percent of the assets acquired by the parties after the marriage. Exhibits A and B were purported to be lists of the parties' premarital assets and debts and the values of the same.

Clarence's attorney, Ronald L. Eggers, drafted the postnuptial agreement and represented him through the execution. Elizabeth was not represented by an attorney. Eggers testified that he would have clearly explained the agreement's "Representation by Counsel" section to Elizabeth, informing her that he did not represent her and that she was free to obtain her own counsel.

Clarence purchased the marital residence 7 years before the parties married, for $130,000. Prior to the marriage, few improvements were made to the marital residence, and the residence had an assessed tax value of just over $103,000. Elizabeth moved into the marital residence after the parties married. During the marriage, the parties made substantial improvements throughout the residence. At trial, Clarence estimated the home to be worth about $310,000; Elizabeth had the home appraised at $330,000. When the parties married, the debt against the marital residence was $90,000; it had been reduced to $18,000 by the time of trial.

Exhibit A of the postnuptial agreement listed the premarital value of the marital residence as $250,000. Clarence signed a deed transferring the marital residence into both parties' names after the postnuptial agreement was executed, under the belief it was required by the agreement. The language of the agreement stated, "The transfer of title of any asset by Clarence to [the parties] shall not affect the terms and provisions of this Agreement, notwithstanding the creation of a joint tenancy or other relationship by such transfer."

The parties' trial testimony is in contradiction on four factual circumstances regarding the execution of the postnuptial

agreement. Eggers also testified about the circumstances surrounding the execution of the postnuptial agreement, but he lacked a strong recollection of the events and testified mostly from the exhibits he provided.

First, Clarence stated the parties decided that $250,000 was a fair assessment of the marital residence's value at the time of their marriage, after taking the county assessment into consideration. However, Elizabeth denied being involved in any of the valuations in exhibit A or B. Eggers stated he would not have prepared exhibit B, the valuation of Elizabeth's separate property, without consulting Elizabeth.

Second, Clarence testified that Eggers went over the postnuptial agreement "word for word" with Elizabeth the day it was signed, but Eggers could confirm only that he discussed the agreement with Elizabeth in May 1998 for "8/10ths of an hour." He could not confirm that he explained it to her in January 1999 or that she ever saw the final postnuptial agreement. Elizabeth stated that she was presented with only the signature page and never saw the contents of the postnuptial agreement or the exhibits, but that she signed the agreement pursuant to Clarence's demand.

Third, Clarence stated that the parties signed the postnuptial agreement in Eggers' office, but Elizabeth testified that she signed it at her kitchen table without the presence of a notary public. Eggers believed that he did not travel out of his office for the signing because he billed only 0.3 hours on that date and that he would have billed more time if travel had been involved. Eggers identified the notary public as a deceased former secretary at his law firm. Eggers stated that he would have never asked a secretary to notarize a document unless she had seen the document and witnessed its execution.

Fourth, Clarence testified that the parties also executed wills, essentially mirroring the terms of the postnuptial agreement, on the same day the parties signed the agreement. Elizabeth confirmed her signature on her will, but she stated that she would not have consented to its terms and could not recall ever

having read it or recall the circumstances behind her signing it. Eggers testified that he represented Elizabeth in executing her will and that he would not have prepared it without Elizabeth's direction on the contents. Elizabeth's will does not contain a valuation of the marital residence or any of the other items present in the exhibits.

The trial court determined that the postnuptial agreement should be enforced as written. Accordingly, the court concluded that $250,000, the agreed-upon premarital value of the marital residence, should be set off from the marital estate for Clarence. Additionally, the court found that the marital residence increased in value by $80,000 during the marriage, and the court equally divided the increase because it had resulted from the parties' joint efforts and expenditures on the property after the postnuptial agreement was signed. The district court then ordered the division of other assets and ordered Clarence to pay Elizabeth an equalization payment of $116,747 within 90 days from the date of the decree.

ASSIGNMENTS OF ERROR

Elizabeth assigns that the district court erred as follows:

(1) in not finding the postnuptial agreement void and unenforceable;

(2) in determining that the value of the marital residence was $250,000 at the time of the marriage; and

(3) in finding that Clarence was entitled to a setoff, as a nonmarital asset, of the first $250,000 in equity in the marital residence.

STANDARD OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[1]

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[1] *SID No. 1 v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015).

[2,3] In actions for dissolution of marriage, 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] This standard of review applies to the trial court's determinations regarding division of property.[3] 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.[4]

ANALYSIS

Property Agreements in Postnuptial Agreements Are Void

Elizabeth contends that postnuptial property agreements are neither permitted by statute nor Nebraska's public policy. Historically, this court has held that postnuptial property agreements were invalid because of a common-law prohibition and on the grounds of public policy.[5]

In contrast, we have long accepted postnuptial separation agreements to divide the parties' property. In 1921, this court described a separation agreement as one

> where husband and wife find it impossible to dwell together in harmony, because of the misconduct of one which would warrant a legal separation, decide to enter into a contract adjusting all the property rights, and each

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[2] *Sellers v. Sellers*, 294 Neb. 346, 882 N.W.2d 705 (2016); *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015).

[3] See *Sellers, supra* note 2.

[4] *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016).

[5] *Chambers v. Chambers*, 155 Neb. 160, 51 N.W.2d 310 (1952); *Focht v. Wakefield*, 145 Neb. 568, 17 N.W.2d 627 (1945); *Smith v. Johnson*, 144 Neb. 769, 14 N.W.2d 424 (1944).

> relinquish any rights in the property of the other, and provid[e] for the immediate separation of the parties.[6]

In *In re Estate of Lauderback*,[7] we held that such agreements are valid and enforceable. In *Smith v. Johnson*,[8] we affirmed that holding: "Separation agreements founded on this broad, equitable doctrine do not contravene public policy."

However, *Smith* also clarified that *In re Estate of Lauderback* did not recognize the right of husband and wife to "enter into a postnuptial agreement barring their respective rights in the other's real property while the complete marriage relation exists."[9] We held that such contracts are void under common law and that the Legislature had not abrogated that rule.[10]

In *Focht v. Wakefield*,[11] we reiterated the holding of *Smith*: "'Postnuptial contracts entered into between husband and wife while residents of [Nebraska] in which they settle their property rights, including their respective rights of inheritance in the property of the other, are not authorized by express statute and are invalid and unenforceable.'" We reasoned that inheritance rights are controlled by statute and that the Legislature had authorized prenuptial agreements only as a vehicle to waive a right to inherit from his or her spouse's estate.[12] We interpreted this specific authorization to preclude such agreements postnuptially.[13]

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[6] *In re Estate of Lauderback*, 106 Neb. 461, 465, 184 N.W. 128, 130 (1921). Accord, *Smith, supra* note 5 (distinguishing cases that are commonly called separation agreement cases); *Ladman v. Ladman*, 130 Neb. 913, 267 N.W. 188 (1936).

[7] *In re Estate of Lauderback, supra* note 6.

[8] *Smith, supra* note 5, 144 Neb. at 772, 14 N.W.2d at 425.

[9] *Id.* at 771, 14 N.W.2d at 425.

[10] *Id.*

[11] *Focht, supra* note 5, 145 Neb. at 573, 17 N.W.2d at 630. See, also, Neb. Rev. Stat. § 30-106 (1943).

[12] *Focht, supra* note 5.

[13] *Id.*

Clarence relies heavily upon the Nebraska Court of Appeals' decision *In re Estate of Kopecky*,[14] where the court held that by amending § 30-106—permitting spouses to also waive inheritance rights in their spouses' estate postnuptially—the Legislature authorized all postnuptial agreements. The *In re Estate of Kopecky* court concluded that the amendment of § 30-106 nullified the holdings of this court in *Chambers v. Chambers*[15] and *Focht* and *Smith*, all of which had held postnuptial agreements void against public policy.

At the time the agreement at issue in *In re Estate of Kopecky* was executed, § 30-106 (Cum. Supp. 1969) was in effect and provided:

> A man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage or after a second or subsequent marriage where one or both of the parties have children of a previous marriage, or where either spouse has been married previously and the other spouse has not been previously married. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made.

In 1974, the Legislature simultaneously repealed § 30-106 and adopted the Uniform Probate Code, including Neb. Rev. Stat. § 30-2316 (Cum. Supp. 1974).[16] Section 30-2316 (Reissue 2008) currently states:

> (a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after

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[14] *In re Estate of Kopecky*, 6 Neb. App. 500, 574 N.W.2d 549 (1998).

[15] *Chambers, supra* note 5.

[16] See 1974 Neb. Laws, L.B. 354, § 38.

> marriage, by a written contract, agreement, or waiver signed by the surviving spouse.
>
> . . . .
>
> (d) Unless it provides to the contrary, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation, divorce, or annulment is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

While the amendment to § 30-106, and the subsequently adopted § 30-2316, overruled the language of *Focht* interpreting previous statutes to prohibit postnuptial estate agreements, the holdings of *Chambers*, *Focht*, and *Smith* were much broader than the issue of estate agreements in postnuptial agreements.[17] Furthermore, in *In re Estate of Kopecky*, the Court of Appeals was concerned only with determining the applicability of an estate agreement.[18] Accordingly, any statements in *In re Estate of Kopecky* that could be interpreted as broadly upholding postnuptial property agreements are not applicable here.

[4,5] We have consistently held that statutes which effect a change in the common law are to be strictly construed.[19] We have also held that all postnuptial agreements were void at common law.[20] So to determine if postnuptial property agreements are statutorily permitted or the public policy against

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[17] See cases cited *supra* note 5.

[18] *In re Estate of Kopecky, supra* note 14.

[19] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012). See, also, *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[20] *Smith, supra* note 5.

such agreements has been superseded by statute, we look to the statutes permitting other types of nuptial property agreements. We conclude that Nebraska statutes do not authorize postnuptial agreements to allocate the parties' property rights upon separation or divorce unless such agreements are concurrent with a separation or divorce.

[6] First, the language of § 30-2316(d) contemplates the waiving of a spouse's rights of inheritance only. It makes no reference to agreements allocating property rights upon separation or divorce.

Second, the Legislature statutorily approved of premarital agreements through the adoption of the Uniform Premarital Agreement Act,[21] which defines a "premarital agreement" as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.[22] The act further sets forth authorized content of a premarital agreement and the enforcement standards for such agreements.[23] We find it informative that our Legislature has not adopted the Uniform Premarital and Marital Agreements Act,[24] created in 2012, which authorizes property agreements when separation or divorce is not imminent. The Legislature has enacted each of the previous uniform acts on the subject of prenuptial and postnuptial agreements but has not yet seen fit to adopt the Uniform Premarital and Marital Agreements Act.

Third, in 1972, the Legislature adopted the Uniform Marriage and Divorce Act's provision permitting separation agreements.[25] The language of § 42-366 essentially incorporates

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[21] Neb. Rev. Stat. §§ 42-1001 through 42-1011 (Reissue 2008). See Unif. Premarital Agreement Act, 9C U.L.A. 39 (2001).

[22] § 42-1002(1).

[23] §§ 42-1004 and 42-1006.

[24] Unif. Premarital & Marital Agreements Act, 9C U.L.A. 13 (Supp. 2016).

[25] Neb. Rev. Stat. § 42-366 (Reissue 2008). See Unif. Marriage & Divorce Act § 306, 9A (part II) U.L.A. 11 (1998).

the definition of a separation agreement in *Smith*[26] and our earlier cases:

> (1) To promote the amicable settlement of disputes between the parties to a marriage *attendant* upon their separation or the dissolution of their marriage, the parties may enter into a written property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children.
>
> (2) In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, except terms providing for the support and custody of minor children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable.

(Emphasis supplied.) However, § 42-366 makes no references to using postnuptial agreements to promote amicable settlements when separation or divorce is not imminent, as is the case currently before us.

[7,8] In *Snyder v. Snyder*,[27] we considered an agreement between a husband and wife concerning the disposition of their property, not made in connection with the separation of the parties or the dissolution of their marriage. We reiterated our earlier holding from *Smith* that such property agreements "are not binding upon the courts during a later dissolution proceeding, as not being within the intendment of section 42-366."[28] Additionally, we affirmed Nebraska's public policy against postnuptial property agreements because of the deleterious effect such agreements have on marriages.[29]

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[26] *Smith, supra* note 5.

[27] *Snyder v. Snyder*, 196 Neb. 383, 243 N.W.2d 159 (1976).

[28] *Id.* at 387, 243 N.W.2d at 161.

[29] *Id.*

[9-11] Therefore, we find no statutory support for upholding postnuptial property agreements. We find it outside the province of this court to read into Nebraska's current statutory authority the effectiveness of postnuptial property agreements when such agreements both were prohibited under common law and violate the public policy of Nebraska. Accordingly, the parties' property agreement in their postnuptial agreement is void.[30]

We recognize that in 1999, when the postnuptial agreement in this case was created, the majority of states had abandoned the public policy prohibition against postnuptial property agreements.[31] However, about half of those states had done so through legislative action.[32] Based on our decision in *Snyder*[33] and our Legislature's acquiescence to that decision, we decide that Nebraska's public policy against postnuptial property agreements has not been abrogated by statute.

Here, the postnuptial agreement was entered into 5 months after the parties married. There is nothing in the record to indicate that when the parties executed the agreement they

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[30] *Johnson v. Nelson*, 290 Neb. 703, 711, 861 N.W.2d 705, 712 (2015) (any "contract which is clearly contrary to public policy is void").

[31] See, e.g., *Tibbs v. Anderson*, 580 So. 2d 1337 (Ala. 1991); *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987); *Matter of Estate of Gab*, 364 N.W.2d 924 (S.D. 1985); *Sanders v. Colwell*, 248 Ga. 376, 283 S.E.2d 461 (1981); *In re Estate of Harber*, 104 Ariz. 79, 449 P.2d 7 (1969); *Sims v. Roberts*, 188 Ark. 1030, 68 S.W.2d 1001 (1934); *D'Aston v. D'Aston*, 808 P.2d 111 (Utah App. 1990); *Lurie v. Lurie*, 246 Pa. Super. 307, 370 A.2d 739 (1976).

[32] See, e.g., Del. Code Ann. tit. 13, § 1513 (2009); 750 Ill. Comp. Stat. Ann. 5/503 (LexisNexis Cum. Supp. 2009); La. Civ. Code Ann. art. 2331 (West 2009); Minn. Stat. § 519.11 (2014); N.M. Stat. Ann. §§ 40-2-4 and 40-2-8 (2006); N.C. Gen. Stat. § 50-20 (2007); Tex. Fam. Code Ann. § 4.102 (West 2006); Va. Code Ann. § 20-155 (2008); Wis. Stat. Ann. § 766.58 (West 2009); *Epp v. Epp*, 80 Haw. 79, 905 P.2d 54 (Haw. App. 1995) (interpreting Haw. Rev. Stat. § 580-47 (West 1993)).

[33] *Snyder, supra* note 27.

were contemplating separation or divorce or that either was imminent. Therefore, the district court erred in finding that those portions of the agreement settling the parties' property rights upon divorce but not attendant upon an immediate separation or divorce were void and unenforceable.

District Court Erred in Determining Premarital Value and Setoff Amount of Marital Residence

[12] Our holding that the postnuptial property agreement was void to the extent it settled the parties' property rights upon unanticipated separation or divorce means that the agreement's valuation of Clarence's premarital interest in the marital residence is void accordingly. The trial court's valuation of the marital residence, at $250,000, is untenable because it relies exclusively on the void postnuptial property agreement. We therefore hold that the district court abused its discretion in its determinations of the marital residence's value, the setoff owed to Clarence from the marital residence, and its division of the marital debts and assets. The district court's decree is vacated in each of these regards.

We leave the determination of the premarital value of the marital residence, and whether Elizabeth shared Clarence's opinion as to the premarital valuation of the marital residence independent of the property agreement and the weight given to any such opinion, to the district court. Further, we advise the district court to consider the mortgage debt on the marital property in determining the appropriate setoff value.

CONCLUSION

We find merit in Elizabeth's assignments of error that the trial court improperly relied on the postnuptial agreement to determine the value of the marital residence and to setoff the first $250,000 in equity from the marital residence to Clarence.

The decree of the trial court is reversed to the extent it enforced the postnuptial agreement and otherwise is vacated as to the premarital value of the marital residence, the appropriate setoff for the marital residence, and the related division of marital debts and assets. Accordingly, we remand the cause to the district court with directions to determine the premarital value of the marital residence for setoff to Clarence and divide the marital property independent of the terms of the postnuptial agreement.

Vacated in part, and in part reversed and remanded with direction.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. David W. Tighe, respondent.

886 N.W.2d 530

Filed October 28, 2016. Nos. S-14-685, S-16-130.

1. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
2. ____. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
3. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
5. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original actions. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

Per Curiam.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed a motion for reciprocal discipline and formal charges against David W. Tighe, docketed as cases Nos. S-14-685 and S-16-130. These cases were consolidated for purposes of briefing, oral argument, and disposition.

Tighe is a member of the Nebraska State Bar Association and practices law in Omaha, Nebraska. In 2014, Tighe was suspended from practicing before the U.S. Bankruptcy Court and the U.S. District Court for the District of Nebraska. Following Tighe's failure to respond to an order to show cause entered by this court, Tighe was temporarily suspended from the practice of law in Nebraska. This case is docketed at No. S-14-685.

In addition, formal charges were filed in the case docketed at No. S-16-130. Tighe filed an answer admitting the allegations. We granted the Counsel for Discipline's motion for judgment on the pleadings and ordered the parties to brief the issue of the appropriate discipline to impose. We also ordered consolidation of cases Nos. S-14-685 and S-16-130.

We now order that Tighe be indefinitely suspended from the practice of law.

BACKGROUND

The facts alleged in the formal charges are uncontested by Tighe. Tighe was admitted to the practice of law in the State of Nebraska on December 14, 2007. He is engaged in the private practice of law in Omaha and is under the jurisdiction of the Committee on Inquiry of the Second Judicial District. This case is composed of two consolidated cases, Nos. S-14-685 and S-16-130, initiated by the Counsel for Discipline against Tighe. These cases were consolidated for purposes of briefing, oral argument, and disposition.

Count I

In 2013, Tighe represented Ellen Miller in the U.S. Bankruptcy Court for the District of Nebraska. As a result of Tighe's failure to file necessary documents, Miller's bankruptcy case was closed without discharge, despite the fact that Miller had fulfilled all of the terms of her chapter 13 plan.

In 2014, Miller learned that she did not receive her discharge, because creditors began contacting her again. Pursuant to her own investigation, Miller learned that Tighe had not filed a "Certification by Debtor in Support of Discharge." On March 28, Miller filed a pro se motion to reopen her bankruptcy case and included allegations of Tighe's deficient representation. The U.S. Bankruptcy Court judge granted Miller's motion and issued an order to Tighe, directing him to respond to Miller's allegations by May 11. After Tighe failed to respond to this order, the bankruptcy court issued a show cause order. Tighe was later suspended from practice before the U.S. Bankruptcy Court.

Thereafter, the U.S. District Court for the District of Nebraska issued an order to show cause as to why that court should not enter a reciprocal order. On July 28, 2014, that court issued an order suspending Tighe from practicing law before the U.S. District Court until further order of the court, because Tighe's response addressed neither the basis for the suspension imposed by the bankruptcy court nor the district court's inquiries.

On July 29, 2014, the Counsel for Discipline filed a motion for reciprocal discipline with the Nebraska Supreme Court. On September 10, this court issued an order to show cause as to why we should or should not enter an order imposing the identical discipline, or greater or less discipline, as we deemed appropriate. This court's order to show cause was mailed to Tighe on September 10. The mail was returned as unclaimed.

On July 15, 2015, the Counsel for Discipline delivered to Tighe a copy of the order to show cause, which Tighe signed.

On July 17, the Counsel for Discipline filed its response to the order to show cause, asking the court not to enter an order of reciprocal discipline, but, rather, to direct the Counsel for Discipline to investigate the facts underlying the indefinite suspension order issued by the federal district court. On July 29, Tighe sent an e-mail to the Counsel for Discipline with his response to the order to show cause. The Counsel for Discipline notified Tighe that his response was inadequate and that he must either file a response with this court or mail a copy to the Counsel for Discipline. Tighe failed to do so.

On August 5, 2015, the Counsel for Discipline sent a letter to Tighe directing him to answer specific questions regarding his handling of Miller's bankruptcy and the orders to show cause issued by the U.S. Bankruptcy Court and U.S. District Court. Tighe failed to comply with either of those requests.

On October 26, 2015, the Counsel for Discipline filed his report and sent a copy to Tighe. On November 25, the Nebraska Supreme Court issued an order suspending Tighe from the practice of law until further order of the court.

Counts II and III

In 2013, Tighe represented William Harris in two felony criminal matters—one in Douglas County, Nebraska, and one in Sarpy County, Nebraska. Harris entered pleas in both cases and was sentenced to lengthy prison terms.

On May 1, 2014, Harris filed a grievance with the Counsel for Discipline against Tighe, alleging that Tighe had failed to provide Harris with multiple documents from Harris' file. On May 27, Tighe submitted his response to Harris' grievance.

On June 4, 2014, Harris submitted to the Counsel for Discipline his reply to Tighe's response, and asserted that Tighe still had not provided him with specific documents related to his criminal case. On June 9, Tighe was directed to submit an additional written response specifically addressing the issues raised in Harris' reply. Tighe failed to respond to the Counsel for Discipline.

On July 18, 2014, the Counsel for Discipline sent a followup letter to Tighe. Tighe failed to respond to the followup letter as well. On August 13, the Counsel for Discipline upgraded the matter to a formal investigation. The Counsel for Discipline sent a certified letter to Tighe, directing him to file a response to Harris' grievance within 15 working days. Tighe signed the certified mail receipt, but failed to respond to the Counsel for Discipline.

In 2013 and 2014, Tighe represented Clarence Alspaugh in a felony case in Douglas County. Alspaugh entered a plea in the criminal case and was sentenced to a lengthy prison term.

On September 29, 2014, Alspaugh filed a grievance with the Counsel for Discipline against Tighe, alleging that Tighe had failed to provide him with multiple documents from his file. A copy of Alspaugh's grievance letter was mailed to Tighe. Tighe failed to respond to the Counsel for Discipline.

On July 15, 2015, Tighe met with the Counsel for Discipline. Tighe signed a receipt acknowledging receipt of a letter from the Counsel for Discipline directing Tighe to file a written response to Harris' grievance and Alspaugh's grievance within 15 working days. On July 29, Tighe submitted his response to Harris' grievance, stating that he had provided every document to Harris. On the same date, Tighe filed his response to Alspaugh's grievance letter; however, Tighe did not respond to or address all of Alspaugh's allegations.

On August 4, 2015, the Counsel for Discipline sent a letter to Tighe, directing him to respond to Alspaugh's specific allegations. As of January 15, 2016, Tighe had not submitted a response to the letter.

On August 19, 2015, Harris submitted his reply, claiming there were still a number of documents that he believed Tighe had in his possession which Harris had not yet received. That same day, the Counsel for Discipline sent a letter to Tighe asking him to respond within 14 days to specific questions related to Harris' requests for documents. As of January 15, 2016, Tighe had not responded to the letter.

Tighe did not file a brief or appear at oral argument in these consolidated appeals. At oral argument, the Counsel for Discipline stated he did not know the underlying circumstances which led to Tighe's behavior resulting in the disciplinary hearing.

ASSIGNMENT OF ERROR

The only question before this court is the appropriate discipline.

ANALYSIS

This court granted the Counsel for Discipline's motion for judgment on the pleadings because Tighe did not file any exceptions.

[1-5] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[1] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[3] Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[4] Responding to disciplinary

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[1] *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003).

[2] *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

[3] *State ex rel. Counsel for Dis. v. Hart, supra* note 1.

[4] *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014).

complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline of the Nebraska Supreme Court indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.[5] In evaluating attorney discipline cases, we consider aggravating and mitigating circumstances.[6] The propriety of a sanction must be considered with reference to the sanctions we have imposed in prior similar cases.[7]

The Counsel for Discipline argues that Tighe's acts and omissions in relation to his representation of Miller constitute violations of his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012) and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-508.1 (bar admission and disciplinary matters), and 3-508.4 (misconduct). The Counsel for Discipline further argues that Tighe's acts and omissions in relation to his representation of Harris and Alspaugh constitute violations of his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by § 7-104 and conduct rules §§ 3-501.4(a)(4), 3-508.1(b), and 3-508.4(a) and (d). Tighe admits that he violated the sections of the Nebraska Court Rules of Professional Conduct as listed. Accordingly, the Counsel for Discipline contends that a minimum 1-year suspension is appropriate for Tighe, because he failed to respond to inquiries from the Counsel for Discipline regarding these clients' grievances. In addition, Counsel for Discipline recommends at least a 2-year period of probation following the suspension.

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[5] *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

[6] *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012).

[7] *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000).

This court was faced with a similar situation of attorney misconduct in *State ex rel. Counsel for Dis. v. Sutton*.[8] In that case, John I. Sutton failed to respond to the Counsel for Discipline's grievance letter and a followup letter and failed to file an answer to the formal charges. He was suspended from the practice of law at the time of the hearing. This court reasoned that "given the lack of information that we have regarding (1) the nature and extent of the present misconduct and (2) Sutton's present or future fitness to practice law," indefinite suspension was "more appropriate at this juncture and will serve as adequate protection for the public."[9] In addition, this court held that "[s]hould Sutton apply for reinstatement in the future, he will need to fully answer for the current charges of neglect and failing to respond to the Counsel for Discipline, and demonstrate a present and future fitness to practice law . . . ."[10]

In addition, this court held in *State ex rel. NSBA v. Simmons*,[11] that indefinite suspension was appropriate for an attorney who failed to file a brief resulting in the dismissal of a client's case without leave to amend. Furthermore, the attorney, Baiba D. Simmons, did not communicate the dismissal to her clients; the clients independently learned of the dismissal. Simmons did not respond to clients' requests, nor did she respond to numerous attempts by the Counsel for Discipline to contact her.[12] This court reasoned that "a failure to make timely responses to inquiries of the Counsel for Discipline such as that exhibited by Simmons herein violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the

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[8] *State ex rel. Counsel for Dis. v. Sutton, supra* note 5.

[9] *State ex rel. Counsel for Dis. v. Sutton, supra* note 5, 269 Neb. at 643, 694 N.W.2d at 651.

[10] *Id.*

[11] *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000).

[12] *Id.*

administration of justice and conduct adversely reflecting on the fitness to practice law."[13] Therefore, Simmons was indefinitely suspended from the practice of law in Nebraska and would only be reinstated upon "a showing which demonstrates her fitness to practice law."[14]

Tighe failed to respond to numerous attempts made by the Counsel for Discipline to contact him concerning multiple clients' complaints. In addition, Tighe failed to respond to requests from the U.S. Bankruptcy Court, the U.S. District Court, and the Nebraska Supreme Court, which resulted in Tighe's indefinite suspension from practicing law before the Nebraska federal courts and this court. Tighe has not claimed any mitigating circumstances as to why he did not respond to nearly all of the requests from the Counsel for Discipline and the courts.

Similar to *Simmons*, Tighe's acts and omissions led to the delay of a client's case as a result of his incompetent representation, lack of communication, and misconduct. Due to Tighe's failure to file a certification by debtor in support of discharge as required by the bankruptcy court's local rules, Neb. R. Bankr. P. 3015-2(N) (2014), Miller's bankruptcy case was closed without discharge, despite the fact that Miller had fulfilled all terms of her chapter 13 plan. There is no evidence in the record that Tighe notified Miller of this failure. Rather, the charges admitted to by Tighe indicate that Miller discovered she did not receive her discharge only when creditors began contacting her again. And it was only through her own investigation that Miller learned Tighe had not filed the certification. Tighe's failure to work competently and his failure to communicate with Miller, the courts, and the Counsel for Discipline nonetheless indicate Tighe's "conduct prejudicial to the administration of justice and conduct

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[13] *Id.* at 123, 608 N.W.2d at 177.

[14] *Id.*

adversely reflecting on the fitness to practice law."[15] This is compounded by Tighe's failure to respond to requests from Harris, Alspaugh, and the Counsel for Discipline in connection with the other two grievances.

The reason for Tighe's misconduct is unknown. Accordingly, this court cannot determine Tighe's present or future fitness to practice law. Tighe's behavioral issues in regard to his lack of communication with his clients, the Counsel for Discipline, and the courts indicate that he needs to prove he is fit to practice law and that he has made "behavioral changes that will allow him to practice law within the disciplinary rules."[16]

We hold that Tighe be indefinitely suspended from the practice of law. Upon application for reinstatement, Tighe shall fully answer for the current charges of neglect and failing to respond to his clients, the Counsel for Discipline, and the courts, and shall also have the burden to demonstrate his present and future fitness to practice law.

CONCLUSION

We order that Tighe be indefinitely suspended from the practice of law, effective immediately. Tighe may apply for reinstatement consistent with the terms outlined above. Tighe shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. Tighe 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 suspension.

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[15] See *id.*

[16] See *State ex rel. Counsel for Dis. v. Widtfeldt, supra* note 2, 269 Neb. at 294, 691 N.W.2d at 536.

Lawrence M. Bixenmann and Norma J. Bixenmann, appellants, v. Dickinson Land Surveyors, Inc., appellee.

886 N.W.2d 277

Filed October 28, 2016. No. S-15-695.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

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

Albert M. Engles and Brock S.J. Hubert, of Engles, Ketcham, Olson & Keith, P.C., and, on brief, James C. Boesen for appellee.

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

Per Curiam.

Case No. S-15-695 is before this court on the appellants' motion for rehearing concerning our opinion in *Bixenmann v. Dickinson Land Surveyors*.[1] We overrule the motion, but we modify the original opinion as follows:

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[1] *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 882 N.W.2d 910 (2016).

We withdraw syllabus points 9 and 10. In the section of the opinion designated "ANALYSIS,"[2] we withdraw the last two paragraphs and substitute the following:

> To address the Bixenmanns' contention that the allegedly negligent act involved ordinary negligence rather than professional negligence, we recall basic principles of law regarding professional acts or services. A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. See *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968). In determining whether a particular act or service is professional in nature, the court must look to the nature of the act or service itself and the circumstances under which it was performed. *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013).
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> Two cases from this court provide guidance as to whether an employee was engaged in professional services. In *Marx v. Hartford Acc. & Ind. Co., supra*, a physician's employee poured benzine instead of water into a sterilization container, resulting in a fire. We concluded that the act was not a professional service covered by language of an insurance policy, because the boiling of water for sterilization purposes was not an act requiring any professional knowledge or training. See *id.* We stated that "the negligent act performed here required no special training or professional skill and in no sense constituted the 'rendering or failing to render professional services.'" *Id.* at 14, 157 N.W.2d at 872. On the other hand, in *Swassing v. Baum*, 195 Neb. 651, 655, 240 N.W.2d 24, 27 (1976), a blood-typing test incorrectly reported a plaintiff's blood type and we determined that the blood test

[2] *Id.* at 411, 882 N.W.2d at 914.

was a professional service "because the performance of the blood test was an essential and integral part of the rendition of professional services by [the physician] to [the plaintiff]."

Whether an action alleges professional negligence or ordinary negligence depends on whether the professional's alleged negligence required the exercise of professional judgment and skill. See *Ambrose v. Saint Joseph's Hosp. of Atlanta*, 325 Ga. App. 557, 754 S.E.2d 135 (2014). "'A professional negligence claim calls into question the conduct of the professional in his area of expertise. Administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple negligence.'" *Id.* at 559, 754 S.E.2d at 137. If the allegations of the complaint involve the exercise of professional skill and judgment within the professional's area of expertise and go to the propriety of professional decisions rather than to the efficacy of the professional's conduct in carrying out decisions previously made, the claim sounds in professional negligence rather than ordinary negligence. See *Hamilton-King v. HNTB Georgia, Inc.*, 311 Ga. App. 202, 715 S.E.2d 476 (2011).

Here, the act of placing the survey stakes in the ground as part of the performance of surveying work qualifies as a professional act or service. Although one could argue that the act of driving a stake into the ground was purely a manual skill and was not dependent on professional knowledge or skill, the setting of the stakes was an integral part of the professional service supplied by Dickinson. How high to set the stakes, how to mark the stakes, and how long to leave the stakes in the ground are matters of professional judgment. In order to know whether Dickinson departed from the standard of care under the circumstances, the finder of fact would need to know what an ordinarily prudent land surveyor would do under similar circumstances. We conclude that the act

complained of qualified as a professional act and required expert testimony to establish the standard of care.

In performing the professional services at issue, the owner of Dickinson had one standard of care. He did not owe one standard of care to his clients and a different standard of care to everyone else. The same factual predicate cannot give rise to two independent obligations to exercise due care according to two different standards, because "a defendant has only *one* duty, measured by *one* standard of care, under any given circumstances." *Flowers v. Torrance Mem. Hosp. Med. Ctr.*, 8 Cal. 4th 992, 1000, 884 P.2d 142, 146, 35 Cal. Rptr. 2d 685, 689 (1994) (emphasis in original). And because he was operating under the standard of care of a professional land surveyor, expert testimony as to that standard of care was needed.

We reject the Bixenmanns' argument that the common knowledge exception applies. As noted, the common knowledge exception is limited to cases of extreme and obvious misconduct. See *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008). This is not such a case. To determine whether the owner of Dickinson acted negligently, a jury would need to know what a surveyor under similar circumstances would have done and why the actions of the owner of Dickinson were improper. This information is not within the comprehension of laypersons and would require expert testimony. We agree with the district court that the common knowledge exception to the requirement of expert testimony does not apply.

The remainder of the opinion shall remain unmodified.

Former opinion modified.

Motion for rehearing overruled.

Connolly, J., not participating in the supplemental opinion.

Randy Strode and Helen Strode, appellants, v. City of Ashland, Nebraska, and Saunders County, Nebraska, appellees.

886 N.W.2d 293

Filed October 28, 2016. No. S-15-956.

1. **Judgments: Res Judicata: Collateral Estoppel: Appeal and Error.** The applicability of claim and issue preclusion is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
3. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or 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. **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 is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Limitations of Actions: Pleadings: Proof.** Where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense and, in that event, the defendant has the burden to prove that defense.
6. **Limitations of Actions: Damages.** An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.

7. **Limitations of Actions.** An aggrieved party has the right to institute and maintain a lawsuit upon the violation of a legal right.
8. **Limitations of Actions: Eminent Domain.** In the context of a physical taking, the statutory period starts running only when a party exercises dominion over or obtains an interest in the property.
9. **Limitations of Actions: Municipal Corporations: Eminent Domain.** In the context of a regulatory taking, a cause of action for inverse condemnation begins to accrue when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights in the property.
10. **Constitutional Law: Eminent Domain: Limitations of Actions.** Actions commenced under Neb. Const. art. I, § 21, are subject to a 10-year statute of limitations.
11. **Constitutional Law: Eminent Domain: Damages.** Neb. Const. art. I, § 21, provides that the property of no person shall be taken or damaged for public use without just compensation therefor.
12. **Constitutional Law: Eminent Domain.** Federal constitutional case law and Nebraska constitutional case law regarding regulatory takings are coterminous.
13. **Eminent Domain.** The U.S. Supreme Court has identified two types of regulatory actions that constitute categorical or per se takings: (1) where the government requires an owner to suffer a permanent physical invasion of his property, however minor, and (2) where regulations completely deprive an owner of all economically beneficial use of his property.
14. ____. Regulatory takings challenges are analyzed using essentially ad hoc, factual inquiries governed by factors which include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.
15. ____. Land use regulations do not effect a taking merely because the regulation caused a diminution in property value.
16. ____. A taking may more readily be found when the interference with property can be characterized as a physical invasion by government, in contrast to when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
17. **Actions: Eminent Domain: Proximate Cause: Proof.** For an inverse condemnation claim to be actionable, the injured party has the burden of proving that the other party's action or inaction was the proximate cause of the damages.
18. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that which, in a natural and continuous sequence,

without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.

Appeal from the District Court for Saunders County: Mary C. Gilbride, Judge. Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellants.

Mark A. Fahleson and Sheila A. Bentzen, of Rembolt Ludtke, L.L.P., for appellee City of Ashland.

Duke Drouillard and Steven J. Twohig, Deputy Saunders County Attorneys, for appellee Saunders County.

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

Heavican, C.J.

I. INTRODUCTION

Randy Strode and Helen Strode seek review of the district court's decision dismissing Randy's zoning regulation inverse condemnation claim, granting a motion for summary judgment on Helen's zoning regulation inverse condemnation claim, and granting a motion for summary judgment on the Strodes' takings claim based on the load limit posted on a bridge located near their property. We affirm.

First, we hold that Randy is barred from bringing his inverse condemnation claim, because the statute of limitations on his claim for compensation began to accrue at the time the City of Ashland (the City) notified Randy that the use of the property was in violation of the ordinance. Next, we turn to Helen's claim. We similarly dispose of that claim based on the statute of limitations, because, as a joint owner, she has the same rights in the property as Randy. Finally, we hold that summary judgment was appropriate on the Strodes' bridge takings claim, because the load limit on the bridge does not amount to

a regulatory taking of the property and there are no issues of material fact.

II. BACKGROUND

Randy and Helen are residents of Saunders County, Nebraska. They are married.

1. Zoning Violation

Randy owns real property on Block 16, Lots 1, 2, and 3, and Randy and Helen jointly own real property on Block 16, Lots 7 through 12, and Block 21, Lots 10 and 11, of Stambaugh's Addition, in Ashland, Saunders County, Nebraska. On April 29, 1999, Randy purchased Lots 1, 2, and 3 of Block 16 from Greenwood Farmers Cooperative. On November 2, 2000, Randy and Helen purchased Lots 10, 11, and 12 of Block 16 from Donald D. Strode and Lucille D. Strode. On December 20, 2001, Randy and Helen purchased Lots 7, 8, and 9 of Block 16 from Donald and Lucille. On April 18, 2002, Randy and Helen purchased Lots 10 and 11 of Block 21 from David L. Hancock. The property was zoned Public (PUB) by ordinance No. 808, passed and approved on March 5, 1998, prior to the Strodes' purchase of the property. The ordinance provides in pertinent part:

> **ARTICLE 2: DEFINITIONS**
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> . . . .
>
> **Section 2.02 Definitions.**
>
> . . . .
>
> **Non-conforming Use** is an existing use of a structure or land which does not comply in some respect with the use regulations applicable to new uses in the zoning district in which it is located.
>
> . . . .
>
> **Variance** A variance is a relaxation of the terms of the Zoning Ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the

Ordinance would result in unnecessary and undue hardship. As used in this Ordinance, a variance is authorized only for height, area, and size of structure or size of yards and open spaces; establishment or expansion of a use otherwise prohibited shall not be allowed by variance, nor shall a variance be granted because of the presence of non-conformities in the zoning district or uses in an adjoining district.

. . . .

ARTICLE 4: GENERAL PROVISIONS

. . . .

Section 4.20 Nonconforming Uses.

1. *Nonconforming Uses of Land:* Where at the effective date of adoption or amendment of this ordinance, lawful use of land exists that is made no longer permissible under the terms of this ordinance as enacted or amended, such use may be continued so long as it remains otherwise lawful, subject to the following provisions:

a. No such conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment [of] this ordinance;

b. No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of adoption or amendment of this ordinance.

c. If any such nonconforming use of land ceases for any reason for a period of more than twelve (12) months, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located.

. . . .

ARTICLE 5: ZONING DISTRICTS

. . . .

Section 5.15 PUB Public and Semi-Public Districts

1. Intent. The Public and Semi-Public District designates those areas reserved for public use and recreation.

2. Permitted Uses

a. Recreational uses including the following: parks, ball fields, swimming pools, soccer fields, trails, and associated uses.

b. Other public uses including: cemeteries and fairgrounds.

3. Permitted Special uses (reserved)

4. Accessory Uses

Since the time of purchase, the Strodes have operated a business for the manufacture of agricultural fencing and the storage of salvage on the property. Between November 2002 and June 10, 2003, the City zoning administrator repeatedly notified Randy that his use of the property was in violation of the City's code and regulations and requested Randy to remedy his violations. Initially, Helen contended that she did not become aware of the zoning violation until Randy mentioned it to her in June 2002, but later testified that she was unaware of the violation notices until May or June of 2003.

2. City's 2003 Request for Injunction

The City filed for an injunction against Randy's nonconforming use of the property on September 5, 2003. Randy alleged in his amended answer that the zoning regulations were ineffective and void because they amounted to a taking of the property without just compensation. In his prayer for relief, Randy asked only that the City's complaint be dismissed at the City's costs. He did not set forth a counterclaim for inverse condemnation.

The district court held that Randy's use of the property to store salvage was in violation of the zoning ordinance and granted the City's request for an injunction. The district court also found that the manufacture of agricultural fencing on Block 16, Lots 7 through 12, was permitted as a continuing, nonconforming use.

Randy appealed from the award of the injunction. On appeal, Randy argued that the regulations amounted to a taking without just compensation. The Nebraska Court of

Appeals affirmed the district court's decision and found Randy's arguments concerning inverse condemnation to be without merit. The Court of Appeals noted that its review was "confined to questions which had been determined by the trial court," and thus it could not address the claim.[1] However, the Court of Appeals did observe that there was "nothing in the record to show the [inverse condemnation] claim would be ripe for review."[2]

3. 2004 Bridge Load Limit Violation

The property may be reached by two access points: (1) a railroad underpass and (2) a bridge located inside the corporate limits of the City with a posted load limit of 14 tons.

The Strodes use the bridge for transporting commercial goods with semitrailer trucks that exceed the load limit. On June 23, 2004, the county highway superintendent mailed notice to Randy that his use of the bridge violated the posted weight limit.

4. 2013 Suit for Inverse Condemnation

On September 5, 2013, Randy and Helen filed suit against the City, Saunders County (hereinafter the County), and the Nebraska Department of Roads for inverse condemnation based on the zoning ordinance and the load limit regulation of the bridge. The cause of action against the Department of Roads was dismissed, apparently because the bridge was not under the jurisdiction of the State. The district court held that Randy's zoning takings claim was barred by claim preclusion because it was a matter that was litigated in the 2003 case. The district court did not dismiss Helen's zoning takings claim because the record did not contain sufficient information from which the court could determine whether Helen's claim was precluded. The district court overruled the County's

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[1] *City of Ashland v. Strode*, No. A-05-467, 2007 WL 1276944, *7 (Neb. App. May 1, 2007) (not designated for permanent publication).

[2] *Id.*

motion to dismiss the Strodes' takings claim in regard to the bridge load limit.

The district court subsequently held that Helen's zoning takings claim was barred by the statute of limitations because she was aware of the effect of the zoning ordinance after June 2003. The district court noted that the applicable statute of limitations was 10 years. As such, Helen's claim, which she discovered in June 2003, was barred as of June 2013, prior to her filing suit in September 2013. Finally, the district court dismissed the Strodes' bridge takings claim. The court held that the restrictions on the bridge did not amount to a taking, because there was reasonable access to the property via an underpass and the bridge—provided the restrictions are observed. The Strodes appeal.

III. ASSIGNMENTS OF ERROR

On appeal, the Strodes assign, restated and consolidated, that the district court erred in (1) granting the City's motion to dismiss by determining Randy's claim was precluded by earlier litigation, (2) determining that Helen's regulatory takings claim was barred by the applicable statute of limitations, (3) finding that the regulation of the bridge structure was not a regulatory taking, and (4) granting the City's and the County's motions for summary judgment.

IV. STANDARD OF REVIEW

[1] The applicability of claim and issue preclusion is a question of law. On a question of law, we reach a conclusion independent of the court below.[3]

[2] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.[4]

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[3] *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[4] *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

[3,4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or 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 the 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]

V. ANALYSIS

1. Randy's Takings Claim

In their first assignment of error, the Strodes argue that Randy's takings claim is not subject to claim preclusion because the issue was not ripe until the district court's decision in the 2003 case. The City argues that Randy's takings claim was ripe as early as the time Randy purchased the property and as late as June 10, 2003, because the permissible uses of the property were known to a reasonable degree of certainty. The district court dismissed Randy's takings claim because the issues were litigated in the 2003 case. Before discussing ripeness, we must determine whether Randy's takings claim is barred by the statute of limitations.

[5] The general rule is that where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense and, in that event, the defendant has the burden to prove that defense.[7] The Strodes' complaint did not disclose on its face that it was time barred by the statute of limitations. However, the City pleaded the statute of limitations as

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[5] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[6] *Id.*

[7] *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

an affirmative defense in its answer and argued at oral argument that the statute of limitations barred both of the Strodes' claims. Therefore, the statute of limitations has been raised as to both Randy's and Helen's takings claims.

[6,7] "The statute of limitations in an inverse condemnation proceeding is 10 years."[8] When applying a statute of limitations, we have held that "[a]n action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages."[9] An aggrieved party has the right to institute and maintain a lawsuit "upon the violation of a legal right."[10]

We discussed the statute of limitations for an inverse condemnation action in the context of physical takings in *Western Fertilizer v. City of Alliance*.[11] In that case, BRG, Inc., purchased property from Western Fertilizer and Cordage Company, Inc. (Western) in 1976, planning to develop the land for residential use. BRG authorized the City of Alliance to improve the property, so in April 1977, the city passed two ordinances approving the plat of an addition that contained a dedication of the streets, alleys, and public grounds therein to the use and benefit of the public. In August, Western signed a dedication for part of the property. In October, BRG gave Western a promissory note secured by a mortgage on the property. Between November 1978 and October 1981, BRG signed more dedications and the city passed several

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[8] *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 108, 504 N.W.2d 808, 817 (1993) (citing Neb. Rev. Stat. § 25-202 (Reissue 1989)).

[9] *Steuben v. City of Lincoln*, 249 Neb. 270, 272-73, 543 N.W.2d 161, 163 (1996).

[10] *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 452, 590 N.W.2d 380, 389 (1999).

[11] *Western Fertilizer v. City of Alliance, supra* note 8.

ordinances approving plats and establishing sewer, water, and street improvement districts in the property. In 1985, Western initiated foreclosure proceedings because BRG defaulted on the mortgage. In 1988, Western purchased the land at a sheriff's sale. In 1990, Western instituted an inverse condemnation action against the city.

[8] The city argued that the statute of limitations barred Western's action. According to the city, Western's cause of action accrued when the dedications were made and the ordinances were passed. We stated that Western received notice of the city's claim when the plats were recorded, but that the record did not reflect when that occurred. We cautioned, "[T]he fact that the [c]ity claimed an interest in the property may not be sufficient to start the statutory period running if the [c]ity did not put the property to public use."[12] We then determined that "the statutory period would have started running only when the [c]ity exercised dominion over or obtained an interest in the property."[13] But because the record was silent as to when the city began construction of the improvements pursuant to the ordinances or when the construction was completed, we could not determine when the city exercised physical control over the property. Ultimately, we concluded that the date of any taking was a factual question that needed to be determined by the trial court.

In *Steuben v. City of Lincoln*,[14] this court also addressed when the statutory period starts running for an inverse condemnation action in a physical taking. In 1986, Charles and Rebecca Steuben acquired property that was located on a plat adjacent to a railroad fill. The embankment for the railroad fill was "substantially higher than the Steubens' property, [and] block[ed] the natural drainage flowing northerly

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[12] *Id.* at 111, 504 N.W.2d at 819.

[13] *Id.* at 112, 504 N.W.2d at 819.

[14] *Steuben v. City of Lincoln, supra* note 9.

behind the property."[15] Within the embankment were culverts through which surface water draining could pass. In 1990, rainfall caused the embankment to overflow into the Steubens' house due to a clogged culvert. The Steubens contended that the flooding of their house constituted a physical taking, and they filed an inverse condemnation claim against the city. While this court did not specify when the Steubens' inverse condemnation claim accrued, it set forth guidance for when an inverse condemnation claim for a physical taking generally accrues. This court stated that "[a]n action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages."[16] Accordingly, "[t]he Steubens filed their claim well within 10 years of any event which would have given them the right to institute and maintain a lawsuit."[17]

This court has not specifically addressed when the statutory period starts running in an inverse condemnation action in the context of regulatory takings, but we find guidance in *Western Fertilizer*. There, we discussed a decision from the Iowa Supreme Court involving an inverse condemnation action brought following the enactment of restrictive zoning regulations.[18] We observed that the Iowa Supreme Court, in considering whether the statute of limitations barred the action, stated that "'the passage of the permanent ordinance had immediate adverse economic consequences for plaintiffs. The regulation's impact on the development potential and market value of the property was immediate, and constituted

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[15] *Id.* at 271-72, 543 N.W.2d at 162.

[16] *Id.* at 272-73, 543 N.W.2d at 163.

[17] *Id*. at 273, 543 N.W.2d at 163.

[18] See *Western Fertilizer v. City of Alliance, supra* note 8.

a single injury.'"[19] We noted that under the facts of *Western Fertilizer*, "BRG's dedications and passage of the city ordinances had an immediate impact on Western's interest in the property."[20]

In *Lindner v. Kindig*,[21] this court considered a constitutional challenge to an ordinance establishing an off-street parking district and specifying funding mechanisms. Arguably, at least one funding mechanism was not challenged, and our principal difficulty in that case was determining, from the face of the complaint, "*when* appellees made the decision choosing the specific funding mechanism to be used or implemented that decision."[22] But *Lindner* was not an inverse condemnation case, and it addressed a different statute of limitations than the one which applies in this case.

We also look to other jurisdictions for guidance. Some jurisdictions have held that the statute of limitations on a regulatory takings claim begins to run when the petitioner has actual notice of the regulatory taking.[23] Other jurisdictions have determined that the statute of limitations begins to run when the petitioner has record notice.[24] Still other jurisdictions

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[19] *Id*. at 110, 504 N.W.2d at 818 (quoting *Scott v. City of Sioux City*, 432 N.W.2d 144 (Iowa 1988)).

[20] *Id.* at 110, 504 N.W.2d at 818.

[21] *Lindner v. Kindig, supra* note 7.

[22] *Id.* at 393, 826 N.W.2d at 873 (emphasis in original).

[23] See, e.g., *Scott v. City of Sioux City, supra* note 19 (statute of limitations began to run no later than when plaintiffs filed action seeking recovery for inverse condemnation because it indicates they believed they had sustained injury at that time).

[24] See, e.g., *Klumpp v. Borough of Avalon*, 202 N.J. 390, 409-10, 997 A.2d 967, 978 (2010) ("[u]nder either principle for accomplishing the taking—physical or regulatory—following the governmental seizure of the property, the cause of action for inverse condemnation begins to accrue on 'the date the landowner becomes aware or, through the exercise of reasonable diligence, should have become aware, that he or she had been deprived of all reasonably beneficial use'").

have held that the statute of limitations begins to run when the land use regulation is passed, because that provides sufficient notice to landowners.[25]

[9] We now hold that in the context of a regulatory taking, a cause of action for inverse condemnation begins to accrue when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights in the property. This is consistent with our holding in *Western Fertilizer* in regard to inverse condemnation actions in the context of physical takings requiring more than a city's claiming an interest in the property; the city must exercise dominion over or obtain an interest in the property for the statutory period to start running.

In determining when a cause of action for inverse condemnation accrued in this case, the relevant inquiry is when the Strodes had the right to institute and maintain a lawsuit against the City for the infringement or attempt at infringement of the legal right to use the property as they wished, because the City exercised dominion over or obtained an interest in the property. The City passed the ordinance in 1998. As in *Western Fertilizer*, the passage of the ordinance indicated that the City claimed an interest in the property, but it was not sufficient to toll the statute of limitations. The City acted to implement the ordinance on the property (1) when the City zoning administrator repeatedly notified the Strodes of

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[25] See, e.g., *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) ("cause of action under section 1983 accrued upon the passage of the ordinance"); *Fredrick v. Northern Palm Beach Cty. Imp.*, 971 So. 2d 974 (Fla. App. 2008) (statute of limitations began to accrue either from date assessments were created or from date city approved them, as this provided property owners with adequate notice); *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005) ("[g]enerally, a cause of action accrues when a wrong produces an injury[, and in] a regulatory taking, it is passage of the ordinance that injures a property's value or usefulness").

their nonconforming use of the property between November 2002 and June 10, 2003, and (2) on June 10, 2003, when the City zoning administrator mailed Randy notice of his nonconforming use and the City's intention to institute legal action if the Strodes did not conform their use to the PUB designation of the property. At both of these times, the City's actions had an adverse economic impact on the Strodes' right to use the property in the commercial manner that they wished. This gave rise to the Strodes' right to institute and maintain a lawsuit against the City for its implementation of the ordinance upon the property. Therefore, at the latest, the City's June 10 letter to Randy stating its intent to institute legal proceedings against him began the running of the statute of limitations on the Strodes' claims. Randy filed his inverse condemnation claim on September 5, 2013. This exceeds the 10-year statute of limitations for inverse condemnation claims. Therefore, Randy's inverse condemnation claim is barred by the statute of limitations.

We note that the district court, in response to the City's motion to dismiss, relied on ripeness and claim preclusion in dismissing Randy's inverse condemnation claim. We reach the same ultimate conclusion, but we rely upon the applicable statute of limitations defense. We further note that the district court also concluded that Helen's takings claim was time barred. Because Randy received notice from the City of its implementation of the zoning ordinance upon the property at the same time, or earlier, than did Helen, Randy's claim would necessarily also be barred by the statute of limitations under the district court's analysis.

The Strodes' first assignment of error is without merit.

2. Helen's Takings Claim

We turn next to Helen's zoning takings claim. The Strodes argue that the statute of limitations on Helen's separate claim for inverse condemnation did not begin to run until the completion of the 2003 litigation. In the alternative, the

Strodes argue that the time at which Helen received notice of the inverse condemnation claim is a disputed issue of material fact. The City contends that the statute of limitations began to run when the Strodes purchased the property in April 1999, because it was zoned as PUB at that time. Alternatively, the City argues that Helen's inverse condemnation claim is barred by claim preclusion, because she is in privity with Randy.

In dismissing Helen's claim, the district court held that Helen's claim relating to the zoning ordinance was barred by the statute of limitations, because (1) her interests in the property were acquired after the zoning ordinance was in place in 1998 and (2) she was aware of the effect of the zoning ordinance on the property since June 2003. We hold that Helen first had the right to institute and maintain a lawsuit in June 2003 at the latest, when the City sent written notification to Randy of the Strodes' nonconforming use of the property and its intent to institute legal proceedings.

[10] "Actions commenced under article I, § 21, are subject to a 10-year statute of limitations."[26] As we mentioned above, when applying a statute of limitations, we have held that "[a]n action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages."[27] An aggrieved party has the right to institute and maintain a lawsuit "upon the violation of a legal right."[28]

As coowner with Randy of Block 16, Lots 7 through 12, and Block 21, Lots 10 and 11, of the property, Helen essentially has the same rights in those lots as Randy. The statute

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[26] *Steuben v. City of Lincoln, supra* note 9, 249 Neb. at 272, 543 N.W.2d at 163 (citing § 25-202).

[27] *Id.* at 272-73, 543 N.W.2d at 163.

[28] *Reinke Mfg. Co. v. Hayes, supra* note 10, 256 Neb. at 452, 590 N.W.2d at 389.

of limitations began to run on Helen's takings claim "upon the violation of a legal right." Since Helen's rights in the lots are essentially the same rights as Randy's, the same act by the City to implement the ordinance that infringed or attempted to infringe upon Randy's rights in the property applies to Helen's claim.

Therefore, the statute of limitations began to run on Helen's takings claim at the same time as Randy's inverse condemnation claim. As reasoned above, the statute of limitations began to run on Randy's inverse condemnation claim when the City infringed upon the Strodes' right to use the property as they wished by exercising dominion over or obtaining an interest in the property and gave rise to their right to institute and maintain a lawsuit. As we held above, the statute of limitations began to run at the latest on June 10, 2003, when the City zoning administrator mailed Randy notice of his nonconforming use and the City's intention to institute legal action if the Strodes did not conform their use to the PUB designation of the property. Helen filed her action on September 5, 2013. This exceeds the 10-year statute of limitations for a takings claim. Accordingly, we hold that Helen's zoning takings claim is barred by the statute of limitations.

The Strodes contend that the time at which Helen received actual notice of the ordinance is an issue of material fact, making summary judgment inappropriate. Helen initially testified that she did not become aware of the ordinance until Randy mentioned it to her in June 2002; she later altered her testimony to say that it was not until May or June 2003. This coincides with the time that Randy received the letter from the City zoning administrator on June 10, 2003. While Helen stated in her testimony that she could not remember if she discovered the City's ordinance on the property because of the City's letter to Randy, the timing suggests that the letter was a reason why Helen learned of the ordinance. However, it was not necessary for Helen to know the "nature and extent

of the damages"[29] ultimately provided by the 2003 district court decision. The relevant inquiry is when the City infringed or attempted to infringe upon Helen's right to use the property as she wished and gave rise to her right to institute and maintain a lawsuit, not when Helen received actual notice of the ordinance affecting the property. Therefore, it is not an issue of material fact as to when Helen contends she received actual notice.

The district court reasoned that the statute of limitations had run on Helen's zoning takings claim, because she acquired the property after the zoning ordinance was in place and she was aware of the effect of the zoning ordinance on the property since June 2003. We reach the same conclusion as the district court, but we disagree with the district court's reasoning that actual notice is required for the statute of limitations to run.

Because we hold that Helen's claim is barred by the statute of limitations, we will not discuss whether Helen's claim is also barred due to the doctrine of claim preclusion. The Strodes' second assignment of error is without merit.

3. Bridge Takings Claim

In their third assignment of error, the Strodes argue that summary judgment was not appropriate because there is a genuine issue of material fact whether the load limit on the bridge allows reasonable access to the property. The City argues summary judgment was appropriate because the Strodes failed to show they were denied reasonable access to the property. The district court held the record was undisputed that there was reasonable access to the property via an underpass and via the bridge, provided the restrictions were observed. At issue is whether there is a dispute of material fact that the load limit on the bridge amounts to a taking.

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[29] See *Steuben v. City of Lincoln, supra* note 9, 249 Neb. at 272, 543 N.W.2d at 163.

[11,12] Neb. Const. art. I, § 21, provides that the "property of no person shall be taken or damaged for public use without just compensation therefor." As we explained in *Scofield v. State*,[30] the U.S. Supreme Court has clarified the law surrounding regulatory takings claims and provided a framework under which such claims are to be addressed. This court has held that federal constitutional case law and our state constitutional case law regarding regulatory takings are "coterminous."[31]

[13] The U.S. Supreme Court has identified two types of regulatory actions that constitute categorical or per se takings: (1) where the government requires an owner to suffer a permanent physical invasion of his property, however minor, and (2) where regulations completely deprive an owner of all economically beneficial use of his property.[32] Neither applies here.

[14] Outside these two relatively narrow categories, regulatory takings challenges are analyzed using "essentially ad hoc, factual inquiries" governed by the factors set forth in *Penn Central Transp. Co. v. New York City*.[33] These include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.[34]

We have held that "'"[t]he right to full and free use and enjoyment of one's property in a manner and for such purposes

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[30] *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[31] *Id.* at 231, 753 N.W.2d at 358.

[32] *Scofield v. State, supra* note 30.

[33] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). See, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014).

[34] *Penn Central Transp. Co. v. New York City, supra* note 33; *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998).

as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law."'"[35] This court recognizes that

> a property owner suffers a compensable damage on account of the construction or vacation of a public road when egress and ingress to his property are cut off or interfered with and he has no other reasonable means of access. The right of access under such circumstances is property which cannot be taken from him without compensation.[36]

And in their complaint, the Strodes allege the City's and the County's actions through "limiting access to their property have substantially diminished the values of [their] land and business enterprises without compensation." Consequently, the Strodes prayed for an order requiring the City and the County "to properly repair and maintain the bridge structure" and "[m]onetary damages for the loss of value and harm, temporary and/or permanent, to [their] real property and business operations."

[15] However, the U.S. Supreme Court clarified the extent of the economic impact of a regulation required to receive compensation. The Court recognized that in "instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."[37] Thus, land use regulations "do not effect a taking merely because the regulation caused a diminution in property value alone."[38] For example, this court

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[35] *Scofield v. State, supra* note 30, 276 Neb. at 234, 753 N.W.2d at 360 (quoting *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997)).

[36] *Fougeron v. County of Seward*, 174 Neb. 753, 759, 119 N.W.2d 298, 303 (1963).

[37] *Penn Central Transp. Co. v. New York City, supra* note 33, 438 U.S. at 125.

[38] *Strom v. City of Oakland, supra* note 34, 255 Neb. at 220, 583 N.W.2d at 318.

has held that "one-third diminution in fair market value alone, if true, would be insufficient to establish a regulatory taking or damages."[39] And even if the landowner loses "50 percent of the value of the property, that level of diminution in value generally does not equate to a regulatory taking under U.S. Supreme Court precedents."[40] These cases concern land use regulations, but they are helpful in analyzing the economic impact of load limit regulations.

This court has held that diminution of property value due to regulation of streets that do not abut the property requires a greater showing of damages. In *Kraft & Sons, Inc. v. City of Lincoln*,[41] we held that a person may only recover for vacation of a street that does not abut his property if he has "sustained an injury different in kind, and not merely in degree, from that suffered by the public at large" and it is insufficient to show he must go "a more roundabout way."

In *Fougeron v. County of Seward*,[42] we held that a landowner could not enjoin a city from barricading one of two streets leading to his property when he could claim "only such inconvenience or injury as is suffered by the public generally, even though his inconvenience may be greater in degree." Therefore, mere inconvenience is not enough to claim damages.

The Federal Circuit explained that recovery for injury to investment-backed expectations is limited to those "'owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.'"[43]

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[39] *Id.* at 221, 583 N.W.2d at 319.

[40] *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment, supra* note 33, 287 Neb. at 798, 844 N.W.2d at 770.

[41] *Kraft & Sons, Inc. v. City of Lincoln*, 182 Neb. 187, 190, 153 N.W.2d 725, 727 (1967).

[42] *Fougeron v. County of Seward, supra* note 36, 174 Neb. at 760, 119 N.W.2d at 304.

[43] *Good v. U.S.*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (quoting *Creppel v. U.S.*, 41 F.3d 627 (Fed. Cir. 1994)).

These expectations must be reasonable.[44] This court has held that "a property owner is presumed to know the law affecting his property."[45]

[16] In regard to the character of government action, the U.S. Supreme Court held that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government."[46] In contrast to "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[47]

The regulation prevents the Strodes from transporting their goods across the bridge in semitrailer trucks that exceed 14 tons. But the Strodes can use the railroad underpass for semitrailer trucks that exceed the 14-ton weight limit. Randy contends that this is not an adequate alternative, because the height of the railroad underpass is 11 feet 3 inches, and when he transports bulk amounts from his business, the semitrailer trucks usually reach 13 feet 6 inches. Randy testified that when he transports his fencing in smaller loads, he can use smaller trucks. The load limit on the bridge restricts Randy to using either semitrailer trucks that weigh less for access across the bridge or trucks of a limited height for access through the railroad underpass. This may be a "more roundabout way" to perform his business, in which he incurs some damages, but it does not constitute an injury different in kind than the general public, only different in terms of degree.[48]

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[44] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984).

[45] *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment, supra* note 33, 287 Neb. at 798, 844 N.W.2d at 770.

[46] *Penn Central Transp. Co. v. New York City, supra* note 33, 438 U.S. at 124.

[47] *Id.*

[48] See *Kraft & Sons, Inc. v. City of Lincoln, supra* note 41, 182 Neb. at 190, 153 N.W.2d at 727.

The Strodes have failed to present any evidence that the weight limit of the bridge decreases the economic value of the property. Randy testified that it cost two to three times more to transport steel in smaller loads rather than in bulk, but he did not conduct any analyses to either substantiate this claim or determine how the property has diminished in value by the weight limits on the bridge.

Nor have the Strodes proved that the load limit interfered with any of their investment-backed expectations. The load limit was posted on the bridge at least as early at 1990, prior to the Strodes' purchase of the land. Any investment-backed expectations in the property based on the use of the bridge were not reasonable.

The character of the governmental intrusion also weighs in favor of the conclusion that there was no taking. The character of the governmental action was not a physical invasion of the land, but, rather, a regulation in place prior to the Strodes' purchase of the adjacent property. Based on the *Penn Central Transp. Co.* factors, the regulation of the bridge does not constitute a regulatory taking.

We conclude that the district court did not err in finding that summary judgment as to the Strodes' bridge takings claim was appropriate. There is no dispute of material fact that the load limit does not amount to a regulatory taking. The Strodes' third assignment of error is without merit.

4. Remaining Issues of Material Fact

Finally, the Strodes assign that summary judgment was inappropriate because issues of material fact exist. The Strodes argue that issues of material fact exist concerning whether either the City or the County has authority over the bridge and whether the County has authority over the PUB zoning classification of the property. They further argue that neither the City nor the County has met its prima facie burden with regard to the issues of causation and damages. The district court held that there were no issues of material fact.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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.[49] In the summary judgment context, a fact is material only if it would affect the outcome of the case.[50]

(a) Authority Over Bridge

The Strodes argue that summary judgment is inappropriate because government authority over the bridge is unsettled. As we established above, the load limit of the bridge does not amount to a regulatory taking. Whether the City or the County has authority over the bridge does not affect the outcome of the case. Therefore, any dispute of fact concerning authority over the bridge is not a disputed material fact.

(b) Authority Over PUB Zoning Classification

The Strodes contend that summary judgment is inappropriate because the County failed to provide evidence of its authority over the zoning ordinance. The County asserted in its answer that it does not have statutory authority to regulate or restrict the Strodes' use of the property in a way that could result in a taking, nor did it perform any act to regulate or restrict the Strodes' use of the property that could result in a taking. As we have already established, the passage of the ordinance does not amount to a taking of the property. The City passed and approved the ordinance. Only the City, not the County, has sought to enforce the ordinance against the Strodes. The disputed fact as to whether the County also had statutory authority to enforce the ordinance does not affect the outcome of the case.

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[49] *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

[50] *Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014).

(c) Issues of Causation and Damages

[17,18] The Strodes argue that the City and the County have failed to produce evidence of causation. For an inverse condemnation claim to be actionable, the injured party has the burden of proving that the City's action or inaction was the proximate cause of the damages.[51] The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.[52] It must also be shown that the invasion of property rights was intended or was the foreseeable result of authorized governmental action.[53]

The Strodes had the burden of proving that the City's action or inaction was the proximate cause of the claimed decreased economic value of their land due to the bridge's load limit. As stated above, the Strodes have failed to present any evidence that the weight limit of the bridge decreases the economic value of the property. They neither established that they sustained an injury different in kind from the general public nor that their injury was proximately caused by the City or the County. Furthermore, the Strodes have not asserted sufficient facts to establish the City and the County knew or could foresee that a load limit on the bridge would result in the taking or damaging of private property. Therefore, the Strodes have not established causation.

The Strodes wrongly contend that the City and the County have not met the prima facie burden with regard to damages. We have held that the initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use.[54] Only after it has been established

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[51] *Steuben v. City of Lincoln, supra* note 9.

[52] *Id.*; *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994).

[53] *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[54] *Id.*

that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.[55] The Strodes have not established that the City's or the County's actions constituted a compensable taking, and thus damages do not need to be addressed. The Strodes' final assignment of error is without merit.

VI. CONCLUSION

The district court did not err in finding in favor of the City and the County. The decision of the district court is affirmed.

Affirmed.

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[55] *Id.*

State of Nebraska, appellee, v. Jeffrey Hessler, appellant.

886 N.W.2d 280

Filed October 28, 2016. No. S-15-960.

1. **Judgments: Appeal and Error.** The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Evidence: Appeal and Error.** 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. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law.
3. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Judgments: Constitutional Law: Legislature: Appeal and Error.** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature.
5. **Judgments: Evidence: Appeal and Error.** The purpose of the 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. 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. The writ is not available to correct errors of law.

6. **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.
7. **Trial: Effectiveness of Counsel: Appeal and Error.** Claims of errors or misconduct at trial and ineffective assistance of counsel are inappropriate for coram nobis relief.
8. **Postconviction: Judgments: Constitutional Law.** 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.
9. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
10. **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.
11. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
12. **Pleas: Mental Competency: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.
13. **Effectiveness of Counsel: Mental Competency: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her incompetent had a competency hearing been conducted.
14. **Effectiveness of Counsel: Pleas: Proof.** To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.

15. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed.

Alan G. Stoler and Jerry M. Hug, of Alan G. Stoler, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

NATURE OF CASE

Jeffrey Hessler appeals the order of the district court for Scotts Bluff County which overruled his motion for postconviction relief and denied his petition for a writ of error coram nobis. Hessler claimed that he had received ineffective assistance of trial counsel and was not competent to enter the plea on which his conviction for first degree sexual assault on a child was based. We affirm.

II. STATEMENT OF FACTS

In 2003, Hessler pled no contest to a charge of first degree sexual assault on a child. Hessler had been charged with sexually assaulting J.B., a girl under 16 years of age, on August 20, 2002. The district court accepted Hessler's plea and sentenced him to imprisonment for 30 to 42 years. No direct appeal was taken from the conviction and sentence.

While Hessler was facing the charge in that first case, he was also facing charges in a second case: first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm in connection with the assault and death of another girl

under 16 years of age, Heather Guerrero. Hessler pled no contest in the first case before the jury trial was held in the second case. Following the jury trial in the second case, Hessler was convicted and sentenced to death for Guerrero's murder. Hessler's convictions and sentences for the charges relating to Guerrero were affirmed on direct appeal to this court. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). This court also affirmed the overruling of Hessler's subsequent motions for postconvction relief relating to such convictions. *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011) (first postconviction motion); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014) (second postconviction motion and motion for writ of error coram nobis).

On August 24, 2012, Hessler filed a pleading he titled as "Verified Motion for Postconviction Relief and Petition for Writ of Error Coram Nobis" in the instant case involving the sexual assault of J.B. That filing gives rise to the present appeal. Hessler alleged that the claims set forth in the filing entitled him to postconviction relief or, in the alternative, a writ of error coram nobis.

The district court determined that Hessler was entitled to an evidentiary hearing on claims which the court characterized as follows:

(1) a claim that Hessler was not competent to enter a plea of no contest, because at the time of the plea "he was suffering from bipolar disorder, severe, with psychotic features"; and

(2) claims that trial counsel was ineffective in

(a) "[f]ailing to investigate, raise, and prove" a claim that Hessler was not competent to enter a plea of no contest;

(b) "[a]dvising Hessler to plead 'no contest'";

(c) "[a]dvising Hessler that a plea of 'no contest' [in this case] would benefit him" by providing him with a double jeopardy defense to the pending charges involving the assault and death of Guerrero;

(d) "[f]ailing to investigate, discover, and present mitigating evidence at the sentencing hearing"; and

(e) "[f]ailing to advise Hessler to file a direct appeal" or to advise him that he "had a right to appeal and a right to counsel to pursue his appeal."

At the evidentiary hearing, the court received evidence including, inter alia, depositions of the two attorneys who had represented Hessler in the original conviction, depositions of a psychologist and a psychiatric nurse who had worked with Hessler in 2003, and the deposition of a psychiatrist who had reviewed Hessler's records and had met with Hessler in 2012 and 2013. Hessler did not testify. Following the evidentiary hearing, the court rejected all of Hessler's claims, overruled his motion for postconviction relief, and denied his petition for a writ of error coram nobis.

With regard to the claim that Hessler was not competent to enter a plea of no contest, the court noted that both attorneys who had represented Hessler in the original conviction were experienced criminal defense attorneys and that both had determined there was nothing indicating that Hessler was not competent to stand trial or that a mental health defense would be successful. The court noted trial counsel had stated that Hessler "was able to provide counsel with background information" and that he "appeared reasonably intelligent and appeared to understand the evidence and strategy of the case."

The court further noted that the psychologist who treated Hessler at the time of the conviction stated that although Hessler "suffered from a bi-polar mood disorder, depression, and paranoid delusional disorder," Hessler still "understood the release he signed, understood the potential consequences of his charges," "understood he was charged with sexual assault[,] and knew he was going to plead and would go to the penitentiary." The court noted the psychologist also stated that at the time of the plea, Hessler "was well aware of who [trial counsel] was and understood [trial counsel's] role in the case." The court further noted that the psychiatric nurse who treated Hessler stated that the medications he was given to treat his bipolar depression would clear his thinking such that he would

be "'more in reality'" and that Hessler "appeared to understand her questions and his responses were appropriate."

In connection with the issue pertaining to Hessler's competence to enter a plea, the court noted that Hessler presented the deposition of a psychiatrist who had been hired in connection with this postconviction action to review Hessler's records from the original conviction in 2003. Although the psychiatrist opined that in 2003, Hessler was "depressed" and had "paranoid thinking," the court noted that the psychiatrist stated he did not have adequate information to form a definitive opinion on "what [e]ffect [such conditions] would have on Hessler's ability for rational choices about entering a plea of no contest."

Considering the evidence presented, the court concluded that "Hessler's evidence failed to demonstrate a reasonable probability that he was, in fact, incompetent to enter a plea of no-contest to sexually assaulting J.B., or that the trial court would have found him incompetent had a competency hearing been conducted." The court further determined that because the record showed Hessler to be competent, "his counsel could not have been ineffective in not raising an issue of competency."

The court then considered Hessler's other claims directed at ineffective assistance of counsel. Regarding Hessler's claim that counsel was ineffective for advising him to plead no contest, the court noted that prior to trial in this case, counsel knew "(1) that Hessler had confessed to the sexual assault of J.B., (2) efforts to suppress Hessler's confession had not been successful, and (3) DNA testing had scientifically confirmed his confession." The court also noted that "Hessler had advised [counsel] early on that he did not want a trial in the J.B. sexual assault case." The court further noted that the same counsel who represented Hessler in this case represented him in connection with the charges related to the assault and killing of Guerrero. Counsel knew that Hessler would be at risk of a death sentence for the murder of Guerrero and that the

State would attempt to use the sexual assault of J.B. to prove an aggravating circumstance in the murder trial. The postconviction court found that "counsel embarked on a global strategy encompassing both cases with the ultimate goal of saving [Hessler's] life." Because counsel had determined that there was "no viable defense to the J.B. sexual assault case," counsel attempted to "preclude use of the sexual assault of J.B. as an aggravating circumstance in the [Guerrero] homicide case."

Counsel's strategy was to have "a final conviction and sentence in the sexual assault case [involving J.B.] prior to trial in the homicide case [involving Guerrero]" and then "to later present a double jeopardy / plea in bar argument against its use as an aggravating circumstance in the homicide trial." The court noted that counsel had explained this strategy to Hessler and had advised him that the double jeopardy or plea in bar "theory was untested." Hessler agreed to the strategy and advised counsel he wanted to plead in the instant case.

The postconviction court noted that the strategy to preclude the sexual assault conviction in this case from being used in the homicide case ultimately proved to be unsuccessful and that the sexual assault of J.B. was allowed to be used to prove an aggravating circumstance in the homicide sentencing trial. The court concluded, however, that counsel was not ineffective for advising Hessler to plead no contest or for so advising him as part of the global strategy for both cases. The court concluded that "[c]onfronted with overwhelming evidence of guilt, Hessler's trial counsel were not ineffective by attempting novel legal defenses." The court further noted that counsel's advice was "consistent with Hessler's expressed desire to admit to the sexual assault" of J.B.

With respect to Hessler's claim that counsel was ineffective for failing to investigate, discover, and present mitigating evidence at the sentencing hearing, the postconviction court did not explicitly reject the claim. However, the court found that "[c]ounsel were never concerned about a sentence in the sexual

assault [of J.B.] case because Hessler would never live outside prison in the homicide [of Guerrero] case." The court considered such lack of focus on the sentence in the instant case to be part of the global strategy that encompassed counsel's advice to plead no contest in this case in hopes of improving Hessler's outcome in the homicide case. The court determined that such global strategy did not constitute ineffective assistance of counsel.

Finally, with respect to Hessler's claim that counsel was ineffective for failing to advise him to file a direct appeal in this case, the court found that "Hessler provided no evidence that he ever requested counsel appeal his conviction and sentence in this case." The court further concluded that Hessler had "shown no prejudice by the failure to file a direct appeal."

Hessler appeals the order which overruled his motion for postconviction relief and denied his petition for a writ of error coram nobis.

III. ASSIGNMENTS OF ERROR

Hessler claims that the postconviction district court erred when it rejected his claims that (1) he was denied due process and effective assistance of counsel because he was not competent to enter a plea of no contest, (2) trial counsel's advice to plead no contest was ineffective assistance of counsel, (3) trial counsel's failure to discover and present mitigating evidence at sentencing was ineffective assistance of counsel, and (4) trial counsel's failure to advise him to file a direct appeal was ineffective assistance of counsel.

IV. STANDARDS OF REVIEW

[1] The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous. *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

[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. An appellate court

upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law. *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016).

[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. *State v. Saylor, supra.*

V. ANALYSIS

1. District Court Did Not Err When It Denied Hessler's Petition for Writ of Error Coram Nobis

In this action Hessler set forth various claims and alleged that such claims entitled him to postconviction relief or, in the alternative, a writ of error coram nobis. A writ of error coram nobis is relief distinct from relief available under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014). As we noted in *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015), § 29-3003 provides that relief under that act "is not intended to be concurrent with any other remedy existing in the courts of this state," including a writ of error coram nobis. Therefore, we consider whether Hessler's claims would entitle him to a writ of error coram nobis separately from our consideration of Hessler's claims for relief under the Nebraska Postconviction Act. We conclude that the district court did not err when it denied Hessler's petition for a writ of error coram nobis.

[4-6] The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature. *State v. Sandoval*, 288 Neb. 754, 851 N.W.2d 656 (2014). The

purpose of the 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. Harrison, supra*. 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. Harris, supra.*

[7] In *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014), we affirmed the denial of Hessler's request for a writ of error coram nobis in connection with his convictions related to the assault and murder of Guerrero. In that case, Hessler raised claims that were similar to claims he raises here. In that appeal, we stated that claims of errors or misconduct at trial and ineffective assistance of counsel are inappropriate for coram nobis relief. Similarly, most of Hessler's claims in the present action are claims of ineffective assistance of trial counsel, and thus, such claims are inappropriate for coram nobis relief.

Hessler's claim in this case with regard to his mental competence was based in part on his claim of a denial of his right to effective assistance of counsel, but the claim was also based in part on an alleged denial of his due process rights. Hessler made similar allegations with regard to his mental competence in his request for a writ of error coram nobis in connection with the convictions related to the homicide of Guerrero. See *id*. Without explicitly deciding whether a meritorious claim of a denial of due process based on a defendant's mental incompetence would be appropriate for coram nobis relief, we determined on appeal that Hessler's claim relating to mental competence was without merit and therefore did not

entitle him to coram nobis relief. *Id*. As discussed below in connection with Hessler's request for postconviction relief in this case, Hessler's claims related to mental competence are also without merit and similarly do not entitle him to a writ of error coram nobis.

Hessler has not identified a fact which would have prevented entry of judgment. The substance of Hessler's claims in this action either is not appropriate for coram nobis relief or is without merit. Accordingly, we conclude that the district court did not err when it denied Hessler's petition for a writ of error coram nobis.

2. District Court Did Not Err When It Overruled Hessler's Motion for Postconviction Relief

[8] Before considering Hessler's specific claims for postconviction relief, we review the applicable general standards. The Nebraska Postconviction Act, § 29-3001 et seq., 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. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

[9,10] Most of Hessler's claims in this action center on the alleged ineffective assistance provided by his trial counsel. A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id*. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 446 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. See *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016).

(a) Mental Competence

Hessler first claims that the district court erred when it rejected his claim that because he was not competent to enter

a plea of no contest, he was denied due process and effective assistance of counsel. Hessler argues both that he was denied due process because the court accepted his plea when he was mentally incompetent and that trial counsel was ineffective for failing to investigate and pursue a claim that he was not competent to stand trial or enter a plea. We find no merit to this assignment of error.

[11-13] A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). The test of mental capacity to plead is the same as that required to stand trial. *Id*. A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence. *Id*. In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her incompetent had a competency hearing been conducted. *Id*.

At the evidentiary hearing in this case, Hessler's trial counsel testified that there was nothing that indicated that Hessler was not competent to stand trial or that a mental health defense would be successful. To the contrary, the court noted that trial counsel testified that Hessler "was able to provide counsel with background information" and "appeared reasonably intelligent and appeared to understand the evidence and strategy of the case." In addition, the court noted the psychologist who treated Hessler at the time of the conviction stated that although Hessler suffered from conditions including "bi-polar mood disorder, depression, and paranoid delusional disorder," Hessler was still able to understand important aspects of the

proceedings against him including "the release he signed, . . . the potential consequences of his charges, [that] he was charged with sexual assault and [that] he was going to plead and would go to the penitentiary." The psychologist stated that Hessler knew who his trial counsel were and their role in the proceedings. In addition, the court noted the psychiatric nurse who treated Hessler stated that the medications he was given helped him and that he "appeared to understand her questions and his responses were appropriate."

Such evidence would indicate that Hessler was mentally competent at the time of his conviction under the legal standards set forth above. The evidence indicated that he had "the capacity to understand the nature and object of the proceedings against him . . . , to comprehend his . . . own condition in reference to such proceedings, and to make a rational defense." See *State v. Dunkin*, 283 Neb. at 44, 807 N.W.2d at 756. The evidence recounted above indicated that Hessler was competent, and Hessler failed to present evidence to call his competence into question. With regard to the latter proposition, Hessler presented the deposition of a psychiatrist who had been retained in connection with this postconviction action to review Hessler's records from the original conviction in 2003. Although the psychiatrist opined that in 2003, Hessler was "depressed" and had "paranoid thinking," the court noted that the psychiatrist stated that he did not have adequate information to form a definitive opinion on "what [e]ffect [such conditions] would have on Hessler's ability for rational choices about entering a plea of no contest." As noted above, the psychologist who treated Hessler at the time of the conviction also determined that Hessler had mental health issues, but that despite such conditions, he was able to understand the proceedings.

The record indicates that Hessler was legally competent at the time of his conviction, and in this postconviction action, he failed to present evidence to dispute such determination. Because there was nothing to indicate to either the trial court

or counsel that Hessler was not competent to stand trial or enter a plea, there is no merit to Hessler's claims that the court violated his due process rights by accepting his plea and that counsel provided ineffective assistance by failing to investigate or pursue a claim that he was not competent. The district court therefore did not err when it denied postconviction relief on Hessler's claims related to mental competence.

(b) Plea Advice

Hessler next claims that the district court erred when it rejected his claim that trial counsel's advice to plead no contest was ineffective assistance of counsel. Hessler argues that counsel's advice was deficient because it was based on a strategy pursuant to which he would enter a plea in this case in order to prevent the sexual assault of J.B. from being used to prove an aggravator in the murder case involving Guerrero. The strategy did not work out, and the sexual assault of J.B. was ultimately used to prove an aggravator in the murder case. We find no merit to this assignment of error.

[14] To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial. *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015). Therefore, Hessler needed to show that if counsel had not given the allegedly erroneous advice to enter a plea in this case, he would have insisted on going to trial.

Hessler contends that counsel's strategy was unreasonable because it was based on a mistaken reading of the law as it existed at the time of his conviction. However, whether or not the strategy was based on a good reading of the law at the time, we note that counsel testified that the strategy had been explained to Hessler, and the court observed that Hessler had been told that the strategy was "untested." Counsel made no guarantee that the strategy would be successful, and Hessler agreed to the strategy with knowledge of its uncertainty.

Furthermore, even without considering the global strategy relating to the separate homicide case against Hessler, the record indicates that counsel had reasons to advise Hessler to plead in this case. The district court in this postconviction action noted in its order that Hessler had confessed to the sexual assault of J.B., that efforts to suppress the confession were unsuccessful, and that DNA evidence was consistent with the confession. The court also noted that Hessler had advised counsel that he did not want a trial in this case. As the district court concluded, counsel's advice to enter a plea was not deficient in light of the "overwhelming evidence" against Hessler and his stated desire to avoid a trial.

Whether or not counsel's advice regarding the global strategy proved erroneous, Hessler has not shown that if counsel had not given such advice, he would have insisted on going to trial. The record indicates that given the strength of the State's case against him in this case and his own stated desire to avoid a trial, Hessler had sufficient reason to enter a plea independently of counsel's advice regarding the global strategy. Therefore, Hessler has not shown that but for the allegedly erroneous advice he would have gone to trial. We conclude that the district court did not err when it rejected Hessler's claim that counsel was ineffective for advising him to enter a plea.

(c) Mitigating Evidence

Hessler next claims that the district court erred when it rejected his claim that trial counsel's failure to discover and present mitigating evidence at sentencing was ineffective assistance of counsel. Hessler's arguments focus on counsel's alleged failure to adequately investigate and address issues of his mental competence; he argues that if the trial court had been made aware of his mental health issues, the court would have determined that he was not competent to understand the sentencing process. We find no merit to this assignment of error.

As we discussed above, Hessler did not present evidence to show that he did not meet the legal standard of competence, and instead, the record indicated that he was able to understand the proceedings against him, including the sentencing aspects of the proceedings. We note in particular with regard to sentencing that the psychologist who treated Hessler at the time of the conviction stated that Hessler "understood the potential consequences of his charges" and that Hessler knew that by entering a plea, he "would go to the penitentiary."

Other than his alleged mental incompetence, Hessler presented no evidence of mitigating circumstances that counsel should have discovered and presented at his sentencing. We therefore conclude that the district court did not err when it rejected Hessler's claim that trial counsel was ineffective for failing to discover and present mitigating evidence at sentencing.

(d) Direct Appeal

Hessler finally claims that the district court erred when it rejected his claim that trial counsel's failure to advise him to appeal was ineffective assistance of counsel. Hessler contends various issues could have been raised on appeal. We find no merit to this assignment of error.

[15] After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). The court in this postconviction case found that "Hessler provided no evidence that he ever requested counsel appeal his conviction and sentence in this case." Such finding was consistent with the court's determination that Hessler was in agreement with counsel's global strategy to enter a plea in this case and refrain from filing a direct appeal in order to have a final judgment before the trial in the murder case. The postconviction court's finding that Hessler has not shown that counsel failed to file a direct appeal after

being directed to do so is not clearly erroneous. See *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016).

In connection with the direct appeal issue, Hessler contends that trial counsel was deficient because counsel should have advised him to appeal and to raise certain issues on appeal. In this respect, the district court in this postconviction action concluded that Hessler has "shown no prejudice by the failure to file a direct appeal." Although Hessler describes certain issues which could have been raised on appeal, such as the denial of his motion to discharge the jury panel and the denial of his motions to suppress, he did not demonstrate that such issues would have been successful on appeal. Furthermore, because Hessler entered a plea, certain issues related to his conviction were waived. See *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015) (noting that normally, voluntary guilty plea waives all defenses to criminal charge). We have recognized that in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id*. Above, we considered and rejected Hessler's allegation that his plea was the result of ineffective assistance of counsel, and Hessler has not shown that any of the issues he suggests could have been raised on direct appeal were of such merit that counsel's advice to enter the plea was deficient.

To illustrate Hessler's assertion that colorable issues should have been presented on appeal, we note that Hessler contends that on direct appeal, he could have shown a denial of due process because the trial court and court reporter failed to make a verbatim record of the plea hearing. He asserts that an appellate court would have vacated his conviction and remanded the matter for new proceedings to be held in the presence of a court reporter. The district court in this postconviction action acknowledged that a verbatim record of the plea hearing was unavailable and that the court reporter was now incompetent to provide such a record. The district court

determined, however, that the lack of a verbatim record did not prejudice Hessler, because counsel's strategy was to enter a plea with no appeal.

In its order, the court cited *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006), in which we concluded that the lack of a verbatim record did not violate defendant's due process rights with respect to his postconviction proceeding because the trial court's journal entries were sufficient to review the defendant's postconviction claims. Hessler asserts that *Deckard* does not apply here because the record in this case is not sufficient to review his various claims, including that he was mentally incompetent, and that without the verbatim record, it cannot be determined whether the trial court knew of his mental health issues and therefore whether the court properly considered whether he was competent to enter his plea.

However, as we determined above, Hessler has not shown that he was not mentally competent to enter a plea, and instead, the evidence and record indicated that he was competent, as the postconviction court found. The court's acceptance of his plea indicates that the court viewed him as competent to enter the plea, and a verbatim record of the proceeding was not necessary to review that claim.

Hessler has not shown either that counsel ignored his request to file a direct appeal or that counsel was ineffective for failing to advise him to take a direct appeal. We therefore conclude that the district court did not err when it rejected this claim.

VI. CONCLUSION

Having rejected each of Hessler's claims on appeal, we affirm the district court's order which overruled his motion for postconviction relief and denied his petition for a writ of error coram nobis.

Affirmed.

Heavican, C.J., not participating.

State of Nebraska, appellee, v. Peter Francis Draper, appellant.

886 N.W.2d 266

Filed October 28, 2016. No. S-15-1222.

1. **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.
2. **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.
3. **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.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **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.
6. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, an appellate court does not pass on the credibility of witnesses—that is for the trier of fact.
7. ____: ____. In reviewing a sufficiency of the evidence claim, 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.

8. **Convictions: Witnesses.** A defendant's conviction of a crime may be based on uncorroborated testimony of a single witness.
9. **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.
10. **Trial: Evidence: Appeal and Error.** Generally, 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.
11. **Sentences: Appeal and Error.** In reviewing a sentence imposed within the statutory limits, an appellate court considers 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. **Sentences.** When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
13. ____. Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.

Appeal from the District Court for Franklin County: Stephen R. Illingworth, Judge. Affirmed.

Charles D. Brewster, of Anderson, Klein, Brewster & Brandt, for appellant.

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

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

Cassel, J.

I. INTRODUCTION

In this direct appeal, Peter Francis Draper challenges his convictions for intentional child abuse resulting in death and

intentional child abuse resulting in serious bodily injury. He alleges that there was insufficient evidence to support either conviction, that improper opinion and rule 404[1] testimony was allowed into evidence, and that he received excessive sentences. Finding no merit in his arguments, we affirm.

II. BACKGROUND

Draper was convicted of intentional child abuse resulting in death and intentional child abuse resulting in serious bodily injury in connection with the untimely death of his 2-year-old grandson. For the second time, Draper has appealed these convictions to this court. On the first direct appeal, after finding cumulative error concerning the testimony of Draper's wife, Nancy Draper (Nancy), we reversed Draper's convictions and remanded the cause for a new trial.[2] The case is now before us on direct appeal from the second trial. We briefly summarize those proceedings.

1. Joe Jr.'s Injuries and Death

Joseph Rinehart, Jr. (Joe Jr.), died on April 30, 2012. He was 2 years old. At the time of his death, Joe Jr. lived with his mother, Laura Rinehart (Rinehart), his maternal grandparents, Draper and Nancy, and his three siblings in a small three-bedroom trailer home. Joe Jr.'s father was separated from Rinehart and had not had contact with Joe Jr. or any of the Rinehart children for the year leading up to Joe Jr.'s death. At all times when Joe Jr. would have sustained his injuries, the only adults to have unchecked access to him were Rinehart, Draper, and Nancy.

On April 30, 2012, at approximately 6 p.m., Joe Jr. was brought to the community hospital by Rinehart and Nancy after Rinehart noticed red in his vomit. He had shown flu-like symptoms—lethargy, diarrhea, and vomiting—for the last

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

[2] *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

several days. At the hospital, the physician on call performed an examination and concluded that the child had a swollen stomach. The physician then ordered an x ray of his abdomen to determine the cause of the swelling. The x ray showed no signs of injuries but did show possible signs of constipation. At that point, the physician treated Joe Jr. for constipation and sent him home.

Approximately 1 hour after Joe Jr. was discharged from the hospital, Rinehart and Nancy brought him back to the emergency room. He was not breathing and had no heartbeat. The hospital staff attempted to revive him for 45 minutes but were never able to find a heartbeat. The treating physician declared Joe Jr.'s time of death at approximately 8:41 p.m.

Because the cause of death was unexplained, the hospital staff notified law enforcement of Joe Jr.'s death. Law enforcement officials then initiated a death investigation for the purpose of collecting information to determine the cause of death.

Law enforcement officials interviewed Rinehart, Draper, and Nancy late in the evening on April 30, 2012. At no point did Rinehart or Draper mention concerns of abuse. Draper did tell the interviewing officer that he believed the autopsy would show no signs of violence but may show signs of a rare "bone disease."

An autopsy was performed on Joe Jr., and the pathologist concluded that the cause of death was multiple blunt force trauma of the head, trunk, and extremities. The manner of death was ruled to be homicide. Post mortem CT scans showed old rib fractures, a recent skull fracture, a recent pelvic fracture, strain injuries on the arms and shoulders, and a ruptured bowel. The perforated bowel was likely associated with the recent pelvic fracture.

Medical experts determined that these injuries were likely the result of abuse or outer trauma, because Joe Jr. did not have any bone disease or other contributing disability. The pathologist who performed the autopsy additionally identified

several bruises on the child's knees, elbows, shoulders, and thighs and dated several of them as less than 24 hours old.

2. Arrest and Charges

After the autopsy, law enforcement officials interviewed Rinehart, Draper, and Nancy again and ultimately arrested all three. The lead investigator noted probable cause arose "based on the amount of injury on [Joe Jr.], [and] given the small size of the residence, . . . it was [not] reasonable that there could be that amount of injury to a small child and any of the adults wouldn't have some knowledge that that was occurring." Once detained, Rinehart shared her belief that Draper had abused Joe Jr. She then entered a plea agreement with the State for a reduced charge in exchange for testifying against Draper at trial. Based on this information, Draper was subsequently charged with child abuse resulting in death, allegedly committed on or between April 23 and 30, 2012, as well as child abuse resulting in serious bodily injury on or between July 12, 2011, and April 22, 2012.

3. Trial Evidence

At trial, the State presented testimony of several health professionals to describe Joe Jr.'s various injuries and the possible sources of the injuries. None of the professionals were able to point to a particular individual who committed the abuse. Rinehart was the only witness to specifically testify to Draper's alleged physical abuse of Joe Jr. and to explain the events leading up to his death. Several other witnesses also testified to their interactions with Draper to confirm his control of the household and substantiate Rinehart's claims. Draper did not testify in his behalf or present any witnesses of his own.

(a) Rinehart's Testimony

Rinehart testified that after her husband left the home, Draper became the primary disciplinarian of her children. His disciplinary techniques supposedly included timeouts that

could last from "a couple minutes to a couple hours to a couple of days." Rinehart's other children, aged 4 to 8 at the time of the trial, would be "disciplined" for crying and would be made to stand in a corner and sometimes would have to lift weights over their heads.

According to Rinehart, Draper generally handled Joe Jr. roughly—dragging him or yanking him by the arm. She also described specific instances of physical abuse of Joe Jr. by Draper. She testified that Draper once pushed Joe Jr. down repeatedly so that his head hit the floor until the child's head was swollen and his eyes were black and blue. On that occasion, Rinehart was not allowed to take Joe Jr. to the hospital, because Draper warned her that Child Protective Services would get involved.

Rinehart recalled one specific instance of abuse that she believed caused the injuries resulting in Joe Jr.'s death. She testified to have had witnessed Draper kneel on Joe Jr.'s abdomen with Joe Jr. on his back on the bed in the back bedroom. At the same time, Draper held Joe Jr.'s arms above his head and pressed one hand down on the child's chest. Apparently, Draper was attempting to get the child to say "'yes, sir,'" and held the child down in this position for several minutes while exerting more pressure with his hand or knee when the child did not immediately say what he wanted. Rinehart testified that it was within a couple days of this incident that Joe Jr. started to get sick and began to vomit a brown liquid.

After Rinehart described this incident she witnessed in the back bedroom, the State questioned her about the cause of a bruise above Joe Jr.'s ear that was discovered during the autopsy:

> Q (By [the State]) Exhibit 104, there's an injury above [Joe Jr.'s] ear. Do you see that?
>
> A Yes, ma'am.
>
> Q Do you know how that occurred?
>
> A I believe that happened on one of the bars that was on the bed. The railings.

Q Are you speculating or do you know? Did you see it happen?

A No, I didn't.

Draper timely objected to Rinehart's response as mere speculation. However, the court overruled this objection, noting that "she didn't testify your client did it. She said she thought it happened on the bed. . . . If she said [Draper] did something to cause it on the bed, then we — I'd reconsider your objection. But she didn't say that."

On cross-examination, Draper questioned Rinehart about missed opportunities to report the abuse of Joe Jr. earlier and her plea agreement. Rinehart admitted that she did not initially speak about Draper's abuse of Joe Jr. until after she was arrested and faced with a Class IB felony charge. Rinehart claimed that she was afraid of what Draper would do if she told anyone about the abuse and that she felt safer talking about it once he was arrested.

(b) Rule 404 Evidence

The State's case heavily relied upon Rinehart's testimony, because she was the only one to tie Draper to the cause of Joe Jr.'s death. To corroborate Rinehart's fear of Draper, the State elicited testimony from two child development social workers and one Children and Family Services (CFS) initial assessment worker who had negative encounters with Draper when visiting the Draper residence.

(i) Child Development Social Workers' Testimony

Prosecution sought to elicit testimony from two child development social workers who had testified in the first case concerning the signs of child abuse they had witnessed at the Draper residence and their confrontation with Draper during an unscheduled child welfare checkup. Before either witness was called to the stand, however, Draper objected to their testimony as improper character evidence. The court considered

this objection as a motion in limine outside the presence of the jury.

Draper was primarily concerned with the two social workers' testimony concerning the confrontation that occurred outside the Draper residence and believed it would be disproportionately prejudicial character evidence. When questioned about whether it was limited-purpose evidence, Draper suggested it would be difficult for the jury to follow such an instruction. The court was not convinced and allowed the testimony with the intent to give a limited-purpose instruction.

When the two social workers were called to the stand, they each testified to have witnessed Joe Jr. with one large bruise on his face with three long lines of bruising across it. The family was not able to provide them with any explanation for how Joe Jr. got the bruise. The social workers each separately explained that after that visit, they were very concerned with what they saw and that when they left the house that day, they were crying. The second social worker additionally testified to calling the child abuse hotline that evening.

When the second social worker to testify said that the social workers cried after leaving, Draper objected on the grounds of relevance and foundation. He had not objected earlier when the first social worker testified to leaving the house in tears. In ruling on his objection, the court allowed the testimony in over the objection, because it was "consistent with the evidence presented by the other witness that they cried."

The social workers also both testified about the unscheduled home visit where they had the altercation with Draper outside of his home. Draper timely renewed his objections in the presence of the jury, and the court gave the limiting instruction for the testimony that the jury was not to "consider it in relation to the character of . . . Draper, but [that they could] consider it for the limited purpose of other issues of what was going on in that house and who was in control in that house."

After not hearing from the family or about the status of their report for a few weeks, the social workers dropped by the Draper residence and one of them approached the fence surrounding the trailer home. Draper arrived at the gate before the social worker and would not let the social worker past the gate. He was very angry and aggressive when he spoke, because he believed that the social workers had reported his family to Child Protective Services. After an unpleasant exchange, Draper told the social workers to "get the [expletive] off of his property and to never come back." The social workers did not return to the property or ever hear back from the family.

(ii) CFS Worker's Testimony

On a separate occasion where a report on the Draper residence was made to the child abuse hotline, one CFS worker made an unscheduled visit to follow up on the report and assess the family. The CFS worker testified that he pulled up to the house in a car with a "'Department of Health and Human Services'" decal on the side and approached the fence surrounding the property. At that point, Draper stopped the CFS worker at the gate and asked him who he was and why he was there. When the CFS worker explained why he was there, Draper was upset and initially did not want to let him inside. Draper eventually let the CFS worker inside but would not allow him full access to the home—he allowed the worker to observe the rooms but only from behind him while he stood in front of the doorway.

The CFS worker testified that during his assessment, Draper "had control of answering the questions and really control of the whole conversation." He also explained that he was unable to speak with Rinehart, Draper, and Nancy separately—as was his practice—because Draper "didn't think . . . that it was necessary. He had said that . . . they had nothing to hide . . . ." The CFS worker also testified that he had to instruct Draper to allow Rinehart to answer his questions,

because Draper would interject with a comment before she could answer the questions.

When the State asked the CFS worker whether he had "any concerns with the way in which . . . Draper treated [Rinehart] during the interview," Draper objected on relevance, foundation, and rule 404. Without discussion, the court overruled his objection. In answering the question, the CFS worker testified:

> [T]here was a point where [Draper] explained to me that [Rinehart] was not a good parent. Was not a good mother. He had made the statement that because of [Rinehart's] being a bad parent, now he and Nancy had to help with bringing up the children. He had stated that Nancy's job now was to care for the children. And she was not going to date or have a social life until after the children graduated from high school. He had made the statement that was kind of concerning that he didn't want [Rinehart] out whoring around while she had children at home.

The court gave no limiting instruction to the CFS worker's testimony as it had given for the two social workers' testimony. At the end of the trial, the court did give the following written limiting instruction: "During the trial I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other. The limited purpose evidence may not be considered by you as evidence of [Draper's] character." The last line of that instruction was specifically edited to address Draper's earlier objection that some testimony may be construed as evidence of his character.

4. Convictions and Sentences

The jury found Draper guilty on both counts—intentional child abuse resulting in death and intentional child abuse resulting in serious bodily injury. Intentional child abuse resulting in death is a Class IB felony[3] and is punishable

[3] Neb. Rev. Stat. § 28-707(6) (Cum. Supp. 2010).

by 20 years' to life imprisonment.[4] Intentional child abuse resulting in serious bodily injury is a Class II felony[5] and is punishable by 1 to 50 years' imprisonment.[6] The district court sentenced Draper to 60 years' to life imprisonment on the first count and 49 to 50 years' imprisonment on the second count, with the sentences to be served consecutively. According to the district court's sentencing advisement, Draper will not be eligible for parole until 2066.

III. ASSIGNMENTS OF ERROR

Draper alleges that the district court erred in (1) finding sufficient evidence to convict him of child abuse resulting in death beyond a reasonable doubt; (2) finding sufficient evidence to convict him of child abuse resulting in serious bodily injury beyond a reasonable doubt; (3) overruling his objection on the basis of speculation and foundation about lay testimony concerning the cause of an injury to the victim's ear; (4) allowing improper rule 404 evidence to be adduced concerning his character; (5) allowing testimony concerning the emotional reaction of witnesses without proper foundation, and over his relevancy objection; and (6) giving him excessive sentences.

IV. STANDARD 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.[7]

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[4] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

[5] § 28-707(5).

[6] § 28-105 (Reissue 2008 & Cum. Supp. 2014).

[7] *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015).

[2,3] 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.[8] 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.[9]

[4,5] We will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[10] 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.[11]

V. ANALYSIS

1. Sufficiency of Evidence

Draper alleges that there was insufficient evidence to support either of his convictions, because they were "based solely on the testimony of . . . Rinehart," and that "her testimony was unbelievable insomuch as she made incredible claims about what [Draper] did and how he did it."[12] He essentially argues that since Rinehart also could have caused the injuries to Joe Jr., she lacks credibility and that, as a result, her testimony is insufficient to sustain his conviction.

[6,7] This argument contradicts our standard of review. In reviewing a sufficiency of the evidence claim, we do not pass on the credibility of witnesses—that is for the trier of fact.[13]

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[8] *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

[9] *Id.*

[10] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[11] *Id.*

[12] Brief for appellant at 9.

[13] See *State v. Newman*, *supra* note 7.

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.[14]

[8] In addition to Rinehart's testimony, the State presented testimony of seven medical experts, two law enforcement officials, and four social workers to corroborate Rinehart's testimony concerning the alleged abuse and Joe Jr.'s injuries. Though Rinehart was the only witness to specifically point to Draper as the perpetrator of the abuse, this alone does not make the evidence insufficient. In fact, Nebraska has a long-standing rule that a defendant's conviction of a crime may be based on uncorroborated testimony of a single witness.[15] Here, Rinehart's testimony was corroborated and it was not rebuked by any contrary testimony.

Viewed in the light most favorable to the State, and without passing on the credibility of witnesses, we find that there was sufficient evidence for any rational juror to find Draper guilty beyond a reasonable doubt for the crimes for which he was convicted. Accordingly, Draper's assignment of error is without merit.

2. Alleged Improper Testimony

Draper assigns error to a few instances of testimony admitted over objection. We review them in the context of a 6-day trial and a record of over 700 pages. And whether they are viewed individually or collectively, we reach the same conclusion.

(a) Testimony Concerning Ear Injury

Draper assigns that the district court erred in allowing Rinehart to testify as to the cause of an injury above Joe Jr.'s ear. Rinehart admitted that she did not see the injury occur,

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[14] *Id.*

[15] See, e.g., *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990). See, also, *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999).

and for that reason, Draper argues her statement that the injury was caused by the bed railing was mere speculation and improper lay opinion testimony.

[9] Assuming without deciding that it was error for the district court to overrule Draper's objection to the testimony, the error was harmless. 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.[16]

Here, the guilty verdict was surely unattributable to any error in admitting the evidence regarding the bruise above Joe Jr.'s ear. The State presented evidence of old rib fractures, a recent skull fracture, a recent pelvic fracture, strain injuries on the arms and shoulders, and a ruptured bowel to support its allegations of child abuse resulting in serious bodily injury and death. Additionally, medical experts testified that the cause of the injuries was likely the result of abuse or outer trauma. The identification of additional bruising was merely collateral. Accordingly, any error in allowing Rinehart's statement concerning the cause of the bruise into evidence was harmless.

(b) Rule 404 Evidence

At trial, two social workers were allowed to testify to an interaction with Draper during an unscheduled visit where Draper was angry and hostile because he believed they had reported his family to Child Protective Services. Prior to their testimony, Draper had unsuccessfully argued that their testimony should be excluded as improper character evidence. A CFS worker also testified to a separate unscheduled visit to the Draper residence. Over Draper's relevance, foundation, and rule 404 objections, the CFS worker was allowed to testify as

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[16] *State v. Cullen, supra* note 10.

to his concern for a few comments Draper made about Rinehart as a mother.

Draper assigns that the district court erred in overruling his objections to the testimony of these three witnesses and argues that the testimony should have been excluded. He alleges that the testimony was not relevant, was unduly inflammatory and prejudicial, and could only have been offered to portray him as a "vi[le] and aggressive individual."[17]

Again, assuming without deciding that it was error for the district court to overrule Draper's objections, the error was harmless. The guilty verdict was surely unattributable to any error in admitting the allegedly improper character evidence.

(c) Testimony Concerning Emotional Reaction of Witnesses

Draper also assigns that the district court erred in allowing the second social worker to testify, over his objection, that the social workers left the Draper residence and cried after one home visit. Assuming without deciding that it was error for the district court to overrule his objection, the error was harmless.

[10] The first social worker had already testified to the same—that the social workers left the residence in tears—and Draper did not object at that time. Generally, 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.[18] Because Draper failed to object to the first social worker's similar testimony, it was harmless error for the district court to allow the second social worker's testimony concerning their emotional reaction after the home visit.

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[17] Brief for appellant at 12.

[18] *State v. Jenkins*, 294 Neb. 475, 883 N.W.2d 351 (2016).

3. Excessive Sentences

Lastly, Draper alleges that he received excessive sentences because the district court "essentially imposed a double life sentence."[19] He was convicted of one count of intentional child abuse resulting in death—a Class IB felony,[20] punishable by 20 years' to life imprisonment[21]—and one count of intentional child abuse resulting in serious bodily injury—a Class II felony,[22] punishable by 1 to 50 years' imprisonment.[23] He was sentenced to consecutive terms of 60 years' to life imprisonment and 49 to 50 years' imprisonment for the first and second counts, respectively. As such, his sentences are within the statutory limits.

[11,12] In reviewing a sentence imposed within the statutory limits, an appellate court considers 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.[24] When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[25]

Draper argues that the sentences were "somewhat excessive" based on his current circumstances and his lack of a criminal record.[26] At the time of sentencing, Draper was

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[19] Brief for appellant at 17.

[20] § 28-707(6).

[21] § 28-105 (Cum. Supp. 2014).

[22] § 28-707(5).

[23] § 28-105 (Reissue 2008 & Cum. Supp. 2014).

[24] See *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

[25] *Id.*

[26] Brief for appellant at 17.

51 years old, with no prior criminal record. At trial, Draper elicited testimony from his family physician confirming that he suffered from multiple sclerosis and was taking several medications to treat the symptoms of the disease. He also presented evidence that he had limited mobility and had decreased vision and deafness from the disease.

[13] The evidence also clearly establishes the severity of the offense and the violence necessary to cause the fatal injuries to the 2-year-old child in this case. As there is no evidence that the district court failed to consider these factors in determining Draper's sentences, and given that, traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence,[27] we find that the court did not abuse its discretion in imposing Draper's sentences.

VI. CONCLUSION

We conclude that the jury's verdicts were supported by the evidence, that any error in admitting testimony over Draper's objections was harmless, and that the district court's sentences did not constitute an abuse of discretion. For these reasons, we affirm the judgment of the district court.

Affirmed.

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[27] *State v. Miller*, 284 Neb. 498, 822 N.W.2d 360 (2012).

In re Interest of L.T., alleged to be a dangerous sex offender. L.T., appellee, v. Mental Health Board of the Fourth Judicial District, appellee, and State of Nebraska, appellant.

886 N.W.2d 525

Filed October 28, 2016. No. S-16-024.

1. **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.
2. ____: ____. An appellate court does not acquire jurisdiction over an appeal if a party fails to properly perfect it.
3. **Constitutional Law: Statutes: Jurisdiction: Time: Appeal and Error.** The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.
4. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Criminal Law: Mental Health: Final Orders: Legislature: Intent: Appeal and Error.** When authorizing appeals from final orders under the Sex Offender Commitment Act, the Legislature expressly authorized both the State and the subject of the petition to take an appeal. And the statutory language of Neb. Rev. Stat. § 71-1214 (Reissue 2009) directs that all such appeals are to be taken in accordance with the procedure in criminal cases, indicating the Legislature intended a single procedure to apply regardless of which party takes the appeal, and regardless of the nature of the issues raised on appeal.
6. **Criminal Law: Mental Health: Final Orders: Appeal and Error.** The proper procedure to be followed when taking an appeal from a final order of the district court under Neb. Rev. Stat. § 71-1214 (Reissue

2009) is the general appeal procedure set forth in Neb. Rev. Stat. § 25–1912 (Reissue 2008).

7. **Jurisdiction: Fees: Legislature: Intent: Appeal and Error.** The Legislature intended that the filing of the notice of appeal and the depositing of the docket fee in the office of the clerk of the district court are both mandatory and jurisdictional.
8. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Appeal dismissed.

Eric W. Wells, Deputy Douglas County Attorney, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Ryan T. Locke for appellee L.T.

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

Stacy, J.

NATURE OF CASE

This case requires us to determine which statutory appeal procedure the State must follow when it seeks to appeal from a district court's order under the Sex Offender Commitment Act (SOCA),[1] which authorizes appeals "in accordance with the procedure in criminal cases."[2] We conclude the general appeal procedure under Neb. Rev. Stat. § 25-1912 (Reissue 2008) governs such appeals, and because the State did not perfect its appeal under that statute, we dismiss for lack of jurisdiction.

BACKGROUND

In April 2015, the Douglas County Attorney filed a petition alleging L.T. was a dangerous sex offender within the meaning of Neb. Rev. Stat. § 83-174.01 (Reissue 2014). Following

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[1] Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009).

[2] § 71-1214.

a hearing, the Mental Health Board of the Fourth Judicial District found L.T. was a dangerous sex offender and determined inpatient treatment was the least restrictive alternative for him. L.T. timely appealed the mental health board's order to the district court for Douglas County. The district court found there was insufficient evidence to support the board's determination that L.T. was a dangerous sex offender under SOCA, and further found there was clear and convincing evidence L.T. could be treated on an outpatient basis. The district court ordered L.T. unconditionally discharged from commitment as a dangerous sex offender.

The State sought to appeal the district court's order pursuant to § 71-1214, which provides:

> The subject of a petition or the county attorney may appeal a treatment order of the mental health board under section 71-1209 to the district court. Such appeals shall be de novo on the record. *A final order of the district court may be appealed to the Court of Appeals in accordance with the procedure in criminal cases*. The final judgment of the court shall be certified to and become a part of the records of the mental health board with respect to the subject.

(Emphasis supplied).

In this case, the State sought to use the appellate procedure for error proceedings set out in Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). Within 20 days after the district court's order was entered, the State presented the district court with an application for leave to docket an appeal. The district court certified the application, and the State then timely filed the application with the Clerk of the Supreme Court and Court of Appeals. The Court of Appeals granted the application, and we then moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

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[3] Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

L.T. moved to dismiss the appeal, arguing the State did not follow the proper appeal procedure and consequently failed to perfect its appeal. We deferred ruling on the motion to dismiss and directed the parties to include, within their appellate briefs, specific discussion of this court's jurisdiction and the proper procedure to be followed when appealing an order of the district court under § 71-1214.

ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) finding the State failed to prove by clear and convincing evidence that L.T. was a dangerous sex offender and that inpatient treatment was the least restrictive alternative, (2) finding outpatient treatment was the least restrictive alternative, and (3) dismissing the petition before the mental health board and unconditionally discharging L.T.

ANALYSIS

[1-3] 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.[4] An appellate court does not acquire jurisdiction over an appeal if a party fails to properly perfect it.[5] The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.[6]

Section 71-1214 specifically authorizes both the subject of a SOCA petition and the county attorney to appeal a final order of the district court "in accordance with the procedure in criminal cases." This case requires us to determine which criminal appellate procedure the Legislature intended the parties to follow when taking such an appeal.

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[4] *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

[5] *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

[6] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

The State's jurisdictional briefing argues that the Legislature's reference to "the procedure in criminal cases" in § 71-1214 should be construed to mean the statutory procedure for error proceedings under § 29-2315.01, which authorizes prosecuting attorneys to take exception to rulings and decisions made in criminal prosecutions. The State argues it has complied with the requirements of § 29-2315.01 and thus has perfected this appeal.

L.T.'s jurisdictional briefing argues we have no appellate jurisdiction over this appeal, because the State did not file a notice of appeal in the district court, and therefore failed to perfect its appeal under either the statutory appeal procedure of § 29-2315.01[7] or the general appeal procedure of § 25-1912.

[4] The language of a statute 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.[8] We thus begin by examining the plain meaning of the phrase "the procedure in criminal cases" as it is used in § 71-1214.

We have not yet had occasion to interpret this phrase, and our task is complicated by the fact that Nebraska has several different statutes addressing appeal procedures in criminal cases, the applicability of which generally depends on which party is taking the appeal and on what sort of issue is being appealed. For instance, the general appeal procedures contained in § 25-1912 govern "[t]he proceedings to obtain a

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[7] See, *State v. Johnson*, 259 Neb. 942, 945, 613 N.W.2d 459, 462 (2000) ("'the general appeal statute [§ 25-1912] does not come into play until there has been compliance with the special requirements of § 29-2315.01'"); *State v. Kissel*, 13 Neb. App. 209, 690 N.W.2d 194 (2004) (reading §§ 29-2315.01 and 25-1912 in pari materia and holding that once appellate court grants leave for State to docket error proceedings, State must file notice of appeal in district court within 30 days to confer jurisdiction in appellate court).

[8] *Huntington v. Pedersen*, 294 Neb. 294, 883 N.W.2d 48 (2016).

reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors . . . .” Additional statutory procedures apply only when a criminal defendant takes an appeal.[9] And other appeal procedures apply only when the State takes an appeal.[10] Section 71-1214 does not specify which criminal appellate procedure parties are to follow, and the legislative history is not helpful either, but we find guidance in the plain language of the remaining portions of that statute.

[5] When authorizing appeals from final orders under SOCA, the Legislature expressly authorized both the State and the subject of the petition to take an appeal. And the statutory language of § 71-1214 directs that all such appeals are to be taken “in accordance with *the* procedure in criminal cases” (emphasis supplied), indicating the Legislature intended a single procedure to apply regardless of which party takes the appeal, and regardless of the nature of the issues raised on appeal.

[6] We therefore hold the proper procedure to be followed when taking an appeal from a final order of the district court under § 71-1214 is the general appeal procedure set forth in § 25-1912. That appeal procedure applies regardless of the party taking the appeal, applies in both criminal and civil cases, and provides a procedure “to obtain a reversal, vacation, or modification of . . . final orders made by the district court.”[11]

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[9] See, e.g., Neb. Rev. Stat. §§ 29-2301 through 29-2306 (Reissue 2008).

[10] See, e.g., § 29-2315.01 (procedure for error proceedings by prosecuting attorney); Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Cum. Supp. 2014) (procedure for State to appeal felony sentence as excessively lenient); and Neb. Rev. Stat. § 29-824 (Reissue 2008) (procedure for State to appeal order granting motion to suppress evidence or for return of seized property).

[11] § 25-1912(1).

[7] To perfect an appeal under § 25-1912, a party must, within 30 days after entry of the order from which the appeal is being taken, file a notice of appeal with the clerk of the district court and deposit the required docket fee unless in forma pauperis status is granted. Section 25-1912(4) characterizes both the notice of appeal and the docket fee as jurisdictional, and provides that "the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court".[12] We have recognized that "'the Legislature intended that the filing of the notice of appeal and the depositing of the docket fee "in the office of the clerk of the district court" are both mandatory and jurisdictional.'"[13]

[8] The record before us does not contain a notice of appeal, and during oral argument, the State admitted it had not, at any time, filed a notice of appeal in the district court. The State has thus failed to perfect its appeal. An appellate court does not acquire jurisdiction over an appeal if a party fails to properly perfect it.[14] And when an appellate court is without jurisdiction to act, the appeal must be dismissed.[15]

CONCLUSION

For the foregoing reasons, we conclude the State failed to perfect an appeal under §§ 71-1214 and 25-1912. We lack jurisdiction, and this appeal must be dismissed.

Appeal dismissed.

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[12] See, also, *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

[13] *State v. Parmar*, 255 Neb. 356, 360, 586 N.W.2d 279, 282 (1998).

[14] *In re Interest of Edward B., supra* note 5.

[15] *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

In re Interest of Antonio J. et al., children under 18 years of age. State of Nebraska, appellant, v. Arturo H. and Noemi M., appellees.

886 N.W.2d 522

Filed October 28, 2016. No. S-16-276.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
2. **Juvenile Courts: Pretrial Procedure: Dismissal and Nonsuit.** Prior to trial, the State may dismiss a count of a juvenile court petition as a matter of right.
3. **Dismissal and Nonsuit: Judgments.** As a general rule, a dismissal with prejudice is an adjudication on the merits.

Appeal from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Affirmed as modified.

Donald W. Kleine, Douglas County Attorney, and Anthony Hernandez for appellant.

Mariette C. Achigbu for appellee Arturo H.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

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

Cassel, J.

INTRODUCTION

At the beginning of a juvenile adjudication hearing, the State moved to dismiss without prejudice two factual allegations of the petition. Instead, the juvenile court ordered those allegations dismissed with prejudice. Because the State was entitled to dismiss the allegations as a matter of right, the allegations should have been dismissed without prejudice. We modify the order accordingly.

BACKGROUND

On August 25, 2015, the State filed an amended petition seeking to adjudicate five children under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014). Count I contained five allegations concerning the fault or habits of the mother, while the four allegations under count II regarded the fault or habits of the father.

Six months after the filing of the amended petition, the juvenile court held an adjudication hearing. At the beginning of the hearing, the State moved to dismiss without prejudice two paragraphs, which alleged that the father had subjected a juvenile to inappropriate sexual contact and that the mother knew or should have known of such contact. The following colloquy ensued:

> THE COURT: No. I'm not going to do that without prejudice. Why are you dismissing it?
>
> [The State]: Because the State is not going — doesn't have evidence to prove those allegations, Your Honor.
>
> THE COURT: Why did you file it then?
>
> [The State]: Because the evidence I had at that time didn't pan out, Your Honor.
>
> THE COURT: Well, I'm not dismissing it without prejudice.
>
> [The State]: So just for the State's clarification, this Court is going to dismiss it with prejudice?
>
> THE COURT: Yes.

The State then informed the court of the plea agreement that had been reached. Under the agreement, the mother and father admitted the allegations of the amended petition that they failed to provide proper parental care, support, and supervision for the children and that the children were at risk for harm. The State then dismissed the remaining allegations. The court accepted the parents' admissions and adjudicated the children. The court's adjudication order shows that it dismissed two allegations with prejudice, that the parents each admitted to two allegations, and that the remaining allegations were "hereby dismissed."

The State timely appealed, and we moved the case to our docket.[1] Upon the filing of a joint motion to waive oral argument, we submitted the case without oral argument.[2]

ASSIGNMENT OF ERROR

The State assigns that the juvenile court erred in dismissing its allegations with prejudice despite not receiving any evidence.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[3]

ANALYSIS

This court has previously addressed the dismissal of a juvenile court action by a county attorney. In *In re Interest of Moore*,[4] the county attorney filed a two-count petition in juvenile court alleging that a juvenile was delinquent or a

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

[2] See Neb. Ct. R. App. P. § 2-111(E)(6) (rev. 2014).

[3] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[4] See *In re Interest of Moore*, 186 Neb. 67, 180 N.W.2d 917 (1970).

child in need of special supervision. Prior to trial, the county attorney moved to dismiss count II. The juvenile court overruled the motion. After trial, the court found count II to be true and dismissed count I. On appeal, we addressed the juvenile court's authority to overrule the county attorney's motion to dismiss count II. We stated that proceedings in juvenile court are quasi-criminal in character but are generally considered to be civil actions unknown at common law. We then observed that, without leave of court, a criminal action could be dismissed by the prosecuting attorney at any time before a jury was impaneled and a civil action may be dismissed any time before final submission. We determined that "the county attorney, when not disqualified, may dismiss the action without leave of court."[5]

[2] *In re Interest of Moore* teaches that prior to trial, the State may dismiss a count of a juvenile court petition as a matter of right. The phrase "without leave of court" means without the court's permission.[6] Because the court's permission is not needed, it follows that the dismissal of a count of a juvenile court petition prior to trial is a matter of right. In similar fashion, we have held that the right of the plaintiff to voluntary dismissal generally is a right and is not a matter of judicial grace or discretion.[7]

[3] The State was entitled to dismiss the factual allegations at issue without prejudice. At the outset of the adjudication hearing, before any admissions were made or evidence was adduced, the State asked to dismiss two of its factual allegations without prejudice. The court allowed the dismissal of the factual allegations at issue, but ordered that the dismissal

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[5] *Id.* at 70, 180 N.W.2d at 918.

[6] See Black's Law Dictionary 1028 (10th ed. 2014) ("leave of court" means "[j]udicial permission to follow a nonroutine procedure").

[7] See, *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007); *In re Guardianship of David G.*, 18 Neb. App. 918, 798 N.W.2d 131 (2011).

was to be with prejudice. But as a general rule, a dismissal with prejudice is an adjudication on the merits.[8] Here, the case had not been finally submitted at the time the State moved to dismiss the pertinent allegations. The merits of the State's case had not yet been passed upon. The juvenile court erred in ordering the dismissal to be with prejudice.

CONCLUSION

Because the State sought dismissal of the two factual allegations at issue before any evidence was presented and before the parents entered their admissions to certain counts, the juvenile court erred in ordering the dismissal to be with prejudice. We therefore modify the adjudication order to reflect that the two allegations identified by the State are dismissed without prejudice. As so modified, the order is affirmed.

Affirmed as modified.

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[8] See *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983).

In re Interest of Nettie F., a child under 18 years of age. State of Nebraska and Maureen K. Monahan, guardian ad litem, appellees, v. Rodney P. and Brenda P., on behalf of Katherine P., appellants.

887 N.W.2d 45

Filed November 18, 2016. No. S-16-241.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Legislature: Standing: Appeal and Error.** Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016), the juvenile code's appeal statute, controls who has the right to appeal from a juvenile court's placement order. Under this statute, the Legislature has not authorized an adjudicated child's sibling to appeal from an adverse placement order.

Appeal from the Separate Juvenile Court of Douglas County: Patricia A. Lamberty, District Judge, Retired. Appeal dismissed.

Karen S. Nelson, of Carlson & Burnett, L.L.P., for appellants.

Ryan M. Hoffman and Mark F. Jacobs, of Anderson, Bressman & Hoffman, P.C., L.L.O., for appellee Maureen K. Monahan.

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

Funke, J.

NATURE OF CASE

The appellants, Rodney P. and Brenda P., are the adoptive parents of Katherine P., who is an older sibling of Nettie F., the child who is the subject of this juvenile dependency proceeding. Rodney and Brenda filed a complaint to intervene on Katherine's behalf, to seek guardianship or adoption of Nettie. The court originally allowed them to intervene but later vacated that order and limited the foster parents and Katherine's parents to presenting evidence on their own qualifications to be Nettie's adoptive parents. After an evidentiary hearing, it found that Nettie's foster parents and Katherine's parents were equally qualified to be foster parents. But it determined that under Nebraska statutes implementing the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCA),[1] a joint-sibling placement with Katherine's parents would be contrary to Nettie's safety and well-being. It found that disrupting her placement would negatively affect her. Instead, it ordered the Department of Health and Human Services (Department) to make reasonable efforts for continuous and frequent sibling visitation or ongoing interaction.

We conclude that whether an adjudicated child's sibling can appeal from a juvenile court's adverse placement order is governed by Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016), which does not authorize such appeal. Accordingly, we dismiss Rodney and Brenda's appeal brought on Katherine's behalf.

BACKGROUND

Nettie was born in June 2014. The Department placed her with Greg G. and Laura G. 3 days after her birth. Nettie's

[1] See Pub. L. No. 110-351, 122 Stat. 3949.

biological mother had previously lost her parental rights to her other children because of neglect. Laura testified that they were considered potential adoptive parents from the start and were told they would be able to adopt Nettie. But near the end of June, Rodney and Brenda learned about Nettie's birth from someone they knew at the Department. They had finalized Katherine's adoption about 6 months before Nettie's birth. Katherine was born in 2011 and was about 3 years old during these proceedings. Rodney and Brenda immediately contacted Nettie's case manager to express their interest in visitations, placement, and their eventual adoption of Nettie.

Rodney and Brenda had moved to Illinois after adopting Katherine, but they offered to move back to Nebraska to facilitate Nettie's visitations with them. In September 2014, after Rodney and Brenda had completed a home study in Illinois, they filed a complaint to intervene on Katherine's behalf. In December, the court granted them leave to do so. Later that month, Nettie's parents voluntarily relinquished their parental rights.

In January 2015, the court issued an adjudication order in which it stated that Nettie's permanency objective was adoption and ordered her placement with Greg and Laura to continue. The Department did not schedule any visitations between Katherine, her parents, and Nettie until March 2015, when Nettie was 9 months old. At that time, Rodney and Brenda drove from Illinois for visitations. They stated that Nettie and Katherine interacted well during visitations and that Nettie displayed no concerning behaviors.

In March 2015, Rodney and Brenda moved to change Nettie's placement to their home. They asked the court to make the change quickly to avoid bonding problems as Nettie grew older. Greg and Laura responded with a complaint to intervene based on their status as Nettie's foster parents and preadoptive parents. The court granted them leave to do so. In its order, the court stated that Nettie was thriving with Greg and Laura and ordered a bonding expert to meet with them to

determine whether disrupting her placement with them would be in her best interests.

In October 2015, Rodney and Brenda moved to vacate the March order allowing Greg and Laura to intervene. They argued that this court had recently clarified in *In re Interest of Enyce J. & Eternity M.*[2] that foster parents have a right to participate in review hearings but no right to intervene as a party. On October 26, the guardian ad litem filed motions for the court to vacate its orders allowing the foster parents and Katherine's parents to intervene. She argued that neither couple had standing to intervene. Rodney and Brenda objected that they had standing to intervene on Katherine's behalf under Neb. Rev. Stat. § 43-1311.02 (Reissue 2016).

In November 2015, the court vacated its earlier orders allowing the foster parents and Katherine's parents to intervene. It reasoned that under our case law, Greg and Laura had no statutory right to intervene as parties and that a juvenile court had no authority to permit an equitable intervention. The court also concluded that under our 2011 decision in *In re Interest of Meridian H.*,[3] Rodney and Brenda could not intervene on Katherine's behalf.

In January 2016, the court quashed Rodney and Brenda's subpoenas for two caseworkers, who had been present during their visitations with Nettie, to testify at the final evidentiary hearing on Nettie's placement. At that February hearing, the court overruled their motion to make an offer of proof intended to challenge the validity of a caseworker's opinion. The court stated that the attorneys for the foster parents and Katherine's parents were limited to calling their clients to testify about their own qualifications to be Nettie's adoptive parents, "otherwise neither one of you have standing and are not parties in this case."

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[2] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[3] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

After the hearing, the court issued an order in which it found that the foster parents and Katherine's parents were equally qualified to be foster parents. But the court found that "it is in [Nettie's] best interests" to be placed with Greg and Laura. Additionally, under § 43-1311.02, the court found that "joint sibling placement would be contrary to the safety and well-being of [Nettie] as she has been placed with [Greg and Laura] since birth and disruption of this placement would have negative effects on Nettie and not be in her best interest[s]." However, the court ordered the Department to "make reasonable effort to provide for continuous and frequent sibling visitation or for ongoing interaction between the siblings, Nettie [and] Katherine."

ASSIGNMENTS OF ERROR

Rodney and Brenda assign, restated, that the juvenile court erred as follows:

(1) in vacating its order allowing them to intervene on Katherine's behalf;

(2) in not allowing them to make an offer of proof at the February evidentiary hearing on Nettie's placement;

(3) in quashing their subpoenas; and

(4) in violating Katherine's due process right to a fair hearing by not allowing her to subpoena, confront, and cross-examine witnesses.

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 of the lower court's decision.[4]

ANALYSIS

[2] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an

[4] *In re Interest of Jackson E.*, 293 Neb. 84, 875 N.W.2d 863 (2016).

appellate court to determine whether it has jurisdiction over the matter before it.[5] Thus, before reaching the merits, we must determine whether we have jurisdiction of this appeal.

Rodney and Brenda contend the court erred in relying on *In re Interest of Meridian H.*[6] to vacate the order that allowed them to intervene. There, we concluded that under Nebraska law, an unadjudicated sibling does not have a cognizable interest in a sibling relationship that is separate and distinct from the adjudicated child's interest. We further concluded that the FCA does not establish any legal interest on the part of an unadjudicated sibling which could have been affected by the juvenile court's placement order or serve as the basis for standing. Thus, the siblings could not demonstrate a personal stake in proceeding that would permit an appeal—even if we assumed that a person who demonstrated such an interest could appeal despite the lack of statutory authority for such.

Rodney and Brenda contend that *In re Interest of Meridian H.* has been superseded by the Legislature's 2011 enactment of Neb. Rev. Stat. § 43-1311.01 (Reissue 2016) and § 43-1311.02 and the 2015 amendments to these statutes. These are two of the statutes that the Legislature enacted or amended to comply with the federal FCA. We briefly set out their requirements.

Since 2011, when a child is removed from parental custody or voluntarily placed with the Department, § 43-1311.01 requires the Department to

> identify, locate, and provide written notification of the removal of the child from his or her home, within thirty days after removal, to any noncustodial parent and to all grandparents, adult siblings, adult aunts, adult uncles, adult cousins, and adult relatives suggested by the child or the child's parents, except when that relative's

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[5] *Id.*

[6] *In re Interest of Meridian H., supra* note 3.

history of family or domestic violence makes notification inappropriate.[7]

In 2015, the Legislature amended § 43-1311.01 to add "all parents who have legal custody of a sibling of the child" as persons who must receive the notification.[8] Among other things, the notice must provide the recipient with an "explanation of the options the relative has under federal, state, and local law to participate in the care and the placement of the child, including any options that may be lost by failing to respond to the notice."[9]

Under § 43-1311.02(1)(a), the Department must make reasonable efforts to place an adjudicated child and a sibling in the same foster care or adoptive placement, even if the siblings' custody orders were entered at separate times, unless such placement is contrary to the safety or well-being of any of the siblings. If the Department does not place the siblings together, § 43-1311.02(1)(b) requires it to provide an explanation to the court and the siblings. Even if a court has terminated parental rights to the siblings, the Department must make reasonable efforts for a joint-sibling placement, or sibling visitation or contact, unless a court has previously suspended or terminated such placement or sibling visitation.[10]

Relying on our decision in *In re Interest of Kayle C. & Kylee C.*,[11] Rodney and Brenda contend that these statutes vest the siblings of an adjudicated child with a legal interest in the subject matter that is sufficient to confer standing to intervene in a dependency proceeding.

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[7] See 2011 Neb. Laws, L.B. 177, § 6 (codified at § 43-1311.01(1) (Cum. Supp. 2014)).

[8] See 2015 Neb. Laws, L.B. 296, § 1 (codified at § 43-1311.01(1) (Reissue 2016)).

[9] See L.B. 177, L.B. 296, and § 43-1311.01(1)(b).

[10] See § 43-1311.02(5).

[11] *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

The guardian ad litem argues that under § 43-1311.02(3), only the "[p]arties to the case" can file a motion for a joint-sibling placement and that an adjudicated child's siblings are not parties to the case under Neb. Rev. Stat. §§ 43-245(19) and 43-247(5) (Reissue 2016). She argues that even though the Department may not have fulfilled its duties in this case, neither § 43-1311.01 or § 43-1311.02 bestow any rights upon a sibling to intervene. Finally, she argues that to interpret these statutes as creating a legal right for siblings to intervene would overburden a foster care system already pressed to its limits.

It is true that in *In re Kayle C. & Kylee C.*,[12] we considered an appeal from grandparents who had been denied leave to intervene in a dependency proceeding involving their grandchildren. But the grandparents in that case appealed directly from the order denying them leave to intervene. We considered their appeal under Neb. Rev. Stat. § 25-328 (Reissue 1995), which we later held serves as a guidepost for deciding whether a person can intervene in a juvenile proceeding.[13] But because the grandparents had timely appealed from the juvenile court's denial of their request to intervene, we had no need to consider whether grandparents can appeal from a juvenile court's adverse placement order. In two more recent cases, however, we have addressed appeal issues in juvenile dependency proceedings that provide guidance here.

First, in *In re Interest of Enyce J. & Eternity M.*,[14] we determined that under statutory changes to Nebraska's Foster Care Review Act, foster parents do not have standing to appeal from an order changing a child's placement. We acknowledged that in 1996, in *In re Interest of Jorius G. & Cheralee*

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[12] *Id.*

[13] See *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002), *disapproved in part, In re Interest of Enyce J. & Eternity M., supra* note 2.

[14] *In re Interest of Enyce J. & Eternity M., supra* note 2.

G.,[15] we held foster parents have standing to intervene in a proceeding to consider a proposed placement change. But because the mother had relinquished her child for an adoption by the foster parents, they had a greater interest in a change of placement than foster parents normally have. More important, we pointed out that in 1996, Neb. Rev. Stat. § 43-1314 (Reissue 1993) gave foster parents the right to notice of and participation in court review of a child's placement. In 1998, however, the Legislature amended this statute to provide that the notice requirement "'shall not be construed to require that such foster parent, preadoptive parent, or relative be made a party to the review solely on the basis of such notice and opportunity to be heard.'"[16]

In *In re Interest of Destiny S.*, we held that under this statutory change, "a foster parent does not have an interest in the placement of an adjudicated child sufficient to warrant intervention in juvenile proceedings as a matter of right."[17] That is, a foster parent cannot intervene as a party. A foster parent's right to participate in review proceedings is a "narrow one" that

> does not extend to discovery, questioning, cross-examining, or calling witnesses beyond what is personally applicable to the foster parent's own qualifications. Section 43-1314 gives foster parents a role in the proceeding, but it does not confer on them a right, title, or interest in the subject matter of the controversy.[18]

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[15] See *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996), *disapproved, In re Interest of Enyce J. & Eternity M., supra* note 2.

[16] *In re Interest of Destiny S., supra* note 13, 263 Neb. at 263, 639 N.W.2d at 407, quoting 1998 Neb. Laws, L.B. 1041.

[17] *Id.* at 263-64, 639 N.W.2d at 407.

[18] *In re Interest of Enyce J. & Eternity M., supra* note 2, 291 Neb. at 972, 870 N.W.2d at 419.

In *In re Interest of Enyce J. & Eternity M.*, we reiterated our holding that foster parents can participate in review hearings under § 43-1314, but that they cannot intervene as a matter of right under § 25-328. A foster parent's "ability to participate under the statute is less than that of a party."[19] We further clarified that a juvenile court is a statutorily created court of limited and special jurisdiction and as a result lacks the authority to permit equitable intervention.

We also extended the same reasoning that precludes foster parents from intervening to hold that they cannot appeal from adverse placement orders. We rejected the argument that foster parents have standing under the doctrine of in loco parentis because they exercise the rights of parents. We explained that foster parents do not have the rights of a parent and that all major, and many minor, decisions for a foster child must be approved by a caseworker from the Department, the child's legal custodian. We concluded that because foster parents do not have an interest akin to that of a parent or the State in a child's placement, they do not have a right or interest that gives them standing to appeal from an order changing a child's placement.

A few months after we decided *In re Interest of Enyce J. & Eternity M.*, we decided *In re Interest of Jackson E.*[20] There, we again held that a child's foster parents, one of whom was the child's maternal grandmother, lacked standing to appeal from a juvenile order that denied their request to have their grandchild returned to their home. The child was placed with the grandmother and her husband for 2½ years while the permanency objective was reunification with the parents. When the Department removed the child and placed him with other foster parents, the grandmother and her husband moved to intervene and requested that the child be returned to them. The juvenile court allowed them to intervene but concluded that

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[19] *Id.* at 975, 870 N.W.2d at 421.

[20] See *In re Interest of Jackson E., supra* note 4.

the Department had proved changing the permanency objective to adoption and placing him with the new foster parents was in the child's best interests.

On appeal, we stated that under *In re Interest of Enyce J. & Eternity M.*, the foster parents had no right, title, or interest in the proceeding that gave them standing to appeal. We explained that a grandparent has no statutory right to appeal and only a diminished right to participate in juvenile proceedings under *In re Interest of Kayle C. & Kylee C.* We held that the "right of appeal in a juvenile case in this state is purely statutory, and neither foster parents nor grandparents, as such, have a statutory right to appeal from a juvenile court order."[21]

Under § 43-2,106.01(2), an appeal from a juvenile court's final order or judgment may be appealed by the following persons: "(a) The juvenile; (b) The guardian ad litem; [and] (c) The juvenile's parent, custodian, or guardian." We reiterated an older holding that foster parents with temporary placements are not a child's custodians under the appeal statute. Because they did not fall into any category under § 43-2,106.01(2), we held "they have no right to take an appeal in these circumstances."[22]

A court determines standing as it existed when a plaintiff commenced an action.[23] Section 25-328 (Reissue 2016) requires a similar analysis when a nonparty attempts to intervene.[24] As stated, we use § 25-328 as a guidepost for intervention issues in juvenile dependency proceedings.[25] But these decisions clarified that grandparents and foster parents do not

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[21] *Id.* at 88-89, 875 N.W.2d 867, citing *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014).

[22] *Id.* at 90, 875 N.W.2d at 868.

[23] See, e.g., *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016).

[24] See, e.g., *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016).

[25] See *In re Interest of Destiny S., supra* note 13.

have the status of "parties" in a juvenile dependency proceeding even if they have a limited right to participate. So we were implicitly determining whether a nonparty has the right to appeal a juvenile court's adverse placement order.

[3] We have stated that in a proper case, a nonparty may have a sufficient interest in a judgment to appeal, but as a general rule, an appeal is available only to persons who were parties to the case below.[26] Our recent cases have made clear that § 43-2,106.01, the juvenile code's appeal statute, controls who has the right to appeal from a juvenile court's placement order. We need not consider here whether the Legislature's statutory changes were intended to permit an adjudicated child's siblings to intervene in a dependency proceeding, subpoena witnesses, or make offers of proof. Even if that were true, under § 43-2,106.01, the Legislature has not authorized an adjudicated child's sibling to appeal from an adverse placement order.

CONCLUSION

Consistent with our earlier decisions, we conclude that Rodney and Brenda have no right to appeal the court's order on Katherine's behalf and, as a result, this court has no jurisdiction over their purported appeal. Accordingly, we dismiss their appeal.

Appeal dismissed.

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[26] See, *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014), citing *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999).

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Douglas R. Lederer, respondent.

887 N.W.2d 44

Filed November 18, 2016. No. S-16-982.

Original action. Judgment of disbarment.

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

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Douglas R. Lederer, on October 17, 2016. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 1, 2005. On October 17, 2016, respondent filed a voluntary surrender of license in which he freely and voluntarily admitted that he had failed to create an appropriate attorney trust account and that he had deposited client advance fees into his personal checking account before earning the fees. Respondent further stated that the Counsel for Discipline was investigating respondent's conduct and could seek disciplinary action against him. Respondent admitted that by his conduct he violated the Nebraska Court Rules

of Professional Conduct and his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012). Respondent further stated that he freely and voluntarily waived his 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 his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

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

Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 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. Todd A. Wagner, appellant.

State of Nebraska, appellee, v. Brandon B. Rohde, appellant.

888 N.W.2d 357

Filed December 2, 2016. Nos. S-15-788, S-16-065.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
2. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
4. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.
5. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
6. **Constitutional Law: Statutes.** It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.
7. **Double Jeopardy: Intent.** The primary purpose of the Double Jeopardy Clause is to protect against multiple trials.

8. **Sentences: Double Jeopardy.** As to the protection against multiple punishments for the same offense, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the Legislature intended.
9. **Drunk Driving: Words and Phrases.** Under Neb. Rev. Stat. § 60-6,197.03(8) (Cum. Supp. 2014), "current violation" encompasses violations of both Neb. Rev. Stat. § 60-6,196 (Reissue 2010) and Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2016).
10. **Constitutional Law: Criminal Law: Statutes.** A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
11. **Appeal and Error.** An appellate court will not address arguments that are too generalized or vague to be understood.
12. **Indictments and Informations.** The function of an information is twofold. With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
13. ____. The information may use the language of the statute or its equivalent.

Appeals from the District Court for Lancaster County: Stephanie F. Stacy and Steven D. Burns, Judges. Affirmed.

Mark E. Rappl for appellant in No. S-15-788.

Joe Nigro, Lancaster County Public Defender, and Nathan Sohriakoff for appellant in No. S-16-065.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ., and Inbody, Judge.

Wright, J.

NATURE OF CASE

These two appeals involve identical charges, similar facts, and identical assignments of error and arguments. Therefore, although they were briefed and argued separately, it is

appropriate to address the two appeals in a single opinion. The defendants appeal the denial of their pleas in bar and motions to quash in relation to the application of Neb. Rev. Stat. § 60-6,197.03(8) (Cum. Supp. 2014) in sentencing them for the crime of refusal to submit to a chemical test as required by Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2016). Both defendants have three prior convictions for driving under the influence (DUI).[1] The defendants argue that the application of § 60-6,197.03(8) is inappropriate because the "current violation" referred to therein must mean a current DUI violation, and not a refusal violation. For the reasons set forth, we affirm.

BACKGROUND

In case No. S-16-065, Brandon B. Rohde pled no contest to the refusal of a chemical test, with three prior convictions, under §§ 60-6,197 and 60-6,197.03(8), in relation to acts committed on April 13, 2015. In case No. S-15-788, Todd A. Wagner pled no contest to refusal of a chemical test, with three prior convictions, under §§ 60-6,197 and 60-6,197.03(8), in relation to acts committed on December 2, 2013. In both cases, the pleas were accepted and the defendants were found guilty of refusal of a chemical test, as prohibited by § 60-6,197.

Section 60-6,197(3) states that it is a crime to refuse to submit to a chemical test, while § 60-6,196 states that it is a crime to operate or be in control of a motor vehicle while under the influence of drugs or alcohol. But neither § 60-6,196 nor § 60-6,197 sets forth any punishment for those crimes.

Section 60-6,197.03 has 10 subsections, which are introduced by stating, "Any person convicted of a violation of section 60-6,196 or 60-6,197 shall be punished as follows." Subsection (8) of § 60-6,197.03 states that it applies to "such person" who has had three prior convictions and, "as part of the current violation," had a breath or blood alcohol concentration of .15 or above "or refused to submit to a test as required

[1] See Neb. Rev. Stat. § 60-6,196 (Reissue 2010).

under section 60-6,197." Subsection (8) provides for harsher penalties than subsection (7), which applies, "[e]xcept as provided in subdivision (8) of this section," to "such person" who has had three prior convictions and has an alcohol concentration of .08 or above.

The defendants filed pleas in bar alleging that application of § 60-6,197.03(8) would subject them to multiple punishments for the same offense by using the same act of refusing to submit to a chemical test as an element of the underlying crime of refusal, in violation of § 60-6,197, and as an element of "enhancement" under § 60-6,197.03(8). The defendants also filed motions to quash repeating this double jeopardy argument and further asserting that (1) the meaning of "current violation" in § 60-6,197.03(8) is a DUI under § 60-6,196, and not refusal under § 60-6,197; (2) § 60-6,197.03(8) is unconstitutionally vague and overbroad by failing to define "current violation"; (3) the enhanced charge under § 60-6,197.03(8) violates due process, because the prior convictions upon which the enhancement is based were for DUI's and not refusals; and (4) the application of § 60-6,197.03(8) is cruel and unusual punishment.

The courts denied the motions. As to the defendants' arguments concerning double jeopardy and the meaning of § 60-6,197.03(8), the courts concluded that "current violation" in § 60-6,197.03(8) was unambiguous and encompasses violations of either § 60-6,196 or § 60-6,197, as described in the introductory sentence of § 60-6,197.03. The courts found that the Legislature had determined to treat refusal and aggravated DUI (breath or blood alcohol concentration of .15 or above) similarly for purposes of determining penalties when a defendant has prior convictions. That determination was not enhancement, but, rather, as one court explained, "a choice the Legislature has made as to the category of the crime itself." The crime of refusal was "enhanced" only by the three prior convictions, and, as the other court reasoned, "referencing the underlying offense in this context does not equate to a second

prosecution for the same offense, nor does it result in multiple punishments for the same offense."

Upon evidence of three prior convictions, the courts sentenced the defendants in accordance with § 60-6,197.03(8). The defendants appeal.

ASSIGNMENTS OF ERROR

The defendants both assign that the district court erred by overruling their (1) pleas in bar and (2) motions to quash.

STANDARD OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below.[2]

ANALYSIS

§ 60-6,197.03: "as part of the current violation"

[2,3] The defendants' principal argument is that § 60-6,197.03(8) was meant to apply only to persons who violated the DUI statute, § 60-6,196, and not to persons who violated the refusal statute, § 60-6,197. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[3] Components of a series or collection of statutes pertaining to a certain subject matter should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[4] We find no ambiguity or inconsistency in reading § 60-6,197.03(8) as encompassing underlying refusal violations. And we find it sensible to prevent prior offenders from avoiding, through the act of refusing a

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[2] *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

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

[4] See *State v. Raatz*, 294 Neb. 852, 885 N.W.2d 38 (2016).

chemical test, the greater penalty for having a breath or blood alcohol concentration of .15 or above, regardless of whether the underlying violation is refusal or DUI.

Section 60-6,197.03 sets forth the punishments for "[a]ny person convicted of a violation of section 60-6,196 or 60-6,197 . . . ." The version of § 60-6,197.03 in effect at the time of the defendants' crimes provided that any person convicted of a violation of § 60-6,196 or § 60-6,197 shall be punished as follows:

> (1) Except as provided in subdivision (2) of this section, if *such person* has not had a prior conviction, such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, order that the operator's license of such person be revoked for a period of six months . . . .
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> . . . .
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> (2) If *such person* has not had a prior conviction and, *as part of the current violation*, had a concentration of fifteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or fifteen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath, such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of one year . . . .
>
> . . . .
>
> (7) Except as provided in subdivision (8) of this section, if *such person* has had three prior convictions, such person shall be guilty of a Class IIIA felony, and the court shall, as part of the judgment of conviction, order that the operator's license of such person be revoked for a period of fifteen years . . . .
>
> . . . .
>
> (8) If *such person* has had three prior convictions and, *as part of the current violation*, had a concentration of

> fifteen-hundredths of one gram or more by weight of alcohol . . . *or refused to submit to a test* as required under section 60-6,197, *such person* shall be guilty of a Class III felony, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years . . . .

(Emphasis supplied.)

The defendants assert that the reference to "current violation" in § 60-6,197.03(8) is, at the very least, ambiguous. They argue that we must construe "current violation" as limited to a current DUI violation and as excluding a current refusal violation. They argue that this reading of the statute is required in light of the rule of lenity, the context of subsection (8) with the other language of the statute, and because construing subsection (8) as encompassing underlying refusal violations would impose double punishment. We find no merit to these arguments.

[4] Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, we may not manufacture ambiguity in order to defeat that intent.[5] The language of § 60-6,197.03 is straightforward. Section 60-6,197.03 states that it is setting forth in its subsections the punishments for "[a]ny person convicted of a violation of section 60-6,196 *or* 60-6,197 . . . ." (Emphasis supplied.) Each subsection then refers back to "such person." We find that "such person" plainly refers to "[a]ny person convicted of a violation of section 60-6,196 *or* 60-6,197 . . . ." (Emphasis supplied.) And when certain subsections, such as subsection (8), refer to specified acts "as part of the current violation" of "such person," it is equally plain that "current violation" refers back to "a violation of section 60-6,196 *or* 60-6,197." (Emphasis supplied.)

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[5] *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008).

[5] "[C]urrent violation" thus plainly encompasses a violation of either § 60-6,196 or § 60-6,197. As the State points out, the defendants ask us to read a "DUI" violation into § 60-6,197.03(8), thereby excluding refusal violations. It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.[6] As we will explain below, we reject the defendants' arguments that this reading of § 60-6,197.03(8) is in any way contrary to the language of the statute read as a whole, or to the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions.

The defendants argue that by referring to the acts of having a breath or blood alcohol concentration of .15 or above or refusing to submit to testing as being "'part of'" the "'current violation,'" those acts must be something "above and beyond" the underlying violation charged.[7] They point out that evidence of refusing a chemical test in the context of a refusal violation is not an act "above and beyond" the violation.[8] The defendants reason that the act of refusing a chemical test must therefore refer only to evidence submitted as circumstantial evidence of a DUI violation.[9]

This argument misconstrues the meaning of the phrase "as part of." To be "part of" is not the same as to be "above and beyond." It means, in fact, the opposite. A "part of" something is a "piece" or "segment" of it.[10] Considering the phrase "as part of" in the context of § 60-6,197.03(8), the Legislature plainly utilized that phrase because of its broadness. The phrase "as part of" does not call into question our reading of the words "current violation."

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[6] *State v. Raatz, supra* note 4.

[7] Brief for appellant in case No. S-15-788 at 19 and for appellant in case No. S-16-065 at 18.

[8] *Id.*

[9] See § 60-6,197(6).

[10] See Merriam-Webster's Collegiate Dictionary 844 (10th ed. 2001).

The defendants relatedly argue that we must read "current violation" as limited to a DUI violation, because such reading is the only reading that would be consistent with the use, in the same sentence, of the element of having a breath or blood alcohol concentration of .15 or above. Having an alcohol concentration of .15 or above, the defendants argue, is evidence of a DUI violation and an aggravator. It is not an essential element of a DUI violation and would not, as a practical matter, be evidence of a refusal violation. The defendants assert that the act of refusing a chemical test must concomitantly refer to the act of refusal only as an aggravator and as circumstantial evidence in a trial charging a DUI violation. They assert that it would be inconsistent for the Legislature to intend that the phrase "refused to submit to a [chemical] test" in § 60-6,197.03 also encompasses that act as an essential element of a refusal violation. We disagree. While the same words used in the same sentence are presumed to have the same meaning,[11] we find no reason to presume that these different words used in the same sentence must be restricted to a parallel status in relation to different underlying violations.

The defendants next argue that the Legislature expressed, through § 60-6,197.03(2), that it did not wish to treat people who have a breath or blood alcohol concentration of .15 or above the same as people who refuse chemical testing. In this regard, the defendants point out that, under subsection (2), a person who has no prior convictions is subject to a greater punishment only if, "as part of the current violation," that person had an alcohol concentration of .15 or above. There is no specific reference in § 60-6,197.03(1) or (2) to the act of refusal. A person without prior convictions who is convicted of refusal under § 60-6,197 (or who refused a chemical test as part of violating § 60-6,196) is punished under § 60-6,197.03(1) the same as a person who did not refuse a chemical test.

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[11] See *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

The defendants' assumptions about legislative intent is contrary both to the plain language of the subsections directly at issue and to the legislative history of § 60-6,197.03. The language, "or refused to submit to a test as required under section 60-6,197," was added by 2007 Neb. Laws, L.B. 578, to each of the provisions applicable to persons with prior convictions. These provisions had previously provided only for the punishment of a person who, as part of the current violation, had a breath or blood alcohol concentration of .15 or above. At the floor debate, Senator Kruse explained the reason for the amendment:

> During the summer we discovered that there is a bit of a loophole in there and so, as I say, make corrections. The bill stated that if a person is a repeat offender and has a high BAC [breath or blood alcohol concentration] that there's additional sanctions. Some persons have learned, through advice of their attorneys, to refuse the test and then, by current law, that would then be at .08. So this corrects that, makes a refusal of the test the same as the offense which is what we do in other parts of the statute, and really it's no more than that.[12]

The Legislature thus intended to prevent legally savvy offenders from avoiding, through refusal of a chemical test, the greater penalty for a breath or blood alcohol concentration of .15 or above. The Legislature presumably did not also add this "or refused" language to § 60-6,197.03(2), because persons without prior convictions would not have had the opportunity to be advised by an attorney of this legal loophole. For persons with prior convictions, however, there is no logical reason for this loophole to be closed only for persons who happen to be charged with a DUI violation rather than a refusal violation.

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[12] Floor Debate, L.B. 578, General Affairs Committee, 100th Leg., 1st Sess. 33 (May 9, 2007).

[6] The defendants lastly argue that if we fail to read § 60-6,197.03(8) as limited to DUI violations, persons convicted of refusal violations would be subjected to multiple punishments for the same offense, in violation of the Double Jeopardy Clauses of the federal and Nebraska Constitutions. It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.[13] However, the defendants misunderstand the principles prohibiting double jeopardy.

[7,8] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[14] The primary purpose of the Double Jeopardy Clause is to protect against multiple trials.[15] Thus, as to the protection against multiple punishments for the same offense, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[16]

The question of what punishments are constitutionally permissible is no different from the question of what punishment the legislative branch intended to be imposed.[17]

We have already answered the question of what the Legislature intended, as reflected by the plain language of § 60-6,197.03(8), and which is consistent with the statutory language as a whole and with sound policy. Nevertheless, the defendants argue that § 60-6,197.03(8), when applied to refusal violations, "'double dip[s]'" the act of refusal as a material element of the underlying refusal offense and as a

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[13] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

[14] *State v. Ramirez, supra* note 5.

[15] *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

[16] *Id.*, 459 U.S. at 366.

[17] *Missouri v. Hunter, supra* note 15.

sentencing aggravator.[18] They assert that such "double dipping" is an inherent vice, contrary to principles prohibiting double jeopardy.

The cases cited by the defendants do not stand for this proposition. Rather, most of the cases cited by the defendants hold that the Legislature did not intend for the offender to be punished under both a specific statute providing for an increased punishment due to a specific aggravator and under a generally applicable enhancement statute based upon the same aggravator.[19] These courts reason that there is a presumption that the Legislature did not intend such double enhancement for the same act.

An enhancement is a fact that increases the punishment range to a certain range above what is ordinarily prescribed for the crime that was charged.[20] Double enhancement of a criminal sentence occurs when a factor already used to enhance or aggravate an offense or penalty is reused to subject a defendant to a further enhanced or aggravated offense or penalty.[21]

The cases from other jurisdictions cited by the defendants are not controlling and are inapposite to the case at bar. The act of refusing a chemical test is not an aggravator for an underlying punishment that is then punished further under a separate statute. There is no punishment set forth in § 60-6,197 at all. Furthermore, unlike in those cases cited by the defendants, there is no ambiguity about whether a generally applicable statute applies to a specific crime. The statutes

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[18] Brief for appellant in case No. S-15-788 at 30 and for appellant in case No. S-16-065 at 32.

[19] See, e.g., *People v. Guevara*, 216 Ill. 2d 533, 837 N.E.2d 901, 297 Ill. Dec. 450 (2005); *People v. Ferguson*, 132 Ill. 2d 86, 547 N.E.2d 429, 138 Ill. Dec. 262 (1989); *Vennard v. State*, 803 N.E.2d 678 (Ind. App. 2004). Compare *State v. Jennings*, 106 Wash. App. 532, 24 P.3d 430 (2001).

[20] See, e.g., *Navarro v. State*, 469 S.W.3d 687 (Tex. App. 2015); *People v. Muhammad*, 157 Cal. App. 4th 484, 68 Cal. Rptr. 3d 695 (2007).

[21] See, e.g., *People v. Melvin*, 2015 IL App (2d) 131005, 37 N.E.3d 310, 394 Ill. Dec. 831 (2015).

here at issue fall under the narrowly tailored Nebraska Rules of the Road.[22]

We rely instead on a case in our jurisdiction. In *State v. Ramirez*,[23] we rejected the defendant's double jeopardy argument that the same prior conviction could not be used as both the element of being a felon in possession of a weapon and as a predicate offense for purposes of habitual criminal enhancement. At the time *Ramirez* was decided, Neb. Rev. Stat. § 28-1206 (Reissue 2008) stated that being a felon in possession of a firearm was a Class III felony, but it did not provide for specific sentencing dependent upon the number of prior convictions. We explained that the element of being a felon merely establishes "status" for the crime of violating § 28-1206.[24] We said that "[p]rohibiting a convicted felon from possessing a firearm neither punishes the felon for the underlying felony, nor enhances the sentence for another conviction—it is a new and separate crime of which the prior conviction is merely an element."[25]

Accordingly, we concluded that the use of the same felony conviction as an element of that underlying offense and as an element of enhancement under the habitual criminal statute "simply does not involve double penalty enhancement."[26] We said, "There is a significant distinction between double enhancement, which involves the 'stacking' of multiple enhancement provisions . . . and the use of a conviction to establish status and then enhance a sentence."[27] Being a felon in possession of a firearm was a Class III felony, with no indication it should be treated differently from any other Class III

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[22] See Neb. Rev. Stat. §§ 60-601 to 60-6,383 (Reissue 2010 & Cum. Supp. 2016).

[23] *State v. Ramirez, supra* note 5.

[24] *Id.* at 883, 745 N.W.2d at 222.

[25] *Id.* at 884, 745 N.W.2d at 223.

[26] *Id.* at 883, 745 N.W.2d at 222.

[27] *Id.*

felony for purposes of sentence enhancement. Only the habitual criminal statute was a sentence enhancement.[28]

We squarely rejected in *Ramirez* the defendants' premise in this case that using the same act as an element of the underlying crime and as an element of enhancement inherently implicates double jeopardy. And it is even clearer here that double jeopardy is not implicated by the "double dipping" of refusal as an element of §§ 60-6,197 and 60-6,197.03(8), because § 60-6,197 sets forth no punishment. Without the provisions of § 60-6,197.03, there would be no sentencing statute for the violation of refusing a chemical test. The presumptive sentence for a person who refuses to submit to a chemical test and who has three prior convictions is set forth by subsection (8).

In other words, subsection (8) is the only sentencing provision that applies under these facts. There is no separate underlying crime for which the defendant is punished, and then an "enhancement" of that sentence. There are differing classes of punishment under § 60-6,197.03, depending on the surrounding facts of the underlying violations.

The court in *Navarro v. State*[29] noted that various subsections were effectively separate offenses and not enhancement provisions in a similar statutory scheme, setting forth one class of misdemeanor for driving while intoxicated and another class of misdemeanor for driving while intoxicated with a blood alcohol level of .15 or above. The subsections, the court explained, described specific types of forbidden conduct that affected the degree of the offense, and there was no enlargement of the sentence beyond that for which the crime was ordinarily prescribed.[30]

In such circumstances, where only one sentencing provision is applicable to a given set of facts, there is not multiple punishment as contemplated by the Double Jeopardy Clause.

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[28] *Id.*

[29] *Navarro v. State, supra* note 20.

[30] *Id.*

We are perplexed by the defendants' insistence that the presumptive sentencing for their crimes is a Class IIIA felony as set forth in § 60-6,197.03(7) and that such sentencing has been "enhanced" to a Class III felony by § 60-6,197.03(8). This appears to be little more than a circular argument of their own making. By reading "current violation" as limited to DUI violations, the defendants conclude that subsection (7) provides the presumptive sentencing for their crimes, and thus, they argue that we must read § 60-6,197.03(8) as limited to DUI violations. But subsection (7) clearly states: "*Except as provided in subdivision (8) of this section*, if such person has had three prior convictions, such person shall be guilty of a Class IIIA felony . . . ." (Emphasis supplied.) And we have rejected the defendants' reading of "current violation."

[9] In conclusion, we find no reason to depart from our reading of § 60-6,197.03(8): "current violation" encompasses violations of both §§ 60-6,196 and 60-6,197. Section 60-6,197.03 may be a complex statute, but it not ambiguous. It plainly sets forth that it encompasses violations of either § 60-6,196 or § 60-6,197.

Unconstitutionally Vague

[10] Having found § 60-6,197.03(8) to be unambiguous, we find no merit to the defendants' alternative argument that § 60-6,197.03(8) is unconstitutionally vague. Due process of law requires that criminal statutes be clear and definite.[31] A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[32] We do not seek mathematical certainty, but, rather, flexibility and reasonable breadth.[33] As applied to the defendants' violations of §§ 60-6,197 and 60-6,197.03(8), ordinary people could understand that they

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[31] *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991).

[32] See *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[33] *Id.*

would be punished under § 60-6,197.03(8) if, as part of a violation of § 60-6,197, they refused a chemical test and had three prior convictions.

Cruel and Unusual Punishment and Due Process

We next consider the defendants' due process and cruel and unusual punishment arguments in relation to their prior convictions. Operative January 1, 2012, before the defendants committed the acts leading to the current refusal convictions, the Legislature amended the statutory scheme so that "prior conviction" included either prior refusal or DUI convictions, i.e., to allow for cross-enhancement.[34] Before 2012, for a violation of § 60-6,196, "prior conviction" was defined as any conviction for a violation of § 60-6,196, and for a violation of § 60-6,197, "prior conviction" meant any prior conviction for violating § 60-6,197.[35] There was no cross-enhancement.

Since 2012, § 60-6,197.02 has stated:

> (1) A violation of section 60-6,196 or 60-6,197 shall be punished as provided in sections 60-6,196.01 and 60-6,197.03. For purposes of sentencing under sections 60-6,196.01 and 60-6,197.03:
>
> (a) Prior conviction means a conviction for a violation committed within the fifteen-year period prior to the offense for which the sentence is being imposed as follows:
>
> (i) For a violation of section 60-6,196 [and section 60-6,197 the prior convictions described are identical]:
>
> . . . .
>
> (4) A person arrested for a violation of section 60-6,196 or 60-6,197 before January 1, 2012, but sentenced pursuant to section 60-6,197.03 for such violation on or after January 1, 2012, shall be sentenced according to the

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[34] See 2011 Neb. Laws, L.B. 667.

[35] See § 60-6,197.02(1)(a)(i)(A) and (1)(a)(ii)(A) (Reissue 2010). See, also, *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

provisions of section 60-6,197.03 in effect on the date of arrest.

The defendants were arrested and sentenced after January 1, 2012. They argue it is disproportionate to elevate a misdemeanor to a felony based upon prior DUI convictions when there was no such "'cross-enhancement'" before 2012, at the time their prior DUI's were committed.[36] They assert this retroactive cross-enhancement violates the prohibition against cruel and unusual punishment and relatedly assert that their due process rights were violated by punishing them as repeat offenders when they had never before committed the crime of refusal.

The defendants concede that in *State v. Hansen*,[37] we said statutes expanding the "look-back" period for prior convictions do not violate ex post facto principles, because the habitual criminal statutes do not punish the defendant for previous offenses; instead, they punish the defendant's persistence in crime. Nevertheless, the defendants argue that redefining what constitutes a prior conviction is more significant than expanding the temporal scope of the prior convictions that can be used for purposes of enhancement. They also state that they are not making an argument based on ex post facto principles.

For their due process argument, the defendants cite only to *Weaver v. Graham*,[38] which refers to protection of preexisting entitlements, something not at issue here. The defendants do not specify whether they rely on principles of procedural or substantive due process or explain how "due process" connects to their conclusion that it is unconstitutional to use their prior DUI convictions to satisfy the elements of § 60-6,197.03(8).

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[36] Brief for appellant in case No. S-15-788 at 27 and for appellant in case No. S-16-065 at 28.

[37] *State v. Hansen*, 258 Neb. 752, 755, 605 N.W.2d 461, 464 (2000).

[38] *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[11] We find that the due process issue raised by the defendants has been insufficiently argued for this court to address it. 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.[39] This court will not address arguments that are too generalized or vague to be understood.[40]

And we find no merit to the defendants' cruel and unusual punishment argument. The U.S. Supreme Court has upheld habitual criminal statutes against similar challenges, explaining that the harsher sentence is justified by the fact that those persons who commit repeated criminal acts have shown they are incapable of conforming to the norms of society as established by criminal law.[41] This justification does not depend on the previous crimes used for enhancement as being in violation of the same statutes for which the defendants are presently being convicted. We conclude that it was not cruel and unusual to subject the defendants to a harsher penalty for their current refusal convictions based on their previous DUI convictions.

Insufficient Allegations

Finally, the defendants assert that the charging informations were defective because they failed to mirror the language of § 60-6,197.03(8) that "as part of the current violation," the defendants refused to submit to a test as required by § 60-6,197. The defendants concede that the informations alleged that under § 60-6,197.03(8), the defendants had refused to submit to a chemical test and had three prior convictions. For reasons that are not entirely clear, the defendants nonetheless argue that by excluding the "as part of the current

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[39] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

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

[41] See *State v. Johnson*, 290 Neb. 369, 859 N.W.2d 877 (2015), citing *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003).

violation" phrasing from the informations, the State failed to sufficiently allege Class III felonies under § 60-6,197.03(8) and that instead, they were charged only with Class IIIA felonies under § 60-6,197.03(7).

[12] The function of an information is twofold.[42] With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.[43] When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient.[44]

[13] The information may use the language of the statute or its equivalent.[45] Here, it was sufficient for the State to make reference to §§ 60-6,197 and 60-6,197.03(8), to refusal, and to the three prior convictions. We find no merit to the defendants' assertion that the informations were defective.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the district court.

Affirmed.

Stacy, J., not participating.

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[42] *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001).

[43] *Id.*

[44] *Chadek v. State*, 138 Neb. 626, 294 N.W. 384 (1940).

[45] See *Barton v. State*, 111 Neb. 673, 197 N.W. 423 (1924).

In re Interest of LeVanta S., a child under 18 years of age.
State of Nebraska, appellee and cross-appellee, v. Patricia B., appellant, and Calvin S., appellee and cross-appellant.

In re Interest of LeRonn S., a child under 18 years of age.
State of Nebraska, appellee and cross-appellee, v. Patricia B., appellant, and Calvin S., appellee and cross-appellant.

887 N.W.2d 502

Filed December 2, 2016. Nos. S-15-909, S-15-910.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** Appellate courts in Nebraska have jurisdiction to hear appeals from final orders issued by juvenile courts in the same manner as appeals from the district courts.
4. **Final Orders: Appeal and Error.** An order that affects a substantial right made in a special proceeding is a final order.
5. **Juvenile Courts: Appeal and Error.** Juvenile court proceedings are special proceedings for purposes of appeal.
6. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.

7. **Juvenile Courts: Parental Rights: Parent and Child: Time: Final Orders: Appeal and Error.** When determining whether a juvenile court order affects a substantial right of a parent to raise his or her child, an appellate court considers the object of the order as well as the length of time over which the parent's relationship with the child may reasonably be expected to be disturbed.
8. **Juvenile Courts: Minors.** Nebraska law requires the creation of permanency plans for every juvenile placed in out-of-home care and requires juvenile courts to hold a hearing on the plan.
9. **Juvenile Courts: Judgments: Parental Rights: Adoption: Guardians and Conservators.** The juvenile court's order on a permanency plan must include whether the objective is for the juvenile to be returned to the parent, referred for a termination-of-parental-rights filing, placed for adoption, or referred for a guardianship.
10. **Parental Rights.** Nebraska law requires reasonable efforts to be made to reunify families after a juvenile is placed in out-of-home care.
11. **Parental Rights: Adoption: Guardians and Conservators.** Reasonable efforts toward reunification may be made concurrently with a plan for adoption or guardianship, but the objective of family preservation and reunification must take priority over the other objectives.
12. **Guardians and Conservators: Minors.** The first requirement for establishment of a permanent guardianship is that the juvenile be adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015).
13. **Parental Rights.** An adjudication of a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) can be a basis for termination of parental rights if subsequent reasonable efforts to preserve and reunify the family have failed. But an adjudication under § 43-247(3)(c) is not a ground for termination under Neb. Rev. Stat. § 43-292 (Reissue 2016).
14. **Guardians and Conservators: Minors.** Pursuant to Nebraska's permanent juvenile guardianship statute, Neb. Rev. Stat. § 43-1312.01 (Reissue 2016), an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) is a requirement for establishing a guardianship.
15. **Juvenile Courts: Jurisdiction: Mental Health.** The only basis for the court's jurisdiction in a case under Neb. Rev. Stat. § 43-247(3)(c) (Supp. 2015) is that the juvenile is mentally ill and dangerous.
16. **Parental Rights: Due Process.** The absence of an opportunity for parents to respond to allegations about their fitness to raise their children implicates their due process rights.
17. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition. But the central meaning of procedural due process is clear: Parties whose rights are to be affected are entitled to be heard.

18. **Parental Rights: Due Process: Appeal and Error.** The absence of a formal opportunity to be heard distinguishes a case under Neb. Rev. Stat. § 43-247(3)(c) (Supp. 2015) from a case under § 43-247(3)(a) in an appellate court's analysis of whether the change in permanency objective was a final order.
19. **Statutes: Appeal and Error.** Appellate courts will adhere to the plain meaning of a statute absent a statutory indication to the contrary.
20. **Guardians and Conservators: Minors.** Because Neb. Rev. Stat. § 43-1312.01(1)(a) (Reissue 2016) requires that for the establishment of a guardianship, the child is a juvenile who has been adjudged to be under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015), a guardianship may not be established without such adjudication.

Appeals from the Separate Juvenile Court of Douglas County: Elizabeth Crnkovich, Judge. Reversed and remanded for further proceedings.

Regina T. Makaitis for appellant.

Karen C. Hicks, of Hicks Law, P.C., L.L.O., for appellee Calvin S.

Donald W. Kleine, Douglas County Attorney, and Jennifer C. Clark for appellee State of Nebraska.

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

Wright, J.

I. NATURE OF CASE

In 2013, the separate juvenile court of Douglas County adjudicated twin brothers LeVanta S. and LeRonn S. under Neb. Rev. Stat. § 43-247(3)(c) (Reissue 2008) as "mentally ill and dangerous." Both brothers were eventually placed in out-of-home care. In September 2015, the juvenile court entered an order changing the brothers' permanency objective from family reunification to guardianship. The mother (appellant, Patricia B.) and the father (cross-appellant, Calvin S.) separately appeal from this order in each brother's case. The appeals from the two cases have been consolidated.

II. FACTS

1. Family Background

At a very young age, LeVanta and LeRonn were adopted by Patricia and Calvin, their parents. The twin brothers have developmental disabilities due to fetal alcohol syndrome. Both have IQ's in the "Extremely Low Range" and meet the criteria for "Mild Mental Retardation." They were 15 years old when their cases began in January 2013, and are now 18 years old.

The parents were separated before January 2013 and have since divorced. After the parents' separation, one brother lived with each parent. From the time the children were 5 years old, the parents have sought professional help in dealing with the brothers' behaviors.

2. Petition and First Hearing

In January 2013, the brothers were brought before the juvenile court for criminal delinquency charges of trespass and truancy. These charges were dropped when it was determined that they were not mentally competent to be tried. The county attorney then filed petitions alleging the brothers were "mentally ill and dangerous" within § 43-247(3)(c). The State moved for temporary custody with the Department of Health and Human Services (DHHS), with placement to include the parental homes.

3. Adjudication and Disposition

An adjudication hearing was held April 3, 2013, and the brothers and the mother and father were present. Each brother had appointed counsel, but the parents were not represented by counsel. The family permanency specialist and the mother both testified. Examples of the brothers' poor judgment, fighting, anger problems, and other violent behavior were offered. Testimony was also offered that LeRonn would at times refuse to take his medications. The court found by clear and convincing evidence that the brothers were within the definition of

§ 43-247(3)(c). Temporary custody was placed with DHHS. The parents did not appeal the adjudication.

A disposition hearing was held May 21, 2013, but the parents were not present and were not represented by counsel. At the beginning of the hearing, there was some discussion whether the parents had been informed of the hearing date and time. The court ordered that the brothers stay at home with their parents, but that applications for out-of-home placements should be made. The court ordered in-home developmental disability services to be provided, with both parents to participate. All visits by the parents were to be supervised, and they were to participate in therapy and complete a psychiatric evaluation.

The court found that reasonable efforts—including evaluations, family support, and case management—had been made to return each brother to the parents' custody, but that it was in their best interests to remain in the temporary custody of DHHS.

4. Additional Hearings

The juvenile court continued to have additional review hearings. The family permanency objective was stated as "family preservation" or "reunification," but applications for out-of-home placements were to be made.

In July 2013, LeRonn threw a mailbox through the front window of his father's house. He was moved from his father's house to an "extended family home" for individuals with developmental disabilities. Later that month, the court appointed counsel to represent the parents.

In June 2014, when LeVanta's behavior regressed, the court ordered that he be placed in out-of-home care. In July, he was placed in a group home. The court sustained an ex parte motion requiring supervision of all visits between the parents and the boys, because the mother reportedly took the brothers on a visit together, in violation of a court order, and the father and LeRonn had gotten into an argument.

At a December 18, 2014, review hearing, the judge questioned whether an adjudication under § 43-247(3)(c) was the right procedure in this case or whether subsection (3)(a) was more appropriate. The court said:

> Without a doubt, [these boys] have their own set of challenges. There is no question about that. That does not make them delinquent, and it does not make them mentally ill and dangerous.
>
> They have a mother and a father who are good, kind people . . . who love these boys dearly. But I'm — I find at every hearing that what is at the heart of these challenges is an inability to parent these boys based on their unique needs.

No new petition was filed alleging the parents' "inability to parent these boys based on their unique needs."

Upon the recommendation of DHHS, the court ordered that LeVanta be placed in the same foster home as LeRonn so they could work on building their relationship and interacting appropriately without fighting. The orders following the hearing stated that the permanency objective was "reunification," with temporary custody remaining with DHHS. The parents were ordered to "participate with the family support worker until successful discharge" in order to learn to better teach the brothers healthy coping skills and ways to interact with each other.

At another review hearing on March 19, 2015, it was reported that the brothers were doing well in their placements and in school. The court ordered the parents to participate in family support services to work on parenting the brothers and to participate in individual and family therapy.

Because a finding of a lack of reasonable efforts "can impact families by shutting off funding for services" and because many of the previous problems had been corrected, the court declined to find a lack of reasonable efforts on the part of DHHS. The court found reasonable efforts had been made by DHHS.

5. Change of Permanency Objective

At the review hearing on September 10, 2015, DHHS recommended continuing to work on the permanency plan of reunification, while making concurrent permanency plans of a guardianship. The parents opposed the recommendation of a guardianship, and the mother's request for a continuance and an evidentiary hearing on the issue was denied. The attorneys for the brothers requested the court to close the case based on the adjudication under § 43-247(3)(c), because the brothers were doing very well.

The court denied the requests to close the case and adopted the permanency objective of guardianship, stating:

> So indeed, young man and your brother, too, you are doing superbly. I could not be more proud. And I wish that I could grant your request today. But it is not because of your behavior that I cannot.
>
> At the same time, [the parents] — I think I've said this before — are loving people, are good people, are kind people, and they love their sons and their sons love them. But it has been clear at every hearing that they are unable to place themselves in a position of parenting these children. And that was clear even when early on the specific services to the kids were confusing.
>
> I'm not letting [DHHS] off the hook. I disagree with — that someone has a mindset that the only solution is a guardianship. I believe the evidence supports that the possibility of reunification, given the almost three years that we have been before the Court, is not likely to happen in the minority of these children before their 19th birthday. And it is those combination of things in the evidence that leads me to conclude that we — a guardianship is the most appropriate permanency plan for these two young men. But I want to know for sure that they will stay in their present placement.
>
> That is the order of the Court. We are adjourned. Thank you.

The written order stated that the "the primary permanency objective is a guardianship." It did not state that this permanency objective was concurrent with an objective of reunification.

The parents were ordered to continue in individual and family therapy. For the first time, the father was ordered to participate in urinalysis testing and to complete a chemical dependency evaluation. The mother was ordered to allow the family permanency specialist to conduct drop-in, walk-through inspections of her home in order to have visits there.

Both parents separately appealed from these orders.

III. ASSIGNMENTS OF ERROR

The mother and father raise the following issues: whether the juvenile court erred by issuing an order changing the permanency objective to guardianship when the juveniles had been adjudicated only under § 43-247(3)(c) and whether the juvenile court violated the parents' constitutional right to due process. The mother claims the court erred in denying her request for an evidentiary hearing on the issue of changing the permanency objective to guardianship.

IV. STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[2]

V. ANALYSIS

This case presents these issues: whether the order of the juvenile court changing the permanency objective for the

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[1] *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

[2] *Id.*

brothers was a final, appealable order; whether the juvenile court exceeded its authority by changing the permanency objective to guardianship when there has been no adjudication under § 43-247(3)(a) (Supp. 2015). The parents argue that the statute for juvenile guardianships requires an adjudication under subsection (3)(a) before a guardianship may be established. The State argues that the juvenile court has broad authority to adopt permanency plans for juveniles in both § 43-247(3)(a) and (c) cases under Neb. Rev. Stat. § 43-285 (Supp. 2015).

The last issue is whether the juvenile court's order violated the parents' due process rights. The parents argue that their rights were violated by the adoption of the permanency plan of guardianship because the only basis for the court's jurisdiction was an adjudication that the brothers were "mentally ill and dangerous" under § 43-247(3)(c). In a subsection (3)(c) case, no allegation is made regarding the fitness of a parent to raise his or her child, nor does a parent have the opportunity to respond to the petition. The parents also assert that their due process rights were violated because they were not advised of their rights or given notice of the possible consequences of future dispositional orders, such as the establishment of a guardianship. The State claims that because the parents were present in the courtroom when the juveniles were advised of their rights, the parents were thereby also advised of their rights.

1. Jurisdiction

As a preliminary matter, we must determine whether we have jurisdiction over this appeal. The State has asserted that the orders from which the mother and father appeal are not final, appealable orders.

[3-6] Appellate courts in Nebraska have jurisdiction to hear appeals from final orders issued by juvenile courts in the same manner as appeals from the district courts.[3] An order that "affect[s] a substantial right made in a special

[3] Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016).

proceeding" is a final order.[4] Juvenile court proceedings are "special proceedings" for purposes of appeal.[5] The question is whether the order affects a substantial right.[6] A substantial right is an essential legal right, not a mere technical right.[7] We have explained:

> Numerous factors determine whether an order affects a substantial right for purposes of interlocutory appeal. Broadly, *these factors relate to the importance of the right and the importance of the effect on the right by the order at issue*. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial. Whether the effect of an order is substantial depends on "'whether it affects with finality the rights of the parties in the subject matter.'" It also depends on whether the right could otherwise effectively be vindicated. An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review. Stated another way, 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.'"[8]

[7] When determining whether a juvenile court order affects a substantial right of a parent to raise his or her child, we consider the object of the order as well as the length of time over which the parent's relationship with the child may reasonably be expected to be disturbed.[9]

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

[5] *In re Interest of Octavio B. et al., supra* note 1, 290 Neb. at 596, 861 N.W.2d at 422.

[6] *Id.*

[7] *Id.*

[8] *Deines v. Essex Corp.*, 293 Neb. 577, 581, 879 N.W.2d 30, 33-34 (2016) (emphasis supplied).

[9] See *In re Interest of Octavio B. et al., supra* note 1.

(a) Permanency Plans

[8-11] Nebraska law requires the creation of permanency plans for every juvenile placed in out-of-home care and requires juvenile courts to hold a hearing on the plan.[10] The court's order on a permanency plan must include whether the objective is for the juvenile to be returned to the parent, referred for a termination-of-parental-rights filing, placed for adoption, or referred for a guardianship.[11] Nebraska law also requires "reasonable efforts" to be made to reunify families after a juvenile is placed in out-of-home care. Reasonable efforts toward reunification may be made concurrently with a plan for adoption or guardianship, but the objective of family preservation and reunification must take priority over the other objectives.[12]

[12] If the juvenile's permanency objective does not include reunification or adoption, a permanent guardianship may be established in certain circumstances.[13] The first requirement for establishment of a permanent guardianship is that the juvenile be adjudicated under § 43-247(3)(a).[14] Guardianship gives the guardian all of the powers, rights, and duties that a child's parents would have, but does not terminate a parent's rights.[15]

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[10] Neb. Rev. Stat. §§ 43-1311 (Reissue 2016) and 43-1312 (Cum. Supp. 2014). See, also, generally, Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. §§ 673b, 678, 679b (2012), requiring states to adopt permanency plans in their juvenile laws in order to maintain federal funding); *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002) (discussing permanency plans and reasonable efforts for family reunification); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999) (discussing adoption of permanency plans in Nebraska law).

[11] § 43-1312(3).

[12] Neb. Rev. Stat. § 43-283.01(6) (Reissue 2016).

[13] Neb. Rev. Stat. § 43-1312.01 (Reissue 2016).

[14] § 43-1312.01(1)(a).

[15] § 43-1312.01(2) and (7).

In the cases *In re Interest of Sarah K.*,[16] *In re Interest of Tayla R.*,[17] *In re Interest of Diana M. et al.*,[18] and *In re Interest of Octavio B. et al.*,[19] this court and the Nebraska Court of Appeals have considered whether an order in a juvenile case, which continues prior dispositional orders but changes the permanency objective from family reunification to another objective, is a final, appealable order. In these cases, the permanency objectives were changed from family reunification to adoption, guardianship, or foster care transitioning to independent living. Read together, these cases provide that such an order is not a final, appealable order unless the parent's ability to achieve rehabilitation and family reunification has been clearly eliminated. However, in all of these cases, the juveniles had been adjudicated under § 43-247(3)(a). As we will discuss, the order in this case affects a substantial right of the parents in a way that a similar order in a subsection (3)(a) case would not.

(b) § 43-247(3)(c): "mentally ill and dangerous"

In the cases at bar, the brothers were both adjudicated under § 43-247(3)(c) as "mentally ill and dangerous." The nature of the adjudication bringing the brothers under the jurisdiction of the juvenile court is important to understanding whether the order affected a substantial right of the parents. The order implicates the parents' due process rights.

Subsection (3)(c) of § 43-247 gives the juvenile court jurisdiction over any juvenile "who is mentally ill and dangerous as defined in section 71-908." Neb. Rev. Stat. § 71-908 (Reissue 2009) is a part of the Nebraska Mental Health Commitment Act and provides:

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[16] *In re Interest of Sarah K., supra* note 10.

[17] *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

[18] *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013).

[19] *In re Interest of Octavio B. et al., supra* note 1.

> Mentally ill and dangerous person means a person who is mentally ill or substance dependent and because of such mental illness or substance dependence presents:
>
> (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
>
> (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

Subsection (3)(c) is substantially different from subsection (3)(a), which, generally speaking, applies to situations in which a juvenile lacks proper parental care, support, or supervision.[20] Because a subsection (3)(a) adjudication addresses the issue of parental fitness, significant legal consequences can flow from such an adjudication and greater procedural protections are required.

[13,14] In a case under § 43-247(3)(a), a parent has the opportunity to deny a petition's allegations.[21] This is a key distinction from a subsection (3)(c) petition, in which the juvenile responds but to which parents have no statutory right to respond.[22] Moreover, an adjudication of a juvenile under

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[20] § 43-247(3)(a).

[21] See Neb. Rev. Stat. § 43-279.01 (Reissue 2016). See, also, *In re Interest of Trenton W. et al.*, 22 Neb. App. 976, 983, 865 N.W.2d 804, 811 (2015) ("factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of § 43-247(3)(a)").

[22] See § 43-279.01 (providing parents with right to respond to allegations in § 43-247(3)(a) petition) and Neb. Rev. Stat. § 43-279 (Reissue 2008) (providing juveniles with right to respond to allegations under § 43-247(1), (2), (3)(b), or (4)).

subsection (3)(a) can be a basis for termination of parental rights if subsequent reasonable efforts to preserve and reunify the family have failed.[23] But an adjudication under subsection (3)(c) is not a ground for termination under § 43-292. Pursuant to Nebraska's permanent juvenile guardianship statute, § 43-1312.01, an adjudication under subsection (3)(a) is a requirement for establishing a guardianship.

Under subsection (3)(a) of § 43-247, a parent has both the opportunity and the incentive to contest and appeal an adjudication, which the parent does not have when the child is adjudicated under subsection (3)(c). And subsequent review orders in a subsection (3)(a) case do not typically affect a substantial right for purposes of appeal, because the parent has been given the full and fair opportunity to respond to the allegations at the adjudication stage. The parent has been given notice of the possible consequences of future dispositional orders and any applicable rights. Furthermore, as compared to subsection (3)(c), such changes in permanency objectives are within the power of the court under a subsection (3)(a) adjudication. Thus, the order changing the permanency plan in a subsection (3)(a) case does not necessarily affect a substantial right of the parent when it continues prior orders directed at family preservation and reunification or remedying the reasons that led to the adjudication.

[15,16] But in an adjudication under § 43-247(3)(c), no determination is made of a parent's ability to care for his or her child. Nor does the parent have the opportunity to respond to the allegations in the subsection (3)(c) petition, because the allegations relate only to the juvenile and not to the parent. The only basis for the court's jurisdiction in a case under subsection (3)(c) is that the juvenile is "mentally ill and dangerous." The absence of an opportunity for parents to respond to allegations about their fitness to raise their children implicates their due process rights.

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[23] Neb. Rev. Stat. § 43-292(6) (Reissue 2016).

[17] The constitutional right to due process protects the parent-child relationship.[24] The concept of due process embodies the notion of fundamental fairness and defies precise definition.[25] But "'the central meaning of procedural due process [is] clear: "Parties whose rights are to be affected are entitled to be heard . . . ."'"[26] Thus we have said:

> When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.[27]

Because this was a case under § 43-247(3)(c), based upon the adjudication of the juveniles as "mentally ill and dangerous," there has been no adjudication under subsection (3)(a) of the parents' ability or fitness to raise their children.

[18] The absence of a formal opportunity to be heard distinguishes this case from cases under § 43-247(3)(a) in our analysis of whether the change in permanency objective was a final order. It is against this backdrop that the juvenile court's orders changing the brothers' permanency objective to guardianship uniquely affects the parents' substantial right to raise their children.

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[24] *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of Davonest D. et al.*, 19 Neb. App. 543, 809 N.W.2d 819 (2012).

[25] *In re Interest of L.V., supra* note 24.

[26] *Id.* at 413, 482 N.W.2d at 257, quoting *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

[27] *In re Interest of L.V., supra* note 24, 240 Neb. at 413-14, 482 N.W.2d at 257.

We conclude the juvenile court's order affected a substantial right of the parents, because they were afforded no formal process to determine their ability to raise their children. Because the order affected a substantial right, it is a final, appealable order.

2. Change of Permanency Plan to Guardianship

Having concluded that we have jurisdiction, we turn to the merits of this appeal. The parents appeal the order issued September 14, 2015, which changed the permanency objectives for both brothers from family reunification to guardianship.

The parents argue that Nebraska's statute governing permanent guardianships for juveniles, § 43-1312.01, requires an adjudication under subsection (3)(a) of § 43-247 as a prerequisite for the establishment of a guardianship. The State argues that § 43-285 gives the court the power to order DHHS to prepare a permanency plan for juveniles that have been adjudicated under either subsection (3)(a) or subsection (3)(c) of § 43-247.

In 2014, the Nebraska Legislature passed L.B. 908 to "provide for the appointment of a guardian for a child who is adjudicated under subdivision (3)(a) of 43-247," among other reasons.[28] The guardianship provision of L.B. 908 was codified at § 43-1312.01. The statute provides that if "the permanency plan for a child . . . does not recommend return of the child to his or her parent or that the child be placed for adoption, the juvenile court may place the child in a guardianship" if certain requirements are met.[29] The first requirement is that "[t]he child is a juvenile who has been adjudged to be under subdivision (3)(a) of section 43-247."[30]

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[28] Committee Statement, L.B. 908, Judiciary Committee, 103d Leg., 2d Sess. (Jan. 29, 2014).

[29] § 43-1312.01(1).

[30] § 43-1312.01(1)(a).

[19] The parents correctly assert that the requirements listed in § 43-1312.01(1) form a conjunctive list. Elements (a) through (d) in subsection (1) are connected with the word "and." When connecting a list of elements, "and" connotes a conjunctive list while "or" connotes a disjunctive list.[31] We have said that the plain meaning of the words "and" and "or," when used to connect elements in a list, may be disregarded when such a reading would lead to an absurd result in conflict with clear legislative intent.[32] And we will adhere to the plain meaning of a statute absent a statutory indication to the contrary.[33]

[20] Moreover, the content of the statute supports the conclusion that the elements form a conjunctive list, each of which must be met before a guardianship may be established. For example, subsection (1)(d)(i) of § 43-1312.01 requires that the guardian be "suitable and able to provide a safe and permanent home for the child." It would be unreasonable to read this as a disjunctive list, so that this requirement need

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[31] See, *Grammer v. Lucking*, 292 Neb. 475, 479, 873 N.W.2d 387, 390 (2016) ("[t]he word 'or,' when used properly, is disjunctive"); *Zach v. Eacker*, 271 Neb. 868, 872, 716 N.W.2d 437, 441 (2006) (referring to "the conjunctive connector 'and'"); *DG Enterprises, LLC-Will Tax, LLC v. Cornelius*, 2015 IL 118975, ¶ 31, 43 N.E.3d 1014, 1021, 398 Ill. Dec. 104, 112 (2015) ("generally the use of a conjunctive such as 'and' indicates that the legislature intended that *all* of the listed requirements be met"); *Sargent v. Shaffer*, 467 S.W.3d 198, 207 (Ky. 2015) ("courts apply the conjunction, 'and,' as written by the legislature unless that construction would clearly thwart the intent of the legislature or produce an absurd result"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116-25 (2012) (discussing conjunctive and disjunctive lists); 1A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 21:14 (7th ed. 2009) (discussing "[c]onjunctive and disjunctive words").

[32] See, *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005); *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952); *Carlsen v. State*, 127 Neb. 11, 254 N.W. 744 (1934); *State, ex rel. Spillman, v. Brictson Mfg. Co.*, 114 Neb. 341, 207 N.W. 664 (1926).

[33] See, e.g., *Shurigar v. Nebraska State Patrol*, 293 Neb. 606, 879 N.W.2d 25 (2016).

not be met if any of the other requirements in subsections (1)(a) through (d) were met. Both the plain language of the statute and common sense require us to read § 43-1312.01(1) as a conjunctive list. Because § 43-1312.01(1)(a) requires that for the establishment of a guardianship, "[t]he child is a juvenile who has been adjudged to be under subdivision (3)(a) of section 43-247," a guardianship may not be established without such adjudication.

The State argues the court had the authority to change the permanency objective to guardianship under § 43-285. Subsection (2)(a) of that statute states in part:

> Following an adjudication hearing at which a juvenile is adjudged to be under subdivision (3)(a) or (c) of section 43-247, the court may order the department to prepare and file with the court a proposed plan for the care, placement, services, and *permanency* which are to be provided to such juvenile and his or her family.[34]

This statute gives a juvenile court the authority to order DHHS to prepare a plan for the care of juveniles in its custody, including a permanency objective and the authority to adopt such an objective. The question is whether the juvenile court had the authority to adopt a permanency objective of guardianship in this case under § 43-247(3)(c) without a subsection (3)(a) adjudication. We hold that it did not. If a guardianship may not be lawfully established without a subsection (3)(a) adjudication, then neither may a permanency plan of guardianship be adopted without such adjudication. The juvenile court exceeded its authority in its order of September 14, 2015, by adopting the permanency plan of guardianship.

3. Due Process

The parents also assert that the juvenile court's order changing the permanency objective to guardianship violated their constitutional right to due process. They argue that because

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[34] § 43-285(2)(a) (emphasis supplied).

the case was filed as a case under § 43-247(3)(c), in which no allegations were made against the parents, and because they were never advised of their rights or the possible consequences of the disposition orders of the court, including that a guardianship may be established, their constitutional right to due process was violated. The mother also asserts that the juvenile court's denial of her request for an evidentiary hearing on the issue of adopting the permanency plan of guardianship violated her due process rights. We have discussed the parents' due process rights in the context of our final order analysis in this case. Because we reverse the juvenile court's order on the basis that a permanency plan of guardianship may not be adopted without a subsection (3)(a) adjudication, we need not reach this assignment of error on the merits.

VI. CONCLUSION

The juvenile court's order adopting the permanency objective of guardianship was a final, appealable order, because it affected a substantial right of the parents in a special proceeding. The parents' substantial right to raise their children was affected, because no determinations were made about their fitness and ability to care for their children in this case under § 43-247(3)(c). They were not given the opportunity to formally respond to the court's opinion that "they are unable to place themselves in a position of parenting these children." The juvenile court exceeded its authority in adopting a permanency objective of guardianship in a case in which there has been no adjudication under § 43-247(3)(a). We reverse the order of September 14, 2015, and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

State of Nebraska, appellee, v. Rosario Betancourt-Garcia, appellant.

887 N.W.2d 296

Filed December 2, 2016. No. S-15-1001.

1. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
2. **Judgments: Pleadings: Plea in Abatement: Appeal and Error.** Regarding questions of law presented by a motion to quash or plea in abatement, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **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.
5. **Courts: Appeal and Error.** Appellate review is limited to those errors specifically assigned as error in an appeal to a higher appellate court.
6. **Criminal Law: Limitations of Actions: Indictments and Informations.** It is generally sufficient in an information to describe the crime charged in the language of the statute and it is not ordinarily necessary to negative the exceptions contained in a statute defining a crime if they are not descriptive of the offense. The statute of limitations is not descriptive of the offense, and it is not necessary to plead an exception which makes it inoperative.

7. **Criminal Law: Limitations of Actions: Pleadings: Pleas.** Statutes of limitations, as applied to criminal procedure, need not be pleaded and may be raised under the general plea of not guilty.
8. **Criminal Law: Indictments and Informations: Proof.** The State, within the information, has the burden to set forth all of the elements of the crime charged.
9. **Criminal Law: Limitations of Actions: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 29-110(1) (Reissue 1995), the phrase "fleeing from justice" means leaving one's usual abode or leaving the jurisdiction where an offense has been committed, with intent to avoid detection, prosecution, or punishment for some public offense.
10. **Convictions: Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
11. **Criminal Law: Directed Verdict.** In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
12. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
13. **Effectiveness of Counsel: Proof: Appeal and Error.** An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal.
14. ____: ____: ____. 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. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
15. **Effectiveness of Counsel: Proof.** To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
16. **Effectiveness of Counsel: Speedy Trial: Appeal and Error.** When a defendant alleges he or she was prejudiced by trial counsel's failure to

properly assert the defendant's speedy trial rights on appeal, the court must consider the merits of the defendant's speedy trial rights under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

17. **Effectiveness of Counsel: Speedy Trial.** Only if a motion for discharge on speedy trial grounds should have resulted in the defendant's absolute discharge, thus barring a subsequent trial and conviction, could a failure by counsel to make the motion for discharge be deemed prejudicial.
18. **Speedy Trial.** Nebraska's speedy trial statutes require that those who are charged with crimes be brought to trial within 6 months, as calculated by the applicable statute. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2014).
19. ____. If the State does not bring the defendant to trial within the permissible time, the court must order an absolute discharge from the offense charged.
20. **Speedy Trial: Indictments and Informations.** For a felony, the speedy trial clock begins to run on the date that the indictment is returned or the information is filed, not on the date on which the complaint is filed.
21. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.
22. ____: ____. In analyzing the prejudice factor of the four-factor test to determine whether constitutional speedy trial rights have been violated, the U.S. Supreme Court enumerated three aspects: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence.
23. **Constitutional Law: Speedy Trial: Presumptions.** Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance when determining whether constitutional speedy trial rights have been violated.
24. **Constitutional Law: Speedy Trial.** A showing of actual prejudice to a defendant alleging violation of constitutional speedy trial rights is

required if the government exercised reasonable diligence in pursuing the defendant.

25. **Kidnapping: Sentences.** The provisions of Neb. Rev. Stat. § 28-313(3) (Reissue 1995) are mitigating circumstances which may reduce the penalty for kidnapping and are therefore a matter for the court at sentencing, not the jury.
26. **Kidnapping.** Rescue is not a voluntary release of a kidnapping victim.
27. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
28. **Constitutional Law: Criminal Law: Pleas.** The considerations involved in determining whether one freely, intelligently, voluntarily, and understandingly pleads guilty have no application where a criminal defendant pleads not guilty, for in such a circumstance, the defendant does not surrender the constitutional rights inherent in a trial.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Mark D. Albin for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Kelch, J.

I. INTRODUCTION

Following a jury trial, Rosario Betancourt-Garcia (Betancourt) appeals his convictions and sentences for kidnapping, use of a firearm to commit kidnapping, and conspiracy to commit kidnapping. On appeal, Betancourt alleges that the district court for Madison County erred in overruling his motion to quash, in overruling his motion for directed verdict, and in sentencing him for kidnapping. Further, Betancourt contends

that he received ineffective assistance of counsel. We reject Betancourt's claims, but we find plain error in the sentencing for the conspiracy conviction. Therefore, we affirm in part and in part vacate and remand for resentencing.

II. FACTS

On November 15, 2003, officers of the Madison Police Department responded to a call and found a young man who had been bound and gagged. After the young man related that Betancourt had kidnapped him, the Madison Police Department conducted an immediate search for Betancourt, but did not find him.

On November 17, 2003, the Madison County Court issued warrants for the arrest of Betancourt and another suspect. That day, the State filed an information in county court, charging Betancourt with kidnapping and use of a deadly weapon to commit a felony.

On May 7, 2004, Texas authorities arrested Betancourt in Plano, Texas, based on the Nebraska warrant. On May 11, Betancourt signed a waiver of extradition proceedings.

On May 17, 2004, the Madison County sherriff's office dispatched transport personnel to Texas to extradite Betancourt back to Nebraska. At that time, the Madison County sherriff's office withdrew the warrant from a national notification system which was termed at trial the "teletype system" and placed a "hold" on Betancourt in Texas, but the warrant itself remained active. That day, Texas authorities mistakenly transferred Betancourt to the custody of the "immigration services," and subsequently, he was deported to Mexico.

On May 17, 2004, the Madison County sherriff's office directed its transport personnel, then en route to Texas, to return to Nebraska. On May 25, the Madison County sherriff's office reentered Betancourt's still-active warrant on the teletype system.

On July 1, 2013, nearly a decade later, Betancourt was arrested once more in Texas, based on the Nebraska warrant, and extradited to Nebraska.

The case was bound over to district court, and on August 21, 2013, the State filed an information charging Betancourt with kidnapping and use of a deadly weapon to commit a felony. Betancourt pled not guilty, and on November 14, he filed a motion for absolute discharge on speedy trial grounds. After hearing the foregoing evidence surrounding the events leading up to Betancourt's ultimate arrest and extradition to Nebraska, the district court overruled the motion. Betancourt's counsel appealed on his behalf, but then subsequently moved to dismiss that appeal, which motion the Nebraska Court of Appeals granted.

On May 21, 2014, the State filed an amended information. It again charged Betancourt with kidnapping (count I) and use of a deadly weapon to commit a felony (count II) and added a third charge, conspiracy to commit kidnapping (count III).

In response to the amended information, Betancourt filed a motion to quash count III as barred by the statute of limitations. His motion to quash stated:

> 1. That the State filed an Amended Information charging [Betancourt] in Count III with Conspiracy to Commit Kidnapping on May 21st, 2014;
>
> 2. That the State has not previously filed any information charging [Betancourt] with Conspiracy to Commit Kidnapping;
>
> 3. That the alleged events are to have occurred on November 15th, 2003, and
>
> 4. That the time for filing an Information for Conspiracy to Commit Kidnapping has lapsed.

The district court conducted a hearing, wherein it again heard the evidence recounted above regarding the events preceding Betancourt's ultimate arrest and extradition to Nebraska. The district court overruled Betancourt's motion to quash.

Betancourt later pled not guilty to all three charges.

At trial, the jury heard evidence that on November 15, 2003, officers with the Madison Police Department responded to a report of a man who had been found bound and gagged. When

officers arrived, they discovered a young Hispanic man on the front porch of a residence, with duct tape tightly wrapped around his face, ankles, and wrists, along with a "shoestring type cord" around his ankles and wrists, the latter of which were bound behind his back. The man was later identified as Pedro Jesus Rayon-Piza (Pedro). Pedro appeared "terrified" and, once freed, explained through a translator that he had been kidnapped at gunpoint by two people, one of whom he identified as his uncle, Betancourt.

Pedro testified that on November 15, 2003, Leonel Torres-Garcia (Torres) came to the house Pedro shared with his brother Jose Rayon-Piza (Jose) and asked for help with his car, which Torres said was stranded several miles away. Pedro stated that Torres requested Jose's help, but because Jose was unavailable, Pedro offered to help.

Pedro testified that he left with Torres in Pedro's car and drove several miles to Torres' car. According to Pedro, when he exited his car to help "jump-start" Torres' car, Betancourt appeared with a gun, put the gun to Pedro's head, and threatened to kill him. Pedro testified that Torres also produced a gun and pointed it at his head. Pedro stated that the men bound and gagged him and that Betancourt repeatedly asked him about the whereabouts of Betancourt's wife, from whom Betancourt was separated. Betancourt told Pedro that he believed Jose was "going out" with Betancourt's wife.

Pedro testified that Betancourt and Torres put him in a car and drove him to Betancourt's house. According to Pedro, Betancourt continued to threaten him with a gun and told him that Betancourt and Torres would put Pedro in a bag with stones and throw him in a river. When they arrived, the men put Pedro in a shed behind the house. Pedro testified that Betancourt told him that he was going to leave Pedro there, bring Jose to the same location, and then kill them both. Betancourt and Torres then left.

Pedro testified that Betancourt and Torres had not injured him. He testified that the doorway to the shed was open and

that he was not tethered to anything inside the shed. Pedro, still bound, managed to stand and jumped to the nearest house, where officers found him.

Torres testified that he and Betancourt had kidnapped Pedro. He generally minimized his involvement and denied participating in any plan. Torres admitted that he and Betancourt threatened Pedro with guns, took him to the shed, and left him there while they sought out Jose. Torres stated that Betancourt spoke to Jose on the telephone that evening.

Torres testified that when they could not find Jose, they returned to the area of the shed but saw officers everywhere. Torres testified that when Betancourt realized that Pedro had likely escaped, he appeared furious. Eventually, Betancourt and Torres decided to flee and drove all night to Houston, Texas. According to Torres, they threw the guns out of the car along the highway.

Jose testified similarly to his brother Pedro concerning the events preceding the abduction. He stated that sometime after Pedro departed with Torres, Jose went out looking for Pedro, but could not find him. Jose testified that after he returned from his search, Betancourt called him, threatened to "gut [him] like a deer," and made several more threatening calls throughout the night. Jose testified that Betancourt was angry because he believed Jose was in a relationship with Betancourt's wife and had accused Jose of having such a relationship sometime before Betancourt's wife had left Betancourt.

Betancourt's wife testified that a few months before she left Betancourt, Betancourt had accused Jose of having a relationship with her.

After Betancourt's wife testified, the State rested. Subsequently, Betancourt moved for directed verdict, claiming that "[t]he State's failed to present a prima facie case." The district court overruled the motion.

Next, Betancourt testified that he was not in Nebraska on or about the day of the offenses. He stated that at that time, he was working 6 days a week or more in Houston.

The jury heard Betancourt's testimony and other evidence concerning the search for Betancourt, his initial arrest in Texas, his deportation, his second arrest, and his ultimate extradition to Nebraska. At trial, the parties essentially established the same facts on these topics as they did at previous hearings.

Betancourt testified that due to his deportation in 2004, he assumed there was no longer a warrant for his arrest in Nebraska at that time. Betancourt admitted that shortly after being deported, he returned to Texas illegally and lived there for almost a decade. He testified that had he been aware of the Nebraska warrant, he did not think he would have returned from Mexico.

After Betancourt rested his case, he made another motion for directed verdict, asserting that no reasonable jury could find him guilty based on the evidence presented. The district court overruled the motion.

The district court held a jury instruction conference. Only the instruction for the conspiracy charge directed the jury to consider whether Betancourt had fled from justice during the period between the offenses and the second arrest, excluding the time Betancourt was incarcerated in Texas prior to being deported. The instructions defined the phrase "fleeing from justice" as "leav[ing] one's usual abode or . . . leav[ing] the jurisdiction where an offense has been [committed], with intent to avoid detection, prosecution, or punishment for some public offense." They advised the jury to find Betancourt not guilty of count III if it concluded that he had not fled from justice.

The jury found Betancourt guilty on all three charges.

Following the verdicts, the district court conducted a mitigation hearing to determine whether mitigating factors existed under Neb. Rev. Stat. § 28-313(3) (Reissue 2016), the presence of which would render the kidnapping conviction a Class II felony rather than a Class IA felony. The district court found that mitigating factors did not exist and that the kidnapping conviction was a Class IA felony.

The district court sentenced Betancourt to life imprisonment for the kidnapping conviction and 10 to 30 years' imprisonment for the use of a weapon to commit a felony conviction, to be served consecutively. Further, the district court treated the conspiracy conviction as a Class II felony and sentenced Betancourt to 30 to 50 years' imprisonment, to be served concurrently with the other sentences.

Betancourt now appeals.

III. ASSIGNMENTS OF ERROR

Betancourt assigns, rephrased, (1) that the district court erred in failing to quash the amended information because it showed on its face that the 3-year statute of limitations set forth in Neb. Rev. Stat. § 29-l10 (Reissue 1995) barred the State's prosecution; (2) that the district court erred in failing to direct a verdict of acquittal because the State failed to produce evidence sufficient to sustain a jury verdict that Betancourt was "fleeing from justice" as provided in § 29-110(1); (3) that his trial counsel provided ineffective assistance by moving for dismissal of his appeal of the district court's denial of his motion for absolute discharge, thereby waiving his right to challenge counts I and II on speedy trial grounds; and (4) that the district court erred in failing to take into account any mitigating factors in sentencing Betancourt.

[1] Further, Betancourt argues, but does not assign, that his counsel was ineffective in failing to investigate, develop, and present exculpatory evidence to support his alibi defense. But an appellate court does not consider errors which are argued but not assigned. *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

IV. STANDARD OF REVIEW

[2] Regarding questions of law presented by a motion to quash or plea in abatement, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. See, *State v. Gozzola*, 273 Neb. 309, 729

N.W.2d 87 (2007) (motion to quash); *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000) (plea in abatement).

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

[4] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

V. ANALYSIS

1. Motion to Quash

Betancourt contends that the district court erred in overruling his motion to quash the amended information. He argues that the amended information showed on its face that the 3-year statute of limitations set forth in § 29-110 barred the State's prosecution. However, as the State correctly points out, Betancourt's motion to quash was limited to only count III, the conspiracy charge. Because Betancourt's motion to quash references only count III, we shall limit our discussion accordingly.

[5] In addition, Betancourt specifically assigns that the amended information showed *on its face* that the 3-year statute of limitations barred any prosecution. Appellate review is limited to those errors specifically assigned as error in an appeal to a higher appellate court. *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). Therefore, we shall treat his motion as one to quash count III based upon the face of the amended information.

[6-8] In Betancourt's challenge to the amended information, he points out that because all relevant events were alleged to have taken place in 2003, the amended information was required to set forth facts that tolled the 3-year statute of limitations. He quotes a civil case, *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 272, 481 N.W.2d 416, 421 (1992): "'If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.'" Quoting *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). However, the controlling *criminal* case is *Emery v. State*, 138 Neb. 776, 777, 295 N.W. 417, 418 (1940), wherein this court held:

> It is generally sufficient in an information to describe the crime charged in the language of the statute and it is not ordinarily necessary to negative the exceptions contained in a statute defining a crime if they are not descriptive of the offense. . . . The statute of limitations is not descriptive of the offense and it is not necessary to plead an exception which makes it inoperative. . . . We think the better rule is that statutes of limitation, as applied to criminal procedure, need not be pleaded and may be raised under the general plea of not guilty.

(Citations omitted.) Therefore, the State is not required to plead an exception to the statute of limitations in a criminal case. But the State, within the information, has the burden to set forth all of the elements of the crime charged. See *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985). Certainly, that burden required the State to allege that the crime had been committed within the time fixed by law. The amended information in this instance fulfilled these requirements; thus, we conclude that the district court did not err in overruling Betancourt's motion to quash.

2. Directed Verdict

[9] Betancourt assigns that the district court erred in not directing a verdict of acquittal because the State failed to

produce evidence sufficient to sustain a jury verdict that he was "fleeing from justice" as provided in § 29-110(1). Section 29-110 states:

> (1) Except as provided in subsections (2) and (3) of this section, no person or persons shall be prosecuted for any felony . . . unless the indictment for the same shall be found by a grand jury within three years next after the offense shall have been done or committed or unless a complaint for the same shall be filed before the magistrate within three years next after the offense shall have been done or committed and a warrant for the arrest of the defendant shall have been issued . . . . This section shall not extend to any person fleeing from justice.

The phrase "fleeing from justice" means leaving one's usual abode or leaving the jurisdiction where an offense has been committed, with intent to avoid detection, prosecution, or punishment for some public offense. See *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

The State contends that this assignment of error, like the previous one, is limited to count III because the issue of "fleeing from justice" applies only to that count, counts I and II having been filed within the statute of limitations. We agree. Because the State filed counts I and II of the amended information within the 3-year statute of limitations, any delay in their prosecution would be reviewed pursuant to a motion to discharge. See Neb. Rev. Stat. § 29-1207 (Reissue 2016). As a result, we shall limit our analysis of this assignment of error to count III of the amended information.

[10] Betancourt essentially challenges the sufficiency of the evidence to support his conspiracy conviction. Prior to trial, Betancourt raised the 3-year statute of limitations set forth by § 29-110 as an affirmative defense to any prosecution for events which occurred in 2003. See *State v. Loyd*, 269 Neb. 762, 696 N.W. 2d 860 (2005) (statute of limitations is affirmative defense). Whether it applied ultimately became a

factual question for the jury to resolve, and the district court properly instructed the jury to consider count III in light of the definition of "flee[ing] from justice." The jury made the factual determination that the evidence was sufficient to show that Betancourt had fled from justice. And an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). However, for the sake of completeness, we consider Betancourt's arguments.

[11] Betancourt primarily contends that given the fact he waived extradition back to Nebraska, there is insufficient evidence to support a finding that he was "fleeing from justice." Brief for appellant at 23. In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990). However, under this standard and upon this record, we cannot conclude that the district court erred in overruling Betancourt's motions for directed verdict. There was evidence that upon seeing law enforcement officers near the shed where they had left Pedro, Betancourt and Torres fled to Texas. Subsequently, Betancourt was arrested and waived extradition proceedings, thus showing that he was aware that charges were pending against him in Nebraska. Yet, there is no evidence that Betancourt made any effort to surrender to Nebraska authorities while in custody prior to his deportation or after.

Betancourt further argues that although he did leave the State of Nebraska for Texas, once he was arrested in Texas and waived extradition proceedings, this stopped any tolling

associated with his initial flight. Betancourt relies on *United States v. Gonsalves*, 675 F.2d 1050 (9th Cir. 1982), where the court held that the statute of limitations period is not tolled during the time an accused makes a good faith effort to surrender himself to authorities. However, any efforts by Betancourt to voluntarily surrender to Nebraska authorities ended after he was taken into custody by the immigration services and deported to Mexico.

Betancourt also cites *United States v. Catino*, 735 F.2d 718 (2d Cir. 1984), where the government agreed that a fugitive who executes a formal and voluntary consent to extradition regains the benefit of the statute of limitations. Here, we discern a significant difference between Betancourt's signing a waiver of extradition and actually submitting himself to Nebraska authorities, which he failed to do.

The court in *Catino* further found that the intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities once he learns that charges against him are pending and that "[a] person can be 'fleeing from justice' in one jurisdiction even though in prison in another." 735 F.2d at 722. Both points apply here, in that Betancourt knew about pending charges in Nebraska and we see no distinction between his apprehension by the immigration services and imprisonment in another state.

Further, Betancourt argues:

> [T]he lack of any attempt by Nebraska law enforcement authorities to follow up on Betancourt's whereabouts upon being transferred to [DHS] custody on or after May 17, 2004, further lends support to Betancourt's argument that the State failed to meet its burden to show the statute of limitations was tolled in the case at bar.

Brief for appellant at 24. In support, he cites *U.S. v. Sotelo-Salgado*, 201 F. Supp. 2d 957, 966 (S.D. Iowa 2002), where the court held that it was "fundamentally unfair" to toll a statute of limitations where there was evidence of inaction by the government to locate a wanted person. However, *Sotelo-Salgado*

is distinguishable from this instance because in that case, the federal authorities were notified but took no action to apprehend the fugitive.

In this case, law enforcement immediately attempted to extradite Betancourt. This certainly constitutes immediate action. Moreover, as the State points out, Nebraska had little authority after the immigration services took Betancourt into custody and deported him to Mexico. Nor did Nebraska authorities have the means to detect when Betancourt illegally reentered the United States. In sum, we conclude that because Betancourt did not actually surrender himself to Nebraska authorities after fleeing, in person or through another law enforcement agency, the evidence the State produced was sufficient to sustain a verdict that Betancourt was "fleeing from justice."

Therefore, the district court did not err in overruling Betancourt's motions for directed verdict.

3. Ineffective Assistance of Counsel

[12,13] We next address Betancourt's allegation that he received ineffective assistance of counsel. We have often said that the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). The determining factor is whether the record is sufficient to adequately review the question. *Id*. An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. *Id.*

In this instance, Betancourt assigns and argues that his trial counsel was deficient in dismissing his appeal of the district court's order that overruled his motion for absolute discharge on counts I and II. Although Betancourt does not set forth specifically how the district court erred in overruling his motion for absolute discharge on counts I and II,

both his allegations and the record are sufficient to warrant further review.

[14,15] The test for ineffective assistance of counsel is well settled. 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. Filholm, supra*. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*.

[16,17] When a defendant alleges he or she was prejudiced by trial counsel's failure to properly assert the defendant's speedy trial rights on appeal, the court must consider the merits of the defendant's speedy trial rights under *Strickland.* See *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006). See, also, *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003). Only if the motion should have resulted in the defendant's absolute discharge, thus barring a subsequent trial and conviction, could the failure to make a motion for discharge be deemed prejudicial. *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

(a) Statutory Speedy Trial

[18,19] We first consider whether Betancourt's motion for discharge would have been successful under statutory speedy trial grounds. Nebraska's speedy trial statutes require that those who are charged with crimes be brought to trial within 6 months, as calculated by the applicable statute. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded

under § 29-1207(4). *State v. Lee, supra.* If the State does not bring the defendant to trial within the permissible time, the court must order an absolute discharge from the offense charged. *Id.*

[20] In this case, the original information was filed on August 21, 2013. For a felony, the speedy trial clock begins to run on the date that the indictment is returned or the information is filed, not on the date on which the complaint is filed. *Id*. Betancourt filed his motion for absolute discharge on November 14. The district court determined that only 55 days should count against the State pursuant to the speedy trial statute. Based upon the record, we concur. Therefore, trial counsel was not ineffective in not pursuing a meritless argument. See *id.*

(b) Constitutional Right to Speedy Trial

[21] We next consider Betancourt's contention that his motion for discharge would have succeeded on appeal due to a violation of his right to a speedy trial under U.S. Const. amend. VI and Neb. Const. art. I, § 11. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *State v. Sims, supra*. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant. *Id.* See, also, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[22] In analyzing the prejudice factor of this four-factor test, the U.S. Supreme Court in *Barker v. Wingo, supra*, enumerated three aspects: (1) preventing oppressive pretrial

incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. Of these three aspects, the third is considered most important "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*, 407 U.S. at 532.

[23] First, we must examine the length of the delay, which acts as the "triggering mechanism." *Id.*, 407 U.S. at 530. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Id.* In this matter, the district court found that the 10-year delay from initial arrest until trial was "presumptively prejudicial" and that this factor favored Betancourt, citing *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), and *U.S. v. Erenas-Luna*, 560 F.3d 772 (8th Cir. 2009). We agree that the 10-year delay from initial arrest until trial was "presumptively prejudicial." Therefore, we move to the second factor.

Under the second *Barker* factor, we consider the reasons for the delay and evaluate "whether the government or the criminal defendant is more to blame." *Doggett v. United States*, 505 U.S. at 651. Accord *U.S. v. Erenas-Luna, supra*. Here, the record contains no evidence that the State intentionally or negligently caused the delay. Further, Betancourt's citizenship status led to his deportation to Mexico, which caused the delay. Moreover, as pointed out by the State, with Betancourt knowing of the pending charges, he could have contacted authorities to resolve this case. This second *Barker* factor weighs against Betancourt.

The third *Barker* factor considers whether in due course the defendant asserted his right to a speedy trial. *Doggett v. United States, supra*; *U.S. v. Erenas-Luna, supra*. Again, Betancourt did not assert this right until he returned to Nebraska after a 10-year absence. This third *Barker* factor weighs against Betancourt.

[24] The final *Barker* factor considers whether the defendant suffered prejudice as a result of the delay. *Doggett v. United States, supra*; *U.S. v. Erenas-Luna, supra*. A showing of actual prejudice is required if the government exercised reasonable diligence in pursuing the defendant. *Doggett v. United States, supra*; *U.S. v. Erenas-Luna, supra*. Here, the State promptly attempted to extradite Betancourt but was prohibited by the federal government's deporting him. In addition, it is not reasonable to expect the State to assume that Betancourt would again illegally enter the United States or, if he did reenter, that he would not enter under the scrutiny of federal authorities. Because the State acted diligently to the extent it could, Betancourt must show actual prejudice. He did not offer any instance of prejudice nor argue any presumed prejudice. This factor weighs against Betancourt.

After weighing the totality of the circumstances and the four factors from *Barker v. Wingo*, *supra*, we conclude that Betancourt's right to a speedy trial under U.S. Const. amend. VI and Neb. Const. art. I, § 11, was not violated. Because Betancourt's motion for absolute discharge lacked merit, trial counsel could not be ineffective by moving for dismissal of Betancourt's appeal of the district court's denial of that motion.

4. Mitigating Factors at Sentencing

[25,26] Betancourt challenges his sentence on count I, the kidnapping conviction. Section 28-313(3) provides, "If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony." The provisions of § 28-313(3) are mitigating circumstances which may reduce the penalty for kidnapping and are therefore a matter for the court at sentencing, not the jury. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). Rescue is not a voluntary release of a kidnapping victim. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

Betancourt contends, "Because the evidence at trial showed that [Pedro] was voluntarily released, alive, . . . in a safe place without having suffered any bodily injury whatsoever . . . , the mitigating factors set forth in . . . § 28-313(3) were satisfied." Brief for appellant at 30. Consequently, he argues that the district court should have treated the kidnapping conviction as a Class II felony, resulting in a sentence to a term of years rather than life imprisonment.

The evidence at trial reflected that after Betancourt and Torres had kidnapped Pedro, bound him with tape and "shoestring type cord," gagged him, and threatened him with a gun, they placed him in a shed. Pedro testified that Betancourt told him that he was going to leave him there, bring Jose to the same location, and then kill them both. Pedro advised that Betancourt and Torres had not injured him or tethered him to anything inside the shed and that the doorway to the shed was open. Pedro, still bound, managed to stand and jump to the nearest house, where officers found him. Based on these facts, the district court found count I to be a Class IA felony, because Betancourt did not voluntarily release Pedro, who instead escaped through his own efforts.

Pedro's ability to effectuate an escape despite being bound and gagged does not equate with a voluntary release. Accordingly, we conclude that the mitigating factors in § 28-313(3) were not present, because the rescue was not a voluntary release, and that the district court did not err in finding count I to be a Class IA felony.

5. Plain Error

[27] Finally, although the State did not file a cross-appeal contending that the sentence imposed was excessively lenient, it urges us to recognize plain error. The State argues that the district court committed plain error in the classification of, and the sentence for, count III, the conspiracy conviction. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature

that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Aguallo*, 294 Neb. 177, 881 N.W.2d 918 (2016).

The State points out that Neb. Rev. Stat. § 28-202(4) (Reissue 2008) provided, "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." Here, the most serious offense which was an object of the conspiracy was kidnapping, a Class IA felony. See § 28-313(2). Therefore, count III, the conspiracy conviction, was a Class IA felony and had a mandatory sentence of life imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 2008). The district court erroneously treated count III as a Class II felony and sentenced Betancourt to 30 to 50 years' imprisonment.

[28] We digress to note that Betancourt acknowledges this mistake, but argues that the district court incorrectly advised him at the arraignment hearing using the classification and penalty above, and that he relied on the incorrect advisement to his detriment, resulting in the violation of his due process rights. He cites *State v. Schnell*, 17 Neb. App. 211, 220, 757 N.W.2d 732, 739 (2008), for the proposition that "[w]here a defendant was unaware of the penal consequences of his or her guilty plea because he or she had been misinformed by the court, his or her plea is not voluntary." Citing *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987). However, both *Schnell* and *Golden* are distinguishable from the case at hand because they involved pleas. Here, Betancourt pled not guilty and went to trial. Where a defendant pleads not guilty at arraignment and proceeds to trial, "the considerations involved in determining whether one freely, intelligently, voluntarily, and understandingly pleads guilty have no application . . . , for in such a circumstance, the defendant does not surrender the constitutional rights inherent in a trial." *State v. McBride*, 252 Neb. 866, 876, 567 N.W.2d 136, 144 (1997). Because

Betancourt proceeded to trial, there has been no violation of his due process rights.

Turning again to plain error, where, after a conviction following a jury trial, the trial judge imposed an incorrect sentence, we have found plain error and ordered the trial court to correct the sentence. See *State v. Thorpe*, 280 Neb. 11, 26, 783 N.W.2d 749, 762 (2010) (remanding with directions to resentence to life imprisonment because "life imprisonment without parole" was not a valid sentence for first degree murder). In this instance, the incorrect sentence constituted plain error, and we remand for imposition of a sentence of life imprisonment.

VI. CONCLUSION

Having found no merit to Betancourt's assigned errors, we affirm his convictions for counts I, II, and III and his sentences for counts I and II. However, because we find plain error in the sentencing for count III, we vacate that sentence and remand the matter to the district court with directions to resentence Betancourt to "life imprisonment" for count III.

Affirmed in part, and in part vacated and remanded for resentencing.

In re Interest of Tyrone K., a child under 18 years of age. State of Nebraska, appellee, v. Tyrone K., appellant.

887 N.W.2d 489

Filed December 2, 2016. No. S-15-1057.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **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.
4. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
5. **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.
6. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
7. **Statutes: Courts.** A court's proper role is to interpret statutes and clarify their meaning.

8. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy of this state.
9. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
10. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
11. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
12. ____: ____. A substantial right is not affected for purposes of appeal when that right can be effectively vindicated in an appeal from the final judgment.
13. **Statutes: Judgments: Juvenile Courts: Appeal and Error.** The fact that the statutory scheme enacted by 2014 Neb. Laws, L.B. 464, contains no specific provision regarding appellate review of juvenile transfer orders does not mean such orders are immune from appellate review on direct appeal after final judgment.
14. **Records: Appeal and Error.** It is the appellant's burden to create a record for the appellate court which supports the errors assigned.
15. **Constitutional Law: Juvenile Courts: Criminal Law.** There is no constitutional right to proceed in juvenile court rather than criminal court.
16. **Juvenile Courts: Criminal Law.** A juvenile whose case may be transferred to criminal court has no right to have his or her case remain in juvenile court, and an order transferring such a case from juvenile to criminal court does not affect a substantial right.
17. **Constitutional Law: Juvenile Courts: Legislature.** Access to juvenile court is a statutory right granted and qualified by the Legislature; it is not a constitutional imperative.
18. **Juvenile Courts: Criminal Law.** Juveniles whose cases may be transferred to criminal court, and juveniles whose cases may be directly filed in criminal court, have no right to avoid the collateral consequences of a criminal conviction.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Appeal dismissed.

Joe Nigro, Lancaster County Public Defender, and Sarah J. Safarik for appellant.

Joe Kelly, Lancaster County Attorney, and Ashley J. Bohnet for appellee.

Juliet Summers for amicus curiae Voices for Children in Nebraska and Christine Henningsen, of Center on Children, Families and the Law at the University of Nebraska-Lincoln, for amicus curiae Nebraska Youth Advocates.

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

Stacy, J.

This case presents the issue of whether an order granting a motion to transfer a juvenile case to criminal court is final and appealable. We conclude it is not, and dismiss the appeal as premature.

I. FACTS

A petition filed in juvenile court on September 4, 2015, alleged 16-year-old Tyrone K. committed four counts of theft by receiving stolen property and one count of operating a motor vehicle to avoid arrest. The charges arose from a series of vehicle thefts which occurred after Tyrone escaped from a youth rehabilitation and treatment center. The alleged law violations were classified as two Class III felonies, a Class IV felony, and two Class I misdemeanors.[1] Due in part to Tyrone's extensive history in the juvenile court system, the prosecutor immediately moved to transfer the proceedings to county court for arraignment and further proceedings under the criminal code.[2] After conducting an evidentiary hearing, the juvenile court granted the motion to transfer. Tyrone filed this appeal. We moved the case to our docket on our own

[1] See Neb. Rev. Stat. §§ 28-517, 28-518, and 28-905 (Reissue 2016).

[2] See Neb. Rev. Stat. § 43-274(5) (Reissue 2016).

motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

II. STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.[4]

III. ASSIGNMENTS OF ERROR

Tyrone assigns there was insufficient evidence for the juvenile court to transfer his case to county court.

IV. ANALYSIS

[2] In a juvenile case, as in any other appeal, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016) gives an appellate court jurisdiction to review "[a]ny final order or judgment entered by a juvenile court . . . ." Whether we have jurisdiction to review the juvenile court's transfer order at this point in the proceedings depends on whether Tyrone has appealed from either a judgment or a final order.

A transfer order is not a judgment, and no party argues otherwise. The transfer order did not address or decide the merits of the alleged law violations and made no final determination of the parties' rights;[6] it merely determined the state court forum in which the case would proceed. Therefore, the threshold question presented here is whether Tyrone has appealed from a final order.

Tyrone makes two arguments in support of his position that a transfer order is a final order. First, he argues the Legislature

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[3] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[4] See *Purdie v. Nebraska Dept. of Corr. Servs.*, 292 Neb. 524, 872 N.W.2d 895 (2016).

[5] *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015).

[6] See Neb. Rev. Stat. § 25-1301 (Reissue 2016).

redefined transfer orders as final orders when it enacted 2014 Neb. Laws, L.B. 464. Second, he argues the transfer order is a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2016), because it was made in a special proceeding and affects a substantial right. We address each argument in turn. Before doing so, however, it is necessary to provide an overview of the relevant statutes.

1. Overview of New Juvenile Statutes

From 1974 to 2014, when a juvenile committed a law violation, the relevant juvenile delinquency statutes gave the prosecuting attorney substantial discretion regarding whether to file charges in criminal court, file delinquency proceedings in juvenile court, or offer juvenile pretrial diversion or mediation.[7] If the prosecutor elected to file in criminal court, the juvenile could file a motion asking that the case be transferred to the juvenile court for further proceedings under the Nebraska Juvenile Code.[8]

In 2014, through L.B. 464, the Legislature made significant changes to this statutory scheme. According to the Introducer's Statement of Intent:

> Nebraska is one of the few states that allows prosecutors broad authority in deciding whether or not to file charges in adult or juvenile court. . . . In 2010 in Nebraska, 45 percent of filings against youth were in adult court, despite the fact that nearly 90 percent of charges against youth in adult court were misdemeanors. Requiring more cases to originate in juvenile court will give more youth a chance at rehabilitation and reduce their chance of having a criminal record.[9]

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[7] See § 43-274(4) (Reissue 2008) and Neb. Rev. Stat. § 43-276 (Cum. Supp. 2012).

[8] Neb. Rev. Stat. § 29-1816 (Cum. Supp. 2012).

[9] Introducer's Statement of Intent, L.B. 464, Judiciary Committee, 103d Leg., 1st Sess. 1 (Mar. 6, 2013).

Generally speaking, L.B. 464 limited the discretion of prosecutors to decide whether a case should be filed in juvenile or criminal court, and replaced it with a three-tiered jurisdictional structure that specifies the court in which a case should be filed, depending on the age of the juvenile and the nature of the alleged law violation. The new jurisdictional structure is first set out in Neb. Rev. Stat. § 43-246.01 (Reissue 2016). The relevant sections of L.B. 464 became operative January 1, 2015.[10]

(a) Exclusive Original Jurisdiction

Section 43-246.01(1) grants exclusive original jurisdiction to the juvenile court over offenders who (1) are under 16 years of age and committed a misdemeanor or infraction, other than a traffic offense, or (2) are under 14 years of age and committed a felony.[11] Proceedings against these juvenile offenders must always be filed via a juvenile petition and must always proceed to completion in juvenile court.[12] Tyrone does not fall into this category of juvenile offenders.

(b) Original Jurisdiction Subject to Transfer

Section 43-246.01(2) grants original jurisdiction to the juvenile court over juvenile offenders who are (1) 16 years of age and committed a misdemeanor[13] or (2) 14 years of age or older and committed a felony lesser in grade than a Class IIA.[14] Actions against these juvenile offenders must always be initiated in juvenile court by filing a juvenile petition, but are subject to transfer to county or district court

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[10] 2014 Neb. Laws, L.B. 464, § 37.

[11] See Neb. Rev. Stat. § 43-247(1) and (2) (Supp. 2015).

[12] § 43-246.01(1).

[13] As of January 1, 2017, this jurisdiction also extends to juveniles who are 17 years old, pursuant to § 43-246.01(2)(a).

[14] § 43-246.01(2)(b).

for further proceedings under the criminal code.[15] All of the allegations against Tyrone, except the allegation of operating a motor vehicle to avoid arrest, put him in this category of juvenile offenders.

(c) Concurrent Jurisdiction

Section 43-246.01(3) grants to the juvenile court and the county or district courts concurrent jurisdiction over juvenile offenders who (1) commit a traffic offense that is not a felony or (2) are 14 years of age or older and commit a Class I, IA, IB, IC, ID, II, or IIA felony.[16] Actions against these juveniles may be initiated either in juvenile court or in the county or district court.[17] The allegation against Tyrone of operating a motor vehicle to avoid arrest put him within this category of juvenile offenders.

All of the offenses allegedly committed by Tyrone are offenses over which both the juvenile court and the criminal court can exercise jurisdiction under the new statutory scheme. With respect to such offenses, if the action is initiated in juvenile court, a party can move to transfer it to county or district court via § 43-274(5) (Reissue 2016), a new statutory provision created by L.B. 464.[18] And if the action is initiated in county or district court, a party can move to transfer it to juvenile court via § 29-1816 (Reissue 2016).[19] Section 29-1816 existed prior to the enactment of L.B. 464, but was amended by it.

(d) Transfers Under § 43-274(5)

All of the allegations against Tyrone were initiated via a petition filed in juvenile court, and the prosecutor simultaneously

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[15] § 43-246.01(2).

[16] § 29-1816(1)(a)(ii).

[17] See §§ 43-246.01(3) and 29-1816.

[18] § 43-246.01(3).

[19] § 29-1816(1)(a)(ii) and (2).

filed a motion to transfer the proceedings to criminal court. Section 43-274(5) controls in this circumstance. That section authorizes a city or county attorney to seek a transfer to criminal court when both the juvenile court and the criminal court have statutory jurisdiction.[20] It specifies that the transfer motion must be filed with the juvenile court petition, and requires the juvenile court to schedule a hearing on the motion within 15 days.[21] The city or county attorney has the burden to prove by a preponderance of the evidence that the case should be transferred.[22] The juvenile court must make a decision within 30 days of the hearing, and must "set forth findings for the reason for its decision."[23]

(e) Transfers Under § 29-1816

Both before and after L.B. 464, § 29-1816 provided that if the case is filed in county or district court, at the time of arraignment, the court must advise the juvenile that he or she may move at any time not later than 30 days after arraignment to transfer the case to the juvenile court for further proceedings under the Nebraska Juvenile Code. If the juvenile so moves, a hearing must be held within 15 days, and the court "shall" transfer the case "unless a sound basis exists for retaining the case."[24] The county or district court must "set forth findings for the reason for its decision."[25]

Prior to L.B. 464, § 29-1816 specifically provided that the county or district court's ruling on a motion to transfer an action to juvenile court "shall not be a final order for the purpose of enabling an appeal."[26] But L.B. 464 removed this

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[20] § 43-274(5).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] § 29-1816(3)(a).

[25] § 29-1816(3)(b).

[26] § 29-1816(2)(c) (Cum. Supp. 2012).

language, and § 29-1816 (Reissue 2016) is now silent as to the finality of an order ruling on a motion to transfer a case from criminal court to juvenile court. Similarly, § 43-274(5), the new statute enacted by L.B. 464, is silent regarding whether a juvenile court's ruling on a motion to transfer an action to a county or district court is a final order.

2. L.B. 464 Did Not Determine Finality of Transfer Orders

Tyrone argues the transfer order is a final, appealable order. In doing so, he places much significance on the effect of L.B. 464 on §§ 29-1816 and 43-274(5). He argues that by deleting the nonfinal order language from § 29-1816, the Legislature intended to authorize interlocutory appeals from orders ruling on motions to transfer from criminal court to juvenile court. And he argues that because the Legislature intended to authorize interlocutory appeals from orders ruling on motions to transfer from criminal court to juvenile court under § 29-1816, we should judicially construe § 43-274(5) to also authorize interlocutory appeals from orders transferring cases from juvenile court to criminal court.

[3-6] Our analysis of the statutory changes made by L.B. 464 is guided by familiar rules of statutory construction. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[27] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.[28] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire

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[27] *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013); *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[28] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

language of the statute considered in its plain, ordinary, and popular sense.[29] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[30]

We find nothing in the legislative history, and the parties direct us to nothing, suggesting why the nonfinal order language of § 29-1816 was removed. Tyrone argues the removal of the language is significant in and of itself, based on the general rule that the Legislature is presumed to know the language used in its statutes, and if in a subsequent act on the same or similar subject it uses different terms in the same connection, a court should presume that a change in the law was intended.[31]

We are not convinced that this principle of statutory construction applies under these circumstances. Here, language prohibiting an interlocutory appeal was removed by L.B. 464, but no different terms were substituted in the same connection. Deleting a negative does not automatically create a positive.

Moreover, when articulating the procedure to be followed after a transfer order is granted by the juvenile court, the Legislature left no room in the statutory process for interlocutory appeal, providing instead:

> If the proceeding is transferred from juvenile court to the county court or district court, the county attorney or city attorney shall file a criminal information in the county court or district court, as appropriate, and the accused shall be arraigned as provided for a person eighteen years of age or older . . . .[32]

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[29] *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

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

[31] See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[32] § 43-274(5).

Generally, when the Legislature has authorized interlocutory appeals from orders entered in ongoing criminal cases, it has done so expressly and has set out detailed and specific procedures for such appeals which balance the interests of the litigants and the interests of justice.[33] In contrast, L.B. 464 contains no specific procedures governing appellate review of transfer orders, and the statutory procedure the prosecutor is to follow after a transfer order is granted appears designed to facilitate timely resolution of the criminal matter, not interlocutory appeal.

Although Tyrone urges us to conclude otherwise, we are not persuaded that anything meaningful can be gleaned from the fact that § 43-274(5) is silent regarding the finality of a juvenile court's order on a motion to transfer a case to county or district court. We note that when L.B. 464 first was introduced, § 43-274 contained a provision that a juvenile court's decision to transfer proceedings to criminal court "shall be a final order for the purpose of enabling an appeal."[34] But that final order language was omitted from § 43-274 during the legislative process, and we find nothing in the legislative history explaining why this language was removed. Tyrone urges us to interpret § 43-274(5) to supply by implication the very language which the Legislature pointedly rejected. We decline to do so. It is not within the province of the courts to read a meaning into a statute that is not there.[35]

Considering §§ 29-1816 and 43-274 together, we observe that when enacting L.B. 464, the Legislature removed language from § 29-1816 that *prevented* transfer orders from being final and appealable, and also removed proposed language from § 43-274 that would have *made* transfer orders final and

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[33] See, e.g., Neb. Rev. Stat. §§ 29-116 through 29-118 and 29-824 through 29-826 (Reissue 2016).

[34] Introduced Copy, L.B. 464, Judiciary Committee, 103d Leg., 1st Sess. 14 (Jan. 22, 2013).

[35] *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012); *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

appealable. Consequently, after L.B. 464, we are left with juvenile transfer statutes that are uniformly silent on whether any transfer orders are final and appealable.

[7,8] The briefing submitted to this court advances several public policy arguments both for and against authorizing interlocutory appellate review of transfer orders in juvenile cases. But a court's proper role is to interpret statutes and clarify their meaning,[36] and it is the Legislature's function through the enactment of statutes to declare what is the law and public policy of this state.[37] Within the proper confines of established rules of statutory construction, we find nothing which permits the conclusion that the Legislature intended, by either silence or omission, to affirmatively confer a statutory right of interlocutory appeal from an order on a motion to transfer a case from criminal court to juvenile court, or vice versa. We conclude that when the Legislature removed the final order language from § 29-1816 without adding any different language pertaining to finality, it left to the judiciary the familiar task of applying Nebraska's final order statute, § 25-1902, to determine whether transfer orders are final and appealable.

3. Transfer Orders Are Not Final Orders Under § 25-1902

[9] Under § 25-1902, an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[38] The order here neither determined

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[36] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[37] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[38] *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015).

the action and prevented a judgment; nor was the order made on summary application after judgment. As such, the transfer order is final and appealable only if it was made during a special proceeding and affected a substantial right.

The transfer decision was made by the juvenile court, and as a general rule, juvenile delinquency proceedings are considered special proceedings.[39] For purposes of this appeal, we assume without deciding that the transfer order at issue was made in a special proceeding. We focus our analysis on whether the order from which Tyrone appeals affected a substantial right. Specifically, the question presented is whether a substantial right of a juvenile is affected when the juvenile court grants the prosecutor's motion to transfer a case to county court and both the juvenile court and the county court have statutory authority to resolve the proceeding.

[10-12] A substantial right is an essential legal right, not a mere technical right.[40] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.[41] A substantial right is not affected for purposes of appeal when that right can be effectively vindicated in an appeal from the final judgment.[42]

In asserting that the transfer order is final and appealable, Tyrone presents three general arguments. First, he argues that if an interlocutory appeal is not allowed now, he will forever lose his right to appeal from the transfer order. Second, he argues that the transfer order affects a substantial right, because a

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[39] See *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

[40] *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015); *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[41] *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012); *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[42] See, *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011); *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

juvenile whose criminal charges are tried in county or district court is denied timely access to rehabilitative services such as pretrial evaluations, plans, and services. Third, he argues that the transfer order affects a substantial right, because a conviction in criminal court exposes him to collateral consequences in the form of loss of civil rights and privileges that are not at issue in juvenile proceedings.

(a) Appealing Transfer Order After Final Judgment

Prior to L.B. 464, we regularly reviewed errors assigned to a trial court's ruling on a motion to transfer, and we did so at the conclusion of the criminal case as part of the direct appeal of the conviction and sentence.[43] Tyrone argues that under the statutory scheme enacted by L.B. 464, he cannot effectively challenge the transfer order at the conclusion of the criminal proceedings. We disagree.

Other jurisdictions addressing this question have concluded that a juvenile may appeal an order transferring his or her cause to criminal court at the conclusion of the criminal proceedings.[44] Indeed, several courts conclude this is the preferable procedure. As one court reasoned:

> "To permit interlocutory review of [a transfer] order would obviously delay the prosecution of any proceeding

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[43] See, *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015); *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Reynolds*, 247 Neb. 608, 529 N.W.2d 64 (1995); *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994); *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

[44] See, *People v. Browning*, 45 Cal. App. 3d 125, 119 Cal. Rptr. 420 (1975), *overruled on other grounds, People v. Williams*, 16 Cal. 3d 663, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976); *People in Int. of D.H.*, 37 Colo. App. 544, 552 P.2d 29 (1976); *Interest of Clay*, 246 N.W.2d 263 (Iowa 1976); *In re Appeal No. 961*, 23 Md. App. 9, 325 A.2d 112 (1974); *Interest of Watkins*, 324 So. 2d 232 (Miss. 1975); *In re T. J. H.*, 479 S.W.2d 433 (Mo. 1972); *In re Becker*, 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974); *In re D.H.*, No. 27074, 2016 WL 4168867 (Ohio App. July 1, 2016).

> in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized. In either proceeding the primary issue is the ascertainment of the innocence or guilt of the person charged. To permit interlocutory review [of a transfer order] would subordinate that primary issue and defer its consideration while the question of the punishment appropriate for a suspect whose guilt has not yet been ascertained is being litigated in reviewing courts. . . ."[45]

Tyrone's concern appears to be premised on the lack of statutory direction as to how to attain appellate review of the transfer order when a case is transferred from juvenile to criminal court. Section 43-274(5) provides:

> If the proceeding is transferred from juvenile court to the county court or district court, the county attorney or city attorney shall file a criminal information in the county court or district court, as appropriate, and the accused shall be arraigned as provided for a person eighteen years of age or older in . . . § 29-1816.

Tyrone argues this language prevents him from appealing the transfer order at the conclusion of the criminal proceedings, but it is not entirely clear from his briefing why he believes this is so.

To the extent Tyrone's argument turns on the absence of a clear statutory directive regarding the procedure by which a party may seek appellate review of a juvenile court's transfer order, we agree L.B. 464 did not include express provisions in that regard.

[13] But contrary to Tyrone's argument, the fact that the statutory scheme enacted by L.B. 464 contains no specific provision regarding appellate review of juvenile transfer orders does not mean that transfer orders are somehow immune from

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[45] *In re Becker, supra* note 44, 39 Ohio St. 2d at 86, 314 N.E.2d at 159. See, also, *Interest of Clay, supra* note 44; *Interest of Watkins, supra* note 44; *State v. Thomas*, 970 S.W.2d 425 (Mo. App. 1998); *In re Joseph T.*, 575 A.2d 985 (R.I. 1990).

appellate review on direct appeal after final judgment. We have not been directed to anything in the statutory scheme or in our court rules which would prevent a juvenile, on direct appeal from a criminal judgment, from requesting and presenting a sufficient record to support an assignment of error related to the juvenile transfer order which authorized the filing of the criminal proceedings.

We acknowledge that our current rules of appellate procedure, which were promulgated prior to the enactment of L.B. 464, were not designed to address and did not contemplate the need to create an appellate record from multiple courts with concurrent jurisdiction over a particular matter.[46] But the provisions of our current court rules do not support Tyrone's fundamental premise that error related to the transfer order cannot effectively be reviewed on direct appeal from any final judgment in the criminal case.

[14] It is the appellant's burden to create a record for this court which supports the errors assigned.[47] Under the existing appellate rules, there is nothing preventing an appellant from filing a praecipe in each court "from which the appeal is taken,"[48] directing the clerk to prepare the transcript necessary to support the assigned errors.[49] Likewise, nothing would preclude an appellant from filing a praecipe to prepare a bill of exceptions in each such court, with a copy delivered to the proper court reporting personnel.[50] The concerns articulated by Tyrone do not support the conclusion that he will be prevented from obtaining appellate review of the transfer order unless he is permitted to appeal immediately.

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[46] See, generally, Neb. Ct. R. App. P. § 2-104 and § 2-105 (rev. 2010).

[47] See, *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013); *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[48] § 2-104(A)(1).

[49] See § 2-104(A)(1) and (2).

[50] See, generally, § 2-105.

(b) Substantial Right to Rehabilitative Services in Juvenile Court

Tyrone argues he has a substantial right to proceed in juvenile court and receive timely access to the rehabilitative services available in that forum. This argument is premised on the assumption that because he was a minor at the time the alleged offenses were committed, he has a right to have his case proceed in juvenile court.

There is only one Nebraska case addressing this general premise. In *State v. Meese*,[51] a confidential informant purchased marijuana from a 16-year-old juvenile in May 1996. The juvenile was not charged or arrested until October 1997. She was nearly 18 years old at that time, and the charges were filed in county court. The juvenile moved to transfer the proceedings to juvenile court, and the county court denied her motion. The criminal case was then bound over to district court for trial.

[15] Prior to trial, the juvenile filed a motion to discharge. She argued the State's delay in charging her violated her right to due process of law, because it resulted in the county court, rather than the juvenile court, handling the case. We held she had not appealed from a final order. In doing so, we noted there is no constitutional right to proceed in juvenile court rather than criminal court, and we observed that on several occasions, we had waited until after any conviction and sentence to review the validity of a trial court's decision on a motion to transfer. We also explicitly stated "the loss of access to juvenile court itself does not affect a substantial right."[52]

Tyrone emphasizes that *Meese* was decided at a time when § 29-1816 specifically provided that the decision on a motion to transfer to juvenile court was not a final order, and thus he argues that *Meese* is not persuasive authority in light of the current version of that statute, which contains no such language.

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[51] *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

[52] *Id.* at 495, 599 N.W.2d at 199.

While we acknowledge the change in statutory language, we conclude it does not affect our reasoning in *Meese.*

This is so, in large part, because the current statutory language is not inconsistent with the statutory language in effect when *Meese* was decided. As noted earlier, the current version of § 29-1816 simply omits the language that specifically stated an order transferring a case from criminal court to juvenile court was not final and appealable. Thus, at most, the current version is silent as to whether a right to interlocutory appeal exists from such an order, whereas the former version expressly stated there was no such right. This difference in the statutory language does not undermine the holding in *Meese*.

[16] More important, despite Tyrone's arguments to the contrary, the jurisdictional changes brought about by L.B. 464 did not create a right to have his alleged offenses proceed in juvenile court rather than criminal court. It is true that when enacting L.B. 464, the Legislature sought to create a statutory scheme that would result in more alleged law violations against juveniles being filed in and resolved in juvenile court.[53] And under that statutory scheme, a certain category of juveniles do have the right to proceed exclusively in juvenile court.[54] Tyrone, however, is not one of those juveniles. Given his age and the nature of his alleged offenses, the current statute required that three of the four offenses against Tyrone must be originally filed in juvenile court.[55] But because all of Tyrone's alleged offenses are those which can, upon proper motion and showing, be transferred to criminal court,[56] Tyrone has no right under the current statutory scheme to have his case remain in juvenile court, so the order transferring his case does not affect a substantial right.

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[53] See Introducer's Statement of Intent, *supra* note 9.

[54] See § 43-246.01(1).

[55] See § 43-246.01(2).

[56] See, § 43-246.01(2) and (3); § 43-274(5).

[17] Our reasoning in *Meese* was thus not affected by the changes in the statutory scheme. Even after L.B. 464, access to juvenile court is a statutory right granted and qualified by the Legislature; it is not a constitutional imperative. As such, we conclude the transfer of Tyrone's case from juvenile court to criminal court did not affect a substantial right.

Our holding in this regard does not ignore the importance of the unique opportunities and the juvenile-centered programs available in juvenile court. But in Nebraska, the possibility of disposition under the juvenile code remains available to juveniles even if their case is transferred from juvenile to criminal court. Neb. Rev. Stat. § 29-2204.02(4) (Supp. 2015) provides:

> If the defendant was under eighteen years of age at the time he or she committed the crime for which he or she was convicted, the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code.

Tyrone concedes that § 29-2204.02(4) allows a juvenile tried in criminal court to receive disposition under the juvenile code. But he contends that the code also allows for pretrial juvenile services, while a criminal action does not, and he argues that transferring the case to criminal court has deprived him of the substantial right to receive preadjudication evaluations and rehabilitative services available in juvenile court. Again, however, under the current statutory scheme, Tyrone has no right to receive the rehabilitative services under the juvenile code, because both the juvenile court and the criminal court have jurisdiction over his case. A delay in receiving services to which he has no statutory right does not affect a substantial right.

(c) Exposure to Collateral Consequences of Criminal Conviction

[18] Finally, Tyrone argues the transfer of his case to criminal court affects a substantial right, because a finding of guilt

would expose him to the collateral consequences of a criminal conviction. It is true that an adjudication of delinquency on the same charges would not result in a criminal record or the loss of civil rights. But as we noted previously, under the statutory scheme enacted by L.B. 464, juveniles whose cases may be transferred to criminal court, and juveniles whose cases may be directly filed in criminal court, have no right to avoid the collateral consequences of a criminal conviction. And of course, not all of the collateral consequences of a transfer from juvenile to criminal court are disadvantageous to juveniles. A transfer makes available rights that are restricted or unavailable in juvenile court, such as the right to a jury trial,[57] the right to a speedy trial,[58] and the full panoply of criminal procedural rights.

V. CONCLUSION

For the foregoing reasons, we conclude the transfer order from which Tyrone appeals is not a final order. The appeal is dismissed.

Appeal dismissed.

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[57] Neb. Const. art. I, §§ 6 and 11; Neb. Rev. Stat. § 29-2004 (Reissue 2016).

[58] U.S. Const. Amend. VI; Neb. Const. art. I, § 11; Neb. Rev. Stat. § 29-1207 (Reissue 2016).

In re Adoption of Micah H., a minor child. Daniel H. and Linda H., appellants, v. Tyler R., appellee.

887 N.W.2d 859

Filed December 2, 2016. No. S-15-1080.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. **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.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
6. **Judgments: Final Orders: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
7. ____: ____: ____. A final judgment is one that disposes of the case either by dismissing it before a hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.
8. **Indian Child Welfare Act: Federal Acts: Child Custody.** The applicability of the federal Indian Child Welfare Act of 1978 and the Nebraska Indian Child Welfare Act to a child custody proceeding turns not on the Indian status of the person who invoked the acts but on the status of the child involved in the proceeding.
9. **Indian Child Welfare Act: Federal Acts: Parental Rights.** To the extent that the Nebraska Indian Child Welfare Act provides a higher

standard of protection to the rights of the parent or Indian custodian of an Indian child under the federal Indian Child Welfare Act of 1978, the Nebraska Indian Child Welfare Act controls.

10. **Indian Child Welfare Act: Parental Rights: Parent and Child.** "Active efforts" must be made to unite the Indian child with both biological parents, regardless of whether they are Indian.

Appeal from the County Court for Saunders County: Patrick R. McDermott, Judge. Reversed and remanded.

John H. Sohl for appellants.

Jennifer D. Joakim for appellee.

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

Kelch, J.

I. NATURE OF CASE

This case presents the issue of whether the "active efforts" and "serious emotional or physical damage" elements of the federal Indian Child Welfare Act of 1978 (ICWA)[1] and the Nebraska Indian Child Welfare Act (NICWA)[2] apply to provide increased protection to the parental rights of a non-Indian, noncustodial parent of an "Indian child."

II. FACTS

Daniel H. and Linda H., the maternal grandparents and guardians of Micah H., a minor child, appeal the order of the Saunders County Court denying their petition to adopt Micah. In their petition, Daniel and Linda alleged, among other things, that the child's mother (their daughter), Allison H., had consented to the adoption; that the father, Tyler R., had abandoned Micah; and that terminating Allison's and Tyler's parental rights was in Micah's best interests. In Tyler's answer, he alleged that Micah was an "Indian Child" pursuant to

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[1] 25 U.S.C. §§ 1901 to 1963 (2012).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1517 (Reissue 2016).

ICWA and NICWA. Because neither party disputed that Micah met the "Indian child" definition under both acts, the county court applied those acts, which provide heightened protection to the rights of parents and tribes in proceedings involving custody, termination of parental rights, and adoption of Indian children.[3] After a hearing on Daniel and Linda's petition, the county court found that it was compelled to deny the petition, because it was "unable to find beyond a reasonable doubt that [Tyler] has abandoned the child."

1. Background

Micah's mother, Allison, was placed with Daniel and Linda when she was 4 years old. Allison is a member of the Oglala Sioux Tribe. Daniel and Linda are not members of an Indian tribe, but they took measures to help Allison understand her Indian heritage. At the hearing on the petition, Linda testified that the family kept Native American artifacts in their home, read Native American books and literature to Allison, and took her to powwows and reservations. Linda also testified that in her practice as a nurse, she underwent training to become "trans-culturally certified," with a focus on Native American culture.

When Allison was 17 years old, she first met Tyler. She had run away from home with a friend, and the two of them went to Tyler's mother's house. Allison testified that Tyler's mother provided Allison with alcohol and that Tyler provided her with marijuana, which they smoked in the basement. Allison testified that Tyler's mother was aware that the marijuana was being used. At some point that night, Tyler and Allison had sexual intercourse. As a result of that sexual contact, Micah was born in September 2007. After his birth, Allison and Micah lived in Daniel and Linda's home.

In June 2008, when Micah was 9 months old, the State initiated an action against Tyler to establish paternity and child

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[3] See *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

support. Prior to that time, Tyler was not aware of Micah's existence. On July 2, 2010, the county court entered a decree of paternity, custody, and child support. The decree granted Allison full legal and physical custody. It ordered Tyler to pay child support of $100 per month beginning August 1, 2010. The decree also awarded Tyler parenting time. Supervised visitation was to occur every other weekend, 1 to 2 weeks in the summer, and on alternating holidays.

(a) Tyler's Visitation

Linda testified that Tyler's first visit with Micah occurred at her home in November 2008. She testified that until the county court awarded Tyler parenting time in 2010, Tyler visited "more than once a year," but not always more than once a month. After Tyler was awarded parenting time, he saw Micah every other week to every 3 weeks. Under the decree, Tyler's visits with Micah were to be supervised by his mother or another suitable person approved by Allison.

Tyler's mother testified that the visits between Tyler and Micah were "great." She stated that she observed a loving relationship between them and that Micah appeared to enjoy himself and look up to Tyler. Tyler also testified about his parenting time, naming various activities that he and Micah enjoyed together. According to Tyler, at some point, Daniel and Linda started denying him visits for no reason.

Linda testified that the face-to-face visits ceased on May 8, 2011, for two reasons. There were concerns, first, that Tyler's visits were not being supervised as ordered, and second, that inappropriate sexual behavior displayed by Micah was attributable to Tyler. At some point, Allison's attorney wrote Tyler a letter stating that Allison was restricting Tyler's parenting time because of Micah's inappropriate behaviors.

On the issue of whether Tyler's visits were being supervised, Linda testified that sometime in February 2011, Tyler came to Daniel and Linda's house to pick Micah up for a visit, and his mother was not with him. When Allison saw that Tyler's

mother was not present, she told him that he could not take Micah. Linda testified that she had also suspected that the visits were sometimes unsupervised because Micah would talk about "being with Daddy Tyler downstairs" and going "up to the big house where [Tyler's mother] was." Tyler and his mother denied that the visits were ever unsupervised.

As for Micah's inappropriate sexual behavior, Linda stated she had observed that "when Micah would hug or kiss, he would say things like, ew-w, baby, baby and rub against." Allison testified that Micah "took Buzz and Woody [dolls representing characters from a children's movie] and talked about Buzz kissing his penis."

Daniel also testified about some of Micah's questionable behavior. Daniel testified that he was supervising Micah's bath one night. Because Micah is uncircumcised, Daniel reminded Micah that he needed to pull the foreskin back to clean himself. Daniel testified that Micah said, "oh, this is how guys make white stuff come out of their penis," and that Micah then started making a lot of movement on his penis. When Daniel asked Micah how he found out about that, Micah said, "from Daddy Tyler," and "from movies." At that time, Micah was 3 or 4 years old.

Tyler's testimony supports Linda's claim that Tyler's last face-to-face visit was May 8, 2011. He testified that prior to his incarceration in February 2012, he did not have face-to-face contact with Micah for what "could have been" a year or more. Linda testified that to her knowledge, Tyler did not request visitation with Micah after that time. Tyler, however, claims that at some point, he filed a contempt action in county court to allow visitation, and that the matter was pending.

Tyler testified that while in prison, he wrote numerous letters to Micah addressed to Daniel and Linda's residence and that he sometimes received a response. Tyler's mother testified that Tyler had sent cards, drawings, and puzzles for Micah to her residence.

(b) Child Support

Tyler was unable to pay the full monthly child support obligation after he was imprisoned in February 2012 for motor vehicle homicide. While in prison, Tyler requested that the State withhold his prison income to satisfy his child support obligation. However, Tyler's request was denied because his income was too low to qualify for withholding. The amount was also insufficient to cover the full child support obligation. Tyler testified that he then sent his prison income to his mother, who supplemented the income with her own funds, to pay the child support obligation on Tyler's behalf. The county court found that it was "the paternal grandmother, not the father, who pays the child support for the child." Tyler's child support payment history reflects that between July 1, 2008, and May 26, 2015, $7,517.20 had been paid and that Tyler owed $816.12.

(c) Daniel and Linda Appointed as Micah's Guardians

Allison has struggled with addiction since she was 15 years old. While she was in Daniel and Linda's custody and control, they sought counseling for her. Allison also received alcohol and drug counseling and treatment prior to the hearing on Daniel and Linda's petition. Although Allison had been sober for 7 months prior to the hearing, she relinquished her rights at the hearing. When asked why she wanted to do that, Allison stated, "Because I have struggled with alcohol on and off for the last 11 years of my life."

The evidence shows that Micah has spent the majority of his life residing with Daniel and Linda. Linda testified that Micah resided with her and Daniel from his birth in September 2007 to October 2008. From October 2008 to January 2009, Micah lived with Allison in an apartment, but had almost daily contact with Daniel and Linda. After that, Allison and Micah lived with Tyler at his mother's residence for 7 to 10 days before moving back to Daniel and Linda's house. After that, Allison

and Micah moved back with Daniel and Linda and lived there until February 2011, at least "most of that time." The evidence does not reflect where Micah lived from February to October 2011, but from November 2011 to the time of the hearing in June 2015, Micah resided with Daniel and Linda again. At that time, Allison had asked Daniel and Linda to care for Micah because she was struggling with addiction.

In March 2012, Daniel and Linda took action to become joint guardians of Micah, and in April, they were appointed.

(d) Tyler's Mother's Visitation

After the guardianship commenced in 2012, Daniel and Linda offered Tyler's mother visitation with Micah. Tyler's mother testified that while Micah was visiting her, she would call Tyler in prison and allow the two to talk. She testified that these telephonic visits ceased when Linda told her that Micah was not allowed to speak to Tyler.

Linda testified that after visits with Tyler's mother, Micah began to exhibit some anxious behavior that caused her concern. She said Micah would cry, tug on his clothing, and make some unusual and rapid hand movements under his chin. She said Micah would ask her and Daniel if he had to "go to that jail place to visit Daddy Tyler." In response to these behaviors, Daniel and Linda obtained a mental health evaluation for Micah with a child psychologist. Tyler's mother testified that she had not taken Micah to visit Tyler in prison.

In late 2013, after Tyler's mother filed for grandparent visitation, Daniel and Linda stopped allowing Micah to visit her at her house.

2. Hearing on Adoption Petition

On September 10, 2014, Daniel and Linda filed a complaint for termination of parental rights and a petition to adopt Micah in Saunders County Court. Daniel and Linda served a copy of their complaint on Allison, Tyler, and the president of the Oglala Sioux Tribe, as required by the notice provisions of

ICWA and NICWA.[4] Allison consented to the adoption, and the tribe did not intervene.

However, on October 24, 2014, Tyler filed an answer and objection to the petition for adoption. In his answer, Tyler alleged that Micah is an "Indian Child" pursuant to ICWA and NICWA and that Daniel and Linda had failed to plead or otherwise satisfy the requirements of those acts. Those requirements will be discussed at length within the analysis section of this opinion.

The hearing on Daniel and Linda's petition was held on June 4, 2015. Among other things, evidence related to Tyler's fitness as a parent was introduced, including evidence of Tyler's history of drug and alcohol abuse and Tyler's criminal record. Allison testified that Tyler had used alcohol, marijuana, and cocaine in her presence; that he had used illegal substances in her presence during the 7 to 10 days that she and Micah resided with Tyler; and that Tyler had been involved in drug deals involving marijuana and cocaine. Allison also testified that Tyler had confided in her that he had once given cocaine to a female at a party who later died from a drug overdose.

Tyler has had numerous drug-related and alcohol-related charges and convictions. In 2006, he was convicted of being a minor in possession. In 2008, he was convicted of driving under the influence (DUI) and of two separate charges of being a minor in possession. In 2010, he was convicted of driving under suspension, possession of marijuana (more than an ounce but less than a pound), and attempted assault on a police office. He was also charged with DUI, which was later amended to willful reckless driving. In 2012, Tyler was again charged with DUI, but that charge was later amended to motor vehicle homicide. As a result of his 2012 conviction, Tyler was incarcerated in the Nebraska State Penitentiary, where he continues to serve his sentence. Tyler will not

[4] See 25 U.S.C. § 1912(a) and § 43-1505(1).

be eligible for parole until 2019, when Micah will be 12 years old.

Tyler testified that while in prison, he has attended an Alcoholics Anonymous program, "Asatrú" religious programs, and language programs. At the time of the hearing, Tyler was employed in the prison's kitchen and earned approximately $87 per month.

After the hearing, the county court denied Daniel and Linda's petition. Applying ICWA, the court concluded, "By nearly any other standard[,] the court would not hesitate to grant adoption but under the unique requirements of ICWA and the burden of proof beyond a reasonable doubt that Court is compelled to deny the petition." The county court found, "While [Tyler] is certainly not a fit parent at this time, the court is unable to find beyond a reasonable doubt that he has abandoned the child."

Daniel and Linda now appeal.

III. ASSIGNMENTS OF ERROR

Daniel and Linda assign (1) that the county court erred in finding that ICWA applied at the request of Tyler, a non-Indian, and (2) that the county court erred in applying a higher burden of proof to the abandonment element and finding that Daniel and Linda failed to show that Tyler had abandoned Micah.

IV. STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[5]

[2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[6]

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an

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[5] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[6] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

independent conclusion irrespective of the determination made by the court below.[7]

V. ANALYSIS

1. Jurisdiction

[4-7] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[8] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[9] A judgment is the final determination of the rights of the parties in an action.[10] We have said that a final judgment is one that disposes of the case either by dismissing it before a hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.[11] Conversely, every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[12] The final judgment in proceedings under an adoption petition is an order granting or denying adoption.[13] Here, unlike in *In re Adoption of Madysen S. et al.*,[14] the county judge, even though the hearing had been bifurcated, denied the entire adoption petition filed by Daniel and Linda. Therefore, we have jurisdiction to proceed.

2. Applicability of ICWA and NICWA

Generally stated, the substantive portions of ICWA and the corresponding provisions of NICWA provide heightened

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[7] *Id.*

[8] *In re Adoption of Madysen S. et al., supra* note 5.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

protection to the rights of parents and tribes in proceedings involving custody, termination of parental rights, and adoption of Indian children.[15] ICWA was enacted by Congress in 1978

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[16]

In 1985, NICWA was enacted "to clarify state policies and procedures regarding the implementation by the State of Nebraska of [ICWA]."[17]

In the present case, Daniel and Linda argue that the county court erred in finding that ICWA applied when invoked by a non-Indian father; they argue that "[o]nly an Indian Tribe or parental Indian member of an Indian family may invoke those statutory protections."[18] Daniel and Linda do not offer any authority directly supporting these assertions, but argue that the purpose of ICWA is not served by applying it to protect the rights of a non-Indian father.

[8] We note that the plain language of ICWA and NICWA does not provide for any exclusion when raised by a non-Indian parent. In fact, under NICWA, "[p]arent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[19] Rather, the applicability of ICWA and NICWA to an adoption proceeding turns not

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[15] See *In re Adoption of Kenten H., supra* note 3.

[16] 25 U.S.C. § 1902.

[17] § 43-1502.

[18] Brief for appellants at 9.

[19] § 43-1503(14).

on the Indian status of the person who invoked the acts but on whether an "Indian child" is involved.[20] Here, there was no dispute that Micah meets the statutory definition of an "Indian child." Accordingly, the county court correctly found that ICWA and NICWA applied, but it did not determine whether certain provisions of ICWA and NICWA applied to Tyler.

Although we find that ICWA and NICWA apply to this adoption proceeding, this is not to say that every provision of ICWA and NICWA applies to a non-Indian parent. As we shall discuss later, certain provisions of ICWA or NICWA may not be applicable to a non-Indian parent.

3. Abandonment

In its application of NICWA, the county court found that it was compelled to deny the adoption petition, because "the court [was] unable to find beyond a reasonable doubt that [Tyler] has abandoned the child." However, NICWA does not require the "beyond a reasonable doubt" standard for the abandonment element.

For a court to grant an adoption petition, Neb. Rev. Stat. § 43-104(1) (Reissue 2016) requires that, unless the adoption falls within one of the exceptions set forth in § 43-104(2), the biological parents of the child must execute written consent to the adoption. Here, Tyler has not consented, but Daniel and Linda seek to establish an exception, i.e., that under § 43-104(2)(b), Tyler has "abandoned the child for at least six months next preceding the filing of the adoption petition."

In addition to the requirements under the adoption statutes, NICWA adds two elements to adoption proceedings involving Indian children. One of those elements requires a determination

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[20] See §§ 43-1504 and 43-1505. See, also, *In re Adoption of Kenten H., supra* note 3, 272 Neb. at 853, 725 N.W.2d at 554 ("[a]pplicability of these protective statutes depends on whether the proceedings involve an 'Indian child'"); *In re Interest of J.L.M. et al.,* 234 Neb. 381, 396, 451 N.W.2d 377, 387 (1990) ("[f]or application of the Indian Child Welfare Act to proceedings for termination of parental rights, the proceedings must involve an Indian child within the purview of the act").

to be made "beyond a reasonable doubt."[21] However, abandonment in adoption proceedings need only be proved by clear and convincing evidence.[22] Only the "serious emotional or physical damage" element imposed by NICWA must be proved beyond a reasonable doubt.[23]

Because the county court applied the incorrect burden of proof to the abandonment element, we must remand the cause for further proceedings and for a redetermination applying the correct standard. However, we first discuss the two additional elements imposed by NICWA, because issues involving those elements may recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[24]

4. Active Efforts

First, § 43-1505(4) and its federal counterpart, 25 U.S.C. § 1912(d), set forth an "active efforts" element. We discuss both federal and state statutes. The federal statute provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[25]

This statute was interpreted by the U.S. Supreme Court in *Adoptive Couple v. Baby Girl*.[26] In *Baby Girl*, the adoptive

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[21] See § 43-1505(6).

[22] See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

[23] See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

[24] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[25] 25 U.S.C. § 1912(d).

[26] *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).

parents of a young Indian girl petitioned the U.S. Supreme Court for certiorari after a South Carolina court interpreted provisions of the federal act to require that the girl be removed from her adoptive parents' care and placed with her biological father. Her father, a member of the Cherokee Nation, had previously attempted to relinquish custody, and the child had never met him. The U.S. Supreme Court reversed, interpreting the "active efforts" provision of ICWA to apply "only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights."[27] Because the Indian father in *Baby Girl* had never had custody of (or even met) the Indian child, the court determined that there was no Indian family to break up.[28] Therefore, the court concluded that the "'active efforts'" element did not apply to the termination of the Indian father's parental rights.[29]

[9] Applying the U.S. Supreme Court's interpretation of the "active efforts" element, the "breakup" of an Indian family would not be precipitated by the termination of Tyler's parental rights, because Tyler has never been part of an "Indian family" to break up. Thus, ICWA's "active efforts" element and the corresponding part of NICWA's "active efforts" element are not applicable. However, this does not end our discussion of whether NICWA's "active efforts" provision applies to the termination of Tyler's parental rights, because the Legislature amended NICWA after *Baby Girl*.[30] To the extent that NICWA provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child under ICWA, NICWA controls.[31]

The amended version of § 43-1505(4) provides, in relevant part:

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[27] *Id.*, 570 U.S. at 651.

[28] *Id.*

[29] *Id.*

[30] See 25 U.S.C. § 1921 and § 43-1503(1).

[31] 25 U.S.C. § 1921.

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *or unite the parent or Indian custodian with the Indian child* and that these efforts have proved unsuccessful.

(Emphasis supplied.)

[10] The Nebraska statute is almost identical to the federal statute, except it adds that "active efforts" must be made "to unite the parent . . . with the Indian child."[32] Again, pursuant to NICWA, "[p]arent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[33] As a result, "active efforts" must be made to unite the Indian child with both biological parents, regardless of whether they are Indian. But the amended version of § 43-1505(4) also provides: "Prior to the court ordering . . . the termination of parental rights, the court shall make a determination . . . *that the party seeking placement or termination has demonstrated that attempts were made to provide active efforts to the extent possible under the circumstances*." (Emphasis supplied.) Therefore, the county court should review active efforts in light of the particular circumstance presented in this case.

Here, the county judge did not make any findings on the issue of "active efforts." In fact, the court found that Daniel and Linda were not required to show active efforts had been made to unite Tyler and Micah. Therefore, on remand, the court must reopen the record, and, in addition to applying the correct standard to the issue of abandonment, determine whether "active efforts" have been made or whether *attempts*

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[32] See § 43-1505(4).

[33] § 43-1503(14).

were made to provide active efforts to the extent possible under the circumstances.[34]

5. Serious Emotional or Physical Damage

We now discuss the second additional element that ICWA and NICWA impose on parties seeking to terminate the parental rights of an Indian child, i.e., the "serious emotional or physical damage" element. The federal statute, 25 U.S.C. § 1912(f), provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Similarly, § 43-1505(6) provides:

> The court shall not order termination of parental rights under this section in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

In *Baby Girl*, the U.S. Supreme Court held that the "'serious emotional or physical damage'" element does not apply to parents who never had custody of the Indian child, reasoning that the words "'continued custody'" within the statute refer to custody that the parent already has (or at least had at some point in the past).[35] Because the Indian father in *Baby Girl* never had custody of the Indian child, the Supreme Court determined that the "'serious emotional or physical damage'"

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[34] See § 43-1505(4).

[35] *Adoptive Couple v. Baby Girl, supra* note 26, 570 U.S. at 647.

element did not apply to him.[36] In the present case, Daniel and Linda argue that because Tyler never had custody of Micah, Daniel and Linda need not prove the "serious emotional or physical damage" element.

On the other hand, Tyler argues that *Baby Girl* is limited to the particular facts of that case, which involved a father who did not have any contact with the child prior to the termination proceedings. Tyler argues that this case is distinguishable from *Baby Girl*, because he has visitation rights and "has paid his child support regularly, even while in custody at the State Penitentiary."[37] Indeed, Tyler does have visitation rights, but even assuming that the rule from *Baby Girl* is limited to the facts presented in that case, having the right of parenting time does little to distinguish this case from *Baby Girl* if the parent fails to exercise that right. Thus, we need to further examine Tyler's rights in the context of his actual parenting time.

The evidence supports that prior to his incarceration, Tyler did not have any contact with Micah for approximately 1 year. Since the birth of Micah in 2007, Tyler has lived with Micah for a mere 7 to 10 days. Tyler's visits with Micah were, by court order, to be supervised, and the record does not reflect that Tyler ever sought unsupervised or increased visitation. Further, Tyler never had custody, and there is no evidence that Tyler ever *sought* custody. Moreover, even if Tyler's rights are not terminated in this proceeding, Tyler will not be eligible to obtain custody of Micah until at least 2019, when he is eligible for parole and Micah is 12 years old. Micah should not be in limbo for years to come.[38]

Micah has two loving family members who have essentially raised him from birth, and there is no evidence that this situation is not in his best interests. The law provides procedural

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[36] See *id.*

[37] Brief for appellee at 13.

[38] See *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982).

safeguards to protect parental rights to the utmost,[39] but the parent must, in return, make reasonable efforts to be a parent. Unfortunately, as the county judge noted, Tyler's record of fatherhood is minimal. Further, we agree with the county court that "it is the paternal grandmother, not the father, who pays the child support for the child."

After reviewing the evidence, we conclude that this case is not distinguishable from *Baby Girl*. Therefore, because Tyler never had custody of Micah, the "serious emotional or physical damage" element does not apply to him. Accordingly, on remand, the county court need not consider whether Daniel and Linda satisfied this element.

VI. CONCLUSION

The county court erred in applying the "beyond a reasonable doubt" standard to the abandonment element and also in finding that Daniel and Linda were not required to show active efforts had been made to unite Tyler and Micah. We therefore reverse, and remand with directions to allow the parties to submit additional evidence in further proceedings consistent with this opinion.

Reversed and remanded.

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[39] See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

State of Nebraska, appellee, v. Frantz G. Kolbjornsen, appellant.

888 N.W.2d 153

Filed December 2, 2016. No. S-16-148.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Prisoners.** The statutory procedure under Neb. Rev. Stat. § 29-3805 (Reissue 2016), rather than the procedure under Neb. Rev. Stat. § 29-1207 (Reissue 2016), applies to instate prisoners.
4. **Judgments: Appeal and Error.** A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.
5. **Good Cause: Words and Phrases.** Good cause means a substantial reason; one that affords a legal excuse.
6. ____: ____. Good cause is something that must be substantial, but also a factual question dealt with on a case-by-case basis.

Appeal from the District Court for Hall County: William T. Wright, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

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

Cassel, J.

INTRODUCTION

Frantz G. Kolbjornsen appeals from a criminal case order denying relief under two different "speedy trial" statutes.[1] Because Kolbjornsen was a Nebraska prisoner at all relevant times, only one statute applied—the one governing intrastate detainers.[2] We conclude that the district court's determination that courtroom unavailability established good cause to extend the time in which to try Kolbjornsen was not clearly erroneous, and we affirm.

BACKGROUND

In September 2014, Kolbjornsen began serving sentences imposed for criminal offenses committed in Hamilton County, Nebraska. Approximately 2 months later, the State filed a complaint in the county court for Hall County, alleging that Kolbjornsen committed assault on a peace officer in the third degree. On December 16, the State received a letter from the Department of Correctional Services stating that Kolbjornsen was requesting a quick and speedy disposition of two untried charges, one of which was the charge for assault on a peace officer in the third degree. The State later amended the charge to assault by a confined person, and Kolbjornsen was bound over to the district court after a preliminary hearing. On March 3, 2015, the State filed an information charging Kolbjornsen with assault by a confined person.

In May 2015, the State filed a motion requesting the district court to advance Kolbjornsen's trial "for speedy trial requirements" and requesting a hearing date as soon as possible. During a hearing on the motion, the court stated that it would

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[1] Neb. Rev. Stat. §§ 29-1207 and 29-3805 (Reissue 2016).

[2] § 29-3805.

advance the trial from August until May 27 or 28. On May 22, Kolbjornsen moved for continuance, stating that the defense was not ready to proceed to trial. The district court thereafter granted the motion and continued the matter until August 26.

On August 12, 2015, the district court held a final plea hearing. During the hearing, Kolbjornsen's counsel stated that Kolbjornsen did not "have a problem" if his trial was not held in August. The court explained that various jury courtrooms were going to be unavailable during renovations to the building, including the courtroom in which Kolbjornsen's trial was to be held. After the bailiff said "no jury trials" for October and November, Kolbjornsen's counsel asked, "Could we shoot for October . . . and see if something breaks[?]" The court responded, "Well, basically, what we have been told is nothing is available for October." The court continued the trial until December 16.

On December 7, 2015, Kolbjornsen filed two motions. One motion requested absolute discharge under § 29-1207. The other motion sought to dismiss the case for lack of jurisdiction under § 29-3805.

During a hearing on the motions before Judge William T. Wright, the district court received exhibits and heard testimony of witnesses. Evidence established that the district court for Hall County had two district courtrooms large enough to accommodate jury trials and that those courtrooms were shared by three district judges. In 2015, Hall County began repairs within the courthouse and repairs to the courtrooms were scheduled to begin in October. The courtrooms were unavailable while being repaired. Since October, only one jury courtroom was available for all district court cases. Each of the three district judges was assigned specific dates to conduct jury trials during October through December. The evidence showed that Judge Wright conducted a criminal jury trial for a different individual on August 26 and 27. Judge Wright's bailiff stated in an affidavit that the judge was scheduled to preside over 26 criminal jury trials for June through August in Hall County

and 27 such trials for September through December. The bailiff stated that Judge Wright also was presiding over additional cases in Buffalo County during those times, in addition to civil cases in both Hall County and Buffalo County. The bailiff stated that "all hearings and trials were calendared and docketed at the earliest . . . date available to the court for such purpose" and that "there weren't any earlier available dates to set this case for hearings or trial."

The district court denied Kolbjornsen's motions. The court found that renovations caused one of the two district court courtrooms to be unusable for jury trials for substantial periods. The order stated that repairs to courtrooms in which jury trials could be held were scheduled to begin in October 2015, that the repairs had not been completed at the time of the order, and that the courtrooms were not available for use while being repaired. The order further stated that from October 25 to the end of 2015, only one jury courtroom was available for all district court cases due to repair work. The court found that all three of the district judges were using one jury courtroom during the months of October, November, and December, and that each district judge was assigned specific dates to conduct jury trials within that timeframe. As to Kolbjornsen's motion under § 29-1207, the court determined that the period from August 26 to December 16 should be excluded under § 29-1207(4)(b) and (f). With regard to Kolbjornsen's motion under § 29-3805, the court found that the reasons it gave on August 12 to continue the matter to December 16 established "good cause." The court found that for good cause, the period of time between May 22 and August 12 and between August 12 and December 16 should be excluded. The court concluded that neither time limit required dismissal at the time that Kolbjornsen filed his motions.

Kolbjornsen filed a timely appeal, which we moved to our docket.[3]

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

ASSIGNMENT OF ERROR

Kolbjornsen assigns, consolidated, that the district court erred in overruling his motions pursuant to §§ 29-1207 and 29-3805.

STANDARD OF REVIEW

[1] Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[4]

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[5]

ANALYSIS

§ 29-1207 Does Not Apply

[3] Kolbjornsen sought relief under the speedy trial provisions of two different legislative acts, but only one applies to his case. Both §§ 29-1207 and 29-3805 address speedy trial rights. But we have previously held that the latter statutory procedure, rather than the former, applies to instate prisoners.[6] Because Kolbjornsen was a "committed offender"[7] in the custody of the Department of Correctional Services at the time that he filed his motions, his statutory speedy trial rights were governed by Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 2016). The procedure under § 29-1207 does not apply.

[4] Kolbjornsen suggests that because the State "never asserted [the statute's] inapplicability" and the district court

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[4] *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

[5] *Id.*

[6] See, *State v. Tucker, supra* note 4; *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990); *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986). See, also, *State v. Caldwell*, 10 Neb. App. 803, 639 N.W.2d 663 (2002).

[7] See Neb. Rev. Stat. § 83-170(3) (Supp. 2015).

"did not decide the issue," we "cannot review a decision not made by the lower court."[8] He relies on our oft-repeated statement that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[9] But the district court *did* consider the applicability of § 29-1207. The question cannot be divided in the artificial way that Kolbjornsen urges. When the court denied any relief purportedly based on § 29-1207, it came to the right result for the wrong reason—albeit without any help from the State below. A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.[10] Kolbjornsen's assignment of error regarding § 29-1207 lacks merit.

Intrastate Detainer

General Time Limit

The intrastate detainer statute generally provides a 180-day time limit to commence a trial. Section 29-3805 requires that an untried indictment, information, or complaint be brought to trial "[w]ithin one hundred eighty days after the prosecutor receives a certificate from the director pursuant to section 29-3803 or 29-3804 or within such additional time as the court for good cause shown in open court may grant . . . ."

The consequence of not bringing a charge to trial within that time period is dismissal with prejudice of the untried indictment, information, or complaint.[11] Here, the 180-day period began running on December 16, 2014. Without any extensions, Kolbjornsen needed to be tried by June 14, 2015.

But, as § 29-3805 expressly states, the 180-day period may be extended "for good cause shown in open court." And the State relies on an extension based on this language.

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[8] Reply brief for appellant at 1.

[9] See, e.g., *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[10] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[11] § 29-3805.

Definition of "Good Cause"

[5,6] We have not defined "good cause" for purposes of § 29-3805, but the Nebraska Court of Appeals has. "Good cause means a substantial reason; one that affords a legal excuse."[12] It is "something that must be substantial, but also a factual question dealt with on a case-by-case basis."[13]

We see no reason to depart from this definition, although it is concededly very general. And in applying the definition, each case must be determined based upon its particular facts and circumstances.

The Nebraska appellate courts have applied the "good cause" extension of § 29-3805 to continuances obtained under a variety of circumstances. We have held that a continuance granted at an instate prisoner's request in the county court where a complaint is pending against the prisoner extends the time within which such a prisoner must be brought to trial under § 29-3805.[14] And the Court of Appeals has determined that a continuance granted at a prosecutor's request but with the implicit consent of the prisoner's attorney extended the time limit.[15]

Application of Statutory Extension

There is no dispute that Kolbjornsen's request for a continuance extended the time in which to try him. On May 22, 2015, Kolbjornsen moved for continuance, and the court continued the matter until August 26. Kolbjornsen agrees that 96 days should be added to the 180-day period. This extended the deadline to September 18. Thus, Kolbjornsen's argument depends upon the events of the August plea hearing.

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[12] *State v. Rouse*, 13 Neb. App. 90, 94, 688 N.W.2d 889, 892 (2004).

[13] *State v. Caldwell, supra* note 6, 10 Neb. App. at 808, 639 N.W.2d at 667.

[14] See *State v. Soule, supra* note 6.

[15] See *State v. Rouse, supra* note 12.

Kolbjornsen's argument that he had no notice that "[§] 29-3805 matters"[16] were being discussed at the August 12, 2015, hearing is perhaps somewhat disingenuous. Although the hearing was a final plea hearing, Kolbjornsen's counsel stated at the outset:

> Well, Your Honor, there is no plea agreement. I have discussed with . . . Kolbjornsen the Court's docket, which I spoke to myself just a few minutes ago, Your Honor, and I think you are well aware of your docket. . . . Kolbjornsen doesn't have a problem if we don't try it this month, Your Honor, but I'm eagerly awaiting some sort of idea when it would be tried, Your Honor. And that would be the point. I mean he doesn't want to wait too long, but he doesn't mind continuing it from this month.

The court responded, "Well, the problem is essentially one of facilities, as well as other matters demanding the Court's time for trial, particularly jury trial." The court proceeded to further explain the upcoming unavailability of courtrooms. After explaining that the only option for a jury trial was in December, the court stated that "Kolbjornsen is free, if he chooses, to seek some kind of motion for dismissal on the basis of speedy trial, but quite frankly under the circumstances, I think the Court and the State have a legitimate excuse." Kolbjornsen's counsel declined to waive a speedy trial and stated, "I agree with you, if I want to, I'll file a motion and I guess the Nebraska Supreme Court can take it up then." Clearly, Kolbjornsen's speedy trial rights were a substantial focus of the August 12 hearing.

And in due course, Kolbjornsen filed his motions (one based on § 29-1207 and the other based on § 29-3805). His motions relied solely on statutory grounds and did not assert any constitutional issue. As we have recited, the district court conducted an evidentiary hearing.

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[16] Brief for appellant at 12.

The evidence at this hearing established that there was no time or place to hold a jury trial for Kolbjornsen in August 2015. Kolbjornsen argues that the State failed to prove a courtroom was unavailable on and around August 26. But the evidence shows that the judge conducted a criminal jury trial on August 26 and 27 for a different defendant, against whom the State had filed an information 1 month before it filed the information against Kolbjornsen. Thus, the judge handling Kolbjornsen's case and a jury-capable courtroom were unavailable on those dates. The judge's bailiff stated that on August 12, she advised the court that another case was set for a jury trial for the August jury term, that "there was no other . . . court space available to complete a jury trial on that date[,] and that the next available jury trial date would be December 16, 2015." The State established courtroom unavailability around August 26.

The district court's determination that courtroom unavailability constituted good cause to continue the trial was not clearly erroneous. According to the evidence, only one jury courtroom was available for all district court cases since October 2015 and the three district judges were assigned specific dates to conduct jury trials during October through December. We agree with the district court that under the circumstances, good cause existed to continue the trial from August 26 to December 16, thereby extending the time to try Kolbjornsen for an additional 112 days.

Nonetheless, we caution trial courts to tread carefully in granting continuances based on courtroom unavailability. The counties play an important role in providing "suitable . . . accommodation."[17] Here, the State produced enough evidence to satisfy its initial burden of production. But evidence of other alternatives might easily have tipped the balance against a continuance.

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[17] See Neb. Rev. Stat. § 23-120(1) (Reissue 2012).

Because good cause was shown to extend the June 14, 2015, trial date by a total of 208 days, the State had until Friday, January 8, 2016, to bring Kolbjornsen to trial. Accordingly, the time to try Kolbjornsen had not expired at the time of his December 7, 2015, motion, and the district court properly overruled Kolbjornsen's motion.

CONCLUSION

We conclude that the speedy trial provisions of § 29-1207 had no application to Kolbjornsen, because he was a Nebraska prisoner. Rather, the time was governed by § 29-3805. Under the circumstances, the district court's determination that courtroom unavailability established good cause to extend the time in which to try Kolbjornsen was not clearly erroneous. Because the time to try Kolbjornsen had not expired when he filed his motion to dismiss the case, the district court correctly overruled the motion.

Affirmed.

State of Nebraska, appellee, v. David L. Rice, appellant.

888 N.W.2d 159

Filed December 9, 2016. No. S-15-932.

1. **Actions: Parties: Death: Abatement, Survival, and Revival: Appeal and Error.** Whether a party's death abates an appeal or cause of action presents a question of law.
2. **Attorney Fees: Appeal and Error.** When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.
3. **Actions: Parties: Death: Abatement, Survival, and Revival: Appeal and Error.** Statutory provisions regarding abatement and revivor of actions apply to cases in which a party dies pending an appeal.
4. **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.
5. **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.
6. **Postconviction: Attorney Fees: Appeal and Error.** Court-appointed counsel in a postconviction proceeding may appeal to the appellate courts from an order determining expenses and fees allowed under Neb. Rev. Stat. § 29-3004 (Reissue 2016). Such an appeal is a proceeding separate from the underlying postconviction proceeding.
7. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, whether to appoint counsel to represent the defendant is within the discretion of the trial court.
8. **Postconviction: Justiciable Issues: Right to Counsel.** When the assigned errors in a postconviction petition before the district court

contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

9. **Postconviction: Attorney Fees.** Although appointment of counsel in postconviction cases is discretionary, Neb. Rev. Stat. § 29-3004 (Reissue 2016) provides that once counsel has been appointed and appointed counsel has made application to the court, the court "shall" fix reasonable expenses and fees.
10. **Attorney Fees.** To determine reasonable expenses and fees under Neb. Rev. Stat. § 29-3004 (Reissue 2016), a court must consider several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Motion for substitution of parties overruled. Reversed and remanded with directions.

Timothy L. Ashford for appellant.

Donald W. Kleine, Douglas County Attorney, and Katie L. Benson for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

This case, No. S-15-932, is an appeal from the order of the district court for Douglas County which denied attorney Timothy L. Ashford's application for expenses and fees for service as court-appointed appellate counsel for David L. Rice in Rice's postconviction proceeding. Rice died while this appeal was pending, and Ashford filed a suggestion of death. Ashford later filed a motion for substitution of parties in which he requested that, if necessary, he or a member of Rice's family be substituted for Rice as a party to this appeal. We determine that because Ashford is the proper appellant in this appeal, no substitution of parties is needed. With regard to

the merits of the appeal, we reverse, and remand to the district court for further proceedings.

STATEMENT OF FACTS

In 1971, Rice was convicted of first degree murder and was sentenced to life imprisonment. His conviction and sentence were affirmed on direct appeal. *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). Rice subsequently filed unsuccessful actions for habeas corpus relief in federal court and a state court petition for postconviction relief, the denial of which was affirmed by this court in *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983).

On September 28, 2012, Rice filed a successive petition for postconviction relief. The district court dismissed Rice's petition on the bases that (1) the petition was barred by the statute of limitations set forth in Neb. Rev. Stat. § 29-3001(4) (Reissue 2016), (2) Rice's claims were procedurally barred because they were or could have been raised in his direct appeal or his previous postconviction proceeding, and (3) Rice's petition did not set forth claims that would entitle him to relief. Rice appealed the denial of his petition for postconviction relief and made several assignments of error on appeal to this court in case No. S-14-056.

The record in case No. S-14-056 shows that Rice's petition for postconviction relief was filed on his behalf in the district court by attorney Ashford. Ashford also filed on behalf of Rice a motion to appoint counsel on the basis that Rice was indigent. Ashford continued to represent Rice in the postconviction proceeding. However, the record in case No. S-14-056 did not contain a ruling on the motion to appoint counsel prior to the district court's order denying postconviction relief. Consequently, after Rice filed his notice of appeal of the order denying postconviction relief and given the unresolved motion pending in district court, we directed the district court "to rule upon [the] motion for appointment of counsel previously filed in the trial court."

In an order filed January 24, 2014, the district court acknowledged that Rice had filed a motion to appoint counsel, but the court stated that it was never presented with the motion and that Rice never asked it to rule on the motion. The district court asserted that because Rice had filed a notice of appeal on January 16, it believed it was without jurisdiction to rule on the motion. The district court stated, however, that this court required it to take action. Therefore, the court entered an order in which it found that Rice should be allowed to proceed in forma pauperis and appointed Ashford as counsel for Rice.

The appeal in case No. S-14-056 proceeded, and in due course, we sustained the State's motion for summary affirmance in an order in which we cited § 29-3001(4)(e) and stated that Rice's "petition for postconviction relief is time barred." We overruled Rice's subsequent motion for a rehearing, and the mandate in case No. S-14-056 was spread on February 6, 2015.

On August 14, 2015, Ashford filed an application in the district court for the allowance of expenses and fees associated with the appeal in case No. S-14-056. The application was accompanied by Ashford's affidavit and an invoice which showed fees of $7,133.75, expenses of $249.85, and mileage of $44.80, for a total request of $7,428.40. After a hearing in which the State did not contest the requested expenses and fees, the district court denied the application for attorney fees. In its order denying the application, the court stated, "Subsequent to the hearing, this Judge received notice that he had been sued in the United States District Court by the applicant herein." The court then noted that it had denied postconviction relief and an evidentiary hearing on the basis that Rice's claims were both procedurally and time barred. The court stated, "Although not material to this Order, the Court is satisfied that the underlying claims for post conviction relief were frivolous." The court then stated that "the appeal itself

was frivolous," and it therefore concluded that "no fees should be allowed."

Ashford appealed the district court's order denying his application for attorney fees, resulting in the current appeal, case No. S-15-932.

While the current appeal was pending, Ashford filed a suggestion of death indicating that Rice had died on March 11, 2016. Ashford later filed a motion for substitution of parties in which he requested that, if necessary, he or a member of Rice's family be substituted for Rice as a party to this appeal. We ordered the case to proceed to briefing and oral argument in order to allow us to consider the effect of Rice's death on this appeal, the need for a substitution of parties, and the merits of the appeal.

ASSIGNMENT OF ERROR

Ashford claims that the district court erred when it denied his application for expenses and fees.

STANDARDS OF REVIEW

[1] Whether a party's death abates an appeal or cause of action presents a question of law. *In re Conservatorship of Franke*, 292 Neb. 912, 875 N.W.2d 408 (2016).

[2] When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

ANALYSIS

§ 29-3004 Governs Fees for Court-Appointed Counsel in This Postconviction Proceeding.

As an initial matter, we note that in this appeal, Ashford contends that he should be allowed attorney fees under Neb. Rev. Stat. § 29-3905 (Reissue 2016) and relies on case law applying § 29-3905 to support his argument. Ashford's reliance on § 29-3905 is misplaced. Section 29-3905 applies to

appointed counsel for a "felony defendant" and should be read in connection with Neb. Rev. Stat. § 29-3903 (Reissue 2016) regarding appointment of counsel in "criminal proceedings." The underlying action in the present case is Rice's action for postconviction relief, and Neb. Rev. Stat. § 29-3004 (Reissue 2016) governs the appointment of counsel and the payment of fees to appointed counsel in postconviction proceedings. Therefore, § 29-3004 rather than § 29-3905 controls the allowance of expenses and fees in this case.

Nevertheless, we note that both § 29-3905 and § 29-3004 require that, upon hearing an application by court-appointed counsel, the court "shall fix reasonable expenses and fees, and the county board shall allow payment to [court-appointed counsel] in the full amount determined by the court." Because of the similarity in language, case law interpreting § 29-3905 will be relevant to our application of § 29-3004 in this appeal.

This Appeal Concerns Ashford's Application for Expenses and Fees Pursuant to § 29-3004, and Therefore, the Appeal Does Not Abate as a Result of Rice's Death and No Substitution of Parties Is Necessary.

Before considering the merits of this appeal, we must first address the suggestion of death and the motion for substitution of parties filed by Ashford. Specifically, we must determine whether this appeal abates as a result of Rice's death and whether a substitution of parties is necessary. We conclude that in this appeal limited to the challenge to the district court's ruling on Ashford's application for expenses and fees, Ashford is the proper appellant, the appeal does not abate as a result of Rice's death, and no substitution of parties is necessary. We therefore overrule the motion for substitution of parties.

[3-5] We have stated that statutory provisions regarding abatement and revivor of actions apply to cases in which a party dies pending an appeal. *In re Conservatorship of Franke*,

292 Neb. 912, 875 N.W.2d 408 (2016). We further stated 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. *Id*. Regarding an appeal, we have stated that 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. *Id*. We have acknowledged that the reason substitution may be required is that a deceased person cannot maintain a right of action against another or defend a legal interest in an action or proceeding. *Id*. Given these principles, to determine whether this appeal abates and whether substitution of parties is necessary, we must consider the legal right at issue in this appeal and whether such right may be adequately pursued despite Rice's death.

[6] The order being appealed in this case concerns Ashford's representation of Rice in connection with this postconviction appointment. Specifically, this appeal is limited to a challenge to the district court's order denying Ashford's application for allowance of attorney fees under § 29-3004. In *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987), court-appointed counsel for a criminal defendant filed applications requesting compensation pursuant to Neb. Rev. Stat. § 29-1804.12 (Reissue 1985), now codified at § 29-3905. We held in *In re Claim of Rehm and Faesser* that "appointed counsel . . . may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under § [29-3905]" and that "[s]uch an appeal is a proceeding separate from the [underlying] criminal case." 226 Neb. at 113, 410 N.W.2d at 96. See, also, *State v. Ryan*, 233 Neb. 151, 444 N.W.2d 656 (1989) (reviewing attorney's appeal of order regarding court-appointed counsel's fees in criminal case). Our reasoning in these criminal cases under a similar appointment statute logically applies to the instant appeal from an attorney-fee ruling in a postconviction case. We therefore hold that court-appointed counsel in a

postconviction proceeding may appeal to the appellate courts from an order determining expenses and fees allowed under § 29-3004 and that such an appeal is a proceeding separate from the underlying postconviction proceeding.

As just noted, Ashford has a statutory basis for the right he asserts in his own behalf both at the trial level and on appeal. With this understanding of the legal interest at issue in this appeal, we determine that this appeal from the trial proceeding for fees under § 29-3004 did not abate and that no substitution of parties is necessary as a result of Rice's death. The legal right at issue is Ashford's right to expenses and fees under § 29-3004, payable by the county. Given the statute, this proceeding involves interests that are personal to Ashford rather than to Rice. Ashford's rights under § 29-3004 did not become moot as a result of Rice's death, and Ashford remains as a person capable of pursuing such rights. See *Davis v. Rahkonen*, 112 Wis. 2d 385, 332 N.W.2d 855 (Wis. App. 1983) (ruling that death of party to divorce action did not deprive court of jurisdiction to award attorney fees pursuant to statute).

We conclude that this appeal did not abate as a result of Rice's death and that no substitution of parties is necessary. We therefore overrule the motion for substitution of parties. We turn to the merits of this appeal.

Pursuant to § 29-3004, District Court Was Required to Fix Reasonable Expenses and Fees and Court Abused Its Discretion When It Concluded That No Fees Should Be Allowed.

[7,8] Ashford claims that the district court erred when it denied his application and concluded that no fees should be allowed. We conclude that after a court has appointed counsel in a postconviction action, § 29-3004 requires the court to fix reasonable expenses and fees. Therefore, the district court abused its discretion in this case when it determined

without an examination of reasonableness that no fees should be allowed.

Section 29-3004 provides that in postconviction proceedings,

> [t]he district court may appoint not to exceed two attorneys to represent the prisoners in all proceedings under sections 29-3001 to 29-3004. The district court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to the attorney or attorneys in the full amount determined by the court. The attorney or attorneys shall be competent and shall provide effective counsel.

We have held that under the Nebraska Postconviction Act, whether to appoint counsel to represent the defendant is within the discretion of the trial court. See *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). We have further stated that when the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant. *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

[9] Although appointment of counsel in postconviction cases is discretionary, § 29-3004 provides that once counsel has been appointed and appointed counsel has made application to the court, the court "shall" fix reasonable expenses and fees. The language in § 29-3004 regarding expenses and fees is nearly identical to the language in § 29-3905 stating that upon hearing appointed counsel's application, the court "shall" fix reasonable expenses and fees, and, as we have noted above, we look to jurisprudence under § 29-3905 for guidance. We have recognized that under § 29-3905, the trial court exercises its discretion in setting the amount of the fee. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015). However, such discretion is exercised within the court's responsibility to determine "reasonable" expenses and fees. The mandatory language of both § 29-3905 and § 29-3004, stating that the court "shall" fix reasonable expenses and fees, does not give

the court the discretion to determine that it will not fix any expenses and fees.

In case No. S-14-056, we directed the district court to rule on the outstanding motion to appoint counsel. We did not direct a particular ruling. At that point, the district court had discretion to consider the merits of Rice's claims when deciding whether or not to appoint postconviction counsel. The district court appointed Ashford as counsel. After Ashford was appointed as postconviction counsel, § 29-3004 required the district court, upon application, to fix reasonable expenses and fees. In its ruling on the application, the district court failed to consider the reasonableness of Ashford's requested expenses and fees; instead, it determined that the appeal of the denial of the postconviction motion was frivolous and that therefore, no fees should be awarded. The proper time for a court to consider frivolousness is when deciding whether to grant or deny leave to proceed in forma pauperis, see Neb. Rev. Stat. § 25-2301.02 (Reissue 2016), or when exercising discretion on whether to grant or deny appointment of postconviction counsel, see *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016). Once a trial court grants leave to proceed in forma pauperis and appoints postconviction counsel, the court has no discretion under § 29-3004 to deny counsel's request for reasonable attorney fees on the ground that the action to which counsel was appointed was frivolous. Because the district court focused on the wrong criterion, it abused its discretion.

[10] With respect to fixing reasonable expenses and fees, we have stated that to determine proper and reasonable attorney fees, a court must consider several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Kercher v. Board of Regents*, 290 Neb.

428, 860 N.W.2d 398 (2015). These are also the proper considerations for a court when fixing reasonable expenses and fees under § 29-3004.

We conclude that the district court abused its discretion when it determined that because the appeal of the denial of Rice's postconviction claims was frivolous, no fees should be awarded to appointed postconviction counsel Ashford. We therefore reverse the district court's order denying Ashford's application for expenses and fees.

On Remand, Application Should Be Assigned to a Different Judge to Determine Reasonable Expenses and Fees.

Having reversed the district court's order denying Ashford's application for fees, we need to consider two additional matters: (1) whether we should fix the expenses and fees or whether we should remand the cause to the district court to make that determination and (2) whether the application should be considered by a different judge if the cause is remanded. We conclude that the cause should be remanded to the district court and that on remand, the application should be assigned to a different judge to fix reasonable expenses and fees under § 29-3004.

Ashford urges this court to direct the district court on remand to simply award the expenses and fees he requested. He notes that the State did not oppose his application either at the district court level or in this appeal. He relies in part on *State v. Lowery*, 19 Neb. App. 69, 798 N.W.2d 626 (2011), in which he contends the Nebraska Court of Appeals held that under § 29-3905, the court must award fees in the amount requested if the State does not object.

In a concurrence in *Lowery*, then-Court-of-Appeals-Judge William B. Cassel suggested that in *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998), this court as a practical result had created a presumption that fees and expenses must be granted in the amount requested if the opposing party did

not object or present contrary evidence. Based on the record in *Schirber*, we had stated that "where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request . . . and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted." 254 Neb. at 1006, 581 N.W.2d at 876. To the extent *Schirber* created a presumption that if the opposing party does not object, fees and expenses must be awarded in the amount requested, it is disapproved. Particularly in a case such as the present case, where § 29-3004 requires the court to fix "reasonable" expenses and fees, the trial court has a duty to determine that expenses and fees requested are in fact reasonable regardless of whether the opposing party objects or presents contrary evidence. The trial court's duty under the statute to set reasonable expenses and fees is not obviated when the opposing party fails to resist the request.

In view of the foregoing analysis, we determine that the present cause should be remanded to the district court for a determination of whether Ashford's request sets forth "reasonable expenses and fees." See § 29-3004. The district court has not yet performed this analysis, and we believe the fixing of reasonable expenses and fees under § 29-3004 should be done in the first instance by the district court. Accordingly, we do not determine the expenses and fees in this appeal; nor do we direct the district court to award a specific amount upon remand.

Ashford also argues that the specific trial judge in this case has a conflict with Ashford and therefore should not have considered Ashford's application. The trial judge was not asked to recuse himself, and his failure to recuse himself was not assigned as error in this appeal. However, because the trial judge acknowledged in his order denying Ashford's application that he had been named as a defendant in a suit filed by Ashford in federal court, in order to avoid bias or the

appearance of bias, we believe it is prudent that on remand, Ashford's application be assigned to a different judge.

CONCLUSION

In this appeal of the district court's order denying Ashford's application for attorney fees, we determine that Ashford is the proper appellant and that therefore, this appeal was not abated and no substitution of parties is necessary as a result of Rice's death. The motion for substitution of parties in this court is overruled. We further conclude that because the court appointed Ashford as postconviction counsel, § 29-3004 required the district court to fix reasonable expenses and fees, and that the court abused its discretion when it determined that no fee should be awarded based on the perceived frivolousness of Rice's appeal. We reverse the order of the district court awarding no expenses and fees, and we remand the cause to the district court with directions that the cause be assigned to a different judge to fix reasonable expenses and fees under § 29-3004.

Motion for substitution of parties overruled.
Reversed and remanded with directions.

Michael J. Wilczewski and Michelle A. Wilczewski, appellants, v. Charter West National Bank, a National Banking Association, appellee.

889 N.W.2d 63

Filed December 9, 2016. No. S-15-1051.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Arbitration and Award: Federal Acts: Statutes: Contracts.** When determining whether an arbitration clause is governed by Nebraska's Uniform Arbitration Act or the Federal Arbitration Act, the initial question is whether the parties' contract evidences a transaction "involving commerce" as defined by the Federal Arbitration Act.
5. **Arbitration and Award: Federal Acts: States.** There does not have to be a multistate transaction for the Federal Arbitration Act to be applicable.
6. **Constitutional Law: Arbitration and Award: Federal Acts: States.** Because Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce where in the aggregate the economic activity in question would represent a general practice subject to federal control, the same must be said for application of the Federal Arbitration Act.
7. **Banks and Banking: Real Estate: States.** Generally, residential real estate lending affects interstate commerce.
8. **Deeds: Merger: Fraud.** The doctrine of merger does not apply where there has been fraud or mistake.
9. **Arbitration and Award: Dismissal and Nonsuit.** Where all of the contested issues are subject to arbitration, a court has discretion to

consider whether dismissal is more appropriate than staying a case pending arbitration.

10. **Courts: Pretrial Procedure: Time.** Because of the individualized nature of the administration of justice, trial courts must necessarily be given wide discretion to ensure that the goal of timely disposition of cases is reached in a manner consistent with fairness to all parties.
11. **Dismissal and Nonsuit: Appeal and Error.** In determining whether dismissal is more appropriate than staying a case, a court should consider the case's procedural history and the situation at the time of dismissal.
12. **Pretrial Procedure: Appeal and Error.** Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

John D. Stalnaker, Robert J. Becker, and Ashley A. Buhrman, of Stalnaker, Becker, & Buresh, P.C., for appellants.

Jeffrey A. Silver for appellee.

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

Per Curiam.

I. INTRODUCTION

A bank foreclosed its loan on residential real estate and resold the property under a written contract containing an arbitration clause. The buyers appeal from an order compelling arbitration of their lawsuit against the bank. Because the Federal Arbitration Act (FAA)[1] extends to the full reach of Congress' Commerce Clause power and the bank's activity fell within its reach, the buyers' claims arising from the purchase of residential real estate were subject to the arbitration clause. And because we find no merit to the buyers' other arguments, we affirm the order compelling arbitration.

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[1] 9 U.S.C. § 1 et seq. (2012).

II. BACKGROUND

Michael J. Wilczewski and Michelle A. Wilczewski bought residential real estate from Charter West National Bank (Charter). The property is located in Douglas County, Nebraska. The purchase agreement for this transaction contained an arbitration clause.

1. Complaint

After the Wilczewskis learned that another bank had a superior lien against the real estate, they sued Charter for money damages. They asserted theories of fraudulent misrepresentation, negligent misrepresentation, common-law fraud, and quantum meruit or unjust enrichment. Their complaint alleged that despite Charter's knowledge of the other bank's lien, Charter represented the property would be conveyed free and clear of all liens. And the complaint alleged that without their knowledge, Charter "manipulated" the language of the deed to make it subject to liens of record.

But the Wilczewskis' complaint also alleged facts showing the full extent of Charter's activity leading to acquisition of its title and its later sale of the property to them. The following list summarizes the Wilczewskis' alleged facts:

- The prior owners' 2004 purchase of the real estate;
- the prior owners' 2004 purchase money loan from the other bank, secured by a deed of trust;
- the prior owners' 2006 loan from Charter, secured by another deed of trust;
- the prior owners' 2008 bankruptcy and the bankruptcy court's authorization of Charter's foreclosure in 2009;
- completion of a trustee's sale by Charter in 2009;
- Charter's issuance of a trustee's deed in foreclosure of the deed of trust, thereby conveying title to the real estate to itself as the purchaser;
- the October 2010 purchase agreement between Charter and the Wilczewskis; and
- the November 30, 2010, deed from Charter to the Wilczewskis.

2. Motion to Compel Arbitration

Charter filed a motion to compel arbitration pursuant to the purchase agreement. The arbitration clause provided: "Any controversy or claim between the parties to this Nebraska Purchase Agreement, its interpretation, enforcement or breach, including but not limited to claims arising from tort, shall be settled by binding arbitration . . . ."

The Wilczewskis objected to Charter's motion to compel arbitration on five grounds, which were later narrowed to two: (1) that the Wilczewskis' claims did not fall within the scope of the arbitration clause and (2) that the arbitration clause was void because it failed to comply with the notice provision under Nebraska's Uniform Arbitration Act (UAA).[2] In connection with the second ground, the Wilczewskis contended that the transaction did not involve interstate commerce and that thus, the FAA did not apply to their claims.

The district court initially denied Charter's motion without prejudice. Charter appealed this order, but we concluded that it was not a final, appealable order and dismissed the appeal.[3] Upon remand, the district court conducted an evidentiary hearing on the motion to compel arbitration.

3. District Court's Order

After the evidentiary hearing, the district court sustained Charter's motion to compel arbitration. The court noted the strong public policy in favor of arbitration and construed the arbitration clause broadly. The court found that the clause was broad enough to encompass all of the Wilczewskis' claims. And, relying upon one of our decisions,[4] the court concluded that the agreement was a transaction "'involving commerce'"

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[2] Neb. Rev. Stat. § 25-2601 et seq. (Reissue 2016).

[3] *Wilczewski v. Charter West Nat. Bank*, 290 Neb. 721, 861 N.W.2d 700 (2015).

[4] *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008).

as defined by the FAA and, therefore, that the FAA rather than Nebraska's UAA, applied. After finding that the FAA controlled, the court determined that the clause was not void for failure to comply with Nebraska's UAA notice requirement. Having sustained Charter's motion to compel arbitration, the court dismissed the case.

The Wilczewskis timely appealed, and we granted their petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

The Wilczewskis assign, reordered, that the district court erred in (1) finding that the FAA preempted the UAA, (2) finding that the arbitration clause applied to their claims, (3) dismissing the instant litigation instead of staying the matter pending arbitration, and (4) not allowing a "full opportunity for discovery on the issue of arbitrability."

IV. STANDARD OF REVIEW

[1-3] Arbitrability presents a question of law.[5] Likewise, a jurisdictional issue that does not involve a factual dispute presents a question of law.[6] And when reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[7]

V. ANALYSIS

At oral argument, Charter conceded that the purchase agreement did not conform to Nebraska's UAA. But it contended that the FAA applies and preempts the UAA. Thus, Charter's motion to compel cannot succeed unless the FAA applies to Charter's activity. Because this is the main issue before us, we address it first.

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[5] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[6] *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

[7] See *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

1. Applicability of FAA

The Wilczewskis argue that Charter's activity here does not affect interstate commerce. The heart of their argument is that "[t]he subject Real Estate is located in Nebraska, the Wilczewskis are residents of Nebraska, and the claims made by the Wilczewskis against Charter . . . involve statements made in Nebraska by representatives of Charter . . . located in Nebraska."[8]

But that argument focuses on only part of Charter's activity. Charter was not a single-family occupant of residential real estate. Clearly, it would not have been engaged in selling the real estate but for its lending activity. Lending money secured by residential real estate plainly includes a risk of nonpayment and, in that event, the necessity of enforcing a lender's deed of trust. And where a nonjudicial foreclosure results in a lender's taking title to residential real estate, the subsequent sale of that real estate is sure to follow. In general, collection of a lender's loan is the only reason it would acquire title to residential real estate and the only reason it would sell the real estate to someone else, such as the Wilczewskis.

Thus, whether the FAA reaches Charter's activity depends upon how the activity is viewed. And to determine the answer to that question, we turn to the case law driven by decisions of the U.S. Supreme Court.

(a) Reach of FAA

[4] The FAA provides at 9 U.S.C. § 2:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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[8] Brief for appellants at 26.

Therefore, when determining whether an arbitration clause is governed by Nebraska's UAA or the FAA, the initial question is whether the parties' contract evidences a transaction "'involving commerce'" as defined by the FAA.[9]

The U.S. Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."[10] For this reason, the Court has consistently found that the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."[11]

A succession of U.S. Supreme Court cases leads to this inescapable conclusion. First, the Court held that the FAA is "based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[12] Second, the Court determined that Congress had withdrawn the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.[13] Third, the Court's later decisions reiterated the FAA's applicability to matters of state

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[9] *Aramark Uniform & Career Apparel v. Hunan, Inc., supra* note 4, 276 Neb. at 704, 757 N.W.2d at 209 (quoting 9 U.S.C. § 2).

[10] *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)).

[11] *Perry v. Thomas*, 482 U.S. 483, 490, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987). See, also, *Citizens Bank v. Alafabco, Inc.*, *supra* note 10; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).

[12] *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 405, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) (quoting H.R. Rep. No. 96, 68th Cong. 1st Sess. 1 (1924), and S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924)).

[13] *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

law.[14] Finally, the Court expressly rejected the argument that the FAA's commerce language "carv[ed] out an important statutory niche in which a State remains free to apply its antiarbitration law or policy."[15] The Court emphasized that "the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'"[16] Thus, the Court settled the question of the reach of the FAA—it extends to the full reach of the Commerce Clause.[17] And in doing so, the Court read the FAA as insisting that the transaction in fact involved interstate commerce, even if the parties did not contemplate an interstate commerce connection.[18] Thus, to summarize, in the words of a case note criticizing the U.S. Supreme Court's decision, the Court "[took] the final step in the federalization of the FAA."[19]

This progression of cases demonstrates that the scope of the FAA is well settled at the federal level as having the same reach as Congress' Commerce Clause power. And, as the district court noted, this court previously recognized the U.S. Supreme Court's interpretation of the FAA's "expansive scope" and concluded that the "FAA's reach is as broad as Congress' Commerce Clause authority."[20]

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[14] See, e.g., *Perry v. Thomas, supra* note 11 (FAA preempted California statute providing that actions for collection of wages could be maintained without regard to existence of private arbitration agreement); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (FAA required federal courts to compel arbitration of pendent arbitrable claims).

[15] *Allied-Bruce Terminix Cos. v. Dobson, supra* note 10, 513 U.S. at 273.

[16] *Id.*, 513 U.S. at 273-74.

[17] *Allied-Bruce Terminix Cos. v. Dobson, supra* note 10.

[18] *Id.*

[19] Scott R. Swier, Note, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner:* Allied-Bruce Terminix Companies, Inc. v. Dobson, 41 S.D. L. Rev. 131, 159 (1996).

[20] *Aramark Uniform & Career Apparel v. Hunan, Inc., supra* note 4, 276 Neb. at 705-06, 757 N.W.2d at 210.

[5,6] For these reasons, there does not have to be a multistate transaction for the FAA to be applicable. Congress has the power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.[21] Because "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce'" where "in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control,'"[22] the same must be said for application of the FAA.

(b) Application to Resale After Foreclosure

Given the Court's explanation that the Commerce Clause reaches economic activity that, in the aggregate, would represent a general practice subject to federal control, it seems clear to us that Charter's activities at issue fell within that realm. Charter engaged in lending money secured by residential real estate. As the Wilczewskis' complaint makes clear, Charter's sale of the subject real estate was not an isolated transaction from one homeowner to another. Rather, the resale to the Wilczewskis was the direct result of Charter's loan to the prior owners, its foreclosure of its deed of trust, its acquisition of title at the trustee's sale, and the necessity of selling the real estate to recover the moneys lent to the prior owners.

As the U.S. Supreme Court said, "No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."[23]

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[21] See *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

[22] *Citizens Bank v. Alafabco, Inc., supra* note 10, 539 U.S. at 56-57 (quoting *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)).

[23] *Id.*, 539 U.S. at 58.

The Court has also said, "[B]anking and related financial activities are of profound local concern. . . . Nonetheless, it does not follow that these same activities lack important interstate attributes."[24]

[7] It makes no difference that the purpose of Charter's loan to the prior owners was to finance residential real estate. Here also, no elaborate explanation is needed to make evident the broad impact of residential real estate lending on the national economy. The nationwide impact of residential real estate lending was a central focus of the Housing and Economic Recovery Act of 2008,[25] which Congress passed in response to a national financial crisis.[26] Generally, residential real estate lending affects interstate commerce. And the sale to the Wilczewskis was merely the last step of Charter's loan, foreclosure, acquisition of title, and resale of its security.

To be clear, it is not the parties' legal status that brings the transaction within the scope of the Commerce Clause. In other words, whether Charter derives its banking powers from a federal- or state-issued charter makes no difference in our analysis.

Similarly, other tangential details associated with the transaction do not control. Charter's brief sets forth a litany of multistate connections regarding homeowner's insurance, title insurance, document transmission via the Internet, issuance of a cashier's check from another state, use of the Federal Reserve wire system, checks drawn on out-of-state bank accounts, and the like. The district court relied, at least in part, on these aspects. But they are only incidental—they do not define the

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[24] *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980).

[25] 12 U.S.C. § 4501 et seq. (2012).

[26] See *Pagliara v. Federal Home Loan Mortgage Corp.*, No. 1:16-cv-337 (JCC/JFA), 2016 WL 4441978 (E.D. Va. Aug. 23, 2016) (memorandum opinion).

scope of Charter's activity. And we are focused on Charter's program or activity of residential real estate lending, which included the sale to the Wilczewskis.

(c) Distinguishing Other Courts' Decisions

We are aware that a few courts have declined to compel arbitration of disputes arising from individual residential real estate transactions.[27] However, we believe the situation before us is significantly different. None of the cases declining to compel arbitration involved a comprehensive practice or activity of lending money on residential real estate, enforcing liens, acquiring title, and reselling. The other cases merely addressed individual sales of residential real estate. As we have already explained, Charter's activity is that of a lender of money on residential real estate, which culminated in the sale to the Wilczewskis. We need not decide and do not suggest whether the FAA applies to a simple contract for the sale of residential real estate.

2. Applicability of Arbitration Clause

Having found that the FAA applies to this purchase agreement, we must now consider whether all of the Wilczewskis'

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[27] See, *Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.*, 538 F. Supp. 2d 468 (D.P.R. 2008) (FAA generally does not apply to residential real estate transactions having no substantial or direct connection to interstate commerce); *Saneil v. Robards*, 289 F. Supp. 2d 855 (W.D. Ky. 2003) (agreement to sell real estate between in-state buyer and out-of-state seller did not involve interstate commerce); *SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059 (N.D. Cal. 2002) (agreement to sell real estate between in-state buyer and out-of-state seller did not involve interstate commerce); *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997) (lack of out-of-state transactions incident to sale of real estate evidenced no interstate commerce); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) (development of residential real estate was inherently intrastate transaction not affecting interstate commerce).

claims are covered by the agreement's arbitration clause. We have already quoted its broad language.

The Wilczewskis argue that their claims do not fall within the scope of the arbitration clause. They assert that the claims for misrepresentation and fraud relate to events leading up to the parties' entering into the agreement, but do not involve any controversies arising out of "'interpretation, enforcement or breach'" of the agreement.[28] Further, the Wilczewskis cite to our decision in *Washa v. Miller*[29] for the proposition that a cause of action for unjust enrichment is only recognized in the absence of an agreement between the parties. They maintain that their claims for unjust enrichment could not have arisen under the agreement and, therefore, are not governed by the arbitration clause.

Yet, as Charter points out, the Wilczewskis themselves cite the agreement within the factual portion of their complaint and, again, in each of their four separate theories of recovery. The Wilczewskis allege that they were improperly induced to enter into the agreement. In so doing, they made the agreement a relevant issue and an essential piece of the proceeding. Accordingly, we agree with the district court that based upon the Wilczewskis' complaint, their claims came within the scope of the arbitration clause. And the Wilczewskis have not pointed to any language of the purchase agreement suggesting that the parties intended to withhold from arbitration the claim of fraud in inducement of the entire contract.[30]

[8] Next, the Wilczewskis argue that under the doctrine of merger, the agreement merged into the deed and, therefore,

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[28] Brief for appellants at 11.

[29] *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996).

[30] See *Prima Paint v. Flood & Conklin, supra* note 12.

the arbitration clause is ineffective. We have held that "'[t]he doctrine of merger does not apply where there has been fraud or mistake.'"[31] Because the Wilczewskis were claiming common-law fraud and fraudulent and negligent misrepresentation, the doctrine of merger did not apply. We need not decide, as several other states' courts have done, whether the merger doctrine does not apply for other reasons.[32]

3. Dismissal of Pending Case

The Wilczewskis allege that even if their claims were subject to arbitration, the court should have stayed the case pending arbitration rather than dismissing it.

The FAA provides:

> If any suit . . . be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . *shall* on application of one of the parties *stay* the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ."[33]

Currently, the federal circuit courts are split on the issue of whether a stay is mandatory once a court compels arbitration pursuant to this section. However, there is a slight majority of the courts that allow dismissal, despite the mandatory language of the statute, where all the contested issues between the parties will be resolved by arbitration and the parties will

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[31] *Newton v. Brown*, 222 Neb. 605, 616, 386 N.W.2d 424, 432 (1986) (quoting *Bibow v. Gerrard*, 209 Neb. 10, 306 N.W.2d 148 (1981)). See, also, *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 483 N.W.2d 757 (1992).

[32] See, e.g., *Thomas v. Sloan Homes, LLC*, 81 So. 3d 309 (Ala. 2011); *Drees Co. v. Osburg*, 144 S.W.3d 831 (Ky. App. 2003); *Homeowners Ass'n v. Pilgrims Landing, LC*, 221 P.3d 234 (Utah 2009).

[33] 9 U.S.C. § 3 (emphasis supplied).

not be prejudiced by dismissal.[34] The U.S. District Court for the District of Nebraska, in reviewing similar actions, has also recognized that a court has discretion to dismiss a case rather than stay pending arbitration.[35]

[9] While we have not yet issued an opinion specifically addressing this issue, we have previously affirmed an order of the district court that compelled arbitration under the FAA and dismissed the action.[36] Upon reviewing the federal court decisions and with our own understanding of a court's inherent authority to manage its docket, we are persuaded that where all of the contested issues are subject to arbitration, a court has discretion to consider whether dismissal is more appropriate than staying a case pending arbitration.

[10,11] Because of the individualized nature of the administration of justice, trial courts must necessarily be given wide discretion to ensure that the goal of timely disposition of cases is reached in a manner consistent with fairness to all parties.[37] In determining whether dismissal is more appropriate than staying a case, a court should consider

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[34] See, *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014); *Green v. SuperShuttle Intern., Inc.*, 653 F.3d 766 (8th Cir. 2011); *Choice Hotels Intern. v. BSR Tropicana Resort*, 252 F.3d 707 (4th Cir. 2001); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992). But see, *Katz v. Cellco Partnership*, 794 F.3d 341 (2d Cir. 2015); *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557 (7th Cir. 2008); *Lloyd v. Hovensa, LLC.*, 369 F.3d 263 (3d Cir. 2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994).

[35] See, *Herd Co. v. Ernest-Spencer, Inc.*, No. 8:09CV397, 2010 WL 76371 (D. Neb. Jan. 5, 2010) (unpublished opinion) (citing *Kalinski v. Robert W. Baird & Co., Inc.*, 184 F. Supp. 2d 944 (D. Neb. 2002)).

[36] See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008), *abrogated on other grounds, Kremer v. Rural Community Ins. Co., supra* note 5.

[37] *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

the case's procedural history and the situation at the time of dismissal.[38]

The Wilczewskis allege that dismissal is inappropriate in this case because it is possible their claims may not be heard in arbitration. Specifically, they contend that if the case is dismissed and they submit a demand for arbitration, Charter "may assert [the Wilczewskis] are out of time to arbitrate. This litigation has been pending since April 9, 2014. To allow procedural delays to result in the Wilczewskis being banned from pursuing redress in any forum would be unjust."[39]

Under different circumstances, that might be true. But, here, the district court has already issued an order compelling arbitration at Charter's request. In making that request, Charter waived its right to assert that its own demand was untimely. And the Wilczewskis have not directed our attention to anything in the evidence that would suggest otherwise. Thus, the Wilczewskis' concern is unfounded. Accordingly, the district court did not abuse its discretion in dismissing the case.

4. Denial of Full Discovery

In appealing from the district court's October 16, 2015, order sustaining Charter's motion to compel arbitration, the Wilczewskis have also attempted to appeal from the district court's August 17 order granting in part and denying in part their request for full discovery.

[12] In this appeal, we clearly lack jurisdiction of the discovery order. Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final.[40] Of course, we have held that an order compelling arbitration is

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[38] See *id.*

[39] Brief for appellants at 29.

[40] *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013).

a final order.[41] And while it is possible that arbitrability may include an issue of fact, that is not the situation here. All of the pertinent facts derive from the Wilczewskis' complaint. For that reason, we express no opinion whether there are any circumstances under which a discovery order regarding arbitrability would fall within the scope of an appeal from an order compelling arbitration.

VI. CONCLUSION

Because the purchase agreement was governed by the FAA and the Wilczewskis' claims were subject to the arbitration clause, we conclude that it was necessary to sustain Charter's motion to compel arbitration. We also conclude that the district court had discretion to dismiss rather than stay the case and that the district court did not abuse its discretion in doing so. And we lack jurisdiction to address the district court's order denying full discovery. For these reasons, we affirm the order of the district court.

Affirmed.

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[41] See *Kremer v. Rural Community Ins. Co., supra* note 5.

In re Interest of Sandrino T., a child under 18 years of age. State of Nebraska, appellee, v. Sandrino T., appellant.

In re Interest of Remus M., a child under 18 years of age. State of Nebraska, appellee, v. Remus M., appellant.

888 N.W.2d 371

Filed December 9, 2016. Nos. S-15-1084, S-15-1087.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
5. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.

6. ____: ____. A substantial right is not affected for purposes of appeal when that right can be effectively vindicated in an appeal from the final judgment.
7. **Constitutional Law: Juvenile Courts: Criminal Law.** There is no constitutional right to proceed in juvenile court rather than criminal court.
8. **Constitutional Law: Juvenile Courts: Legislature.** Access to juvenile court is a statutory right granted and qualified by the Legislature; it is not a constitutional imperative.

Appeals from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Appeals dismissed.

Joe Nigro, Lancaster County Public Defender, and George C. Dungan for appellant in No. S-15-1084.

Steffanie Garner Kotik, of Kotik & McClure Law, for appellant in No. S-15-1087.

Joe Kelly, Lancaster County Attorney, and Christopher M. Reid for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Sandrino T. and Remus M. were each charged in the separate juvenile court of Lancaster County with six counts in connection with automated teller machine (ATM) "skimming." In each case, the State filed a motion to transfer to county court. A consolidated hearing was held on the motions to transfer, and after the hearing, the juvenile court granted the motions in separate orders. Both Sandrino and Remus appeal. Sandrino's appeal is case No. S-15-1084. Remus' appeal is case No. S-15-1087. We consolidate the cases on appeal for disposition. The primary issue before us is whether the orders transferring the cases from juvenile court to county court are final and

appealable. We determine that the transfer orders are not final orders, and we therefore dismiss each appeal based on lack of jurisdiction.

STATEMENT OF FACTS

On September 28, 2015, the State filed separate petitions in juvenile court against Sandrino and Remus. The petitions alleged that they committed three counts of attempted unlawful manufacture of a financial transaction device and three counts of criminal possession of a forgery device. The alleged violations were classified as three Class IIIA felonies and three Class IV felonies.

The charges arose from Sandrino's and Remus' alleged involvement with an operation that used skimming devices and cameras on ATM's to collect credit card, debit card, and personal identification numbers from cards that are inserted into an ATM. The information thus obtained can then be utilized to create a "clone" card that could be used to withdraw money from an ATM or purchase items in a store or online, or the obtained information could be sold to another party. According to the State's evidence, the operation was conducted nationwide by a group made up primarily of Romanian citizens who were brought to the United States for the purpose of furthering the operation.

Dental examinations were conducted on Sandrino and Remus to help narrow down their ages. Based on the results of the dental examinations, Remus was between 16½ and 17 years old and Sandrino was between 16½ and 17½ years old, although Sandrino could possibly have been 18 years old.

After filing the petitions, the State moved to transfer each case to county court for arraignment and further proceedings under the criminal code. See Neb. Rev. Stat. § 43-274(5) (Reissue 2016). After a consolidated evidentiary hearing, the juvenile court granted the motions.

Sandrino and Remus appeal from the orders of the juvenile court which granted the State's motions to transfer the cases from juvenile court to county court.

ASSIGNMENTS OF ERROR

Sandrino and Remus each claim that the juvenile court erred when it determined that the evidence was sufficient to transfer their cases from juvenile court to county court.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law. *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016).

ANALYSIS

The cases against Sandrino and Remus were brought in juvenile court pursuant to Neb. Rev. Stat. § 43-246.01 (Reissue 2016). Section 43-246.01(2) grants original jurisdiction to the juvenile court over juvenile offenders who are "(a) . . . sixteen years of age" and committed a misdemeanor or "(b) . . . fourteen years of age or older" and committed a felony lesser in grade than a Class IIA. According to the record, both Sandrino and Remus were at least 16 years old. Six allegations were brought against each juvenile; three of the allegations were Class IIIA felonies, and three were Class IV felonies. Therefore, both Sandrino and Remus were in the category of juveniles whose cases are initiated in juvenile court under § 43-246.01(2).

Although actions against juvenile offenders who fall under § 43-246.01(2) must always be initiated in juvenile court by filing a juvenile petition, they are subject to transfer to county or district court for further proceedings under the criminal code. § 43-246.01(2). In this opinion, we sometimes refer to county and district courts as the "criminal court." As noted, the State filed motions to transfer each case to county court under § 43-274(5) and the juvenile court granted the

motions. These are the orders from which Sandrino and Remus appeal.

[2] In a juvenile case, as in any other appeal, 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. See *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015). Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2016) gives an appellate court jurisdiction to review "[a]ny final order or judgment entered by a juvenile court . . . ." Whether we have jurisdiction to review the juvenile court's transfer orders at this point in the proceedings depends on whether Sandrino and Remus have appealed from a final order or judgment. No party argues that the transfer orders were judgments, so the question is whether the transfer orders are final orders.

Both Sandrino and Remus contend that the transfer orders in these cases are final, appealable orders. They each argue that the Legislature effectively redefined transfer orders as final orders when it enacted 2014 Neb. Laws, L.B. 464. We reject this argument.

We recently provided an overview of L.B. 464 and its effect on various statutes in *In re Interest of Tyrone K., ante* p. 193, 887 N.W.2d 489 (2016). One such statute is Neb. Rev. Stat. § 29-1816 (Reissue 2016), which generally concerns transfers from county and district court to juvenile court. As we observed in *In re Interest of Tyrone K.*, prior to L.B. 464, § 29-1816 (Cum. Supp. 2012) specifically provided that the county or district court's ruling on a motion to transfer an action to juvenile court "shall not be a final order for the purpose of enabling an appeal." L.B. 464 removed the quoted language, and § 29-1816 (Reissue 2016) is now silent as to the finality of an order ruling on a motion to transfer a case from criminal court to juvenile court. *In re Interest of Tyrone K., supra*. As noted, § 43-274(5) concerns transfers from juvenile court to county or district court. Section 43-274(5), the new statute enacted by L.B. 464,

is silent regarding whether a juvenile court's order ruling on a motion to transfer an action from juvenile court to county or district court is a final order.

Sandrino and Remus argue that by deleting the nonfinal order language from § 29-1816, the Legislature intended to authorize interlocutory appeals from orders ruling on motions to transfer from criminal court to juvenile court, and they further argue that we should judicially construe § 43-274(5) to also authorize interlocutory appeals from orders transferring cases from juvenile court to criminal court. As explained below, we do not adopt Sandrino's and Remus' suggested reading of the transfer statutes.

We recently addressed arguments comparable to those advanced here in *In re Interest of Tyrone K., supra*, a case with similar procedural facts. In that case, a petition was filed against the appellant in juvenile court and the State filed a motion to transfer to criminal court. The appellant filed an appeal from the order which granted the motion to transfer. With respect to the appellant's argument that by virtue of L.B. 464, the Legislature intended to allow for interlocutory appeals of orders transfering a case from juvenile court to criminal court, we stated:

> Within the proper confines of established rules of statutory construction, we find nothing which permits the conclusion that the Legislature intended, by either silence or omission, to affirmatively confer a statutory right of interlocutory appeal from an order on a motion to transfer a case from criminal court to juvenile court, or vice versa. We conclude that when the Legislature removed the final order language from § 29-1816 without adding any different language pertaining to finality, it left to the judiciary the familiar task of applying Nebraska's final order statute, § 25-1902, to determine whether transfer orders are final and appealable.

In re Interest of Tyrone K., ante at 204, 887 N.W.2d at 497.

[3] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. See *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016). The orders at issue in the instant appeals neither determined the actions and prevented judgments nor were made on summary applications after judgments. As such, the transfer orders are final and appealable only if they were made during special proceedings and affected substantial rights.

The transfer orders were issued by the juvenile court, and as a general rule, juvenile delinquency proceedings are considered special proceedings. *In re Interest of Tyrone K., ante* p. 193, 887 N.W.2d 489 (2016). For purposes of these appeals, we assume without deciding that the transfer orders at issue were made in a special proceeding. See *id*. Therefore, we will focus our analysis on whether the transfer orders affected substantial rights.

[4-6] Sandrino and Remus generally argue that their substantial rights were affected because if they are not allowed to file interlocutory appeals of the transfer orders, they will lose their rights to appeal the rulings and they will be prohibited from accessing the rehabilitative services of the juvenile court in a timely manner. We have stated that a substantial right is an essential legal right, not a mere technical right. *Id.*; *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. *In re Interest of Tyrone K., supra*. A substantial right is not affected for purposes of appeal

when that right can be effectively vindicated in an appeal from the final judgment. *Id*.

Sandrino and Remus argue that if they are not allowed to immediately appeal from the transfer orders, they would not be able to appeal the transfer orders at the conclusion of the criminal proceedings, because the language of neither § 29-1816 nor § 43-274(5) would allow for such an appeal at the conclusion of the criminal proceedings. Because an appeal is available, we disagree. In *In re Interest of Tyrone K.*, we concluded that "the fact that the statutory scheme enacted by L.B. 464 contains no specific provision regarding appellate review of juvenile transfer orders does not mean that transfer orders are somehow immune from appellate review on direct appeal after final judgment." *Ante* at 207-08, 887 N.W.2d at 499.

[7] Sandrino and Remus further argue that they have a substantial right to proceed in juvenile court and receive timely access to the rehabilitative services available in that forum. We rejected a similar argument in *In re Interest of Tyrone K., ante* p. 193, 887 N.W.2d 489 (2016). In *In re Interest of Tyrone K.*, we observed that in *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999), we had determined that there is no constitutional right to proceed in juvenile court rather than criminal court. We had further observed in *Meese* that on several occasions, we had waited until after any conviction and sentence to review the validity of a criminal trial court's decision denying a juvenile's motion to transfer from criminal court to juvenile court. We also noted in *In re Interest of Tyrone K., ante* at 209, 887 N.W.2d at 500, that we had explicitly stated in *Meese* that "'the loss of access to juvenile court itself does not affect a substantial right.'"

[8] Our reasoning in *Meese* was not affected by the changes in the statutory scheme by L.B. 464, and we stated in *In re Interest of Tyrone K.* that "[e]ven after L.B. 464, access to juvenile court is a statutory right granted and qualified by the Legislature; it is not a constitutional imperative." *Ante* at

211, 887 N.W.2d at 501. Accordingly, we concluded in *In re Interest of Tyrone K.* that the transfer of the appellant's case from juvenile court to criminal court did not affect a substantial right. We similarly conclude in these appeals that the transfer of Sandrino's and Remus' cases from juvenile court to county court did not affect their substantial rights and that the orders are not appealable at this time.

CONCLUSION

For the reasons stated above, we conclude that the juvenile court's orders transferring Sandrino's and Remus' cases from juvenile court to county court are not final, appealable orders. Accordingly, we lack jurisdiction, do not reach the merits of these appeals, and dismiss these appeals.

Appeals dismissed.

Annie J. Windham, appellant, v. Lakisha Griffin and Lemar Mictizic, also known as Robert M. Tizic, also known as Robert M. McTizic, appellees.

887 N.W.2d 710

Filed December 9, 2016. No. S-15-1194.

1. **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.
2. **Child Custody: Parental Rights.** The parental preference doctrine provides that in the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.
3. ____: ____. The right of a parent to the custody of his or her minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he or she is shown to be unfit or to have forfeited his or her superior right to such custody.
4. **Constitutional Law: Child Custody: Parental Rights.** A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship.
5. **Child Custody: Parental Rights.** The parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the

child's reciprocal right to be raised and nurtured by a biological or adoptive parent.

6. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
7. **Child Custody: Parental Rights.** Allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference.

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

Mark F. Jacobs, of Anderson, Bressman & Hoffman, P.C., L.L.O., for appellant.

No appearance for appellees.

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

Miller-Lerman, J.

NATURE OF CASE

After Miracle G. was born in September 2011 to Lakisha Griffin, Annie J. Windham, the appellant, agreed to care for Miracle until Griffin was able to care for her child. Aided by law enforcement, Miracle was returned to Griffin in January 2013, but was later temporarily placed with Windham. Windham subsequently filed a complaint in which she alleged that she stood in loco parentis to Miracle and sought custody of the child. After trial, the district court awarded custody of Miracle to Griffin and awarded considerable unsupervised visitation to Windham. Windham appeals. We affirm.

STATEMENT OF FACTS

Miracle was born to Griffin in September 2011. The day after her birth, Miracle went to live with Windham, who is Griffin's cousin, under the mutual agreement of Griffin and Windham. Griffin and Windham both testified at trial that they

understood that Windham would take care of Miracle until Griffin was able to care for her.

At the time Miracle was born, Griffin had five other children, and during the 4 years of this dispute, Griffin had additional children. At the time Miracle was born, Windham had one biological child and one child for whom she was the guardian and who resided with her. While this matter was pending before the trial court, Windham had one more child, and the child for whom she was a guardian was no longer living with her.

From September 2011 until January 8, 2013, Miracle lived with Windham. In January 2013, Griffin, accompanied by police, recovered the child. On January 18, Windham filed a complaint against Griffin and Miracle's father in which she alleged that she stood in loco parentis to Miracle and sought custody of the child. She also alleged that the parental rights of Griffin and Miracle's father should be terminated. On January 22, Windham filed a motion for temporary custody. A hearing was held on the motion, and Griffin did not appear at the hearing. On March 15, the district court filed a temporary order in which it granted temporary custody to Windham, subject to Griffin's supervised visitation.

On March 19, 2013, Griffin filed an answer in which she stated that it would be in Miracle's best interests for Griffin to have custody of her child. That same day, Griffin also filed a motion for a hearing to regain custody of Miracle.

On April 5, 2013, the district court filed an order in which it appointed a guardian ad litem for Miracle. On May 13, Windham filed an amended complaint in which she properly named Miracle's father.

On August 21, 2013, the district court filed an order in which it granted Griffin's motion to transfer the case to juvenile court. On November 26, the juvenile court filed an order in which it stated that the termination of parental rights was no longer an issue in the case and that therefore, the case should be transferred back to district court.

On November 14, 2013, Griffin filed a motion to modify the temporary order that had granted temporary custody to Windham and requested that custody of Miracle be placed with Griffin. After a hearing, the district court on December 9 denied Griffin's motion.

On April 9, 2014, the district court filed an order in which it modified its order appointing a guardian ad litem for the child and stated that "such appointment shall be as an attorney for the minor child."

On July 15, 2014, the district court filed a stipulated order which stated that Griffin and Windham were in the process of attempting to mediate the issues currently before the court. The court ordered that so long as the parties remained in mediation and they were each compliant with the terms and conditions of mediation, supervision of Griffin's parenting time would not be required. After nearly 1½ years, mediation was not successful.

The custody trial was held on October 21, 2015. Windham was represented by counsel, and Griffin appeared pro se. Miracle's father did not appear.

At trial, Griffin testified that at the time of trial, her children ranged in age from 2 weeks old to 10 years old and were living with her. Griffin testified that she worked at a daycare and that her non-school-aged children went to the same daycare at which she worked. Griffin acknowledged that she did not send money to Windham for Miracle. Griffin testified that after Miracle was born in September 2011, Griffin saw Miracle once a week or once every 2 weeks during 2011. In 2012, Griffin saw Miracle on average once a month. In January 2013, with the assistance of the police, Griffin retrieved Miracle, and Miracle lived with Griffin until Windham was awarded temporary custody. Griffin thereafter exercised supervised visits with Miracle. Griffin testified that once supervised visitation ended, Windham would not allow Griffin to see Miracle for unsupervised visits. At trial, Griffin

stated that because of Windham's interference, she had not seen Miracle in more than a year.

Windham generally testified that she lived with her boyfriend and her two children, ages 14 and 1. She stated that she worked as a busdriver. Windham testified that when Miracle was born, Griffin and Windham agreed that Windham would take care of Miracle until Griffin was "on her feet" and that then Windham was expected to return Miracle to Griffin. In contrast to Griffin's testimony, Windham stated that Griffin visited Miracle twice in 2011 and about four times in 2012. Windham testified that starting in 2013, Griffin exercised all her supervised parenting time, but that she missed "a couple of visits" in June. Windham stated that in the winter of 2013, Griffin's parenting time was not consistent. In contrast to Griffin's testimony, Windham testified that Griffin had not requested parenting time and that as a result, Griffin had not exercised parenting time in 2015.

After trial, the district court filed its order on November 19, 2015. The district court determined that Windham stood in loco parentis to Miracle and that therefore, Windham had standing to seek custody and visitation. This finding is not challenged on appeal.

In making the custody determination, the district court applied the parental preference doctrine. The court found that both Griffin and Windham were fit to perform the duties of a parent, and it found that Griffin had not forfeited her parental rights. The court then concluded that "awarding legal and physical custody of Miracle to Griffin is in the best interests of the child and consistent with parental preference." The court further determined that "it would be in Miracle's best interests for Windham to have unsupervised visitation rights to Miracle every other weekend, with two overnights, taking place from Friday evening until Sunday evening." Windham appeals.

ASSIGNMENT OF ERROR

Windham claims, restated and summarized, that the district court erred when it granted custody of Miracle to Griffin.

STANDARD OF REVIEW

[1] 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. *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

ANALYSIS

For a variety of reasons, Windham claims that the district court erred when it granted custody of Miracle to Griffin. We reject Windham's arguments and affirm the order of the district court.

It is undisputed that Windham is neither the biological nor adoptive parent of Miracle and that Griffin is the biological mother of Miracle. As an initial matter, we note that the district court determined that Windham stood in loco parentis to Miracle and we accept this finding of the district court.

Windham acknowledges that Nebraska has adopted the parental preference doctrine in custody cases, but she nevertheless contends that because the district court found that she stood in loco parentis to Miracle, the court erred when it applied the parental preference doctrine to determine custody. Windham asserts that by virtue of her in loco parentis status, she and Griffin were "standing on equal ground" with respect to the custody dispute. Brief for appellant at 15. Windham further contends that the district court "should have simply undergone a best interests analysis" and that under such analysis, the court should have determined that it was in Miracle's best interests to award custody to Windham. *Id.* at 13.

Windham's argument that she is on equal footing with Griffin is derived in part from this court's explanation of the

doctrine of in loco parentis. We have explained the doctrine of in loco parentis wherein we have stated that

> "a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent."

Latham v. Schwerdtfeger, 282 Neb. 121, 128, 802 N.W.2d 66, 72 (2011), quoting *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000). Referring to this explanation, Windham claims that with respect to Miracle, she has the "same rights" as Griffin. Brief for appellant at 15. We do not agree.

Our reference to "same rights" goes back at least to *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991), which relied in part on *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). In *Gribble*, the Supreme Court of Utah based a stepparent's standing to seek visitation upon an interpretation of a Utah divorce statute, then codified as Utah Code Ann. § 30-3-5 (1953). Using the in loco parentis doctrine as an interpretive tool, the court in *Gribble* determined that a "stepparent" serving as in loco parentis was included as a "parent" under the divorce statute and that the stepparent had standing. The ultimate source of standing was the statute, not the common-law doctrine of in loco parentis. The stepparent's rights under the statute in *Gribble* were the "same" as those of a "parent" under the statute.

In *Hickenbottom*, we recognized that the stepparent in *Gribble* was functionally a parent within the terms of the Utah statute and had "the same rights" thereunder. To the extent we have suggested in cases such as *Hickenbottom v. Hickenbottom, supra*; *Weinand v. Weinand, supra*; and *Latham v. Schwerdtfeger, supra*, that application of the common-law doctrine of in loco parentis confers the same rights as those of a lawful parent for all purposes, they are disapproved. For

completeness, we note that this limitation of "same rights" as used in *Gribble* is consistent with the reading of this aspect of *Gribble* by the Supreme Court of Utah in the subsequent case of *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

The foregoing limitation on in loco parentis status is consistent with our explanation that, unlike biological and adoptive parenthood, the status of in loco parentis is temporary, flexible, and capable of being both suspended and reinstated. See, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000); *Weinand v. Weinand, supra*.

With respect to rights, in *Latham v. Schwerdtfeger, supra*, we determined that a nonbiological, nonadoptive individual who had in loco parentis status had the right to seek custody and visitation. But an individual standing in loco parentis, which is temporary in nature, is not the functional equivalent of a lawful parent for all purposes or in all contexts. This type of custody dispute is one such context. This is because the parental preference doctrine still applies to this type of custody determination and must be considered in such a dispute. Compare *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991) (stating in case where no party claimed in loco parentis status that biological mother who had validly relinquished her rights forfeited parental preference and stood on equal ground with prospective adoptive parents).

Contrary to Windham's suggestion that parental preference should be ignored due to her in loco parentis status, the Nebraska appellate courts have applied the parental preference doctrine in custody cases where one party is the biological or adoptive parent and another party has been found to have had in loco parentis status. See, e.g., *State on behalf of Combs v. O'Neal*, 11 Neb. App. 890, 662 N.W.2d 231 (2003) (determining that parental preference doctrine applied but that under facts of case, biological father had forfeited his superior parental rights and maternal grandmother who stood in loco parentis was awarded custody); *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992)

(awarding custody to biological mother under parental preference doctrine, even though ex-stepfather stood in loco parentis and both parties were fit and proper persons to have custody). We conclude that in loco parentis status alone does not eclipse the superior nature of the parental preference doctrine in custody disputes.

[2,3] The parental preference doctrine provides that in the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child. See *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). See, also, *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980). We have stated that the right of a parent to the custody of his or her minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he or she is shown to be unfit or to have forfeited his or her superior right to such custody. *Id*. We have acknowledged the importance of the best interests of the child in resolving a child custody dispute, but "a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child." *In re Guardianship of D.J.*, 268 Neb. 239, 248, 682 N.W.2d 238, 245 (2004). We have referred to parental preference as "a presumption in favor of parental custody." *Id*. at 247, 682 N.W.2d at 245. See, also, *In re Interest of Sloane O.*, 291 Neb. 892, 870 N.W.2d 110 (2015).

[4,5] We have recognized that the parental preference doctrine is grounded in the lawful parent's constitutional rights. See *id*. In *In re Guardianship of D.J.*, we stated:

> "A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to,

> companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. Hence, the parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. . . ."

268 Neb. at 246, 682 N.W.2d at 244. We continue to adhere to the view that the parental preference doctrine, by definition, is a preference, and it will be applied to a child custody determination unless it is shown that the lawful parent is unfit or has forfeited his or her superior right or the preference is negated by a demonstration that the best interests of the child lie elsewhere. See *id*.

In this custody case, the district court correctly determined that the parental preference doctrine applied. Because the parental preference doctrine applies, preference will be given to Griffin's superior right to custody unless she is shown to be unfit or to have forfeited her superior right to custody. After examining the evidence, the district court did not find Griffin to be unfit and it found that she had not forfeited her parental rights. On appeal, Windham does not challenge the district court's finding that Griffin is not unfit. However, on appeal, Windham claims that the district court erred when it determined that Griffin had not forfeited her parental rights. Applying the law to the facts of this case, we do not believe that the district court erred.

[6,7] This court has established that parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *In re Guardianship of D.J., supra*. See, also, *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008). We have also stated that allowing a third party to take custody, even for a significant period of time, is not

the equivalent to forfeiting parental preference. *Farnsworth v. Farnsworth, supra*.

The case of *State on behalf of Combs v. O'Neal*, 11 Neb. App. 890, 662 N.W.2d 231 (2003), is an example of a situation where the courts found that the biological father had forfeited his parental rights. In *State on behalf of Combs*, the child was born in 1988, and the Nebraska Court of Appeals noted that the father did not seek custody of the child until a paternity action was initiated and he was ordered to pay child support in 1999. The child's mother died when the child was 19 months old and the Court of Appeals stated that the child's maternal grandmother stood in loco parentis to the child, having raised the child for the 13 years since the child's birth, 11½ years of which were after the death of the biological mother. Based on this evidence, the Court of Appeals affirmed the trial court's finding that the father had forfeited his parental rights.

Unlike *State on behalf of Combs*, in this case, Griffin has appeared in Miracle's life since she was born. Griffin and Windham both testified that at the hospital after Miracle was born, they reached an understanding that Windham would temporarily care for Miracle until Griffin was able to care for her. Griffin testified that she suffered postpartum depression, but that from a few days after Miracle's birth, her long-term goal was to have custody of Miracle. The record shows that Griffin visited Miracle during Miracle's first year of life. In January 2013, when Miracle was approximately 15 months old, Griffin sought reunification and, with the assistance of law enforcement, brought Miracle to her home. Miracle lived with Griffin until Windham got a temporary order from the district court granting temporary custody of Miracle to Windham. Since at least January 2013, Griffin testified she consistently sought and requested custody of Miracle. Griffin encouraged her other children to develop relationships with Miracle, and she exercised her visitation with Miracle until she was unable to find a relative to supervise visitation in late 2014 or early 2015.

Although Griffin initially placed Miracle in Windham's care after the child's birth, entrusting another to raise a child does not generally rise to the forfeiture of parental rights. We have stated that allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference. See *Farnsworth v. Farnsworth, supra*. We have noted that a parent's decision to place a child in "the capable and loving hands" of a relative when the parent is unable to care for the child can be evidence of the parent's ability to adequately provide for the child's care. See *In re Guardianship of D.J.*, 268 Neb. 239, 251, 682 N.W.2d 238, 247 (2004).

Based on this and other evidence, the district court found that Griffin had not forfeited her parental rights. Upon our de novo review of the record, we find no error with the district court's determination that Griffin did not forfeit her parental rights and that, as such, she retained her superior right to custody of Miracle.

The district court stated in its order that awarding custody to Griffin was consistent with the parental preference doctrine and that it was in Miracle's best interests. We find no error in the district court's approach. While preference must be given to a biological or adoptive parent's superior right to custody where the parent is not unfit and has not forfeited his or her parental rights, a court also considers the child's best interests in making its custody determination. See *In re Guardianship of D.J., supra*.

As noted above, Windham suggests that we revise our legal framework. She urges us to examine the merits as though the parties were standing on equal footing and the outcome would be determined only by reference to best interests. Although we are aware of instances where courts have determined that the best interests of the child defeated the lawful parent's preference, we view these cases as exceptional. For example, in *Gorman v. Gorman*, 400 So. 2d 75 (Fla. App. 1981), the trial court found both the biological father and the ex-stepmother

to be fit and proper parents, but awarded custody of the child to the ex-stepmother. On appeal, the biological father argued that because he was the child's natural father and he had been found to be a fit and proper parent, he should have been awarded custody of the child. The appellate court rejected the father's claim, noting that the child had a strong bond with his ex-stepmother and that the child "felt like he never had a father because his father was often away from home, was frequently intoxicated, and physically abused and blamed this child for the death of his natural mother [during childbirth]." *Gorman v. Gorman*, 400 So. 2d at 78. The appellate court noted that "[i]n finding the father a fit and proper parent the trial judge was charitable." *Id*. The appellate court affirmed the trial court's determination that it was in the child's best interests for the ex-stepmother to have custody rather than the lawful parent. The facts present in *Gorman* are not present in this case, and the district court ably considered best interests and stated in its order that it was in Miracle's best interests for Griffin to have custody.

To the extent that Windham argues that it is in Miracle's best interests for Windham to be awarded custody because she is able to provide more amenities and a better life for Miracle, this is not an appropriate focus for the custody determination in this case. In *In re Guardianship of D.J.*, 268 Neb. at 247, 682 N.W.2d at 245, we stated that "in custody disputes between a parent and nonparent, courts turn to the parental preference principle because the best interests standard, taken to its logical conclusion, would place the minor children of all but the 'worthiest' members of society in jeopardy of a custody challenge." See, also, *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000); *Worden v. Worden*, 434 N.W.2d 341, 342 (N.D. 1989) (stating that "[a]bsent exceptional circumstances the natural parent is entitled to custody of the child even though the third party may be able to offer more amenities"). We have observed that the existence of a "'better'" alternative home cannot overcome the constitutionally required presumption that

reuniting the child with the parent is best. See *In re Interest of Xavier H.*, 274 Neb. 331, 350, 740 N.W.2d 13, 26 (2007). We have stated: "'"The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide."'" See *id.* at 350-51, 740 N.W.2d at 26, quoting *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

We additionally note that although the district court found it was in Miracle's best interests for Griffin to have custody of her child, the court recognized, as do we, the significant bond established between Windham and Miracle and Windham's demonstrated care of Miracle. Because of this bond, the district court awarded Windham considerable unsupervised visitation and found that this visitation was in Miracle's best interests. We agree that the award of such visitation is appropriate.

CONCLUSION

For the reasons set forth above, we affirm the district court's order granting custody of Miracle to Griffin.

Affirmed.

State of Nebraska, appellant, v. Sydney L. Thieszen, appellee.

887 N.W.2d 871

Filed December 9, 2016. No. S-16-004.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (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 a judgment is rendered.
6. **Postconviction: Final Orders: Appeal and Error.** A postconviction proceeding is a special proceeding for appellate purposes.
7. **Postconviction: Final Orders: Sentences.** An order vacating a sentence in a postconviction proceeding is a final order.
8. **Constitutional Law: Courts.** Upon questions involving the interpretation of the U.S. Constitution, the decision of the U.S. Supreme Court is the supreme law, by which state courts are bound.

Appeal from the District Court for York County: James C. Stecker, Judge. Affirmed and remanded for resentencing.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and Corey M. O'Brien for appellant.

Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellee.

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

Kelch, J.

NATURE OF CASE

Sydney L. Thieszen was 14 years old when he murdered his 12-year-old sister in 1987. Thieszen was convicted of first degree murder and sentenced to life imprisonment. In June 2013, Thieszen filed a motion for postconviction relief, alleging that his sentence was cruel and unusual punishment in light of the U.S. Supreme Court decision in *Miller v. Alabama*.[1] The district court granted Thieszen's motion, and the State appeals.

BACKGROUND

Thieszen was charged by information with one count of murder in the first degree and one count of use of a deadly weapon to commit a felony. Thieszen pled guilty to one count of murder in the second degree and one count of use of a firearm to commit a felony. At the time of his convictions, the crime of murder in the second degree was punishable by 10 years' to life imprisonment. Thieszen was given maximum sentences for both crimes: life imprisonment for the murder conviction and a consecutive term of 80 to 240 months' imprisonment for the use of a firearm conviction.

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

In 1995, Thieszen's convictions were vacated due to the omission of the element of "malice" in his murder charge. Thereafter, a jury trial was conducted, and Thieszen was convicted of first degree murder and use of a firearm to commit a felony. Thieszen was again sentenced to life imprisonment for the murder conviction and a consecutive term of 80 to 240 months' imprisonment for the use of a firearm conviction.

On June 19, 2013, Thieszen filed a motion for postconviction relief, claiming that the life imprisonment sentence he received as a result of his first degree murder conviction was cruel and unusual punishment in light of the U.S. Supreme Court decision in *Miller v. Alabama*. In *Miller v. Alabama*, the U.S. Supreme Court held 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.'"[2]

The district court found that Thieszen's life sentence was clearly within the parameters of the holding of *Miller v. Alabama*; that based on this court's subsequent jurisprudence,[3] the rule in *Miller v. Alabama* applies retroactively; and that, therefore, Thieszen was entitled to postconviction relief. Accordingly, the district court vacated Thieszen's life sentence and set a hearing to determine Thieszen's sentence on the first degree murder conviction. The State appeals.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred by granting postconviction relief and vacating Thieszen's sentence of life imprisonment for his first degree murder conviction.

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

[3] *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014); *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[4]

[2] In appeals from postconviction proceedings, an appellate court independently resolves questions of law.[5]

ANALYSIS

[3] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[6]

[4,5] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[7] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (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 a judgment is rendered.[8]

[6,7] This case involves the second type of final order—an order affecting a substantial right made during a special proceeding. The terms "special proceeding" and "substantial right" are not defined by statute, but have been interpreted by case law. Our case law establishes that a postconviction

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[4] *State v. Penado*, 282 Neb. 495, 804 N.W.2d 160 (2011).

[5] *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014); *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013); *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013); *State v. Pittman*, 285 Neb. 314, 826 N.W.2d 862 (2013); *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[6] See *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007).

[7] *Id*.

[8] *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

proceeding is a special proceeding for appellate purposes.[9] Although this court did not use the term "substantial right," we have nevertheless found that an order vacating a sentence in a postconviction proceeding is a final order.[10] This is understandable in light of the fact that the order granting and disposing of Thieszen's entire postconviction motion by vacating his sentence disposes of the postconviction proceeding, which was civil in nature. Whereas, resentencing will again be part of the criminal proceeding. Accordingly, we find that the district court entered a final order when it vacated the sentence of Thieszen.

[8] In *Miller v. Alabama*, the U.S. Supreme Court held that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[11] In the recent case of *Montgomery v. Louisiana*,[12] the Court verified that the rule in *Miller v. Alabama* was retroactive on state collateral review. Upon questions involving the interpretation of the U.S. Constitution, the decision of the U.S. Supreme Court is the supreme law, by which state courts are bound.[13]

The State asserts that the district court erred in finding it was bound by *Miller v. Alabama* and that, therefore, the district court erred in granting Thieszen postconviction relief. The State claims that the district court was not bound by *Miller v. Alabama* for two reasons; the State argues first that Thieszen's sentence to life imprisonment was not mandatory and, second, that Thieszen has a possibility of parole.

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[9] See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[10] See *State v. Bartlett*, 210 Neb. 886, 317 N.W.2d 102 (1982).

[11] *Miller v. Alabama, supra* note 1, 132 S. Ct. at 2469.

[12] *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

[13] See *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992).

The State claims first that the life sentence was not mandatory, but discretionary, because of Neb. Rev. Stat. § 29-2204(2) (Reissue 1979), which provided:

> Whenever the defendant was under eighteen years of age at the time he committed the crime for which he was convicted, the court may in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the provisions of Chapter 43, article 2, as to persons adjudicated in the juvenile courts.

However, as Thieszen noted in his brief, although the statute cited above was applicable in 1987, when the crime was committed, its use in 1996, when Thieszen was 23 years of age, was not a viable option for a murder conviction. Thus, we conclude that § 29-2204(2) is not applicable to the question of whether Thieszen was sentenced to a mandatory term of life imprisonment.

Second, the State argues that Thieszen's life sentence does not equate to *Miller v. Alabama*'s "life without parole," because at the time Thieszen was sentenced, the sentencing scheme was such that, after serving 30 calendar years of the original sentence, Thieszen would be "considered for programming, including recommendation to the Board of Pardons for commutation of the life sentence to a definite number of years."[14]

We have already rejected this argument in *State v. Castaneda*.[15] In *State v. Castaneda*, the juvenile defendant, Juan Castaneda, was sentenced to two terms of life imprisonment for first degree murder. At the time Castaneda was sentenced, Nebraska's statutes provided that a juvenile convicted of first degree murder was subject to mandatory life imprisonment.[16] Although the statutes did not expressly contain the

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[14] Brief for appellant at 14-15.

[15] *State v. Castaneda, supra* note 3.

[16] See Neb. Rev. Stat. §§ 28-105 and 28-303 (Reissue 2008).

qualifier "without parole," a committed offender becomes eligible for parole in Nebraska after serving "one-half the minimum term of his or her sentence."[17] In *State v. Castaneda*, we explained that "[b]ecause there is no way to compute 'one-half' of a life sentence, an offender sentenced to life imprisonment in Nebraska for first degree murder is not eligible for parole."[18]

[9] In *State v. Castaneda*, the State argued that *Miller v. Alabama* did not apply to Castaneda's sentence, because offenders like Castaneda had their record reviewed by the Board of Parole every 10 years and could become eligible for parole if their sentence was commuted. We rejected this argument and found that the "mere existence of a remote possibility of parole does not keep Nebraska's sentencing scheme from falling within the dictates of *Miller*"[19] and further found that "Nebraska's sentence of life imprisonment is effectively life imprisonment without parole under the rationale of *Miller* . . . , because it provides no meaningful opportunity to obtain release."[20]

In the present case, the State attempts to distinguish *State v. Castaneda* by suggesting that, unlike Castaneda, Thieszen's sentence was likely to be commuted to a term of years. The State references a letter from the Nebraska Board of Pardons, which was entered into evidence. The letter states that since 1969, there have been 28 offenders who were sentenced to life imprisonment as a result of first degree murder convictions who have had their sentences commuted to a term of years. However, this letter tells us little about the likelihood that Thieszen's life sentence would be commuted and does not change the discretionary nature of a grant of commutation.

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[17] See Neb. Rev. Stat. § 83-1,110(1) (Reissue 2014).

[18] *State v. Castaneda, supra* note 3, 287 Neb. at 311, 842 N.W.2d at 757.

[19] *Id.* at 312, 842 N.W.2d at 757.

[20] *Id.* at 313-14, 842 N.W.2d at 758.

Therefore, based upon the principles outlined by the U.S. Supreme Court, the district court's decision to grant Thieszen's motion for postconviction relief must be affirmed.

CONCLUSION

The district court was bound by U.S. Supreme Court precedent in *Miller v. Alabama*, because the relevant sentencing scheme mandated life imprisonment without the possibility for parole. We therefore affirm the district court's decision to grant Thieszen's motion for postconviction relief, and we remand the cause for resentencing.

Affirmed and remanded for resentencing.

In re Estate of Bruce F. Evertson, deceased. Travelers Indemnity Company, appellant, v. Julie A. Wamsley, personal representative of the Estate of Bruce F. Evertson, deceased, appellee.

889 N.W.2d 73

Filed December 16, 2016. No. S-15-104.

1. **Jurisdiction: Statutes.** Subject matter jurisdiction and statutory interpretation present questions of law.
2. **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.
3. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
4. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
5. ____: ____. A court action taken without subject matter jurisdiction is void.
6. **Statutes: Legislature: Intent.** Absent contrary statutory language, a court gives statutory language its plain meaning; a court will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.
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.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language.

9. **Workers' Compensation: Subrogation: Courts.** Under Neb. Rev. Stat. § 48-118.01 (Reissue 2010), a subrogated claim against a third party must be brought in the district court.
10. **Jurisdiction: Courts: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2016), the district courts shall have and exercise general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided.
11. **Workers' Compensation: Subrogation: Courts: Words and Phrases.** The term "the court," as used in Neb. Rev. Stat. § 48-118.01 (Reissue 2010), refers to the district court.
12. **Workers' Compensation: Subrogation: Courts: Jurisdiction.** Under Neb. Rev. Stat. § 48-118.04 (Reissue 2010), district courts have exclusive subject matter jurisdiction over the fair and equitable distribution of proceeds subject to subrogation.
13. **Courts: Jurisdiction: Legislature.** County courts can acquire jurisdiction only through a specific legislative mandate in a legislative enactment.
14. **Workers' Compensation: Subrogation: Courts: Jurisdiction.** Neb. Rev. Stat. § 48-118.04 (Reissue 2010) is not a specific mandate that county courts have jurisdiction over fair and equitable distribution hearings.
15. **Jurisdiction: Appeal and Error.** When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
16. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed.
17. ____: ____. An appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.
18. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Irwin and Inbody, Judges, on appeal thereto from the County Court for Morrill County, Paul G. Wess, Judge. Judgment of Court of Appeals vacated, and cause remanded with directions.

Gregory W. Plank, of Ray Lego & Associates, and Thomas D. Wulff and Thomas J. Freeman, of Wulff & Freeman, L.L.C., for appellant.

R. Kevin O'Donnell, of Law Office of R. Kevin O'Donnell, P.C., L.L.O., for appellee.

Dallas D. Jones, David A. Dudley, and Michael D. Sands, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for amici curiae Nebraskans for Workers' Compensation Equity and Fairness et al.

Bradley D. Shidler, of Werner Enterprises, Inc., and, of counsel, Gary L. Wickert, Matthew T. Fricker, and Alyssa A. Johnson, of Matthiesen, Wickert & Lehrer, S.C., for amicus curiae Werner Enterprises, Inc.

Steven L. Theesfeld, of Yost & Baill, L.L.P, and, of counsel, Vlad Kushnir, of VB Kushnir, L.L.C., for amicus curiae National Association of Subrogation Professionals.

Vincent M. Powers, of Vincent M. Powers & Associates, and Rodney J. Rehm, of Rehm Bennett Law Firm, P.C., L.L.O., for amici curiae Nebraska Association of Trial Attorneys et al.

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

Funke, J.

NATURE OF CASE

This matter commenced as a probate proceeding filed for the sole and limited purpose of collecting wrongful death benefits exclusively for the widow and next of kin of the decedent, Bruce F. Evertson, under Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 2016). Bruce was killed in a motor vehicle accident. The county court accepted a settlement from

the insurer of the other driver for the wrongful death claim of the estate of Bruce F. Evertson (Estate) and allocated the proceeds among Bruce's widow and adult children.

As a result of Bruce's acting within the course and scope of his employment at the time of his death, Bruce's widow, Darla Evertson, received and continues to receive workers' compensation benefits from the appellant, Travelers Indemnity Company (Travelers). Before distributing Darla's share of the wrongful death settlement, the county court held a fair and equitable distribution hearing and issued an order on Travelers' subrogation claim to Darla's proceeds.

The county court ordered that Travelers was not entitled to any distribution of Darla's proceeds. The order also did not provide Travelers any future credit against the workers' compensation benefits it owes Darla. Travelers appealed from this order. The Nebraska Court of Appeals affirmed.[1]

The primary issue we address is the question of subject matter jurisdiction and whether the probate proceeding in the county court was the proper venue to decide Travelers' subrogation claim or whether the same should have been brought in a separate action in the district court. Further, because the issue of the availability of future credit for Travelers is likely to recur, we also clarify our precedent on that issue.

We hold that the county court lacked subject matter jurisdiction to hear and decide the subrogation matter. Because the county court lacked jurisdiction over the subrogation matter, the Court of Appeals also lacked subject matter jurisdiction to hear the merits of the appeal. Accordingly, we vacate the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to vacate the order of the county court which determined the fair and equitable distribution of Darla's settlement proceeds.

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[1] *In re Estate of Evertson*, 23 Neb. App. 734, 876 N.W.2d 678 (2016).

BACKGROUND

In February 2014, Bruce died in a motor vehicle collision while acting in the course and scope of his employment. Travelers, the insurer of Bruce's employer, began paying workers' compensation benefits to Darla of $728 per week, which will be paid until she dies or remarries.

In June 2014, the county court appointed a personal representative to pursue a wrongful death claim for the Estate. In the county court proceeding, Travelers filed a statement of claim to assert its subrogation right to Darla's distribution from the settlement against the third-party tort-feasor, under Neb. Rev. Stat. § 48-118 (Reissue 2010). Travelers claimed a lien for $26,208 in indemnity payments made to Darla and $10,000 in funeral expenses. It wanted the remaining balance distributed to Darla as "future credit" against the remaining benefits it owes Darla.

In October 2014, the personal representative filed a petition to settle its wrongful death claim against the tort-feasor's insurance carrier. The insurance carrier paid its policy limit of $1 million, of which $500,000 was paid to the Estate and the other $500,000 was paid to the estate of an occupant in Bruce's vehicle who was also killed in the accident. The county court approved the settlement's distribution to Bruce's dependents as follows: $125,000 to each of Bruce's two adult children and $250,000 to Darla.

In the personal representative's request for distribution of the wrongful death settlement proceeds, she stated Darla's portion was "subject to the lien for worker's [sic] compensation." Accordingly, the personal representative requested the county court set a date for a hearing on the subrogation issue. The county court held a hearing at which Travelers and Darla each presented evidence as to the fair and equitable division of Darla's proceeds between them and the amount, if any, of Traveler's future credit. After the hearing, the county court ordered $42,583.31 of the settlement proceeds be paid to the attorneys of the Estate and the remaining $207,416.69 be

distributed to Darla. Travelers was awarded $0 of the proceeds and was given no consideration for payments that may be due in the future. Travelers appealed.

The appeal was litigated between Travelers and the Estate. The Court of Appeals affirmed the county court's subrogation distribution as fair and equitable. It also agreed that Travelers was not entitled to future credit. Regarding future credit, the Court of Appeals interpreted the second paragraph of § 48-118 as inapplicable in this case, because it states that an employer is entitled to future credit when there is a "recovery by *the employer* against [a] third person" and here it was the employee's estate that made the recovery. (Emphasis supplied.) Travelers petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

Travelers assigns, restated, the following errors:

(1) The county court lacked subject matter jurisdiction to hear and decide the subrogation matter;

(2) the Court of Appeals erred in affirming the county court's order, because the county court failed to consider the possibility of Darla's receiving underinsured motorist settlement funds;

(3) the Court of Appeals erred in affirming the county court's order, because it was not a fair and equitable distribution; and

(4) the Court of Appeals erred by refusing to allocate any portion of Darla's settlement funds to Travelers' lien for benefits already paid to Darla or as future credit for the ongoing benefits it must continue to pay to Darla.

STANDARD OF REVIEW

[1] Subject matter jurisdiction and statutory interpretation present questions of law.[2]

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[2] *Village at North Platte v. Lincoln Cty. Bd. of Equal.*, 292 Neb. 533, 873 N.W.2d 201 (2016).

ANALYSIS

[2-5] 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.[3] Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.[4] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[5] A court action taken without subject matter jurisdiction is void.[6]

Travelers argues, for the first time in its petition for further review, that the county court lacked subject matter jurisdiction to conduct the subrogation hearing. Specifically, Travelers contends that the Nebraska Workers' Compensation Act expressly provides that the district court should handle these types of subrogation issues, as evidenced by the fact that the act references the "district court" four times in Neb. Rev. Stat. § 48-118.01 (Reissue 2010). Accordingly, "the court" in Neb. Rev. Stat. § 48-118.04 (Reissue 2010) should be interpreted in pari materia with § 48-118.01 to limit jurisdiction to the district court.

[6-8] Absent contrary statutory language, a court gives statutory language its plain meaning; a court will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.[7] An appellate court does not consider a statute's clauses and phrases as detached

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[3] *Kotrous v. Zerbe*, 287 Neb. 1033, 846 N.W.2d 122 (2014).

[4] *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[5] *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015).

[6] *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

[7] See *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

and isolated expressions.[8] Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.[9] It is not within the province of a court to read a meaning into a statute that is not warranted by the language.[10]

Section 48-118.01 states, in relevant part, as follows:

> [T]he district court before which the action is pending shall allow [the employee, personal representative, employer, or workers' compensation insurer] to intervene in [the action against a third party], and if no action is pending then the district court in which it could be brought shall allow either party to commence such action. Each party shall have an equal voice in the claim and the prosecution of such suit, and any dispute arising shall be passed upon by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought.
>
> If the employee or his or her personal representative or the employer or his or her workers' compensation insurer join in prosecuting such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought.

Section 48-118.04(2) provides:

> If the employee or his or her personal representative or the employer or his or her workers' compensation insurer do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court, upon

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[8] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015).

[9] *Id.*

[10] *Interiano-Lopez, supra* note 4.

application, shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

Section 48-118 was originally enacted in 1913.[11] The Legislature has made numerous amendments, adding piecemeal clauses and phrases, to § 48-118.[12] In 2005, however, the Legislature separated § 48-118 into § 48-118 et seq. (Reissue 2016).[13] The Legislature made no comments indicating that its purpose for separating § 48-118 was to change the meaning of the language substantively. So, we read §§ 48-118 et seq. as a whole.

[9,10] The language of § 48-118.01, "the district court before which the action is pending . . . and if no action is pending then the district court in which it could be brought," plainly establishes that a subrogated claim against a third party must be brought in the district court. While § 30-810 provides special procedures for settling wrongful death claims, it is silent on wrongful death actions. Pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2016), the district courts shall have and exercise general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided. Accordingly, wrongful death actions must be brought in the district court.[14]

Section 48-118.01 goes on to use the phrase "the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." Because we have already established that a subrogated claim against a third party must be brought in the district court, the plain language of this phrase is that disputes among

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[11] 1913 Neb. Laws, ch. 198, § 18, p. 585, codified as Rev. Stat. § 3659 (1913).

[12] See § 48-118 (Reissue 2004).

[13] 2005 Neb. Laws, L.B. 13, §§ 2 and 23 to 27.

[14] See Neb. Rev. Stat. § 30-2464(c) (Reissue 2016) ("a personal representative of a decedent domiciled in this state at his or her death has the same standing to sue and be sued in the courts of this state").

a subrogor and subrogee must be resolved by the district court in which the action is or the district court in which the action could be brought.

[11,12] In light of § 48-118.01's exclusive consideration of district courts, we turn to § 48-118.04. While § 48-118.04 does not provide the additional language of § 48-118.01 that a subrogation must be brought in a district court if no action is pending, both statutes refer to "the court." Because § 48-118.01's reference to the "the court" is an unambiguous reference to the district court, we must also read "the court" in § 48-118.04(2) as an unambiguous reference to the district court. Therefore, we hold that district courts have exclusive subject matter jurisdiction over the fair and equitable distribution of proceeds subject to subrogation.

We note that this interpretation is consistent with our holding in *Miller v. M.F.S. York/Stormor*.[15] In *Miller*, the employee, Kevin Miller, was injured during the course and scope of his employment due to the alleged negligence of a third-party tort-feasor. Miller brought a personal injury action against the tort-feasor in federal court, and Miller's employer joined the suit. The parties reached a settlement before trial.

Miller and his employer then sought a determination as to the employer's subrogation claim for benefits paid under its workers' compensation plan. The federal court held a hearing to determine the fair and equitable allocation of the settlement proceeds. In doing so, however, no determination was made as to the amount of credit the employer would be entitled to on disability benefits and medical and other expenses that accrued after the order.

After the case had been completed in federal court, Miller brought an action in the Nebraska Workers' Compensation Court for other workers' compensation benefits and expenses which accrued after the final order in federal court. The

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[15] *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999).

Workers' Compensation Court determined it lacked jurisdiction to determine Miller's claims, because they had vested in federal court. Miller then filed an application for review in the Workers' Compensation Court. The review panel found that the Workers' Compensation Court did have jurisdiction under § 48-118 (Reissue 1993) and remanded the case to the workers' compensation judge. The employer appealed to the Court of Appeals, which affirmed the order of the review panel. We took the matter on a petition for further review.

On appeal, we first held that upon entering a final order, the federal court matter was completed and the case was no longer pending in that court. We then determined that as a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. Lastly, we held that the language of § 48-118, which stated "'the court before which the case is pending and if no action is pending then by the district court in which such action could be brought,'" requires the subrogation dispute be brought in the court where the underlying third-party action was litigated or the district court.[16] Accordingly, the Workers' Compensation Court lacked subject matter jurisdiction over the dispute.

[13,14] In further support of our interpretation that district courts have exclusive subject matter jurisdiction over the fair and equitable distribution of proceeds subject to subrogation, we note that county courts are statutorily created courts which possess limited jurisdiction.[17] County courts can acquire jurisdiction only through a specific legislative mandate as a result of a legislative enactment.[18] Nowhere in the Nebraska Workers' Compensation Act's statutes on subrogation of rights against

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[16] *Id.* at 103, 595 N.W.2d at 881 (quoting statute language currently found at § 48-118.01).

[17] See *In re Adoption of Hemmer*, 260 Neb. 827, 619 N.W.2d 848 (2000).

[18] *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991). See, also, *In re Adoption of Hemmer, supra* note 17.

third-party tort-feasors, § 48-118 et seq., does the Legislature provide a specific mandate of jurisdiction to the county courts. Therefore, we cannot read a mandate into § 48-118.04 that county courts also have jurisdiction over fair and equitable distribution hearings by the Legislature's use of the phrase "the court."

Section 30-810 also does not confer jurisdiction to the county court for the subrogation of wrongful death proceeds. While § 30-810 does confer exclusive jurisdiction to the county court to approve wrongful death settlements and discretionary jurisdiction to distribute the proceeds of the wrongful death claims, as we mentioned above, wrongful death actions themselves can be litigated only in the district court. The jurisdiction granted to the county courts by § 30-810 is narrow to its terms and cannot be exceeded by the county court.[19] Further, the beneficiaries of the wrongful death action are not entitled to be parties to the wrongful death distribution proceedings[20]; therefore, a dispute could not arise between the employer or insurer and the beneficiary, as envisioned by § 48-118.01, within the proceedings in the county court.

Here, the extent of the county court's jurisdiction extended to the distribution of the settlement proceeds from the wrongful death claim to the beneficiaries only. The county court lacked

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[19] See *In re Estate of Panec*, 291 Neb. 46, 864 N.W.2d 219 (2015) (reversing decision of county court that distributed survivorship proceeds in addition to wrongful death proceeds, because § 30-810 provided no jurisdiction for distributing proceeds other than from wrongful death claims).

[20] *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 24-26, 230 N.W.2d 99, 104-05 (1975) ("[t]his makes it clear that no apparent heir or beneficiary under the wrongful death statute has any vested right to any of the proceeds recovered in said action until after a hearing has been held before the county court, and a determination made by the court as to who is entitled to receive the proceeds and how much. . . . One may employ counsel to assist a litigant, or may testify as a witness in his favor or give other active support to his cause in court, without becoming a party to the record . . .").

subject matter jurisdiction to adjudicate the subrogation issue as it related to the distribution of Darla's settlement proceeds. Accordingly, the county court's order is void in its determination of the fair and equitable distribution of Darla's settlement proceeds.

[15-17] When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[21] When an appellate court is without jurisdiction to act, the appeal must be dismissed.[22] However, we have the power to determine whether we lack jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.[23]

Because the county court lacked jurisdiction over the subrogation matter, the Court of Appeals was also without jurisdiction to hear the subrogation issue. Accordingly, the Court of Appeals' decision is also void because it was solely concerned with the county court's determination of the subrogation matter.

[18] Travelers also contends that the Court of Appeals erred in its interpretation of § 48-118 by refusing to allocate any portion of Darla's settlement funds for future credit for the ongoing benefits it must continue to pay to Darla because Travelers did not participate in obtaining the proceeds. In raising that assignment of error, Travelers relies upon our holding in *Bacon v. DBI/SALA*.[24] In *Bacon v. DBI/SALA*, we held that an employer's or insurer's right to a future credit against a

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[21] *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d 284 (1997).

[22] *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010).

[23] See *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014), citing *In re Interest of Trey H., supra* note 6.

[24] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

beneficiary's proceeds from a wrongful death claim does not depend upon who happens to recover first. However, because we have determined that the county court lacked subject matter jurisdiction to decide the issue of subrogation, we need not comment further on the issue of whether the Court of Appeals erred in its interpretation of § 48-118. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.[25]

CONCLUSION

We hold that the county court lacked subject matter jurisdiction over the subrogation matter. Because the county court lacked jurisdiction over the subrogation matter, the Court of Appeals also lacked subject matter jurisdiction to hear the merits of the appeal. Accordingly, we vacate the judgment of the Court of Appeals and remand the cause to the Court of Appeals with directions to vacate the order of the county court which determined the fair and equitable distribution of Darla's settlement proceeds.

Judgment vacated, and cause
remanded with directions.

Kelch, J., not participating.

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[25] *In re Interest of Jackson E.*, 293 Neb. 84, 875 N.W.2d 863 (2016).

State of Nebraska, appellee, v. Joseph D. Senn, Jr., appellant.

888 N.W.2d 716

Filed December 16, 2016. No. S-15-734.

1. **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.
2. **Criminal Law: Weapons.** Generally, under Neb. Rev. Stat. § 28-1202 (Reissue 2016), any person who carries a weapon or weapons concealed on or about his or her person, such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying a concealed weapon.
3. **Weapons: Motor Vehicles: Words and Phrases.** A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach.
4. **Motor Vehicles: Words and Phrases.** Under Neb. Rev. Stat. § 60-642 (Reissue 2010), the word "driver" includes "any person who operates, drives, or is in actual physical control of a vehicle."
5. **Jury Instructions.** As a general rule, in giving instructions to the jury, it is proper for the court to describe the elements of the offense in the language of the statute.
6. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Petition for further review from the Court of Appeals, Inbody, Pirtle, and Riedmann, Judges, on appeal thereto from the District Court for Richardson County, Daniel E. Bryan,

Jr., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Keith M. Kollasch, of Kollasch Law Office, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Kelch, J.

INTRODUCTION

Following a jury trial, Joseph D. Senn, Jr., was convicted of carrying a concealed weapon. The Nebraska Court of Appeals reversed the conviction on the basis that the evidence was insufficient to support the jury's guilty verdict. Upon further review, we find that the evidence, viewed in the light most favorable to the prosecution, was sufficient to sustain Senn's conviction. We therefore reverse the Court of Appeals' decision and remand the cause with directions to affirm the judgment of the district court.

BACKGROUND

Senn was charged in the district court for Richardson County, Nebraska, with attempted second degree murder, use of a firearm to commit a felony, two counts of terroristic threats, and carrying a concealed weapon. Following a jury trial, he was convicted of carrying a concealed weapon but was acquitted of the remaining charges.

The evidence at trial established that Senn argued with Buckley Auxier while assisting Natalie Auxier in removing some of her possessions from Buckley's home. At that time, Natalie and Buckley were involved in divorce proceedings.

When Buckley directed them to leave, Senn allegedly returned to the U-Haul truck he had driven there and pulled out

a handgun. When asked where in the U-Haul the handgun had been stored, Buckley testified, "It might have been underneath the seat. I don't know. It was in the U-Haul, easy to reach." Buckley's hired hand, who also witnessed the incident, testified that Senn "went over to the U-Haul and obtained a pistol that was hidden in there." According to Buckley and his hired hand, Senn pointed the handgun at Buckley and fired a shot, but missed. Senn and Natalie then got into the U-Haul and left the premises. Senn testified that he left the property when the confrontation grew heated, but denied that he ever retrieved the handgun or fired a shot at Buckley.

Buckley contacted law enforcement immediately after Senn departed from the property. The Richardson County Sheriff and his deputy encountered the U-Haul and initiated a traffic stop. Senn was driving the U-Haul, and Natalie was riding as a passenger. During the stop, the deputy noticed a blue plastic manufacturer's firearms box behind the passenger seat in the U-Haul. It contained a 9-mm semiautomatic handgun, which Senn admitted belonged to him.

The sheriff testified that the firearms box was found "against the wall of the truck—between the passenger seat and the right side wall of the truck, partially behind the seat, with some clothing on top of it," and that "it was completely on the other side of the cab" from the driver's seat. The deputy testified that given the location of the firearms box during the stop, the driver of the vehicle could not have reached the handgun while driving.

A forensic scientist testified regarding his opinion that a spent shell casing found on Buckley's property was fired from the handgun found in the U-Haul. Senn testified that he did not fire his handgun on the date of the alleged offenses, but that he had visited Buckley's property with Natalie approximately 1 week earlier and had fired several shots using an old basketball as a target. He testified that he did not collect all of the shell casings after firing the handgun on that occasion. However, Buckley's hired hand testified that the spent shell

casing found on the property shortly after the incident smelled like it had just been fired. Buckley testified that he found two more shell casings on his property 2 days after the incident with Senn.

The district court instructed the jury that the State must prove the following elements beyond a reasonable doubt for the carrying a concealed weapon charge: "(1) That . . . Senn . . . ; (2) On or about October 4, 2014; (3) In Richardson County . . . ; (4) Did carry a weapon concealed on or about his person to-wit: 9mm semi-automatic handgun." The jury was not instructed regarding the meaning of the phrase "on or about his person." During the instruction conference, neither party objected to the instructions relating to the concealed weapon charge.

During closing arguments, the State asserted that the handgun was "on or about [Senn's] person" because it was found in the driver's compartment of the U-Haul truck during the traffic stop. Defense counsel argued that the handgun was not "on or about [Senn's] person" because it was unreachable during the traffic stop.

After the jury found Senn guilty of carrying a concealed weapon, the district court fined him $200, plus court costs. Senn appealed. He argued that the evidence adduced at trial was insufficient to support his conviction because the State did not prove that the handgun was concealed "on or about" his person as required by Neb. Rev. Stat. § 28-1202(1)(a) (Reissue 2016). The State argued that the handgun's location in the cab of the vehicle driven by Senn was enough to satisfy the element that the weapon be concealed "on or about" Senn's person, even if it was not within his reach while driving. Additionally, the State argued that the jury could have found that Senn carried a concealed weapon not only during the traffic stop, but also immediately before he allegedly shot at Buckley.

The Court of Appeals reversed Senn's conviction for carrying a concealed weapon. See *State v. Senn*, 24 Neb. App. 160,

884 N.W.2d 142 (2016). In a split decision, it found that the evidence was insufficient to support Senn's conviction because the uncontroverted testimony established that the handgun was not within Senn's immediate physical reach at the time of the traffic stop. Citing a civil case, the Court of Appeals declined to address the State's argument that Senn could have committed the offense just before he allegedly shot at Buckley, on the basis that the State did not argue that theory at trial. See *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989) (as general rule, appellate court will decide case on theory on which it was presented in trial court).

We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

In its petition for further review, the State assigns that the Court of Appeals erred in (1) refusing to consider an argument made on appeal, on the basis that it was different from the theory argued by the State at trial, and (2) finding insufficient evidence to support the jury's guilty verdict.

STANDARD OF REVIEW

[1] 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. *State v. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016).

ANALYSIS

On further review, the State assigns that the Court of Appeals erred in finding insufficient evidence to support the jury's guilty verdict. Accordingly, our standard of review requires us to consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Senn's handgun was "concealed on or about his . . . person," as provided in § 28-1202. See *State v. Irish, supra*. Under this standard, we conclude that

the State presented sufficient evidence to support the jury's guilty verdict.

In reversing Senn's conviction, the Court of Appeals relied on the deputy's testimony that the location of the handgun in the vehicle was such that Senn could not have reached it while driving and the sheriff's testimony that the handgun was "completely on the other side of the cab" from the driver's seat. From this testimony, the Court of Appeals deduced that "both testified that Senn could not reach the firearm at the time he was pulled over." *State v. Senn*, 24 Neb. App. 160, 170, 884 N.W.2d 142, 149 (2016). However, we note that the sheriff did not testify regarding Senn's ability to reach the handgun, only regarding its location. Based on its interpretation of the officers' testimony alone, the Court of Appeals found that "the uncontroverted testimony in this case establishes that the gun was not within immediate physical reach of Senn." *Id.* at 169, 884 N.W.2d at 148. We disagree.

[2-4] The State charged Senn pursuant to § 28-1202(1)(a), which provides: "Except as otherwise provided in this section, any person who carries a weapon or weapons concealed *on or about his . . . person*, such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying a concealed weapon." (Emphasis supplied). In applying this statute in the context of an automobile, we have held that "[a] weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach." *State v. Saccomano*, 218 Neb. 435, 436, 355 N.W.2d 791, 792 (1984). Accord *State v. Goodwin*, 184 Neb. 537, 169 N.W.2d 270 (1969). And in Nebraska, the word "driver" includes "any person who operates, drives, or is in actual physical control of a vehicle." See Neb. Rev. Stat. § 60-642 (Reissue 2010).

The Court of Appeals relied on testimony establishing that Senn could not reach the handgun *while driving*, but that testimony did not speak to whether he could have reached it in

other driving situations, such as while the vehicle was stopped. Neither § 28-1202 nor case law requires that the weapon be within the defendant's reach *while driving* in order to be considered "on or about his person." In fact, in *Kennedy v. State*, 171 Neb. 160, 170-71, 105 N.W.2d 710, 718 (1960), where the defendant was one of several occupants in the vehicle, we held that a weapon is concealed when it is hidden from ordinary observation and is "readily accessible on [the] person [of] *or in a motor vehicle operated by* [*the*] *defendant*." (Emphasis supplied). Further, in *State v. Goodwin*, 184 Neb. at 541, 169 N.W.2d at 273, we affirmed the jury's factual finding and held that a loaded pistol found in a locked glove compartment during a postarrest search was concealed "on or about" the person of the driver because it was concealed in an accessible location over which the defendant had control.

[5] Although the Court of Appeals stated the proper standard of review, it essentially focused its analysis on contemplating a legal definition of "on or about his person." However, similarly to *Goodwin*, due to the presence of a handgun in the passenger compartment of Senn's vehicle, there was sufficient evidence to pose a factual question for the jury to determine whether the handgun was concealed on or about his person. In framing this factual question for the jury, the district court instructed the jury as to the elements of § 28-1202, elements that the State was required to prove beyond a reasonable doubt. And as a general rule, in giving instructions to the jury, it is proper for the court to describe the elements of the offense in the language of the statute. See *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015).

The jury, after being instructed on the elements of § 28-1202, ultimately found that Senn carried the handgun concealed on or about his person, which is all that is required by the statute. Neither the statute nor the instruction limited the jury's consideration to a particular time or location for the charged offense, except for the date and the county specified by the instruction. Certainly, as a rational trier of fact, the

jury considered the evidence that Senn could not reach the handgun while driving. However, this evidence represented but one factor for the jury's deliberation, along with the other evidence received at trial, in reaching its verdict.

[6] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Viewing the evidence in the light most favorable to the prosecution, we conclude that the jury, as a rational trier of fact, could have found that the handgun was on or about Senn's person, even though it was not within his reach while driving.

Because we find that the Court of Appeals erred in reversing Senn's conviction on the basis of insufficient evidence, we decline to address the State's remaining assignment of error. See *State v. Planck*, 289 Neb. 510, 856 N.W.2d 112 (2014) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

CONCLUSION

For the reasons set forth above, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the judgment of the district court.

Reversed and remanded with directions.

Dawn Amory, appellant, v.
City of Lincoln, appellee.
888 N.W.2d 499

Filed December 16, 2016. No. S-15-846.

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

Cameron E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellant.

Jeffery R. Kirkpatrick, Lincoln City Attorney, and Jocelyn W. Golden for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Per Curiam.

The August 13, 2015, order of the district court for Lancaster County is affirmed by an equally divided court.

Affirmed.

Stacy, J., not participating.

In re Interest of Nizigiyimana R., a child under 18 years of age. State of Nebraska, appellee, v. Kristopher E. and Stephanie E., appellants.

889 N.W.2d 362

Filed December 16, 2016. No. S-15-975.

1. **Jurisdiction: Interventions: Standing: Final Orders: Appeal and Error.** An appellate court exercises jurisdiction over an appeal from an order denying intervention even if the appellant would not have standing to appeal from the court's final order or judgment on the merits.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Interventions.** Whether a nonparty has the right to intervene is a question of law.
4. **Statutes.** The meaning and interpretation of a statute present questions of law.
5. **Juvenile Courts: Interventions: Equity.** A juvenile court lacks authority to permit an equitable intervention.
6. **Juvenile Courts: Jurisdiction: Parties.** When a juvenile court adjudicates a child under Neb. Rev. Stat. § 43-247(3) (Reissue 2016), the court has exclusive original jurisdiction over the parties listed in § 43-247(5).
7. **Interventions: Minors.** Because the Nebraska Juvenile Code contains no specific provisions governing the rights of other persons to intervene in juvenile proceedings, the rules governing intervention in civil proceedings generally serve as a court's guidepost in determining whether nonparties can intervene.
8. **Interventions.** Under Neb. Rev. Stat. § 25-328 (Reissue 2016), to be entitled to intervene in an action, a nonparty must show a direct and legal interest. A nonparty must lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. A nonparty must allege facts showing that he or she possesses the requisite

legal interest in the subject matter of the action and must be joining the proceedings to defend his or her own rights or interests. An indirect, remote, or conjectural interest in the result of a proceeding will not establish intervention as a matter of right.

9. **Interventions: Pleadings.** In ruling on a request for leave to intervene, a court assumes that the nonparty's factual allegations are true.
10. **Statutes.** Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute.
11. **Administrative Law: Minors.** Under Neb. Rev. Stat. §§ 43-1311.01 and 43-1311.02 (Reissue 2016), the Department of Health and Human Services' duties regarding siblings do not depend on whether both siblings are adjudicated under Neb. Rev. Stat. § 43-247 (Reissue 2016) or whether the department has placement authority for both siblings.
12. **Administrative Law: Minors: Legislature.** The Legislature has not created a private right of action for an adjudicated child's sibling to enforce the Department of Health and Human Services' duties under Neb. Rev. Stat. §§ 43-1311.01 and 43-1311.02 (Reissue 2016). Section 43-1311.02(3) specifically limits the right to enforce these duties to parties.
13. **Administrative Law: Minors: Parties.** The only persons who can enforce the Department of Health and Human Services' duties under Neb. Rev. Stat. § 43-1312.02 (Reissue 2016) are a guardian ad litem, on behalf of an adjudicated child, or an adjudicated child's parent, guardian, or custodian.
14. **Statutes: Legislature: Intent.** A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.
15. ____: ____: ____. When statutes dealing with the same subject matter do not show a contrary legislative intent, a court interprets them so that they are consistent, harmonious, and sensible.
16. **Statutes: Legislature: Minors: Words and Phrases.** Interpreting Neb. Rev. Stat. §§ 43-1311.01 and 43-1311.02 (Reissue 2016) so that they are consistent with the Nebraska Juvenile Code means that the Legislature's definition of a party in the juvenile code also applies to the term "party" in § 43-1311.02(3).
17. **Minors: Adoption: Parental Rights.** A preadoptive parent in a dependency proceeding is a foster parent whom a juvenile court has approved for a future adoption because a child's parent has surrendered his or her parental rights, a court-approved permanency plan does not call for the child's reunification with his or her parent, or the parents' parental rights have been or will be terminated.

Appeal from the County Court for Hall County: Philip M. Martin, Jr., Judge. Affirmed.

Bruce E. Stephens, of Stephens Law Offices, P.C., L.L.O., for appellants.

Megan Alexander, Deputy Hall County Attorney, for appellee.

Stacie A. Goding, of Myers & Goding, P.C., L.L.O., guardian ad litem.

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

Funke, J.

I. NATURE OF CASE

The appellants, Kristopher E. and Stephanie E., appeal from the juvenile court's order that denied them leave to intervene, on their daughter's behalf, to seek the placement and eventual adoption of Nizigiyimana R. (Ziggy). They had privately adopted Ziggy's younger sister, who was born after Ziggy was removed from her mother's home and placed in the custody of the Nebraska Department of Health and Human Services (Department), but before the court terminated the parental rights of Ziggy's parents. Kristopher and Stephanie sought Ziggy's placement and adoption to maintain and foster Ziggy's relationship with their daughter. But the juvenile court determined the Nebraska statutes implementing the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCA)[1] did not give them or their daughter any cognizable interests in the dependency proceeding. Kristopher and Stephanie appealed. We affirm.

We conclude that Neb. Rev. Stat. §§ 43-1311.01 and 43-1311.02 (Reissue 2016) do not permit a nonparty to seek a joint-sibling placement or define an adjudicated child's sibling

[1] See Pub. L. No. 110-351, 122 Stat. 3949.

as a party. Instead, the plain language of § 43-1311.02(3) permits only a party to move for a joint-sibling placement. We further conclude that Kristopher and Stephanie were not preadoptive parents with a right to participate in review hearings. Accordingly, we conclude that the juvenile court did not err in denying them leave to intervene on their daughter's behalf to seek a joint-sibling placement.

II. BACKGROUND

1. Facts Preceding Intervention Hearing

On October 1, 2013, the State sought Ziggy's adjudication under Neb. Rev. Stat. § 43-274(3)(a) (Reissue 2008), when he was about 6 months old. In its December 2013 disposition order, the court continued Ziggy's placement with his foster parents with a goal of reunification. Ziggy had four older half siblings, ranging in age from 6 to 12, whom the Department placed with their great-grandmother and her husband. The couple adopted the older siblings in May 2014. That same month, Ziggy's parents had another child, who was Ziggy's full sister and about a year younger than him. She was born about 5 months after the court entered the disposition order calling for Ziggy's reunification with his parents.

Ziggy's younger sister, however, left the hospital in the custody of Kristopher and Stephanie because Ziggy's parents had consented to her private adoption. Ziggy's mother testified that she had asked Ziggy's great-grandmother for help in finding someone to adopt Ziggy's younger sister because she was not ready to have another child. Stephanie was a distant cousin to Ziggy and his siblings, and Ziggy's mother and father chose Kristopher and Stephanie as the adoptive parents. Ziggy's great-grandmother testified that she and her husband did not accept placement of Ziggy or his younger sister because of their ages and because she did not want their placement to interfere with the couple's adoption of Ziggy's older siblings.

Stephanie testified that shortly after Ziggy's parents gave her and Kristopher custody of Ziggy's sister in May 2014, they asked the Department to place Ziggy with them because they were licensed foster care providers. The Department denied their request. On November 17, they adopted Ziggy's younger sister. On December 11, the State moved to terminate the parental rights of Ziggy's parents.

Stephanie and Ziggy's great-grandmother arranged regular visits or contacts between Ziggy's younger sister and his four older half siblings to maintain their relationships. Beginning in January 2015, the Department allowed Ziggy to visit with his siblings as well. Ziggy's great-grandmother believed that Ziggy and his younger sister had developed a bond in the times they had visited.

On April 7, 2015, the State filed an amended motion to terminate the parental rights of Ziggy's parents. The next day, the court entered the termination order. The court ordered the Department to prepare a new permanency plan for adoption and scheduled a review hearing for the end of May. After the court terminated parental rights in April, the Department ceased Ziggy's visitations with his siblings.

On April 17, 2015, Kristopher and Stephanie filed a complaint to intervene. They alleged that they had adopted Ziggy's younger sister and wished to have Ziggy placed with them for adoption to preserve the siblings' familial relationship. They claimed a right to intervene because § 43-1311.02 requires the Department to make reasonable efforts for a joint-sibling placement. Alternatively, they sought equitable intervention for the same reason and because their intervention was in Ziggy's best interests. They attached a copy of the Department's regulations that required placement teams to give preference to adult relatives and siblings.

The Department objected to intervention by Kristopher and Stephanie. Regarding their daughter, it argued that she and Ziggy had no relationship before he was removed (because she was born after his removal) and that they had no legal

relationship solely because Ziggy's sister had been adopted. Regarding Kristopher and Stephanie, it argued that if a great-grandparent and foster parent cannot intervene under this court's prior holdings, then distant relatives also cannot. It argued that Kristopher and Stephanie did not have a substantial relationship with Ziggy or a sufficient interest to intervene because they had only received supervised visitations with him for a short period when he visited his siblings. It argued that the juvenile court was not bound by the Department's regulations but must consider a child's best interests and that Ziggy had bonded with his foster parents.

In May 2015, the court approved a case plan, which is not part of the record, calling for Ziggy's adoption. It scheduled a permanency hearing for November and a hearing on Kristopher and Stephanie's motion to intervene for July. In June, they moved to reinstate Ziggy's visitation with their daughter. They alleged that after they filed their complaint to intervene, the Department immediately discontinued the siblings' visitation. In July, they moved to have Ziggy placed with them and for an order permitting him to visit their daughter throughout the proceedings.

2. Intervention Hearing

At the July intervention hearing, the court sustained the State's objection to Kristopher and Stephanie's offers of proof regarding their initial request to have Ziggy placed with them. For their offer of proof, Stephanie stated that she was related to Ziggy and that the Department did not provide her with a statutory notice about a relative's options to participate in a child's care and placement. The court agreed with the State that this proof was beyond the scope of whether she and Kristopher could intervene.

A caseworker testified that she had assisted another caseworker to place Ziggy with foster parents when he was removed from parental custody. She stated that to the best of her knowledge, when Ziggy was removed, his mother did

not mention Kristopher and Stephanie as possible relatives for placement. Similarly, she denied any knowledge that Ziggy's great-grandmother had identified them as a relative placement.

Kristopher and Stephanie argued that the Legislature had implemented the FCA through statutes that required the Department to (1) exercise due diligence to find a removed child's adult relatives and the parents of a sibling and (2) provide a specified notice to these persons that explains their options to participate in the care and placement of the child. They argued the new statutes required the Department to make reasonable efforts to place siblings in the same foster care or adoption placement and that those new statutes had superseded this court's decision in *In re Interest of Meridian H.*[2] They claimed standing to intervene as Ziggy's adult relatives and as the adoptive parents of his sister.

3. Court's Order

In its order, the court denied Kristopher and Stephanie's leave to intervene for six reasons. First, the court concluded their kinship relationship to Ziggy was too distant to warrant their intervention.

Second, the court implicitly concluded that the Department had complied with its duties under these facts. It stated that the Department's placement policies "were applicable at the time of the initial placement of the juvenile . . . where the juvenile remains currently, and that the Department is under no constraints at the present time to effect a change in placement in order to comply with regulations." The court reasoned that the Department had not placed Ziggy with a nonrelative until after the great-grandmother and her husband had declined Ziggy's placement with them: "The [FCA] arguments advanced by [Kristopher and Stephanie] are not appropriate to the present facts."

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[2] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

Third, the court agreed with the State that even if Kristopher and Stephanie had a sufficient legal interest to intervene, they had not sought intervention before the trial started and had filed a complaint only after the parents' parental rights to Ziggy were terminated. It implicitly concluded that they had not complied with the requirement under Neb. Rev. Stat. § 25-328 (Reissue 2016) to seek intervention before the trial commenced.

Fourth, the court ruled that Kristopher and Stephanie did not have standing to intervene as preadoptive parents. Fifth, it determined that their daughter did not have any cognizable rights in the proceeding under federal or state law.

Finally, the court concluded that it would be improper to allow Kristopher and Stephanie to intervene under its equitable powers because Ziggy had lived with the foster parents since October 2013 and knew no one else as parents or family: "[I]t would not be in the best interest of the juvenile, or any juvenile for that matter, to disrupt a two year placement[,] particularly one that occurred in the earliest stages of the juvenile's life."

III. ASSIGNMENTS OF ERROR

Kristopher and Stephanie assign, restated, that the court erred in (1) denying them leave to intervene and (2) excluding evidence which showed that the Department did not give them a statutory notice.

IV. STANDARD OF REVIEW

[1-4] We exercise jurisdiction over an appeal from an order denying intervention even if the appellant would not have standing to appeal from the court's final order or judgment on the merits.[3] When reviewing questions of law, we resolve

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[3] See *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015), citing *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

the questions independently of the lower court's conclusions.[4] Whether a nonparty has the right to intervene is a question of law.[5] The meaning and interpretation of a statute present questions of law.[6]

V. ANALYSIS

1. Parties' Contentions

Kristopher and Stephanie claim that as the parents of Ziggy's younger sister, they have a legal right to intervene under Nebraska's new statutes implementing the FCA. They contend that these statutes give siblings a right to participate in review hearings and to be placed together unless the placement would be contrary to the safety or well-being of any sibling. They argue that the court erred in implicitly relying on *In re Interest of Meridian H.* to deny intervention because we held therein only that the federal FCA did not apply and their claim is under the newly implemented statutes.[7] They also claim they had standing to intervene as preadoptive parents under Neb. Rev. Stat. § 43-1314 (Reissue 2016) because it requires a juvenile court to permit preadoptive parents to participate in review hearings. Alternatively, they contend that the court erred in denying them leave to intervene as a matter of equity because Ziggy's placement with his sibling would be in his best interests. They argue that if they cannot intervene and argue for a joint-sibling placement, no other party will advocate for protecting these siblings' relationship.

The State contends that § 25-328 requires a party seeking to intervene to do so before a trial commences and that Kristopher and Stephanie failed to comply with this requirement. Alternatively, the State contends that they lacked standing under § 43-1311.02. It contends that the federal FCA is

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[4] See *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016).

[5] *In re Interest of Enyce J. & Eternity M., supra* note 3.

[6] *Id.*

[7] See *In re Interest of Meridian H., supra* note 2.

substantively similar to § 43-1311.02 and that in *In re Interest of Meridian H.*, we stated that the FCA did not establish a legal interest that gave a sibling standing to intervene in a dependency proceeding.[8] The State argues that the Department's duties under § 43-1311.02 apply only when it has placement authority over both siblings and that its placement decisions cannot be held hostage to a parent's decision to place an unadjudicated child in a different home. It contends that interpreting § 43-1311.02 to apply to unadjudicated siblings would frustrate the juvenile code's goal of achieving permanency for adjudicated children. The guardian ad litem concurs, but also points out that we have held a juvenile court has no authority to permit an equitable intervention.

2. Juvenile Courts Have No Statutory Authority to Permit Equitable Intervention

[5] The guardian ad litem correctly argues that in *In re Interest of Enyce J. & Eternity M.*,[9] we held a juvenile court lacks authority to permit an equitable intervention. We did not issue our decision in *In re Interest of Enyce J. & Eternity M.* until after the juvenile court issued its order denying Kristopher and Stephanie leave to intervene. But because of this decision, we need not further address their argument that the court erred in not permitting an equitable intervention.

3. Juvenile Court's Authority to Permit Intervention Under § 25-328 Does Not Control

[6,7] When a juvenile court adjudicates a child under Neb. Rev. Stat. § 43-247(3) (Reissue 2016), the court has exclusive original jurisdiction over the parties listed in § 43-247(5).[10]

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[8] See *id.*

[9] See *In re Interest of Enyce J. & Eternity M., supra* note 3.

[10] See Neb. Rev. Stat. § 43-246.01(1)(c) (Reissue 2016).

Section 43-247(5) defines the parties as the "parent, guardian, or custodian of any juvenile described in this section." But because the "juvenile code contains no specific provisions governing the rights of other persons to intervene in juvenile proceedings,"[11] we have held that the rules governing intervention in civil proceedings generally serve as a court's guidepost in determining whether nonparties can intervene.[12]

[8,9] Under § 25-328, to be entitled to intervene in an action, a nonparty must show a direct and legal interest.[13] A nonparty must lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.[14] A nonparty must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action[15] and must be joining the proceedings to defend his or her own rights or interests.[16] An indirect, remote, or conjectural interest in the result of a proceeding will not establish intervention as a matter of right.[17] In ruling on a request for leave to intervene, a court assumes that the nonparty's factual allegations are true.[18]

[10] As noted, the State argues that under § 25-328, a nonparty seeking to intervene as a matter of right must file a pleading "'before the trial commences.'"[19] This is certainly true in actions; however, we need not decide here how that requirement should interplay with our adoption of § 25-328

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[11] *In re Interest of Destiny S.*, 263 Neb. 255, 259, 639 N.W.2d 400, 405 (2002), *disapproved in part, In re Interest of Enyce J. & Eternity M., supra* note 3.

[12] See *id.*

[13] See *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016).

[14] See *id.*

[15] See *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006).

[16] See *In re Interest of Enyce J. & Eternity M., supra* note 3.

[17] See *id.*

[18] See *Spear T Ranch, supra* note 15.

[19] See *American Nat. Bank v. Medved*, 281 Neb. 799, 815, 801 N.W.2d 230, 242 (2011), quoting § 25-328.

as a guidepost for deciding intervention issues in juvenile proceedings, which are special proceedings—not actions. Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute.[20] As we explain later, we conclude that the Legislature's new statutes implementing the FCA are more specific to the intervention issue presented here and therefore control.

4. § 43-1311.02 Precludes Adjudicated Child's Sibling From Intervening to Ask for Joint-Sibling Placement

Before determining whether an adjudicated child's sibling can intervene in a dependency proceeding to enforce the Department's duties, we must determine whether §§ 43-1311.01 and 43-1311.02 impose any duties on the Department to consider a placement with an unadjudicated sibling. As noted, the State argues that the Department's duties under § 43-1311.02 apply only when it has placement authority over both an adjudicated child and the child's sibling.

(a) Department's Duties Regarding Siblings Are Not Limited to Siblings Who Are Wards of State

Since 1996, a goal of the juvenile code has been to "consider relatives as a preferred potential placement resource" when a child must be removed from parental custody.[21] Except for proceedings under the Nebraska Indian Child Welfare Act, the term "relative" includes a "brother, sister, . . . stepbrother, [and] stepsister."[22] Accordingly, since 1998, the Department's regulations have required its placement teams to give preference to placing a child with an appropriate adult relative over

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[20] *Schaffer v. Cass County*, 290 Neb. 892, 863 N.W.2d 143 (2015).

[21] See 1996 Neb. Laws, L.B. 1001, § 2 (codified at Neb. Rev. Stat. § 43-246(5) (Reissue 2016)).

[22] See Neb. Rev. Stat. § 43-245(21) (Reissue 2016).

nonrelatives and to give preference to placing siblings together unless the placement would be detrimental to one or more of them.[23]

But in *In re Interest of Meridian H.*, we concluded that under Nebraska law, an unadjudicated sibling does not have a cognizable interest in a sibling relationship that is separate and distinct from the adjudicated child's interest.[24] We further concluded that the FCA does not establish any legal interest on the part of an unadjudicated sibling which could be affected by a juvenile court's placement order or serve as the basis for standing. In reaching that conclusion, we specifically noted that the FCA "does not require notice to relatives who are minors or to the parents or custodians of such minors."[25]

Nebraska's new statutes implementing the FCA, however, did not apply to our analysis in *In re Interest of Meridian H.* We believe that the State misreads these new statutes in arguing that the Department's duties apply only when it has placement authority over both an adjudicated child and the child's sibling.

In 2011, through L.B. 177,[26] the Legislature clarified and heightened the Department's duties to implement joint-sibling placements, sibling visitations, or ongoing contacts. The Legislature amended statutes in the Nebraska Juvenile Code and amended or enacted statutes in the Foster Care Review Act to comply with specific requirements of the FCA.[27] As relevant here, L.B. 177 was intended to comply with federal requirements that states use "due diligence to notify adult relatives when a child is removed from parental custody[, and

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[23] See 390 Neb. Admin. Code, ch. 6, § 002.04 (1998).

[24] See *In re Interest of Meridian H., supra* note 2.

[25] *Id.* at 481, 798 N.W.2d at 108.

[26] 2011 Neb. Laws, L.B. 177 (effective Aug. 27, 2011).

[27] See Introducer's Statement of Intent, L.B. 177, Health and Human Services Committee, 102d Leg., 1st Sess. (Feb. 16, 2011).

make] efforts to place siblings together, or provide for sibling time if placement together is not possible."[28]

One statute that L.B. 177 amended was Neb. Rev. Stat. § 43-905 (Reissue 2008), which deals with the Department's responsibility to use care and diligence in finding a suitable home for a child committed to its legal custody. The Department must now "make reasonable efforts to accomplish joint-sibling placement or sibling visitation or ongoing interaction between siblings as provided in section 43-1311.02."[29]

Sections 43-1311.01 and 43-1311.02 are new statutes in the Foster Care Review Act created by L.B. 177.[30] Section 43-1311.01 imposes duties on the Department to identify and locate a child's adult relatives and notify them that the child has been removed from parental custody or that the child's parent has voluntarily placed the child with the Department. As originally enacted, within 30 days of the triggering event, the Department must locate and notify "any noncustodial parent[,] all grandparents, adult siblings, adult aunts, adult uncles, adult cousins, and adult relatives suggested by the child or the child's parents, except when that relative's history of family or domestic violence makes notification inappropriate."[31] The State must notify these persons in writing of any options they have to participate in the child's care and placement; the requirements for serving as a foster parent or other care provider; the training, services, and support available to children receiving such care; and information about guardianship assistance payments.[32]

In 2014, however, Congress amended 42 U.S.C. § 671,[33] which sets out the requirements for federally approved foster

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[28] *Id.* See, also, 42 U.S.C. § 671 (2012 & Supp. II 2014).

[29] See L.B. 177, § 2 (codified at § 43-905(1) (Reissue 2016)).

[30] See L.B. 177, §§ 6 and 7.

[31] See § 43-1311.01(1) (Cum. Supp. 2014).

[32] *Id.*

[33] See Pub. L. No. 113-183, § 209(a)(1), 128 Stat. 1941.

care and adoption plans in order for states to receive specified federal funds.[34] As a result, in 2015, the Legislature amended § 43-1311.01 through L.B. 296[35] to comply with Congress' newest requirements.[36] The 2015 amendment extended the Department's duty to notify specified persons of a child's removal or voluntary placement with the Department to include "all parents who have legal custody of a sibling of the child."[37]

The newly created § 43-1311.02(1)(a) requires the Department to make reasonable efforts "to place a child and the child's siblings in the same foster care placement or adoptive placement, unless such placement is contrary to the safety or well-being of any of the siblings. This requirement applies even if the custody order of the siblings are made at separate times."

Under § 43-1311.02(1)(b), if the siblings are not placed together, the Department must provide the siblings and the court with the reasons for its conclusion that a joint placement would be contrary to the safety or well-being of one of them.

Under § 43-1311.02(2), if the Department does not make a joint-sibling placement, it must make reasonable efforts to provide for frequent sibling visitation or ongoing interaction, unless it "provides the siblings and the court with reasons why such sibling visitation or ongoing interaction would be contrary to the safety or well-being of any of the siblings."

Finally, under § 43-1311.02(5), unless a court has suspended or terminated sibling joint-placement or contact, then even if the parents' parental rights are terminated, the Department must make reasonable efforts to implement a joint-sibling placement. Alternatively, the Department must take specific

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[34] See 45 C.F.R. § 1356.20(a) (2015).

[35] See 2015 Neb. Laws, L.B. 296, § 1 (operative July 1, 2015).

[36] See Introducer's Statement of Intent, L.B. 296, Health and Human Services Committee, 104th Leg., 1st Sess. (Feb. 19, 2015).

[37] See § 43-1311.01(1) (Reissue 2016).

steps to facilitate sibling visitation or ongoing interaction between an adjudicated child and the child's siblings when the child is adopted or enters into a permanent placement.[38]

L.B. 177 defined "siblings" in the Foster Care Review Act to mean "biological siblings and legal siblings, including, but not limited to, half-siblings and stepsiblings."[39] It also amended the definition of a "family unit" to clarify that "for purposes of potential sibling placement, the child's family unit shall also include the child's siblings even if the child has not resided with such siblings prior to placement in foster care."[40] In 2015, to comply with the new FCA requirements,[41] the Legislature amended § 43-1311.01 to specify that the term "sibling" means an individual considered to be a sibling but for a termination of parental rights or other disruption of parental rights such as the death of a parent.[42]

In short, under §§ 43-1311.01 and 43-1311.02, the Department's duties to make reasonable efforts to implement a joint-sibling placement do not depend upon the continued existence of the parent-child relationship with each of the siblings. The Department's duties exist even if the siblings' custody orders were entered at separate times, even if a court has terminated a parent's relationship with each child, and even if the siblings have not previously lived together.

Additionally, the Foster Care Review Act defines "foster care placements" to include placements made by a parent.[43] So the Department's duty under § 43-1131.02(1)(a) to make reasonable efforts to place an adjudicated child and the child's siblings in the "same foster care placement or adoptive

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[38] See § 43-1311.02(5).

[39] L.B. 177, § 3 (codified at Neb. Rev. Stat. § 43-1301(10) (Reissue 2016)).

[40] *Id.* (codified at § 43-1301(7)).

[41] See Introducer's Statement of Intent, L.B. 296, *supra* note 36.

[42] See L.B. 296, § 1.

[43] See § 43-1301(4).

placement" does not show that the Department's duties apply only when both the child and the sibling are wards of the state. Any doubt that the Department's duties extend to joint-sibling placements with unadjudicated siblings was put to rest by the Legislature's 2015 amendment to § 43-1311.01(1).

As stated, before 2015, the Department's notification duties under § 43-1311.01(1) were limited to a child's noncustodial parent, grandparents, and specified adult relatives. Since July 2015, however, that statute also requires the Department to notify "all parents *who have legal custody of a sibling*" of a child's removal from parental custody and of their option to participate in the care and placement of the child.[44]

The Legislature did not limit the amended notice requirement to those parents who have legal custody of a removed child's sibling through a juvenile court's order. Instead, the "legal custody" requirement includes those parents who have legal custody of a child's full sibling under an adoption decree and those parents whose parental rights to a half sibling or stepsibling are intact.[45] This interpretation is consistent with the Legislature's definition of a sibling to include half siblings and stepsiblings. Nor has the Legislature treated an adoption as severing the sibling relationship for the purpose of triggering the Department's duties under § 43-1311.02. As noted, even if an adjudicated child is adopted, the Department must take specific steps to facilitate sibling visitation or ongoing interaction "between the child and the child's siblings."[46]

Thus, the 2015 amendment created notification duties to the parents of an unadjudicated sibling for whom the Department does not serve as legal custodian. The only reasons to require the Department to notify the parents of an unadjudicated sibling is to ensure that they are aware that the child has been removed from parental custody and to ensure

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[44] See § 43-1311.01(1) (emphasis supplied).

[45] See *id.* and § 43-1301(10).

[46] § 43-1311.02(5).

that the Department makes an effort to place the siblings together or to provide for sibling time if placement together is not possible.

[11] Reading §§ 43-1311.01 and 43-1311.02 harmoniously, as we must,[47] we conclude that under Nebraska's implementing statutes, the Department's duties regarding siblings do not depend on whether both siblings are adjudicated under § 43-247 or whether the Department has placement authority for both siblings. Instead, the Legislature intended for the Department to develop and maintain an adjudicated child's sibling relationships in a variety of circumstances.

(b) Amendments Do Not Permit Siblings to Intervene

[12] Despite the Legislature's creation of new duties for the Department to preserve sibling relationships, it has not created a private right of action for an adjudicated child's sibling to enforce the Department's duties under §§ 43-1311.01 and 43-1311.02. Instead, § 43-1311.02(3) specifically limits the right to enforce these duties to parties: "Parties to the case may file a motion for joint-sibling placement, sibling visitation, or ongoing interaction between siblings." Of course, the Department's duty to make reasonable efforts for a joint-sibling placement, sibling visitation, or ongoing interaction between siblings exists even if no party moves for that placement, visitation, or interaction. So we read § 43-1311.02(3) as a statutory remedy to enforce the Department's duties. And that remedy is limited to "parties."

The juvenile code defines a party to a juvenile proceeding in two different statutes. Section 43-245(19) provides that "[p]arties means the juvenile as described in section 43-247 and his or her parent, guardian, or custodian." As noted, when a child is adjudicated under § 43-247(3), a juvenile court has exclusive original jurisdiction over a party listed in

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[47] See, e.g., *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016).

§ 43-247(5),[48] which also gives the court jurisdiction over the "parent, guardian, or custodian of any juvenile described in this section."

[13] Under the Foster Care Review Act, the Legislature has not enacted a definition of "party" that shows a court should consider an adjudicated child's sibling to be a party for the purpose of moving for a joint-sibling placement, sibling visitation, or ongoing sibling interaction.[49] Nor does § 43-1312.02 include an intervention provision that would permit a nonparty to seek a joint-sibling placement. Thus, we conclude that the only persons who can enforce the Department's duties under § 43-1312.02 are a guardian ad litem, on behalf of an adjudicated child, or an adjudicated child's parent, guardian, or custodian.

We recognize that under § 25-328, we have previously held a grandparent has a limited right to intervene in a dependency proceeding involving his or her grandchild. In *In re Interest of Kayle C. & Kylee C.*,[50] we reasoned, in part, that § 43-247(5) identified the necessary parties to a juvenile proceeding under § 43-247, but determined that the list was not exclusive. Thus, because grandparents can otherwise show a substantial interest in the proceeding, they can intervene to be heard on their fitness to accept placement of a grandchild or to act as the child's legal custodian.

However, that reasoning does not apply here because this intervention issue is not governed by § 25-328. Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute.[51] We conclude that § 43-1311.02(3) controls here because it specifically provides that "parties" may move for a "joint-sibling

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[48] See § 43-246.01(1)(c). See, also, § 43-245(19).

[49] See § 43-1301.

[50] *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

[51] *Schaffer, supra* note 20.

placement, sibling visitation, or ongoing interaction between the siblings."

[14-16] A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.[52] Obviously, if the Legislature had intended to permit a nonparty to intervene or to include a sibling as a party, it could have enacted such provisions. Moreover, when statutes dealing with the same subject matter do not show a contrary legislative intent, a court interprets them so that they are consistent, harmonious, and sensible.[53] Sections 43-1311.01 and 43-1311.02 deal with the Department's notification and placement duties for children who are wards of the state under the juvenile code. Interpreting these statutes so that they are consistent with the juvenile code means that the Legislature's definition of a party in the juvenile code also applies to the term "party" in § 43-1311.02(3). Accordingly, because Kristopher and Stephanie's daughter was not a party to the proceeding, § 43-1311.02(3) precluded them from intervening on her behalf to ask for a joint-sibling placement.

5. Parent of Adjudicated Child's Sibling Does Not Have Automatic Status as Preadoptive Parent

We reject Kristopher and Stephanie's contention that they had standing to intervene under § 43-1314 as Ziggy's preadoptive parents. That statute deals with the right to notice and to participate in a court review or hearing in juvenile proceedings. Section 43-1314(2) requires a juvenile court to give notice of review proceedings to specified persons, including a child's preadoptive parent, so that they may participate in the proceeding. But it specifically provides that the notice

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[52] See *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 829 N.W.2d 676 (2013).

[53] See *Cisneros, supra* note 47.

requirement does not mean that these participants are necessary parties. Kristopher and Stephanie appear to argue that because the Department must consider joint-sibling placement, sibling visitation, or ongoing interaction between Ziggy and his sister, including adoption, they have standing to intervene as Ziggy's preadoptive parents.

Neither the Nebraska Juvenile Code, the Foster Care Review Act, nor the Department's regulations define the term "preadoptive" parent or "preadoptive" placement. However, Neb. Rev. Stat. § 43-1312(2) (Reissue 2016) governs the Department's duties when its investigation of a child's circumstances reveals that a juvenile court is unlikely to return a child to parental custody. In that event, the Department

> shall recommend termination of parental rights and referral for adoption, guardianship, placement with a relative, or, as a last resort, and only in the case of a child who has attained sixteen years of age, another planned permanent living arrangement. If the child is removed from his or her home, the [D]epartment shall make reasonable efforts to accomplish joint-sibling placement or sibling visitation or ongoing interaction between the siblings as provided in section 43-1311.02.[54]

Additionally, § 43-1312(3) requires a juvenile court to conduct a permanency hearing for a child in foster care no later than 12 months from the date the child entered foster care and annually thereafter. At a permanency hearing, the court must determine whether the permanency plan is appropriate and, when applicable, determine whether the child will be returned to the parent, referred to the State for termination of parental rights, placed for adoption, or referred for a guardianship.[55]

[17] The Department's duties under § 43-1312 are consistent with understanding that the term preadoptive parent

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[54] § 43-1312(2).

[55] See § 43-1312(3).

means the following: A preadoptive parent in a dependency proceeding is a foster parent whom a juvenile court has approved for a future adoption because a child's parent has surrendered his or her parental rights, a court-approved permanency plan does not call for the child's reunification with his or her parent, or the parents' parental rights have been or will be terminated.[56]

Kristopher and Stephanie did not have the status of preadoptive parents because the juvenile court had not placed Ziggy in their care for a future adoption. We agree that the Department had a duty to make reasonable efforts to accomplish a joint-sibling placement with their daughter. But the Legislature has explicitly limited the remedy of enforcing that duty to the parties, and they were not parties to the dependency proceeding.

VI. CONCLUSION

We conclude that the court correctly denied Kristopher and Stephanie leave to intervene in this dependency proceeding. We agree that Nebraska's statutes implementing the FCA create new duties for the Department to make reasonable efforts for a joint-sibling placement even if an adjudicated child's sibling is not a ward of the state and has not previously lived with the adjudicated child. However, the creation of these new duties upon the Department does not bestow new rights upon nonparties. Because neither Kristopher and Stephanie nor their daughter are parties to the proceeding, they have no right to intervene to enforce the Department's duties.

Affirmed.

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[56] See 1 Joan Heifetz Hollinger et al., Adoption Law and Practice § 3.02[2] (2016).

In re Estate of George Edward Balvin, Sr., deceased. George Balvin, Jr., appellant, v. Kevin Balvin, appellee.

888 N.W.2d 499

Filed December 16, 2016. No. S-15-1033.

1. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
2. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
3. **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.
4. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous.
5. **Decedents' Estates: Trusts.** Neb. Rev. Stat. § 30-2715 (Reissue 2016) allows for nonprobate transfers upon death in the form of nontestamentary trusts, and nontestamentary trust assets are not subject to probate other than for specific statutory expenses.
6. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** Whether a contract is ambiguous is a question of law.
9. **Decedents' Estates: Wills: Joint Tenancy.** Property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die.
10. **Decedents' Estates: Insurance.** Neb. Rev. Stat. § 30-2715(a) (Reissue 2016) provides, in part, that a provision for a nonprobate transfer on

death in an insurance policy or other written instrument of a similar nature is nontestamentary; therefore, nonprobate life insurance benefits cannot be used to set off a portion of an intestate estate.

11. **Decedents' Estates.** Under Neb. Rev. Stat. §§ 30-2209 and 30-2303 (Reissue 2016), a decedent's daughter-in-law is not an heir at law of the intestate estate.

Appeal from the County Court for Douglas County: Marcena M. Hendrix, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael D. Kozlik and William G. Stockdale, of Harris & Associates, P.C., L.L.O., for appellant.

William F. McGinn, of McGinn, McGinn, Springer & Noethe Law Firm, for appellee.

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

Kelch, J.

INTRODUCTION

This appeal arises from a dispute concerning an intestate estate. On appeal, one of the decedent's two children challenges the order of the county court for Douglas County that approved the final accounting and ordered distribution accordingly. He further contends that the county court erred in naming the decedent's daughter-in-law as an heir at law of the intestate estate. We conclude that the county court erred in including certain nonprobate assets in the intestate estate and in naming the decedent's daughter-in-law as an heir at law, but we determine that the county court did not err in excluding certain assets from the intestate estate. Therefore, we affirm in part and in part reverse, and remand to the county court for further proceedings consistent with this opinion.

FACTS

The parties stipulated to the relevant facts, which we summarize as follows:

On March 17, 2004, George Edward Balvin, Sr. (George Sr.), and Rita J. Balvin, then Florida residents, executed a revocable trust agreement (the Balvin Family Trust) as grantors and as trustees. The Balvin Family Trust designated the couple's son Kevin Balvin as the successor trustee upon the last to die of George Sr. and Rita. The Balvin Family Trust provided for equal division, per stirpes, of all remaining assets of the trust to Kevin and George Balvin, Jr. (George Jr.), the couple's other son. On March 17, George Sr. and Rita conveyed their Florida real estate to the Balvin Family Trust by recorded deed.

On March 20, 2010, George Sr. opened an account at Mutual of Omaha Bank with an initial deposit of $69,446.97. All of these funds belonged to George Sr., as Rita had died the year before. The account's agreement form, incorporated into the stipulation, lists Kevin as an authorized signer. The parties stipulated that this agreement form conforms to Neb. Rev. Stat. § 30-2719(a) (Reissue 2016). The provision for a "Multiple-Party Account" with right of survivorship is marked with an "X" but is not initialed, as directed in the agreement form and in § 30-2719(a), which states that a "contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided." The agreement form shows no other "Beneficiary Designation" or "Right of Survivorship" selection. On March 24, Kevin purchased a Volvo automobile titled to him and his wife, Sarah Balvin, using $27,000 drawn from the Mutual of Omaha Bank account.

George Sr. died in Omaha on May 10, 2011. The parties do not dispute that George Sr. died intestate. The county court appointed Kevin and George Jr. as joint personal representatives of George Sr.'s estate.

On the date of George Sr.'s death, the Mutual of Omaha Bank account carried a balance of $28,034.81.

Following George Sr.'s death, Kevin, acting as the successor trustee of the Balvin Family Trust, sold the Florida real

estate. He then executed a warranty deed dated April 20, 2012, individually and as trustee of the Balvin Family Trust. On April 27, a closing agency deposited the proceeds from the sale of the Florida real estate, amounting to $69,164.35, into the trust account of a Council Bluffs, Iowa, law firm representing Kevin.

The corpus of the Balvin Family Trust included a checking account in Florida. On April 27, 2012, the last check drawn from that account, payable to Kevin in the amount of $3,645.19, was deposited in the law firm's trust account. A refund of $126.41 from a Florida utilities company was also deposited into the law firm's trust account.

On July 14, 2011, life insurance policy proceeds of $30,027.12 were issued to Kevin, whom the parties stipulated was the designated beneficiary, and deposited in his personal checking account. Kevin deposited another $6,000 into his personal checking account that he received as designated beneficiary of a burial benefit from "Metal Lathers Union #46." On July 29, Sarah mailed George Jr. a $15,013.56 check drawn from a joint account that she shared with Kevin. The memorandum line of the check read, "50% life Insurance." On August 15, Kevin mailed George Jr. a $3,000 check from the same account, with a memorandum line stating "1/2 of Death Benef." George Jr. received and deposited both checks.

On November 4, 2013, Kevin filed a petition in county court, probate division, for complete settlement of the estate, along with an "Amended Inventory." The parties did not stipulate to this amended inventory. Kevin requested that the county court determine that George Sr. had died intestate, determine his heirs, approve the "Final Accounting filed herein," approve previous distributions, and direct distribution of the estate.

On December 2, 2014, the county court conducted a hearing where the parties presented the stipulated facts above.

At oral argument, Kevin's counsel informed this court that the parties had presented additional evidence at another

hearing. However, a bill of exceptions for that hearing is not in the record before us.

On September 30, 2015, the county court filed its "Formal Order for Complete Settlement After Informal Intestate Proceeding." The county court found that George Sr. had died intestate, leaving his sons, Kevin and George Jr., and his daughter-in-law Sarah as heirs. The county court approved Kevin's final accounting as personal representative and incorporated it into the order, approved the reported distributions already made, and directed Kevin to deliver and distribute title and assets of the estate accordingly.

Kevin's final accounting of the intestate estate, as approved by the county court, included the net proceeds from the sale of the Florida residence, which had been transferred to the law firm's trust account. The final accounting did not include the Mutual of Omaha Bank account as part of the intestate estate, nor did it include the $27,000 that Kevin withdrew from that account to purchase the Volvo automobile. Kevin's final accounting offset George Jr.'s share of the intestate estate by the voluntary payments that Kevin and Sarah had made to George Jr. from life insurance proceeds.

George Jr. now appeals the formal order for complete settlement.

ASSIGNMENTS OF ERROR

George Jr. assigns that the county court erred in (1) ordering the distribution of the Florida residence sale proceeds, held in trust, as part of the intestate estate; (2) failing to include the Mutual of Omaha Bank account as an asset of the intestate estate; (3) failing to include in the intestate estate the $27,000 that Kevin "converted" from George Sr.'s checking account to purchase the Volvo automobile; (4) allowing an offset of the voluntary payments of insurance proceeds by Kevin and Sarah to George Jr. against George Jr.'s share of the intestate estate and trust assets; and (5) finding that Sarah, the decedent's daughter-in-law, was an heir at law of the intestate estate.

[1] We note that George Jr. also argues, but does not specifically assign, that the county court erroneously included in the intestate estate sums sourced from Bank of America accounts of which the Balvin Family Trust was partly comprised. But an appellate court does not consider errors which are argued but not assigned. *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

STANDARD OF REVIEW

[2-4] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Greb*, 288 Neb. 362, 848 N.W.2d 611 (2014). 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.* The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous. *Id.*

ANALYSIS

Proceeds From Sale of Florida Residence

George Jr. asserts that the county court erred in ordering the distribution of the proceeds from the sale of the Florida residence as part of the intestate estate. In 2004, George Sr. and Rita conveyed their Florida residence by recorded deed to the Balvin Family Trust, a revocable inter vivos trust. The trust named Kevin as the successor trustee and provided that upon the death of George Sr. and Rita, the residence was to be transferred in equal shares to Kevin and George Jr. However, after his parents' deaths, Kevin sold the residence, transferred the net proceeds to the trust account of the law firm representing him, and listed the proceeds as part of the intestate estate in his final accounting. George Jr. claims that the court erred in approving the distribution of the Florida residence proceeds because they were nonprobate property of the Balvin Family Trust and not property of the estate. On the other hand, Kevin

contends that the formal order for complete settlement after informal intestate proceedings was "retrospective" and not in error. Brief for appellee at 6. However, Kevin does not explain how terming the order "retrospective" refutes George Jr.'s claims.

[5] As noted by George Jr., Neb. Rev. Stat. § 30-2715 (Reissue 2016) allows for nonprobate transfers upon death in the form of nontestamentary trusts, which include inter vivos trusts like the Balvin Family Trust. See, also, *In re Conservatorship of Franke*, 292 Neb. 912, 928, 875 N.W.2d 408, 420 (2016) (recognizing that "the Nebraska Probate Code authorizes nontestamentary, nonprobate transfers on death, including transfers through trusts"). Clearly, the Balvin Family Trust created by George Sr. and Rita was nontestamentary, and therefore, the property of the Balvin Family Trust was not subject to probate other than for specific statutory expenses of the estate, not applicable here, as allowed by Neb. Rev. Stat. § 30-3850(3) (Reissue 2016). See, also, *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009). Because the residence in Florida and the proceeds therefrom were property of the Balvin Family Trust and not subject to probate, the county court erred in including such property in the final order.

Mutual of Omaha Bank Account

George Jr. also claims that the county court erred in failing to include the Mutual of Omaha Bank account as an asset of the estate. Kevin and George Jr. stipulated that on March 20, 2010, George Sr. executed a contract of deposit to create an account with Mutual of Omaha Bank. Both parties agree, as do we, that the contract of deposit conformed with § 30-2719(a). Because the contract of deposit is statutorily sufficient under § 30-2719(a), we need not determine the intent of the depositor, George Sr. See *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007) (if contract of deposit is in form provided in § 30-2719(a), then court looks only to contract of deposit

and treats account as type of account designated in contract of deposit).

Although George Jr. agrees that the contract of deposit is statutorily sufficient, he nevertheless argues that George Sr. did not choose a multiple-party account with right of survivorship, because he did not initial the contract of deposit as set forth in § 30-2719(a). Thus, he concludes, the contract of deposit was not a multiple-party account with right of survivorship, and the proceeds therefrom should be part of the estate inventory.

[6-8] In essence, George Jr. alleges deficiencies in the execution of a valid contract. In the instant case, any such deficiencies, if present, would stem from ambiguity of the contract itself. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). However, a contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004). Whether a contract is ambiguous is a question of law. See *General Drivers & Helpers Union v. County of Douglas*, 291 Neb. 173, 864 N.W.2d 661 (2015).

The relevant portion of the contract of deposit reads as follows:

> *Ownership of Account*
> The specified ownership will remain the same for all accounts.
> *(For consumer accounts, select and initial.)*
> ☐ Single-Party Account ____ ☒ Multiple-Party Account ____
>
> ☐ Corporation - For Profit ☐ Corporation - Nonprofit
> ☐ Partnership ☐ Sole Proprietorship
> ☐ Limited Liability Company
> ☐ Trust-Separate Agreement Dated: _____
> ☐ _____

Beneficiary Designation
(Check appropriate ownership above - select and initial below.)
☐ Single-Party Account ____
☐ Single-Party Account with Pay-On-Death (POD) ____
☒ Multiple-Party Account with Right of Survivorship ____
☐ Multiple-Party Account with Right of Survivorship and POD ____
☐ Multiple-Party Account without Right of Survivorship ____

Here, the contract of deposit listed both George Sr. and Kevin as joint owners. In addition, George Sr. signed the bottom of the form, which bears a marked box next to "Multiple-Party Account" under the ownership section and a marked box next to "Multiple-Party Account with Right of Survivorship" under the beneficiary designation section to assign rights upon the death of an account holder. Even though neither party to the contract of deposit initialed the selected options, the document is not subject to at least two reasonable but conflicting interpretations or meanings. We find the contract of deposit clearly reflects that George Sr. desired a "Multiple-Party Account with Right of Survivorship" and, as a result, is not ambiguous as a matter of law.

[9] As a multiple-party account with right of survivorship, then, the Mutual of Omaha Bank account is subject to the "elementary principle of law that property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die." *In re Estate of Walters*, 212 Neb. 645, 647, 324 N.W.2d 889, 890 (1982). Accordingly, the Mutual of Omaha Bank account was a nonprobate asset, and the county court did not err in excluding it from the probate estate.

Purchase of Volvo Automobile

Next, George Jr. claims that the county court erred in failing to include in the intestate estate the $27,000 that Kevin "converted" from George Sr.'s checking account to purchase the Volvo automobile. On March 20, 2010, George Sr. opened

an account at Mutual of Omaha Bank with an initial deposit of $69,446.97. All of these funds belonged to George Sr. The account's agreement form listed Kevin as an authorized signer and joint owner. On March 24, Kevin purchased a Volvo automobile titled to him and Sarah. Kevin paid for it with a $27,000 check drawn from the Mutual of Omaha Bank account.

The contributions to a joint account are controlled by Neb. Rev. Stat. § 30-2722 (Reissue 2016), which provides:

> (a) In this section, net contribution of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. . . .
>
> (b) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

The parties do not dispute that Kevin withdrew funds that he did not contribute to the joint account, and pursuant to § 30-2722, George Sr. may have had a claim against Kevin, assuming he had not consented to the withdrawal. Upon George Sr.'s death, the personal representative became the authorized party with standing to bring an action to recover assets of the estate. See Neb. Rev. Stat. §§ 30-2464, 30-2470, and 30-2472 (Reissue 2016). However, Kevin and George Jr. were appointed copersonal representatives, and one copersonal representative can bring a claim for conversion only with the concurrence of the other. See Neb. Rev. Stat. § 30-2478 (Reissue 2016) (providing that "[i]f two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate"). Without

Kevin's concurrence, George Jr. could not solely bring a claim of conversion. Moreover, the record does not reflect that Kevin agreed to bring a claim against himself or that George Jr. ever sought the removal of Kevin as copersonal representative due to a conflict of interest pursuant to Neb. Rev. Stat. § 30-2454 (Reissue 2016).

In the absence of a conversion claim, properly lodged, the county court did not commit error in failing to include in the intestate estate the $27,000 that Kevin withdrew from the joint account to purchase the Volvo automobile.

Offset of Insurance Payments

George Jr. further contends that the county court erred in allowing an offset of voluntary payments against his intestate share of estate assets. On July 14, 2011, life insurance policy proceeds of $30,027.12 were issued to Kevin, who the parties stipulated was the designated beneficiary and who deposited the proceeds into his personal checking account. On July 29, George Jr. received a check from Kevin and Kevin's wife, Sarah, in the amount of $15,013.56, which represented 50 percent of the life insurance proceeds. Also, the parties stipulated that as the designated beneficiary of "Metal Lathers Union #46," Kevin received a burial benefit check in the amount of $6,000. Again, Kevin sent George Jr. a check for $3,000, representing 50 percent of the death benefit.

[10] George Jr. argues that insurance proceeds with a designated beneficiary are nonprobate assets and cannot be used to set off his share of the intestate estate. We agree. Section 30-2715(a) provides, in part, "A provision for a nonprobate transfer on death in an insurance policy . . . or other written instrument of a similar nature is nontestamentary." See, also, *In re Trust of Rosenberg*, 273 Neb. 59, 68, 727 N.W.2d 430, 440 (2007) (citing § 30-2715 and holding that "[g]enerally, life insurance benefits are a type of nonprobate transfer on death which is nontestamentary"). Accordingly, the life insurance benefits in this instance were nonprobate and the county court

erred by offsetting any amounts in the probate proceedings due to the payment of life insurance.

Heir of Decedent

Lastly, George Jr. assigns that the county court erred in finding Sarah, the daughter-in-law of George Sr., to be an heir at law. We agree.

[11] Neb. Rev. Stat. § 30-2209 (Reissue 2016), provides:

> (18) Heirs mean those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.
>
> . . . .
>
> (23) Issue of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Nebraska Probate Code.

Further, Neb. Rev. Stat. § 30-2303 (Reissue 2016) states:

> The part of the intestate estate not passing to the surviving spouse . . . , or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation.

Under the foregoing authority, Sarah, as a daughter-in-law rather than the issue of George Sr., is not an heir at law, and the county court erred in so finding.

CONCLUSION

We affirm in part and in part reverse the formal order for complete settlement and remand the cause to the county court for further proceedings consistent with this opinion.

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

In re Interest of Darryn C., a child under 18 years of age. State of Nebraska, appellee, v. Sarah J. and Nathanial C., appellees, and Sharon J., intervenor-appellant.

888 N.W.2d 169

Filed December 16, 2016. No. S-15-1159.

1. **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.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
3. **Juvenile Courts: Final Orders: Appeal and Error.** Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2016), and an order in a juvenile special proceeding is final and appealable if it affects a substantial right.
4. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
5. **Juvenile Courts: Final Orders: Time.** Whether a substantial right has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the relationship with the juvenile may reasonably be expected to be disturbed.

Appeal from the Separate Juvenile Court of Douglas County: Christopher Kelly, Judge. Appeal dismissed.

Jeffrey A. Wagner and Ryan P. Watson, of Schirber & Wagner, L.L.P., for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee State of Nebraska.

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

Kelch, J.

I. NATURE OF CASE

Sharon J., the paternal grandmother of Darryn C., appeals from the juvenile court's December 2, 2015, order, which overruled her motion for custody of Darryn and further ordered that home studies be conducted on her two homes.

II. FACTS

On November 12, 2013, the separate juvenile court of Douglas County determined that it had jurisdiction over Darryn pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013), which grants juvenile courts jurisdiction over any juvenile who is lacking proper parental care by reason of the faults or habits of his or her parent. The court made this determination based on the admissions of Darryn's biological parents, Sarah J. and Nathanial C. At the adjudication hearing, the mother admitted that she placed Darryn at risk for harm due to her "use of alcohol and/or controlled substances" and the father admitted that he had placed Darryn at risk for harm by engaging in domestic violence with the mother.

At the time of the adjudication hearing, Darryn had already been removed from his home in Omaha, Nebraska, and was in the custody of the Department of Health and Human Services (DHHS). One month prior to the adjudication hearing, when Darryn was placed in foster care, Sharon, Darryn's paternal grandmother, helped place Darryn with her sister Judi L., who lived near Darryn's parents in Omaha. At that time, Sharon lived in Clarksville, Iowa, which was a 4½-hour drive from Omaha.

In the juvenile court's November 12, 2013 order, the court ordered that Darryn remain in the care of DHHS. Among other

things, the court ordered the parents to undergo pretreatment assessments for chemical dependency and submit to random drug and alcohol testing. The parents were allowed reasonable rights of supervised visitation.

On December 3, 2013, Sharon filed a complaint to intervene and requested that Darryn be placed with her. On January 15, 2014, the juvenile court allowed her to intervene, but overruled her request for placement. It found that at the time of the order, the permanency objective for Darryn was reunification and that it was in the best interests of the child to remain in his current placement.

On January 12, 2015, the juvenile court issued an order changing the permanency objective from reunification to reunification concurrent with adoption. The order also mandated Darryn to undergo a psychological evaluation and participate in individual therapy.

At a review hearing on July 1, 2015, both Darryn's case manager and Darryn's guardian ad litem (GAL) expressed concerns related to Darryn's interactions with his mother, father, and Sharon. Darryn's case manager reported that Darryn had said "concerning things" to his therapist. The case manager testified that although the parents were not to be visiting Darryn together, Darryn had disclosed that when he visited his mother, his father would be present. The case manager also said that although Darryn's parents were not to have unsupervised contact with Darryn, Darryn had disclosed that when he visited Sharon, she would transport him to and leave him with one of his parents. When confronted by the case manager, the mother, the father, and Sharon denied the allegations.

The GAL also expressed concern over Darryn's obsession with superheroes and violent play, which his therapist had noted was "above that of a typical six-year-old." The GAL's June 25, 2015, report reflects that the therapist had expressed concerns about Darryn's behaviors, "including overly violent play as well as talking to/pretend play with superheroes."

According to the GAL's report, Darryn's therapist "stated that Darryn's aggression is 'off the charts', and that when Darryn engages in superhero role play, he uses different voices such that 'you would think someone else is there.'" The therapist did not testify at the review hearing.

The GAL also told the court that neither Darryn's parents nor Sharon seemed to be taking the superhero obsession seriously. She stated that "on every single visit with his parent [Darryn] ends up watching a superhero video." She also claimed that Sharon had taken Darryn to see the new "Avengers" superhero movie. Sharon's attorney suggested that this latter claim was false and that Sharon had not been advised of the superhero issue until the week prior. Sharon requested an evidentiary hearing on the matter.

Based on the concerns expressed by Darryn's case manager and GAL, the court ordered that all visitations were to be supervised until, at least, the next hearing, which was scheduled to take place the next month. At that hearing, the juvenile court reinstated Sharon's reasonable rights of unsupervised visits with Darryn.

Toward the end of the July 1, 2015, review hearing, the juvenile court reminded the State that the county attorney was required to file a motion to terminate parental rights where a child has been in an out-of-home placement for 15 of the previous 22 months and that this case was "six months beyond that point." On August 24, the State moved to terminate the parental rights of both parents.

On November 24, 2015, Sharon filed a motion for custody after the mother and father had relinquished their parental rights to her. She also filed a motion for continued visitation. The same day, Randall J., Sharon's husband, filed a complaint to intervene. Darryn's mother and father did not resist Sharon's motion for custody; however, the State, Darryn's GAL, and DHHS did. The matter was set for December 1, the same day as the hearing on the termination of parental rights.

1. Hearing on Motion for Custody

At the hearing on Sharon's motion for custody, Sharon offered voluntary relinquishments signed by both parents, conveying to Sharon and Randall "all right to and custody of and power and control over [Darryn]." No objection was made, and the relinquishments were received by the court. As for witnesses, Sharon, Randall, and Darryn's therapist were all called to testify.

(a) Sharon's Testimony

Sharon testified that when she had helped place Darryn with her sister Judi in October 2013, the understanding was that Darryn and his parents would reunite, and that if reunification was not possible, Sharon would step in and raise Darryn. She explained that she did not initially request that Darryn be placed with her, because she had hoped that Darryn would reunite with his parents and she lived 4½ hours from Darryn's parents, which would have made reunification difficult.

After Darryn was placed with Judi, Sharon visited Darryn every 2 to 3 weeks. Sharon testified that she would have Darryn for overnight visits over the weekend until June 2015, when her visitation rights were changed to supervised. After September, she was allowed unsupervised visitation again.

In October 2015, after it became apparent that reunification of Darryn with his parents was no longer possible, Sharon moved to Omaha to a two-bedroom apartment 3 miles from Darryn's school. She then requested that Darryn be placed in her custody. Sharon testified that she and her husband, Randall, were ready, willing, and able to have Darryn placed in their home as a placement or to assume custody.

Although Sharon had selected Judi for placement, Sharon expressed concerns that if Darryn were to remain with Judi, Darryn would be prevented from having a relationship with his other family members. Sharon testified that Judi does not

have ties within the family. Sharon explained that until the last few weeks, she and Judi had not had any communication for the last 2 years. Sharon testified that she and Judi have been participating in therapy to attempt to fix the relationship, but at the time of the hearing on her motion, the relationship had not been healed.

Sharon also expressed concerns about Judi's health. She testified that Judi has had back surgeries, with resultant limited mobility, and diabetes. Sharon testified, "[S]he's pretty much 90 percent dependent physically on her husband to get around."

(b) Randall's Testimony

Although Sharon had moved to Omaha in October 2015, Randall continued to reside in Iowa at the time of the hearing on Sharon's motion for custody. Randall testified that he supported Sharon's endeavors and that he wanted to adopt Darryn as his own child. Randall testified that he believed it was in Darryn's best interests that Darryn be placed with Sharon and Randall. Randall explained that if they were granted custody, he and Sharon would resume residence together and proceed with adoption.

(c) Therapist's Testimony

Darryn's therapist testified that she has worked with Darryn since December 2013 and that in the 9 months prior to the hearing, she had started to discuss placement with Darryn. She testified that Darryn, who was 7 years old at the time of the discussion, told her that he would like to remain in his current placement with Judi and her husband. The therapist admitted that she did not fully understand Darryn's basis for wanting to live with Judi and that his decision may not have been fully informed, but she believed that remaining in his current placement was in Darryn's best interests, because he had been there for over 2 years. She testified that if Darryn became available for adoption, Judi and her husband had stated that they would adopt Darryn. Neither Judi nor her husband appeared or testified at the hearing.

On cross-examination, the therapist stated that she had no indication that Sharon and Randall were unfit parents and that she had no reason to believe that Darryn had a negative relationship with Sharon. She also stated that she did not know what effect placement with Sharon and Randall would have on Darryn.

After some questioning from the court, the therapist testified that she had facilitated the therapy sessions between Sharon and Judi. When asked if she was able to identify issues between the two, the therapist explained that the biggest barrier in their relationship seemed to be a communication breakdown.

The court also asked the therapist about her understanding as to Judi's propensity to allow Darryn to have contact with extended family members. The therapist told the court that Judi had stated she would allow it and that over the past Thanksgiving holiday, Darryn was allowed to spend quite a bit of time with Sharon and his extended family. On cross-examination, however, the therapist admitted that up until recently, Judi had not had any contact with her extended family, and that the Thanksgiving visit was not something that Judi had volunteered, but was something that had to be facilitated through Sharon and Judi's counseling sessions. The therapist testified that it was in Darryn's best interests to maintain contact with his extended family.

2. Disposition of Sharon's Motion for Custody

On December 2, 2015, the juvenile court issued an order overruling Sharon's motion for custody. The court also ordered that DHHS conduct home studies of Sharon and Randall's two homes and that DHHS obtain Judi's medical records. Sharon appeals from the December 2 order.

As for the proceedings on the State's motions to terminate parental rights and Randall's motion to intervene, those proceedings were continued to January 8, 2016. The record

does not reflect the court's disposition of the State's and Randall's motions.

III. ASSIGNMENTS OF ERROR

Sharon assigns that the juvenile court erred in (1) failing to find that the relinquishment of parental rights to Sharon provided her priority under the parental preference doctrine and (2) in finding that it was not in the best interests of Darryn to be placed in Sharon's custody.

IV. STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[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 of the lower court's decision.[2]

V. ANALYSIS

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] This case presents two separate jurisdictional issues: (1) whether the order appealed from is a final, appealable order and (2) whether Sharon has standing to appeal. Because we determine that the order appealed from is not a final order, we do not reach the standing issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[4]

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[1] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[2] *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

[3] *Id.*

[4] *In re Interest of Jackson E.*, 293 Neb. 84, 875 N.W.2d 863 (2016).

[2-5] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[5] Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2016), and an order in a juvenile special proceeding is final and appealable if it affects a substantial right.[6] A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.[7] Whether a substantial right has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the relationship with the juvenile may reasonably be expected to be disturbed.[8]

The issue in this case is analogous to the issue of whether an order changing a permanency objective from family reunification to another objective is a final, appealable order. This court has recently addressed that issue in *In re Interest of LeVanta S.*[9] In *In re Interest of LeVanta S.*, we explained that at least in the context of children adjudicated under § 43-292(3)(a), "an order is not a final, appealable order unless the parent's ability to achieve rehabilitation and family reunification has been clearly eliminated."[10] Similarly, we think the proper inquiry in this case is whether the court's order overruling Sharon's motion for custody clearly eliminated Sharon's ability to gain custody of Darryn. As with cases involving the changing of a permanency objective, this

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[5] *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.3d 415 (2015).

[6] *In re Interest of Mya C. & Sunday C.*, 286 Neb. 1008, 840 N.W.2d 493 (2013).

[7] *Steven S. v. Mary S., supra* note 2.

[8] See *id.*

[9] *In re Interest of LeVanta S., ante* p. 151, 887 N.W.2d 502 (2016).

[10] *Id.* at 162, 887 N.W.2d at 511.

inquiry is very fact specific and "can easily lead to different results from case to case."[11]

Because a court's written order does not always clearly set forth the order's impact on the parties' rights, an appellate court may need to interpret an order to determine whether the order affects a party's substantial right.[12] Such was the case in *In re Interest of Tayla R.*,[13] which involved a written order changing a permanency plan from reunification to adoption. Although the court's order did not say whether the mother would be able to reunify with her children, it directed the mother to continue doing such things as weekly individual therapy sessions, family therapy sessions, and supervised visitation with the children. The Nebraska Court of Appeals read the court's order as "implicitly provid[ing] [the mother] with an opportunity for reunification by complying with the terms of the rehabilitation plan[,] which terms have not changed from the previous order."[14] Because the mother did not lose the ability to reunify with her children, the Court of Appeals determined that the order did not affect a substantial right and was therefore not a final, appealable order. As we noted in *In re Interest of Octavio B. et al.*,[15] this analysis is consistent with our precedent in *In re Interest of Sarah K.*[16]

Although at first glance the order here appears to affect Sharon's right to custody, upon further inspection, it becomes clear that the order does not diminish Sharon's ability to obtain placement or custody. Instead, the order mandates that DHHS conduct a home study of Sharon's homes and sets a "Home

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[11] *In re Interest of Octavio B. et al., supra* note 5, 290 Neb. at 596, 861 N.W.2d at 422.

[12] See, *id.*; *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

[13] *In re Interest of Tayla R., supra* note 12.

[14] *Id.* at 605, 767 N.W.2d at 135.

[15] *In re Interest of Octavio B. et al., supra* note 5.

[16] *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

Study Check" hearing to occur approximately 1 month later, which indicates that the court is still considering Sharon for some type of placement and that the issue of custody will be disposed of within a reasonable amount of time. This finding is supported by the following statements from the bench:

> The Motion for Custody is overruled. I am, however, going to order a couple of things to occur: [DHHS] and [Nebraska Families Collaborative] shall conduct a home study on the home of Sharon and Randall . . . . [DHHS] and [Nebraska Families Collaborative] shall obtain medical records of Judi . . . , based on what I've heard here today.
>
> It's simply not in the child's best interest to uproot him, certainly at this point in time and maybe not ever. I don't know. Okay? But as we sit here today, parental rights are intact.

These comments clearly indicate that the court has not completely disposed of the custody issue and that Sharon may still gain custody.

We therefore conclude that the December 2, 2015, order does not disadvantage Sharon or change or affect a substantial right of Sharon and therefore is not a final, appealable order. Because the order on appeal is not a final, appealable order, we lack jurisdiction to address Sharon's assignments of error, and we dismiss her appeal.

VI. CONCLUSION

For the foregoing reasons, we conclude that the juvenile court's order was not final and appealable. When an appellate court is without jurisdiction to act, the appeal must be dismissed. We therefore dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

State of Nebraska, appellee, v. Charles D. Bluett, appellant.

889 N.W.2d 83

Filed December 16, 2016. No. S-15-1168.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
3. **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.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be either a final judgment or a final order entered by the court from which the appeal is taken.
5. **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.
6. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2016) are (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 a judgment is rendered.
7. **Words and Phrases.** A substantial right as an essential legal right, not merely a technical right.

8. **Final Orders: Appeal and Error.** 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.
9. ____: ____. Having a substantial effect on a substantial right depends most fundamentally on whether the right could otherwise effectively be vindicated through an appeal from the final judgment.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Appeal dismissed.

Thomas C. Riley, Douglas County Public Defender, and Timothy F. Shanahan for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Heavican, C.J.

INTRODUCTION

Charles D. Bluett moved to transfer his case to juvenile court. That motion was denied. Bluett appeals.

BACKGROUND

Bluett was charged with robbery and use of a weapon to commit a felony. Because Bluett was 15 years of age at the time of the commission of the crimes charged, he moved to transfer his case to the separate juvenile court of Douglas County. That motion was denied. Bluett then filed this appeal. We granted Bluett's petition to bypass the Nebraska Court of Appeals. Because Bluett appeals from a nonfinal order, we dismiss his appeal.

ASSIGNMENT OF ERROR

Bluett assigns that the district court erred in denying his motion to transfer.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.[1]

[2,3] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[2] 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.[3]

ANALYSIS

[4,5] For an appellate court to acquire jurisdiction over an appeal, there must be either a final judgment or a final order entered by the court from which the appeal is taken.[4] 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.[5]

[6] The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2016) are (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 a judgment is rendered.[6]

[7-9] In this case, we need not decide which of the above categories, if any, this case fits under because we conclude

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[1] See *Purdie v. Nebraska Dept. of Corr. Servs.*, 292 Neb. 524, 872 N.W.2d 895 (2016).

[2] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[3] See *State v. Jones*, 293 Neb. 452, 878 N.W.2d 379 (2016).

[4] *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015). See, also, Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[5] *Id.*

[6] *State v. Meints*, 291 Neb. 869, 869 N.W.2d 343 (2015).

that it does not affect a substantial right. A substantial right is an essential legal right, not merely a technical right.[7] 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.[8] But it is not enough that the right itself be substantial.[9] Having a substantial effect on a substantial right depends most fundamentally on whether the right could otherwise effectively be vindicated through an appeal from the final judgment.[10]

Bluett argues that he had a substantial right affected by the district court's denial of his motion to transfer. He argues that the U.S. Supreme Court, in *Miller v. Alabama*,[11] noted a clear distinction between the culpability of adults as opposed to minors and creates a substantial right for juveniles in criminal proceedings. Bluett further argues that the deletion of language in Neb. Rev. Stat. § 29-1816 (Reissue 2016) that specifically noted that the denial of such a transfer motion was not final lends support to the conclusion that this is a substantial right.

We turn first to the deletion of language in § 29-1816. We addressed the import of the deletion of this language in *In re Interest of Tyrone K.*[12] In that opinion, we concluded that the changes to the statute as a result of the passage of 2014 Neb. Laws, L.B. 464, did not determine the finality of an order under § 29-1816, noting that "[d]eleting a negative does not automatically create a positive," and, further, that the Legislature is fully capable of authoring language that would

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[7] *State v. Jackson, supra* note 4.

[8] *Id.*

[9] *Id.*

[10] *In re Adoption of Madysen S.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

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

[12] *In re Interest of Tyrone K., ante* p. 193, 887 N.W.2d 489 (2016).

create the right to an interlocutory appeal, but did not do so in this case.[13] As such, we conclude that in accordance with our reasoning in *In re Interest of Tyrone K.*, the deletion of the language expressly stating that the denial of such a transfer was not a final, appealable order does not lead to the conclusion that this appeal is now final.

Nor do we find *Miller* applicable here. *Miller* explicitly noted that adults and children were constitutionally "different from adults for purposes of sentencing."[14] This case deals not with sentencing, but with a transfer from adult court to a juvenile court. Moreover, we are concerned here only with determining whether the order denying such a transfer is appealable and are not yet concerned with whether that decision was correct on its merits.

We find that no substantial right is affected by the denial of a motion to transfer. Relevant to this conclusion is this court's decision in *State v. Meese*.[15] In *Meese*, we concluded that the "right to be tried as a juvenile is not constitutionally guaranteed."[16] Moreover, we have often reviewed cases where the denial of a motion to transfer in an appeal is filed after final judgment. While those appeals, of course, predated the change in the language of § 29-1816, the fact remains that those appeals show the issue can be effectively reviewed after final judgment.

The district court's denial of the motion to transfer is not a final, appealable order, and we dismiss Bluett's appeal.

CONCLUSION

We dismiss Bluett's appeal for lack of a final order.

Appeal dismissed.

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[13] *Id.* at 202, 887 N.W.2d at 496.

[14] *Miller, supra* note 11, 567 U.S. at 471.

[15] *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

[16] *Id.* at 495, 599 N.W.2d at 199.

Ricky J. Sanders, appellant, v. Scott R. Frakes, director, Nebraska Department of Correctional Services, et al., appellees.

888 N.W.2d 514

Filed December 23, 2016. No. S-15-898.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Constitutional Law: Habeas Corpus.** The Nebraska Constitution provides for the remedy of habeas corpus, while the procedure for the writ is governed by statute.
3. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
4. ____. A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
5. ____. Eligibility for a writ of habeas corpus is governed by the criteria set forth in Neb. Rev. Stat. § 29-2801 (Reissue 2016).
6. **Criminal Law: Habeas Corpus.** Neb. Rev. Stat. § 29-2801 (Reissue 2016) explicitly excludes from the scope of habeas corpus persons convicted of some crime or offense for which they stand committed.
7. **Habeas Corpus.** In Nebraska, habeas corpus is quite limited in comparison to the scope of the writ in federal courts.
8. **Habeas Corpus: Judgments: Collateral Attack.** Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.
9. **Judgments: Collateral Attack.** A collateral attack on a judgment is where the judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement.
10. ____: ____. Absent statutory authority to the contrary, only a void judgment may be collaterally attacked.

11. ____: ____. A judgment that is not void, even if erroneous, cannot be collaterally attacked.
12. **Habeas Corpus: Prisoners.** In the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void.
13. **Habeas Corpus: Judgments: Sentences.** The writ of habeas corpus will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void, but only voidable.
14. **Judgments: Jurisdiction: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
15. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
16. **Habeas Corpus: Appeal and Error.** A writ of habeas corpus may not be used as a substitute for an appeal.
17. **Habeas Corpus: Sentences.** The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding.
18. **Judgments: Jurisdiction.** A judgment is void when the court rendering it lacks subject matter or personal jurisdiction.
19. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
20. **Habeas Corpus: Convictions.** Unless the conviction is void, those who stand committed pursuant to a final conviction are excluded from the scope of the relief afforded by the writ of habeas corpus in Nebraska.
21. **Constitutional Law: Judgments: Final Orders: Collateral Attack.** A final judgment pursuant to an unconstitutional statute is voidable, not void, and thus may not be collaterally attacked.
22. **Habeas Corpus: Sentences.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
23. **Constitutional Law: Habeas Corpus.** Habeas corpus is not a proper remedy to challenge a petitioner's detention pursuant to a final conviction and sentence on the basis that the statute underlying the conviction is unconstitutional.

24. ____: ____. A final conviction and sentence entered upon an alleged facially unconstitutional statute is not absolutely void, but is voidable only, and may not be attacked in a habeas corpus proceeding.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Affirmed.

Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellees.

Heavican, C.J., Wright, Miller-Lerman, Kelch, and Funke, JJ., and Riedmann and Bishop, Judges.

Wright, J.

I. NATURE OF CASE

Ricky J. Sanders appeals from the dismissal of his petition for habeas corpus relief. The district court dismissed his petition, in which Sanders argued that Neb. Rev. Stat. § 28-1212.04 (Reissue 2016) was facially unconstitutional. The district court reasoned that a final conviction pursuant to an unconstitutional statute is voidable, not void, and thus under Nebraska law may not be challenged in a habeas action. We affirm the judgment of the district court.

II. BACKGROUND

In 2011, Sanders was convicted of unlawful discharge of a firearm under § 28-1212.04 and use of a firearm to commit a felony under Neb. Rev. Stat. § 28-1205 (Reissue 2016). He was sentenced to 10 to 15 years' imprisonment on each conviction, to run consecutively. On his direct appeal, the only assignments of error were the insufficiency of the evidence and the excessiveness of the sentences. On July 9, 2012, in case No. A-12-050, the Nebraska Court of Appeals sustained the State's motion for summary affirmance.

In 2013, Sanders sought postconviction relief. Sanders claimed ineffective assistance of counsel for the first time on postconviction, because he had the same counsel at trial and on direct appeal. He claimed trial and appellate counsel failed to challenge the constitutionality of § 28-1212.04. He argued that the statute was unconstitutional special legislation under Neb. Const. art. III, § 18, and unconstitutional under the Equal Protection Clause. The district court dismissed his petition without an evidentiary hearing, which this court affirmed on appeal.[1] Without deciding the merits of the constitutional issue, we rejected Sanders' claim of ineffective assistance of counsel, stating that "counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance."[2]

Sanders subsequently filed a habeas corpus petition in district court, making a facial challenge to the constitutionality of § 28-1212.04.

After reviewing the general principles of Nebraska habeas corpus law, the district court narrowed its focus: "The legal issue before this Court . . . is whether, under Nebraska law, habeas corpus is a proper vehicle by which to challenge the facial constitutionality of a statute underlying a criminal judgment and sentence, once the criminal judgment is final." The court distinguished the cases cited by Sanders in which habeas was used to challenge the constitutionality of a statute, explaining that none of those cases involved a final conviction. The court relied on *Mayfield v. Hartmann*[3] for the proposition that "'[a] statute is presumed to be constitutional and a judgment entered on an unconstitutional statute is not absolutely void but

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[1] See *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014).

[2] *Id.* at 343, 855 N.W.2d at 357.

[3] *Mayfield v. Hartmann*, 221 Neb. 122, 125, 375 N.W.2d 146, 149 (1985).

is voidable only'" and thus not subject to collateral attack in a habeas proceeding. The court dismissed Sanders' petition for habeas corpus relief.

Sanders appealed. We granted Sanders' petition to bypass the Court of Appeals.

III. ASSIGNMENTS OF ERROR

Sanders claims the district court erred in (1) holding that habeas corpus was not the "'proper vehicle'" by which he could seek release from confinement by bringing a facial challenge to the constitutionality of the statute under which he was convicted and (2) failing to grant habeas corpus relief and order Sanders released from confinement because his convictions were void. Sanders argues that § 28-1212.04 is facially unconstitutional under Neb. Const. art. I, § 3 (due process clause); Neb. Const. art. III, § 18 (prohibition on special legislation); and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

IV. STANDARD OF REVIEW

[1] On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[4]

V. ANALYSIS

1. Writ of Habeas Corpus

The writ of habeas corpus, known as the great writ,[5] is regarded as a "fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."[6] Habeas corpus is a Latin term that, translated literally, means

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[4] *Johnson v. Gage*, 290 Neb. 136, 858 N.W.2d 837 (2015).

[5] E.g., *State v. King*, 180 Neb. 631, 144 N.W.2d 438 (1966). See, also, 39 Am. Jur. 2d *Habeas Corpus* § 2 (2008).

[6] 39 Am. Jur. 2d, *supra* note 5, § 1 at 206.

"'that you have the body'"[7]; it is an appropriate remedy where a person is unlawfully restrained of his or her liberty.[8]

[2-6] The Nebraska Constitution provides for the remedy of habeas corpus,[9] while the procedure for the writ is governed by statute.[10] It is a special civil proceeding providing a summary remedy to persons illegally detained.[11] A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[12] Eligibility for the writ is governed by the criteria set forth in § 29-2801.[13] Section 29-2801 explicitly excludes from its scope "persons convicted of some crime or offense for which they stand committed."

[7-9] In Nebraska, habeas corpus is quite limited in comparison to the scope of the writ in federal courts.[14] Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.[15] A collateral attack on a judgment is where the judgment is attacked in a way other than a proceeding in the original action to have it vacated,

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[7] Black's Law Dictionary 825 (10th ed. 2014).

[8] See *Meyer v. Frakes*, 294 Neb. 668, 884 N.W.2d 131 (2016).

[9] See, Neb. Const. art. I, § 8; Neb. Const. art. V, § 2; *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016). See, also, *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). But see, *Johnson v. Gage, supra* note 4; *Leach v. Dahm*, 277 Neb. 452, 763 N.W.2d 83 (2009); *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001), *disapproved on other grounds, State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). See, generally, *Williams v. Olson*, 143 Neb. 115, 8 N.W.2d 830 (1943).

[10] See Neb. Rev. Stat. §§ 29-2801 to 29-2824 (Reissue 2016).

[11] *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

[12] *Id.*

[13] *Johnson v. Gage, supra* note 4.

[14] See *Peterson v. Houston, supra* note 11.

[15] *Id.*

reversed, or modified, or a proceeding in equity to prevent its enforcement.[16]

[10-13] Absent statutory authority to the contrary, only a void judgment may be collaterally attacked.[17] Thus, a judgment that is not void, even if erroneous, cannot be collaterally attacked.[18] Accordingly, we have held that habeas corpus will not lie on the ground that the sentence is merely erroneous.[19] This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void.[20] The writ will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void, but only voidable.[21]

[14,15] Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.[22] Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.[23]

[16,17] A writ of habeas corpus may not be used as a substitute for an appeal.[24] The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired

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[16] *Mayfield v. Hartmann, supra* note 3.

[17] See, *Peterson v. Houston, supra* note 11; *Mayfield v. Hartmann, supra* note 3.

[18] See *Meyer v. Frakes, supra* note 8.

[19] *Id.*

[20] *Rust v. Gunter*, 228 Neb. 141, 421 N.W.2d 458 (1988).

[21] *Meyer v. Frakes, supra* note 8.

[22] *Peterson v. Houston, supra* note 11.

[23] *Id.*

[24] See *Mayfield v. Hartmann, supra* note 3. See, also, *Meyer v. Frakes, supra* note 8; *Peterson v. Houston, supra* note 11.

into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding.[25]

2. Sanders' Argument: Final Judgment of Conviction Under Facially Unconstitutional Statute Is Void and May Be Collaterally Attacked in Habeas Corpus Proceeding

In this case, Sanders argues that habeas corpus is an appropriate remedy because he is making a facial, rather than as-applied, challenge to the constitutionality of the statute under which he was convicted. He argues that a conviction under an unconstitutional statute is void, rather than voidable.

(a) Distinction Between Void and Voidable Judgments

[18,19] A void judgment is "[o]f no legal effect,"[26] while a voidable judgment is "[v]alid until annulled."[27] A judgment is void when the court rendering it lacks subject matter or personal jurisdiction.[28] Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.[29] Thus, a judgment is void if the court lacked a legal basis to impose it.[30]

From our very earliest habeas corpus cases to the present, we have recognized that a judgment is void when the court rendering it lacks jurisdiction or a legal basis for the judgment.[31]

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[25] *Peterson v. Houston, supra* note 11.

[26] Black's Law Dictionary, *supra* note 7 at 1805.

[27] *Id.*

[28] See *Peterson v. Houston, supra* note 11.

[29] *Id.*

[30] See *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[31] E.g., *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015); *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999); *In re Carbino*, 117 Neb. 107, 219 N.W. 846 (1928); *Keller v. Davis*, 69 Neb. 494, 95 N.W. 1028 (1903); *In re Ream*, 54 Neb. 667, 75 N.W. 24 (1898).

In *In re Betts*,[32] we held that habeas corpus relief was not available to address the petitioner's claim that the grand jury by which he was indicted was not composed in accordance with statute. In that case, we explained:

> The supposed errors and defects relied upon are not jurisdictional, and hence are not available in a [habeas corpus] proceeding like this, for it is well established in this state that mere errors and irregularities in a judgment or proceedings of an inferior court in a criminal case, under and by virtue of which a person is imprisoned, or deprived of his liberty, but which are not of such a character as to render the proceedings absolutely void, cannot be reviewed on an application for a writ of *habeas corpus*. The writ cannot perform the office of a writ of error, but only reaches jurisdictional defects in the proceedings.[33]

Recently, in *Meyer v. Frakes*,[34] we granted habeas relief to a petitioner who was sentenced for the nonexistent crime of being a habitual criminal. We said that "the habitual criminal statute is not a separate offense, but, rather, provides an enhancement of the penalty . . . for each count committed by one found to be a habitual criminal."[35] A separate sentence for the nonexistent crime of being a habitual criminal is void.[36] Because the petitioner had already served his sentence on his other conviction, we granted habeas relief.[37]

What these cases illustrate is that a judgment is void, and not merely voidable, if the court rendering it lacked personal

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[32] *In re Betts*, 36 Neb. 282, 54 N.W. 524 (1893).

[33] *Id*. at 284, 54 N.W. at 524.

[34] *Meyer v. Frakes, supra* note 8.

[35] *Id.* at 673, 884 N.W.2d at 136 (citing *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981)).

[36] *Meyer v. Frakes, supra* note 8 (citing *Kuwitzky v. O'Grady*, 135 Neb. 466, 282 N.W. 396 (1938)).

[37] See *Meyer v. Frakes, supra* note 8.

or subject matter jurisdiction or otherwise lacked a legal basis for the judgment. On the other hand, a judgment is merely voidable if there are only errors and irregularities that are not jurisdictional.[38]

(b) Habeas Corpus as Means to Challenge Constitutionality of Statute Prior to Final Judgment

Sanders cites several cases in which habeas relief was granted before the judgment became final.[39] While these cases may be informative in other respects, they are not helpful in addressing the question of whether a facial challenge to the constitutionality of a statute underlying a judgment is permitted in a habeas corpus proceeding *after* the judgment becomes final.

[20] Cases involving habeas challenges prior to a final judgment are distinguishable because the habeas corpus statute specifically excludes from the writ "persons convicted of some crime or offense for which they stand committed."[40] Thus, unless the conviction is void, those who "stand committed" pursuant to a final conviction are excluded from the scope of the relief afforded by the writ of habeas corpus in Nebraska.[41] But this exclusion does not apply to a conviction and sentence that are not final. Prior to a final conviction and sentence, one may show that he or she is being "unlawfully deprived of his or her liberty."[42] Hence, cases involving challenges to the constitutionality of a statute under which a petitioner is charged or convicted (prior to the conviction and sentence becoming

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[38] See *id.*

[39] See, *In re Resler*, 115 Neb. 335, 212 N.W. 765 (1927); *In re Application of McMonies*, 75 Neb. 702, 106 N.W. 456 (1906); *In re Havelik*, 45 Neb. 747, 64 N.W. 234 (1895).

[40] § 29-2801.

[41] See *id.*

[42] *Id.*

final) are inapposite to the determination whether a facial constitutional challenge may be raised *after* the conviction and sentence are final.

As early as 1877, this court recognized that the scope of habeas corpus was significantly limited when the petitioner was detained pursuant to a final conviction and sentence.[43] In *Ex parte Fisher*,[44] the petitioner brought a habeas petition to challenge his imprisonment for selling liquors without a license. He contended that the statute under which he was convicted was unconstitutional.[45] We refused to consider his constitutional challenge to the statute in the habeas proceeding, explaining:

> It is, however, contended that the license law is unconstitutional, and on this ground the prisoner should be discharged. But after judgment and commitment in a criminal action by an inferior court having jurisdiction of the offense charged, we think that *habeas corpus* is not the proper mode of procedure to bring the cause into this court for review upon alleged errors of law; for it seems to us, that when the validity of a statute is controverted, the controversy raises a legal question which, like all other legal questions raised on the trial of a cause in an inferior court, can be reviewed only by the mode prescribed by law.
>
> To entertain jurisdiction in such case upon a writ of *habeas corpus*, it would be necessary to look beyond the judgment and re-examine the charges upon which it was rendered, as well as to review the questions of law raised on the trial and decided by the inferior court. If such practice were to obtain, then indeed every conviction for a criminal offense might be brought here for review on a writ of *habeas corpus*.

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[43] See *Ex parte Fisher*, 6 Neb. 309 (1877).

[44] *Id.*

[45] *Id.*

> We think it is not within the province of this court to open the door to such a system of practice. And we are not prepared to say that, upon a writ of *habeas corpus*, we can look beyond the judgment and re-examine the charges on which it was rendered, or to pronounce the judgment an absolute nullity on the ground that the constitutionality of the statute relative to the license law is controverted. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law.[46]

DeBacker v. Brainard,[47] cited by Sanders, is distinguishable. In *DeBacker*, a divided court[48] opined about the constitutionality of portions of the Juvenile Court Act, specifically, whether they violated a juvenile's constitutional right to trial by jury.[49] The habeas petition was brought after the petitioner was adjudicated as a delinquent and ordered to be committed to a boys' training school.[50] However, prior to the proceedings, the petitioner objected to the juvenile court's jurisdiction on the basis of his denial of a right to a jury trial.[51] Because the challenge involved a jurisdictional question, the order finding

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[46] *Id.* at 310-11, 1877 WL at *1.

[47] *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968).

[48] *Id.* at 461, 161 N.W.2d at 509 (explaining that "[f]our judges are of the opinion that the [juvenile court] statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional. Article V, section 2, Constitution of Nebraska, provides in part: 'No legislative act shall be held unconstitutional except by the concurrence of five judges,'" and affirming district court's judgment).

[49] *DeBacker v. Brainard, supra* note 47.

[50] *Id.*

[51] *Id.* (four-justice opinion).

the petitioner to be a delinquent would be void if his arguments were accepted.[52]

Because the juvenile court's order adjudicating the petitioner as a delinquent and ordering him to the boys' training school was not a criminal conviction and sentence,[53] he did not fall within the statutory exception to habeas corpus relief, under § 29-2801, of "persons convicted of some crime or offense for which they stand committed."

(c) Availability of Habeas Corpus to Challenge Constitutionality of Statute After Final Conviction and Sentence

Sanders erroneously argues that even after a conviction and sentence become final, he can raise a facial challenge to the constitutionality of the statute underlying the conviction in a habeas proceeding. We disagree. He cites cases in which this court and other courts have concluded that an unconstitutional statute is void. None of the cases cited by Sanders involved a collateral attack on a final judgment.

[21] We have held that a final judgment pursuant to an unconstitutional statute is voidable, not void, and thus may not be collaterally attacked.[54] In the case *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*,[55] we said:

> Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. . . . *Not even a statute which is declared unconstitutional is void ab initio insofar as a previous judgment*

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[52] *Id.*

[53] See *id.* (three-justice opinion).

[54] See, *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979); *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970). See, also, *Iowa v. Herkleman*, 251 N.W.2d 214 (Iowa 1977) (citing *Norlanco, Inc.*).

[55] *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276, supra* note 54, 204 Neb. at 323-24, 282 N.W.2d at 580 (emphasis supplied).

> *based upon the statute is concerned*. In Norlanco, Inc. v. County of Madison,[56] we said: "'The general rule is said to be that a statute declared unconstitutional is void ab initio. However, this is subject to the exception that the finality of a judgment cannot be affected thereby.'"

This rule prohibiting collateral attacks on final judgments based upon an unconstitutional statute also applies when the judgment attacked is a criminal conviction and sentence. We applied a variation of this rule in the criminal context in *State v. Keen*.[57] The defendant in *Keen* was charged with driving under the influence (DUI).[58] Pursuant to a plea agreement, he pled guilty. After a hearing, the court found that this was his second DUI and gave him an enhanced sentence.[59]

On appeal, the defendant argued that his prior DUI was invalid and unenforceable, because the Omaha ordinance under which he was convicted did not conform to the state statute as required by law and thus was invalid. We recognized that his argument was a collateral attack on his prior DUI conviction.[60] While his collateral attack was based on the alleged invalidity and unenforceability of a municipal ordinance underlying his conviction rather than the constitutionality of a statute, we said:

> The principles and reasoning which support [the] holdings [in *Norlanco, Inc.* and *Davis Management, Inc.*] that parties are generally not permitted to collaterally attack prior judgments, even when the prior judgment is based upon an unconstitutional statute, also support a holding that a defendant cannot collaterally attack a conviction

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[56] *Norlanco, Inc. v. County of Madison, supra* note 54.

[57] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006), *reaffirmed, State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

[58] *Id.*

[59] *Id.*

[60] See *id.*

> by alleging that it is invalid because it was obtained pursuant to an ordinance which was later declared to be unenforceable as inconsistent with a statute.[61]

[22] In *Mayfield*, we refused to allow a habeas corpus challenge to the constitutionality of the confinement of the petitioner to a treatment facility pursuant to a final order by a board of mental health.[62] This court noted that habeas cannot be used as a substitute for a direct appeal.[63] We said that "even if it can be argued that the statute does violate some constitutional principle, it is still not subject to collateral attack. We have repeatedly held that to release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void."[64]

In *In re Resler*,[65] we used language that may have implied that the unconstitutionality of a statute renders a final conviction pursuant to that statute void and subject to collateral attack by habeas corpus. In *In re Resler*, we said:

> [I]f a court or a judge thereof which renders a judgment, or who enters an order, has not jurisdiction to perform the act done, either because the proceeding *or the law under which it is taken is unconstitutional*, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged.[66]

But in *In re Resler*, the petitioner was only detained and charged with a crime; there was no final conviction and sentence. And none of the cases we are aware of that cite the above-quoted language in *In re Resler* involved a habeas

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[61] *Id.* at 129, 718 N.W.2d at 499.

[62] *Mayfield v. Hartmann, supra* note 3.

[63] *Id.*

[64] *Id.* at 125, 375 N.W.2d at 149.

[65] *In re Resler, supra* note 39.

[66] *Id.* at 338, 212 N.W. at 766 (emphasis supplied).

challenge to a final conviction based on the unconstitutionality of the statute underlying the judgment.[67] Neither do the cases cited by *In re Resler* for the above proposition involve such a challenge to a final conviction.[68] To the extent that the above-quoted language in *In re Resler* and its progeny[69] is inconsistent with our holding in this case, we disapprove of it.

[23,24] What these cases show is that when used to challenge a final conviction and sentence, habeas corpus is a collateral attack. Therefore, habeas corpus is not a proper remedy to challenge a petitioner's detention pursuant to a final conviction and sentence on the basis that the statute underlying the conviction is unconstitutional. Therefore, we conclude that a final conviction and sentence entered upon an alleged facially unconstitutional statute is not absolutely void, but is voidable only, and may not be attacked in a habeas corpus proceeding.

VI. CONCLUSION

For the reasons set forth above, we affirm the district court's dismissal of Sanders' petition.

Affirmed.

Cassel and Stacy, JJ., not participating.

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[67] See, *Lingo v. Hann*, 161 Neb. 67, 71 N.W.2d 716 (1955); *In re Application of Maher, North v. Dorrance*, 144 Neb. 484, 13 N.W.2d 653 (1944).

[68] See, *In re Application of McMonies, supra* note 39; *In re Vogland*, 48 Neb. 37, 66 N.W. 1028 (1896); *In re Havelik, supra* note 39.

[69] See cases cited *supra* note 67.

In re Adoption of Chase T., a minor child. Jennifer T., appellant, v. Lindsay P. and Jessica P., appellees.

888 N.W.2d 507

Filed December 23, 2016. No. S-15-1145.

1. **Jurisdiction.** Statutory authority to exercise subject matter jurisdiction may be raised sua sponte by a court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Jurisdiction: Appeal and Error.** Before deciding the merits of an appeal, an appellate court must determine if it has jurisdiction.
4. ____: ____. If the court from which a party appeals lacked jurisdiction, then the appellate court acquires no jurisdiction. But an appellate court has the power to determine whether it has jurisdiction over an appeal and to correct jurisdictional issues even if it does not have jurisdiction to reach the merits.
5. **Adoption.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
6. **Adoption: Courts: Jurisdiction.** Neb. Rev. Stat. § 43-104 (Reissue 2016) mandates that certain consents be filed in the county court before an adoption can proceed, including the consent of any district court in Nebraska having jurisdiction of the custody of the minor child.
7. **Adoption: Statutes.** Before holding hearings and ruling on matters in an adoption proceeding, the county court should first consider whether it has statutory authority to proceed with the adoption.
8. **Adoption: Courts: Jurisdiction.** Failure to file the consents required by Neb. Rev. Stat. § 43-104 (Reissue 2016) is a procedural defect that is jurisdictional in nature.
9. ____: ____: ____. Without the consents required by Neb. Rev. Stat. § 43-104 (Reissue 2016), a county court lacks authority, or jurisdiction, to entertain an adoption proceeding.

10. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
11. ____: ____. The language of a statute 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.
12. **Adoption: Statutes.** The requirement of Neb. Rev. Stat. § 43-102 (Reissue 2016) that necessary consents must be on file "prior to the hearing" is designed to ensure that before the county court entertains a decision on the merits in an adoption proceeding, all those required to consent to the adoption proceeding have done so.
13. ____: ____. Although the adoption statutes no longer require that necessary consents be filed "together with" the adoption petition, the statutes still require that such consents be filed before a county court holds hearings and entertains the merits of any issue in the adoption proceeding.
14. **Statutes: Presumptions: Legislature: Intent.** When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than an absurd result in enacting a statute.
15. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or questions, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.

Appeal from the County Court for Douglas County: Lawrence E. Barrett, Judge. Judgment vacated, and cause remanded for further proceedings.

Angela Lennon, of Koenig Dunne Divorce Law, P.C., L.L.O., and George T. Babcock, of Law Offices of Evelyn N. Babcock, for appellant.

Desirae M. Solomon, and Terry M. Anderson, of Hauptman, O'Brien, Wolf & Lathrop, for appellees.

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

Stacy, J.

NATURE OF CASE

Jennifer T. appeals from an order of the county court dismissing her complaint to intervene in an adoption proceeding and denying her request to stay the adoption. We conclude the county court lacked statutory authority to exercise subject matter jurisdiction over the adoption proceeding, and we thus vacate the order from which Jennifer appeals and remand the cause to the county court for further proceedings consistent with this opinion.

BACKGROUND

Lindsay P. and Jennifer were involved in a committed relationship from 2001 until 2012. They never wed. In 2010, Lindsay gave birth to a son, Chase T., conceived by artificial insemination using an anonymous donor. Chase's biological father is unknown and is not a party to the adoption proceeding. After Chase's birth, Jennifer stayed home to care for him while Lindsay worked outside the home.

In 2012, Lindsay and Jennifer separated. They continued to coparent Chase, and agreed to a parenting schedule under which Lindsay had Chase on Mondays and Tuesdays, Jennifer had Chase on Wednesdays and Thursdays, and they alternated weekend parenting time. Jennifer continued to provide daycare for Chase while Lindsay worked. Sometime in 2015, Lindsay married Jessica P.

On August 12, 2015, Jennifer filed a complaint against Lindsay in the district court for Douglas County seeking to establish custody of Chase. Jennifer alleged she stands in loco parentis to Chase and requested that she and Lindsay be awarded his joint legal and physical custody. According to the parties' attorneys, the district court custody action remains pending and trial has been scheduled.

Approximately 1 month after the custody action was filed, Lindsay and her wife filed a petition for stepparent adoption

in the county court for Douglas County. A few weeks later, Jennifer sought to intervene in the adoption proceeding based on her purported status as in loco parentis. Jennifer also moved to stay the adoption proceeding pending resolution of the district court custody action. Lindsay and Jessica objected to the intervention and opposed the stay. After an evidentiary hearing, the county court concluded Jennifer did not have standing to intervene in the adoption based on her purported status as in loco parentis. In an order entered November 17, 2015, the county court dismissed Jennifer's complaint to intervene and overruled her motion to stay the adoption proceeding. Jennifer timely appealed.

After perfecting the appeal, Jennifer filed a motion asking the Nebraska Court of Appeals to stay the adoption proceeding pending the outcome of her appeal. The Court of Appeals sustained the motion and ordered the adoption proceeding stayed. Thereafter, we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Jennifer assigns, restated and renumbered, that the county court erred in (1) concluding it had jurisdiction over the adoption, (2) exercising jurisdiction in violation of the doctrine of jurisdictional priority, and (3) dismissing the complaint to intervene based on a finding that she lacked standing to intervene in the adoption.

STANDARD OF REVIEW

[1] Statutory authority to exercise subject matter jurisdiction may be raised sua sponte by a court.[2]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

[2] Statutory interpretation presents a question of law.[3] When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court.[4]

ANALYSIS

[3,4] Before deciding the merits of an appeal, an appellate court must determine if it has jurisdiction.[5] If the court from which a party appeals lacked jurisdiction, then the appellate court acquires no jurisdiction.[6] But we have the power to determine whether we have jurisdiction over an appeal and to correct jurisdictional issues even if we do not have jurisdiction to reach the merits.[7]

Jennifer argues the county court lacked jurisdiction over the adoption proceeding when it dismissed her complaint in intervention and denied her motion to stay. She bases this argument in part on Lindsay's failure to obtain the consents required by the adoption statutes. Specifically, Jennifer asserts that because she had previously invoked the jurisdiction of the district court to determine the custody of Chase, the county court lacked authority, absent the district court's consent, to exercise its subject matter jurisdiction over the later-filed adoption proceeding.

[5,6] We have long recognized that in Nebraska, the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.[8] Nebraska's adoption statutes mandate that certain consents be filed in the county court before an adoption can proceed, including the consent of any district court in Nebraska having

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[3] *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009).

[4] *Id.*

[5] *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016).

[6] *Id.*

[7] *Id.*

[8] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

jurisdiction of the custody of the minor child.[9] Specifically, § 43-104(1) provides in relevant part: "[N]o adoption shall be decreed unless written consents thereto are filed in the county court . . . by . . . (b) any district court . . . in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of proceedings had in any district court." A district court's written consent is shown by "a duly certified copy of order of the court required to grant such consent."[10]

[7] Our record on appeal does not contain a certified order of the district court granting consent to proceed with the adoption, and it is apparent from the parties' filings and arguments below that no such consent was obtained. Among the arguments Jennifer presented to the county court was the argument that the court lacked jurisdiction to proceed with the adoption because Lindsay and Jessica had not obtained and filed the written consent of the district court, which had pending before it a custody action involving Chase. The record demonstrates the county court was aware the custody case involving Chase was filed in the district court before Lindsay and Jessica filed their adoption petition, and the parties' pleadings and arguments in county court should have alerted the county court to a possible jurisdictional issue. Under such circumstances, before holding hearings and ruling on matters in the adoption proceeding, the county court should first consider whether it has statutory authority to proceed with the adoption.

[8,9] In *In re Adoption of Kassandra B. & Nicholas B.*,[11] we explained that the failure to file the consents required by § 43-104 is "a procedural defect that is jurisdictional in nature."[12] We held that "[w]ithout requisite consents, a county

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[9] See Neb. Rev. Stat. § 43-104 (Reissue 2016).

[10] Neb. Rev. Stat. § 43-106 (Reissue 2016).

[11] *In re Adoption of Kassandra B. & Nicholas B., supra* note 2.

[12] *Id.* at 920, 540 N.W.2d at 559.

court lacks authority, or jurisdiction, to entertain an adoption proceeding."[13] We reasoned such a conclusion was required by the plain language of the adoption statutes and by our prior decisional law.[14] And we cautioned that "[t]he consent filing requirements imposed [by statute] are not mere procedural matters which can be easily disregarded or waived."[15]

In *In re Adoption of Kassandra B. & Nicholas B.*, we construed the adoption statutes to require that all necessary consents must be filed "'together with'"[16] the adoption petition. And we concluded the failure to file statutory consents simultaneously with the adoption petition was a procedural defect that was "jurisdictional in nature"[17] and required dismissal.

After our decision in *In re Adoption of Kassandra B. & Nicholas B.*, Neb. Rev. Stat. § 43-102 (Reissue 2016) was amended. Now, instead of providing that consents must be filed "together with" the adoption petition, it provides that consents "shall be filed prior to the hearing required in section 43-103."[18] Neb. Rev. Stat. § 43-103 (Reissue 2016) requires the court to set a hearing on the petition for adoption within a certain timeframe (not less than 4 weeks nor more than 8 weeks after the petition is filed), but does not expressly reference preliminary hearings. We have not previously construed this statutory amendment or considered its impact on the rule announced in *In re Adoption of Kassandra B. & Nicholas B.*

[10,11] The rules of statutory interpretation require an appellate court to give effect to the entire language of a

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[13] *Id.* at 921, 540 N.W.2d at 559.

[14] See *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988) (holding that consent granted by district court permits county court to entertain jurisdiction over adoption proceeding).

[15] *In re Adoption of Kassandra B. & Nicholas B., supra* note 2, 248 Neb. at 922, 540 N.W.2d at 560.

[16] *Id.* at 919, 540 N.W.2d at 558, quoting § 43-102 (Reissue 1988).

[17] *Id.* at 920, 540 N.W.2d at 559.

[18] See 1993 Neb. Laws, L.B. 16, § 1, and 1998 Neb. Laws, L.B. 1041, § 6.

statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.[19] The language of a statute 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.[20]

[12-14] Construing the provisions of §§ 43-102, 43-103, and 43-104 together, the requirement that necessary consents must be on file "prior to the hearing" is designed to ensure that before the county court entertains a decision on the merits in an adoption proceeding, all those required to consent to the adoption proceeding have done so. We conclude that although the adoption statutes no longer require that necessary consents be filed "together with" the adoption petition, the statutes still require that such consents be filed before a county court holds hearings and entertains the merits of any issue in the adoption proceeding. To hold otherwise would permit a county court to exceed its statutory authority and exercise jurisdiction over preliminary issues in an adoption case where it may never obtain jurisdiction to proceed to decree. When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than an absurd result in enacting a statute.[21]

We have observed that the consent of the court "does nothing more than permit the [county or juvenile] court to entertain the adoption proceedings,"[22] but the present appeal illustrates that the district court's consent serves another important purpose: to ensure that when a custody case involving the child is being litigated in district court, an adoption proceeding

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[19] *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014).

[20] *Huntington v. Pedersen*, 294 Neb. 294, 883 N.W.2d 48 (2016).

[21] *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

[22] *Id.* at 372, 640 N.W.2d at 380.

involving the same child does not proceed until the district court gives consent to proceed with the adoption. In that sense, requiring necessary court consents to be filed before entertaining the merits of an issue in the adoption proceeding serves to promote judicial efficiency and prevent an adoption court from issuing inconsistent or premature rulings on matters affecting the best interests of the child.

As discussed earlier, the record before us does not reflect the district court's consent. Absent the district court's consent as required by §§ 43-102 and 43-104(1)(b), the county court lacked the statutory authority to exercise jurisdiction over the adoption proceeding and also lacked authority to rule on the merits of Jennifer's intervention claim.

[15] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[23] As such, our disposition of this case does not permit us to reach the merits of whether Jennifer has the right to intervene in the adoption proceeding.

CONCLUSION

For the foregoing reasons, we vacate the county court's order of November 17, 2015, and remand the cause for further proceedings consistent with this opinion.

Judgment vacated, and cause remanded for further proceedings.

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[23] *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001).

State of Nebraska, appellee, v. James D. Marrs, appellant.

888 N.W.2d 721

Filed December 23, 2016. No. S-16-192.

1. **Collateral Estoppel: Res Judicata: Appeal and Error.** The availability of issue preclusion or claim preclusion is a matter of law, although any factual determinations in applying these doctrines are reviewed for clear error.

Appeal from the District Court for Saunders County: Mary C. Gilbride, Judge. Affirmed.

James D. Marrs, pro se.

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

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

Wright, J.

NATURE OF CASE

James D. Marrs was convicted of second degree murder, and his conviction and sentence were affirmed on direct appeal. This is an appeal from Marrs' second motion for testing of biological materials. The State asserts that his motion is barred by principles of res judicata.

BACKGROUND

Marrs was convicted, pursuant to a plea of guilty, to second degree murder in relation to the death of Sharron Erickson in

June 2003. The State submitted as part of the factual basis supporting Marrs' guilty plea evidence that DNA matching Marrs' profile was found in the panties worn by Erickson the night of her murder.

A report from June 2004 by the University of Nebraska Medical Center concluded that Marrs could not be excluded as the source of DNA in the sperm cell fraction obtained from the panties. The report set forth that the probability of an unrelated individual matching the DNA profile obtained from the panties was "1 in 433×10^{15} (quadrillion) for Caucasians, 1 in 10.9×10^{18} (quintillion) for African Americans, and 1 in 11.4×10^{18} (quintillion) for American Hispanics." We affirmed Marrs' conviction on direct appeal.[1]

In 2009, Marrs, represented by counsel, filed a motion under the DNA Testing Act (the Act)[2] for retesting of biological material related to Marrs' prosecution. These materials were the victim's panties worn the night she was killed, an anal swab from the victim that DNA testing had shown was a single source contributor matching Erickson's profile, and Marrs' oral swab. Marrs alleged there were discrepancies between reports by the University of Nebraska Medical Center and testing done at the State Patrol crime laboratory.

At the hearing on the 2009 motion, the only evidence submitted by Marrs' counsel were the DNA reports from 2003 and 2004, prepared by the two laboratories. Marrs' counsel did not call any witnesses.

At the hearing, the State adduced expert testimony explaining that there were no inconsistencies between the various laboratory testing reports submitted by Marrs in support of his motion. The expert witnesses testified that there was no reason to "cast any doubt" or question the accuracy of the prior DNA testing results.

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[1] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

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

In particular, the State's expert witnesses testified there was no reason to question the conclusion that biological material found on Erickson's panties matched Marrs' DNA profile. The expert witnesses also testified that there were no other untested items likely to yield DNA profiles. The witnesses were not specifically asked to what extent, if any, DNA testing techniques had advanced since the time of Marrs' plea.

In addition to adducing expert testimony relating to the DNA reports, the State submitted the deposition testimony of eight inmates who were incarcerated with Marrs. Each of the inmates described that Marrs had admitted to killing Erickson.

The district court overruled the 2009 motion for DNA testing. The court found that Marrs had failed to demonstrate that further DNA testing of the items collected would produce noncumulative, exculpatory evidence relevant to the claims at issue. The court further found that the record failed to reflect that there was any newly available technology that would produce noncumulative, exculpatory evidence relevant to the claims at issue. Marrs' appeal from that order was summarily dismissed by the Nebraska Court of Appeals.

In 2015, Marrs, acting pro se, filed another motion for DNA testing under the Act, which motion is the subject of the current appeal. Marrs asserted that further testing of the biological material found in Erickson's panties could lead to exculpatory evidence, because the 2004 report stated only that Marrs "could not be excluded" as the contributor. Marrs alleged that the 2004 DNA report was the primary reason he chose to plead guilty. Marrs also sought testing or retesting of the other evidence in the State's possession. Marrs alleged that the items could be retested with more accurate current techniques, and he generally described the new amplification techniques that have become available since 2004. Marrs did not allege that the biological material could be retested with techniques that are more accurate than those available at the time of his 2009 motion. Marrs sought appointment of counsel to defend his motion.

The State objected to the motion on the ground of res judicata. At the preliminary hearing, Marrs added no additional argument and stood on his motion. The court subsequently entered an order stating, "Upon review of the court file and the motions on file, the court overrules all pending motions [without] further hearing." Marrs appeals from the dismissal of his DNA motion without an evidentiary hearing.

ASSIGNMENT OF ERROR

Marrs assigns that the district court erred and abused its discretion by overruling all pending motions without further hearing.

STANDARD OF REVIEW

[1] The availability of issue preclusion or claim preclusion is a matter of law, although any factual determinations in applying these doctrines are reviewed for clear error.[3]

ANALYSIS

The Act provides that notwithstanding any other provision of law, "a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material" that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession or control under circumstances likely to safeguard the integrity of the biological material's original physical composition, and (3) was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more

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[3] See, *Griswold v. County of Hillsborough*, 598 F.3d 1289 (11th Cir. 2010); *Dias v. Elique*, 436 F.3d 1125 (9th Cir. 2006); *Dubuc v. Green Oak Tp.*, 312 F.3d 736 (6th Cir. 2002); *Lundquist v. Rice Memorial Hosp.*, 238 F.3d 975 (8th Cir. 2001); *Campbell v. State*, 906 So. 2d 293 (Fla. App. 2004); *Feightner v. Bank of Oklahoma, N.A.*, 65 P.3d 624 (Okla. 2003); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4405 (2d ed. 2002).

accurate and probative results.[4] The first step under the Act is to file a motion requesting forensic DNA testing of biological material that satisfies these three criteria.[5]

Once a proper motion has been filed, the county attorney shall prepare an inventory of the biological evidence.[6] Then, upon consideration of affidavits or after a hearing, the court shall order DNA testing upon a determination that (1) the testing may produce noncumulative, exculpatory evidence; (2) that such testing was effectively not available at the time of trial; and (3) the material was retained under circumstances likely to safeguard the integrity of its original physical composition.[7] The court shall appoint counsel for an indigent person "[u]pon a showing by the person that DNA testing may be relevant to the person's claim of wrongful conviction . . . ."[8]

Marrs' motion for DNA testing was dismissed upon the State's objection that the motion was procedurally barred by virtue of the court's factual determinations under the 2009 motion. The Act does not specifically address under what circumstances a successive motion under the Act is procedurally barred, and thus, such issues are governed by common law and any other generally applicable statutes.

The State's objection reasonably raised the common-law defenses of claim preclusion and issue preclusion.[9] Claim preclusion, which we have referred to in the past as "res judicata," bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication.[10]

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[4] See § 29-4120(1).

[5] See *State v. Pratt*, 287 Neb. 455, 842 N.W.2d 800 (2014).

[6] See § 29-4120(4).

[7] See § 29-4120(5).

[8] § 29-4122.

[9] See *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008).

[10] See *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015).

Issue preclusion, which we referred to in the past as collateral estoppel, bars relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate.[11]

Claim preclusion bars litigation of any claim that has been directly addressed or necessarily included in a former adjudication, as long as (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[12] Claim preclusion bars litigation not only of those matters actually litigated, but also of matters which could have been litigated in the former proceeding.[13] It is founded on a public policy and necessity that litigation be terminated and a belief that a person should not be vexed more than once for the same cause.[14]

Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[15] Issue preclusion applies only to issues actually litigated.[16]

In *State v. Pratt*,[17] the Court of Appeals noted that the plain language of the Act contemplates, and thus permits, successive motions. Claim preclusion, insofar as it is founded on the principle that a party should not be vexed more than once,

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[11] *Id.*

[12] See *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[13] See *id*. See, also, *Millennium Laboratories v. Ward*, 289 Neb. 718, 857 N.W.2d 304 (2014).

[14] See *Security State Bank v. Gugelman*, 230 Neb. 842, 434 N.W.2d 290 (1989).

[15] *Hara v. Reichert, supra* note 12.

[16] *Id*. See, also, e.g., Restatement (Second) of Judgments § 27 (1982).

[17] *State v. Pratt*, 20 Neb. App. 434, 824 N.W.2d 393 (2013).

does not strictly apply to successive motions under the Act.[18] The Court of Appeals concluded that "res judicata principles" would bar a successive motion for DNA testing only "if the exact same issue was raised in both motions."[19]

The court's reasoning effectively limits claim preclusion in DNA motions to matters that were actually litigated in the former proceeding, making claim preclusion effectively indistinguishable from issue preclusion in this context. This is in line with other jurisdictions and our case law holding that res judicata does not strictly apply to postconviction actions.[20] As one court explained, successive motions are permitted to raise issues that could have been, but were not, previously litigated, because "[i]f DNA testing has the proven ability to 'exonerate[] wrongly convicted people,' we can perceive no viable argument that matters of judicial economy should supersede the law's never-ending quest to ensure that no innocent person be convicted."[21]

Applying these principles here, both claim preclusion and issue preclusion bar Marrs' claim for relief. In the proceedings under the 2009 motion, the court found that there was no newly available technology that would produce noncumulative, exculpatory evidence. The court found no evidence that there were more current DNA techniques that would provide a reasonable likelihood of more accurate and probative results of a noncumulative and exculpatory nature.

Though neither party submitted specific evidence on advancements in DNA testing technology at the hearing on the 2009 motion, the burden of proof usually is upon the party seeking affirmative relief, and we find no reason why the

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[18] See *id.*

[19] *Id.* at 442, 824 N.W.2d at 400.

[20] See, *Ochala v. State*, 93 So. 3d 1167 (Fla. App. 2012); *State v. Ayers*, 185 Ohio App. 3d 168, 923 N.E.2d 654 (2009). See, also, e.g., *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

[21] *State v. Ayers, supra* note 20, 185 Ohio App. 3d at 174, 923 N.E.2d at 659.

burden would not lie with Marrs on that issue.[22] Moreover, the State's expert witnesses testified in relation to the 2009 motion that there was no reason to "cast any doubt" or question the accuracy of the prior DNA testing results, which found that the biological material on Erickson's panties matched Marrs' DNA profile to such a degree that the probability of an unrelated individual matching the DNA profile obtained from the panties was "1 in 433×10^{15} (quadrillion) for Caucasians, 1 in 10.9×10^{18} (quintillion) for African Americans, and 1 in 11.4×10^{18} (quintillion) for American Hispanics."

Claim preclusion and issue preclusion may not apply when the facts have materially changed or new facts have occurred,[23] but Marrs did not allege new technology has developed since the proceedings on his 2009 motion, which could produce noncumulative, exculpatory evidence. Thus, the court did not err in dismissing Marrs' successive motion for DNA testing on the ground that it was governed by the determinations made under the 2009 motion. And, because there can be no showing that DNA testing may be relevant to Marrs' current claim of wrongful conviction, the court did not err in refusing Marrs' request for appointment of counsel.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[22] See *State v. Pratt, supra* note 5.

[23] See, *In re Interest of D.H.*, 281 Neb. 554, 797 N.W.2d 263 (2011); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

State of Nebraska, appellee, v. Douglas M. Mantich, appellant.

888 N.W.2d 376

Filed December 23, 2016. No. S-16-221.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Constitutional Law: Minors: Sentences.** Life imprisonment without the possibility of parole for juveniles convicted of nonhomicide offenses is unconstitutional; such juvenile offenders must be given some meaningful opportunity for relief based on demonstrated maturity and rehabilitation.
4. **Constitutional Law: Homicide: Minors: Sentences.** There is no categorical bar against life sentences without parole for juveniles convicted of homicide offenses; however, the sentencing court must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile.
5. **Homicide: Sentences.** Felony murder is a homicide offense, and there is no bar against sentences of life without parole.
6. **Constitutional Law: Criminal Law: Sentences.** The Eighth Amendment does not require strict proportionality between crime and sentence, but, rather, forbids only extreme sentences that are grossly disproportionate to the crime.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Adam J. Sipple, of Johnson & Mock, P.C., L.L.O., for appellant.

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

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

Heavican, C.J.

INTRODUCTION

Douglas M. Mantich was convicted of first degree murder and use of a weapon to commit a felony. He was initially sentenced to life imprisonment on the murder conviction; he was later granted postconviction relief in the form of resentencing as a result of the U.S. Supreme Court's decision in *Miller v. Alabama*.[1] Following a hearing, Mantich was sentenced to 90 years' to 90 years' imprisonment on the first degree murder conviction. He appeals. We affirm.

BACKGROUND

Mantich was convicted of first degree murder and use of a weapon to commit a felony in September 1994. The following factual recitation is from this court's 2014 opinion vacating Mantich's life sentence:

> On December 5, 1993, a gathering was held to mourn the death of a "Lomas" gang member. Several members of the gang attended the party, including Mantich, Gary Brunzo, Daniel Eona, Juan Carrera, and Angel Huerta. At the gathering, Mantich consumed between 5 and 10 beers and smoked marijuana in a 2½-hour period.
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> Sometime after 1 a.m., Carrera decided that he wanted to steal a car and commit a driveby shooting of a member

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

of a rival gang. While holding a gun, Eona responded that he also wanted to steal a car and talked about "jackin' somebody" and "putting a gun to their head." Brunzo and Eona then walked toward Dodge Street to steal a vehicle. They returned about 20 minutes later in a stolen red minivan, and Carrera and Huerta got in. Over his girlfriend's objection and attempt to physically restrain him, Mantich also got into the van.

The van had no rear seats. Eona was in the driver's seat, and Brunzo was in the front passenger seat. Carrera sat behind the driver's seat; Huerta sat on the passenger side, close to the sliding side door; and Mantich sat behind Carrera and Huerta, toward the back of the van. After a short time, Mantich realized that a man, later identified as Henry Thompson, was in the van. Thompson was kneeling between the driver's seat and the front passenger seat with his hands over his head and his head facing the front of the van.

The gang members began chanting "Cuz" and "Blood." Mantich thought the purpose was to make Thompson believe they were affiliated with a different gang. Eona demanded Thompson's money, and Brunzo told Thompson they were going to shoot him. Mantich saw Brunzo and Eona poke Thompson in the head with their guns. Eventually, a shot was fired and Thompson was killed. Thompson's body was pulled out of the van and left on 13th Street.

The group then drove to Carrera's house so he could retrieve his gun. After this, they drove by a home and fired several shots at it from the vehicle. Later, they sank the van in the Missouri River and walked back to 13th Street. From there, Mantich and Huerta took all the guns and went to Huerta's house to hide them. Brunzo, Eona, and Carrera walked toward the area of Thompson's body.

After hiding the guns with Huerta, Mantich walked to Brian Dilly's house. While still intoxicated, Mantich told Dilly and Dilly's brothers about the events of the night. Mantich claimed he had pulled the trigger and killed Thompson. When the 6 o'clock news featured a story on the homicide, Mantich said, "'I told you so,'" and "'I told you I did it.'" About an hour after the newscast, Mantich told Dilly that Brunzo was actually the person who shot and killed Thompson. The police later learned about Mantich's conversations with Dilly, and arrest warrants were issued for Mantich, Brunzo, Eona, and Carrera. Mantich was arrested on January 4, 1994.

Mantich agreed to talk with Omaha police about what happened and initially claimed that Brunzo shot Thompson. The police told Mantich that statements were being obtained from Brunzo, Eona, and Carrera and that Mantich's statement was inconsistent with the information the police had acquired. The police also told Mantich that Dilly said Mantich confessed to shooting Thompson. Mantich admitted telling Dilly he shot Thompson, but explained that it was a lie and that he was only trying to look like "a bad ass." Mantich claimed that he had not shot anyone and that Brunzo was the shooter.

The police then told Mantich they knew what happened and assured Mantich that his family and girlfriend "would not abandon him" if he told the truth. At this point, Mantich admitted that he had pulled the trigger. Mantich said, "'I'm sorry it happened. I wished it wouldn't have happened.'" Mantich further stated, "'They handed me the gun and said shoot him, so I did it.'" Mantich again confessed during a taped statement to shooting Thompson.

Mantich testified in his own behalf at trial. He acknowledged his statements to Dilly and the police that he had shot Thompson, but told the jury that he had not shot Thompson. On September 26, 1994, the jury returned a

verdict of guilty on one charge of first degree murder and one charge of use of a firearm to commit a felony.[2]

Mantich was 15 years old at the time of the commission of the acts leading to his convictions. His murder conviction was based upon felony murder with the underlying felonies of kidnapping, robbery, or both. Mantich was sentenced to life imprisonment on the first degree murder conviction and 5 to 20 years' imprisonment on the use conviction. Mantich's convictions and sentences were affirmed on direct appeal.[3]

Mantich subsequently filed a motion for postconviction relief, which was granted by this court[4] following the U.S. Supreme Court's decision in *Miller*.[5] Mantich's life sentence for first degree murder was vacated and the cause was remanded for resentencing.

Upon resentencing, a hearing was held. At that hearing, Mantich offered evidence, including the deposition of a neuropsychologist who testified generally about adolescent brain development.

Mantich also offered the testimony of Charles Newring, a psychologist with experience assessing youth and adults involved in the court system. Newring testified that Mantich was of low risk for future acts of violence if his sobriety was maintained. Mantich was also assessed for psychopathy, which Newring testified was one of the best predictors of future violence. According to Newring, Mantich scored well below the "cut score" for psychopathy.

Newring also testified as to Mantich's prison misconduct record, noting that the last report involving violence was in 2000 and that it involved the group related to the offense for which Mantich was convicted. The record otherwise showed

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[2] *State v. Mantich*, 287 Neb. 320, 322-24, 842 N.W.2d 716, 719-20 (2014).

[3] *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

[4] *State v. Mantich, supra* note 2.

[5] *Miller v. Alabama, supra* note 1.

that between January 1995 and June 2015, Mantich had 122 misconduct reports.

The record also showed that Mantich had successfully received a diploma through the GED program as well as other educational programming while he was in prison, but that he had not undergone substance abuse treatment. A correctional system employee testified that Mantich was a "model inmate," a "'leader,'"; that he followed the rules; and that he was one of seven inmates chosen to participate in a dog training program.

Following that hearing, Mantich was sentenced to 90 years' to 90 years' imprisonment. He appeals.

ASSIGNMENTS OF ERROR

On appeal, Mantich assigns that the district court erred in (1) imposing a de facto life sentence prohibited by the Eighth Amendment; (2) imposing a sentence unconstitutionally disproportionate to his offense in light of Mantich's age, conduct, and subsequent reform; (3) failing to consider Mantich's youth in light of the principles and purposes of juvenile sentencing; and (4) violating his right to due process by failing to use adequate procedural safeguards to protect against arbitrary and capricious imposition of a sentence violating Mantich's substantive protection against cruel and unusual punishment.

STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[6] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[7]

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[6] *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016).

[7] *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

ANALYSIS

Validity of Sentence Imposed.

In his first and second assignments of error, Mantich assigns that the sentence imposed upon him on resentencing was erroneous. Mantich argues that he was a "child who did not kill," but that the district court sentenced him as though he was "an adult who took a life."[8] His argument, particularly when considered in the aggregate with his consecutive 5- to 20-year sentence of imprisonment for use of a weapon, is that his sentence for felony murder was a de facto life sentence without parole, was disproportionate to the crime for which he was convicted, and was erroneous.

[3,4] Some background with respect to juvenile sentencing is helpful. In *Graham v. Florida*,[9] the U.S. Supreme Court held that life imprisonment without the possibility of parole for juveniles convicted of nonhomicide offenses was unconstitutional. Specifically, the Court in *Graham* held such juvenile offenders must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[10] Several years later, in *Miller*,[11] the Court declined to extend that categorical bar of no life sentences without parole to juveniles convicted of homicide. This court noted in considering Mantich's[12] motion for postconviction relief that there was no bar to a life sentence, but that "a sentencer must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile."

[5] Mantich's argument that his sentence is unconstitutional is contingent upon two assumptions: (1) that a sentence of years can, under certain circumstances, be a de facto life

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[8] Brief for appellant at 14.

[9] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[10] *Id.*, 560 U.S. at 75.

[11] *Miller v. Alabama, supra* note 1.

[12] *State v. Mantich, supra* note 2, 287 Neb. at 340, 842 N.W.2d at 730.

sentence and (2) that felony murder is a nonhomicide offense under *Graham*. We need not decide the validity of Mantich's de facto life sentence argument, however, because we disagree with the assertion that felony murder is a nonhomicide offense. Rather, we hold that felony murder is a homicide offense under *Miller* and note that there is no bar against sentences of life without parole.

Neb. Rev. Stat. § 28-303 (Reissue 1989) provided for the crime of first degree murder and set forth three different ways that it can be committed:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done . . . .

Subsection (2) provided that felony murder is first degree murder. A specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question.[13] We have held that premeditated murder and felony murder are but different ways to commit a single offense of first degree murder.[14] Thus, our statutory scheme plainly envisions felony murder as a homicide offense.

This result is consistent with other jurisdictions that have held that felony murder is a homicide offense to which *Graham* is inapplicable,[15] and it is also consistent with the holding in *Graham*.

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[13] *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[14] *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[15] *Graham v. Florida, supra* note 9. See *Arrington v. Florida*, 113 So. 3d 20 (Fla. App. 2012). See, also, *Trimble v. Trani*, No. 09-cv-01943-REB, 2011 WL 3426207 (D. Colo. Aug. 5, 2011) (unpublished opinion); *Jensen v. Zavaras*, No. 08-cv-01670-RPM, 2010 WL 2825666 (D. Colo. July 16, 2010) (unpublished opinion); *Bell v. Arkansas*, No. CR 10-1262, 2011 WL 4396975 (Ark. Sept. 22, 2011).

The Court in *Graham* held that the Eighth Amendment prohibited sentencing a juvenile to the maximum penalty of life imprisonment without parole for a nonhomicide offense committed by that juvenile.[16] But felony murder, regardless of which individual perpetrated the actual killing, results in the death of a victim. As the Court reasoned in *Graham*, nonhomicide offenses "differ from homicide crimes in a moral sense."[17] That felony murder results in death supports our conclusion that felony murder is a homicide offense.

Mantich suggests that felony murder should be considered a nonhomicide offense at least under circumstances where the defendant at issue was not directly responsible for the victim's death. He further argues that in his case, there was no jury finding that he was actually responsible for Henry Thompson's death.

Mantich is correct in that the jury did not find that he killed Thompson. But the jury was not asked to find that fact; it needed only to conclude that Mantich was guilty of the underlying felony during perpetration of the act during which Thompson was killed.

And in those cases where there might be evidence that the defendant being sentenced did not actually kill, the sentencing court may consider that mitigating factor when sentencing a juvenile defendant.[18] But this is not that case: There was evidence in the record that supported the conclusion that Mantich did, in fact, kill Thompson, including testimony that Mantich admitted to others that he had done so.

Unless and until the U.S. Supreme Court rules otherwise, we conclude the felony murder is a homicide offense for purposes of sentencing under *Miller* and *Graham*.[19] Because under *Miller* a juvenile defendant may be sentenced to

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[16] *Graham v. Florida, supra* note 9.

[17] *Id.*, 560 U.S. at 69.

[18] Neb. Rev. Stat. § 28-105.02 (Reissue 2016).

[19] *Miller v. Alabama, supra* note 1; *Graham v. Florida, supra* note 9.

life imprisonment without parole, it is immaterial whether the sentence imposed upon Mantich was a de facto life sentence.

[6] Nor was Mantich's sentence disproportionate. The Eighth Amendment does not require strict proportionality between crime and sentence, but, rather, forbids only extreme sentences that are "'grossly disproportionate'" to the crime.[20] In this case, while Mantich now denies that he shot the victim, he did make statements that admitted as much. There was evidence at trial to that effect, and the original sentencing court sentenced him based upon the court's belief that Mantich "'pulled the trigger.'" And in any case, Mantich was part of a group of gang members who carjacked and abducted an innocent person, drove around taunting that person, and put the person in fear for his life before the person was shot and thrown out of the moving vehicle into the street. On these facts, Mantich's sentence was not disproportionate.

Mantich's first and second assignments of error are without merit.

Sentencing Hearing.

In his third and fourth assignments of error, Mantich argues that the sentencing court failed to consider his youth or to use adequate procedural safeguards when sentencing him.

We turn first to Mantich's contention that the sentencing court did not give "conscientious 'consideration'" to his youth.[21] We find that assertion to be without merit. Rather, the district court explicitly noted Mantich's age and further explained that it was "one of the few mitigating factors in this case." The district court also noted that Mantich was receiving some benefit from his age insofar as he was being resentenced to a term of less than life imprisonment.

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[20] *Ewing v. California*, 538 U.S. 11, 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003).

[21] Brief for appellant at 34.

As the facts of this case demonstrate, Mantich participated in the carjacking, abduction, and taunting of an innocent victim, who was shot in the back of the head, perhaps by Mantich himself. The victim was then pulled out of his own vehicle and left dead on the street. The fact that Mantich is unhappy with the sentence he received does not mean that the district court ignored Mantich's age or otherwise erred in imposing sentence. We have reviewed the record from the sentencing hearing and reject Mantich's claim that the district court did not adequately consider his age and other mitigating factors when sentencing him.

We turn next to Mantich's contention that his due process rights were violated when the district court failed to use adequate procedural safeguards.

Mantich asks this court to "establish procedural safeguards to ensure sentences imposed upon juvenile offenders do not exceed constitutional boundaries."[22] Specifically, Mantich asks us to include the requirement of a mitigation hearing, a presumption against life or de facto life sentences, and factfinding sufficient for meaningful appellate review. But we find that the procedural safeguards Mantich seeks either are already in place or are not required by the U.S. Supreme Court's decisions in *Miller* and *Graham*.[23]

Mantich first suggests that we establish a required mitigation hearing, but he fails to explain why the sentencing hearing that he, as well as every other criminal defendant, was already afforded is inadequate. Moreover, § 28-105.02 expressly allows a defendant to present mitigating factors to the court and mandates that the court consider such factors.

Mantich also seeks a presumption against sentences of life imprisonment and life imprisonment without parole. But *Miller*[24] allows such sentences for a homicide offense. The

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[22] *Id.* at 35.

[23] *Miller v. Alabama, supra* note 1; *Graham v. Florida, supra* note 9.

[24] *Miller v. Alabama, supra* note 1.

presumption against such sentences is not required by the U.S. Supreme Court. The Legislature has not mandated such a presumption, and we will not create one. Nor is there language in *Miller*, nor anything more generally in our case law or in § 28-105.02, that would require specific factfinding at sentencing.[25]

We have reviewed the record and conclude that Mantich was sentenced in accordance with § 28-105.02 and *Miller*. The Legislature has set forth the sentencing procedure applicable to juveniles who have committed homicide offenses. That procedure is consistent with *Miller* and with the Eighth Amendment as it is currently interpreted by the U.S. Supreme Court. We therefore find Mantich's third and fourth assignments of error to be without merit.

CONCLUSION

The sentence of the district court is affirmed.

Affirmed.

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[25] See *State v. Hunt*, 214 Neb. 214, 333 N.W.2d 405 (1983).

Millard Gutter Company, a corporation, doing business as Millard Roofing and Gutter, appellee, v. Farm Bureau Property & Casualty Insurance Company, appellant.

889 N.W.2d 596

Filed December 30, 2016. No. S-15-912.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. **Insurance: Contracts.** As a general principle, a clause in an insurance policy restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred.
6. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
7. **Statutes: Legislature: Public Policy.** It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of the state.

8. **Insurance: Contracts: Damages.** In the absence of a statute to the contrary, a postloss assignment of a claim under a homeowner's insurance policy for the homeowner's property damage casualty loss is valid, despite a nonassignment clause.

Appeal from the District Court for Douglas County, Shelly R. Stratman, Judge, on appeal thereto from the County Court for Douglas County, John E. Huber, Judge. Judgment of District Court affirmed.

Michael T. Gibbons and Aimee C. Bataillon, of Woodke & Gibbons, P.C., L.L.O., for appellant.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellee.

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

Cassel, J.

INTRODUCTION

A homeowner's insurance policy prohibited an assignment of "[a]ll rights and duties" without the insurer's consent. Nonetheless, after a storm damaged the homeowner's roof, he assigned his claim to the company that repaired it. The company obtained a county court judgment, which the district court affirmed. This appeal followed. Because we conclude that a postloss assignment of a claim under a homeowner's insurance policy is valid despite the nonassignment clause, we affirm the decision of the district court.

BACKGROUND

Farm Bureau Property & Casualty Insurance Company (Farm Bureau) issued a homeowner's insurance policy to Howard Hunter. The policy contained in part the following nonassignment clause:

> **Change / Assignment of Interest**
>
> A. All rights and duties under this policy may not be assigned without our written consent.

> B. No change of interest in this policy is effective unless we consent in writing.

During the policy coverage period, a storm damaged Hunter's home and he made a claim under his insurance policy.

Hunter retained Millard Gutter Company, a corporation doing business as Millard Roofing and Gutter (Millard Gutter), to repair the damage to his roof. Millard Gutter believed that the entire roof required replacement, and its estimate showed the cost of repairs to be $8,854.35. Farm Bureau opined that only two slopes of the roof needed to be replaced, and it computed the cost of those repairs to be $3,022.43. Millard Gutter ultimately replaced Hunter's entire roof.

At some point after the loss, Hunter signed an "Assignment of Claim" presented by Millard Gutter. According to the document, Hunter assigned to Millard Gutter "any and all claims or moneys due or to become due" to Hunter under his insurance policy for damages to Hunter's property. There is no evidence that Hunter obtained Farm Bureau's written consent prior to executing the assignment. Farm Bureau received a copy of Hunter's assignment and issued a check for $3,022.43 directly to Millard Gutter.

Millard Gutter sued Farm Bureau, seeking judgment against Farm Bureau of at least $5,252.66. Millard Gutter alleged that Farm Bureau was obligated under its policy with Hunter to pay the fair and reasonable value of Millard Gutter's services. Farm Bureau set forth a number of affirmative defenses. It alleged that the complaint failed to state a cause of action upon which relief could be granted for three reasons: (1) Farm Bureau did not consent to the alleged assignment, (2) Millard Gutter was not the real party in interest, and (3) Millard Gutter lacked privity of contract with Farm Bureau. Farm Bureau also claimed that the county court lacked subject matter jurisdiction.

Following a bench trial, the county court found in favor of Millard Gutter in the amount of $5,252.66. The county court later awarded Millard Gutter $11,668.34 in attorney fees.

Farm Bureau appealed to the district court, which affirmed the judgment of the county court. Farm Bureau took a further appeal, and we granted Millard Gutter's petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Farm Bureau assigns that the district court erred in affirming the county court's exercise of subject matter jurisdiction, because the purported assignment of rights by Hunter to Millard Gutter was invalid and Millard Gutter lacked privity of contract with Farm Bureau.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[1]

[2-4] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.[4]

ANALYSIS

Jurisdictional Argument Depends Upon Assignment's Validity

Farm Bureau raises a jurisdictional argument that turns upon the assignment to Millard Gutter. Farm Bureau argues

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[1] *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

[2] *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015).

[3] *Id.*

[4] *Id.*

that Millard Gutter lacked standing to sue and that thus, the county court lacked subject matter jurisdiction over the action. Millard Gutter brought its breach of contract action against Farm Bureau as the assignee of Hunter's insurance claim, and a statute provides that "[t]he assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf . . . ."[5] Whether Millard Gutter had standing depends on the validity of the assignment.

Farm Bureau's argument is grounded on contract and is quite simple. The policy provided that "[a]ll rights and duties under this policy may not be assigned without our written consent" and that without such consent, "[n]o change of interest in this policy is effective . . . ." Thus, Farm Bureau asserts that Hunter's assignment to Millard Gutter was invalid because Farm Bureau did not consent to it.

But courts have often upheld assignments despite a nonassignment provision. The three theories typically used for upholding such an assignment are:

> (1) The parties did not intend the nonassignment provision to apply to rights to receive payments, but only to the duties under the personal contract; (2) The reason for the prohibition ceased because the insurer's risks and liabilities under the contract became fixed when the insured event occurred; and (3) The public policy supported free alienability of a chose in action.[6]

At least after a loss has occurred, an indemnity contract of insurance is a chose in action because it confers a right to bring a legal action to recover a sum of money from or out of the contract.[7]

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[5] Neb. Rev. Stat. § 25-302 (Reissue 2016).

[6] See *OB-GYN v. Blue Cross*, 219 Neb. 199, 205, 361 N.W.2d 550, 554 (1985).

[7] See 17 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 49:119 (4th ed. 2015).

Nonassignment Clause Jurisprudence in Nebraska

Over a century ago, we were faced with an assignment of a claim in light of a contractual provision prohibiting an assignment in the context of a fire insurance policy. In *Star Union Lumber Co. v. Finney*,[8] after a loss caused by fire, the party who obtained insurance assigned the policy to an entity who held a mechanic's lien on the property. Each policy stated that if the policy was assigned without written consent, the policy should be void. In upholding the assignment of the claim, we stated: "It is claimed that a policy could not be assigned without the assent of the company. However this may be as to a policy before a loss occurs, the objection does not apply as to the assignment of a claim for a loss after it occurs."[9]

More recently, we addressed the issue with reference to a health insurance contract. In *OB-GYN v. Blue Cross*,[10] an insurer's contract with its subscribers provided that benefits payable to subscribers may not be assigned by the subscribers. One nonparticipating provider, in an effort to collect payment directly from the insurer for services it provided to subscribers, took assignments of the subscribers' benefits and submitted them to the insurer for payment. The insurer, relying on the nonassignment clause, refused to pay the nonparticipating provider directly and instead sent the payment to the subscribers. We upheld the nonassignment provision, determining that it was not void as a matter of public policy.

In *OB-GYN*, we discussed—but did not overrule—our decision in *Star Union Lumber Co*. Initially, we appeared to minimize its holding:

> The *Star Union* opinion deals with the nonassignment issue in two sentences . . . and gives no reasoning for such a holding. The *Star Union* case has never been cited

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[8] *Star Union Lumber Co. v. Finney*, 35 Neb. 214, 52 N.W. 1113 (1892).

[9] *Id.* at 223, 52 N.W. at 1116.

[10] *OB-GYN v. Blue Cross, supra* note 6.

> in Nebraska on the nonassignment point. How this fleeting reference in 1892 regarding a fire insurance policy sets out the public policy of Nebraska in 1982 with regard to a medical insurance policy is not argued.[11]

But we also distinguished the insurance contract in *Star Union Lumber Co.* from that in *OB-GYN*:

> [R]eading *Star Union* and [an Eighth Circuit case] in light of the public policy and equity questions before those courts, it is important to distinguish the insurance contracts in those cases from that of [the insurer] in another way. Both the insurance contracts in *Star Union* and [the Eighth Circuit case] required the avoidance of the entire contract on assignment. The [insurer's] contract does not avoid payment on assignment, it simply claims the contracted right to pay the subscriber with whom it contracted. Many contracts commentators have recognized the negative weight of an avoidance penalty in the public policy balance; that weight is not present here.[12]

In this respect, the contractual provision in the instant case is more akin to that in *OB-GYN*—it did not void the policy, but would invalidate an insured's purported transfer of payment to an unauthorized assignee.

Our other nonassignment clause cases did not involve insurance policies. In several cases involving the sale of land, we stated that a contractual provision requiring a seller's consent to any assignment was intended to safeguard performance and that the provision was not enforceable when security for the seller was not an issue, such as when performance was rendered or was being tendered.[13] But we have also held that

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[11] *Id.* at 205, 361 N.W.2d at 554.

[12] *Id.* at 205-06, 361 N.W.2d at 555.

[13] See, *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988); *Panwitz v. Miller Farm-Home Oil Service*, 228 Neb. 220, 422 N.W.2d 63 (1988); *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975); *Wagner v. Cheney*, 16 Neb. 202, 20 N.W. 222 (1884).

an assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent is ineffective without such consent.[14] And in a case involving an action to recover professional fees relating to several construction projects, we determined that the nonassignment clause did not bar the assignment of the claims, because the assignment occurred after the contracts were breached.[15] We reasoned that "the intent of the provision against assignment of rights under a contract, which generally is to allow the parties to choose with whom they contract, is not affected by allowing an assignment of a right to collect damages for breach of contract."[16]

A Nebraska federal court recently considered a similar issue as that now before us.[17] In that case, a roofing contractor took assignments from numerous homeowners but the insurer refused to recognize the assignments or to pay the contractor. After the contractor sued, the insurer moved to dismiss and presented evidence that the homeowners' policies each stated that "'[a]ssignment of this policy shall not be valid except with the written consent of [the insurer].'"[18] The court observed that the homeowner's insurance policy at issue and the fire insurance policy in *Star Union Lumber Co.* both prohibited the assignment of the *policy*, which was not comparable to the clause in *OB-GYN*, which prohibited assignment of *amounts payable*. The federal court determined that assignments received by the contractor from the homeowners

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[14] See, *American Community Stores Corp. v. Newman*, 232 Neb. 434, 441 N.W.2d 154 (1989); *Moritz v. S & H Shopping Centers, Inc.*, 197 Neb. 206, 247 N.W.2d 454 (1976).

[15] See *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001).

[16] *Id.* at 547, 633 N.W.2d at 126.

[17] See *Valley Boys, Inc. v. Allstate Ins. Co.*, 66 F. Supp. 3d 1179 (D. Neb. 2014).

[18] *Id.* at 1181.

were limited to "'claims made'"[19] by the insureds and that the nonassignment clause would not prohibit the contractor from recovering benefits due and owing to the insureds under the policies.

Enforceability of Nonassignment Clauses in Other Jurisdictions

[5] The majority of courts follow the rule that clauses in insurance policies prohibiting assignments do not prevent an assignment after the loss has occurred. The rule has been applied to property insurance policies[20] and fire insurance policies.[21] Courts have applied the rule to various types of automobile insurance policies.[22] The rule has been applied to many types of liability insurance policies, including pollution liability insurance,[23] directors and officers liability

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[19] *Id.* at 1182.

[20] See, *Edgewood Manor Apartment Homes v. RSUI Indem. Co.*, 782 F. Supp. 2d 716 (E.D. Wis. 2011) (applying Mississippi law); *U.S. v. Lititz Mut. Ins. Co.*, 694 F. Supp. 159 (M.D.N.C. 1988); *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001).

[21] See, *Alabama Farm Bureau Insurance Co. v. McCurry*, 336 So. 2d 1109 (Ala. 1976); *Georgia Fire Asso. v. Borchardt*, 123 Ga. 181, 51 S.E. 429 (1905); *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, 5 N.W. 303 (1880); *Ardon Constr. Corp. v. Firemen's Ins. Co.*, 16 Misc. 2d 483, 185 N.Y.S.2d 723 (1959); *Aetna Ins. Co. v. Aston*, 123 Va. 327, 96 S.E. 772 (1918); *Smith v. Buege*, 182 W. Va. 204, 387 S.E.2d 109 (1989); *Gimbels Midwest v. Northwestern Nat. Ins. Co.*, 72 Wis. 2d 84, 240 N.W.2d 140 (1976).

[22] See, *Giglio v. American Economy Ins. Co.*, No. CV020282069, 2005 WL 1155148 (Conn. Super. Apr. 26, 2005) (unpublished opinion); *Santiago v. Safeway Ins. Co.*, 196 Ga. App. 480, 396 S.E.2d 506 (1990); *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 328 Ill. 571, 160 N.E. 145 (1928); *Bolz v. State Farm Mut. Auto. Ins. Co.*, 274 Kan. 420, 52 P.3d 898 (2002); *First-Citizens Bank & Tr. Co. v. Universal Underwriters Ins. Co.*, 113 N.C. App. 792, 440 S.E.2d 304 (1994).

[23] See *R.L. Vallee v. American Intern. Specialty Lines*, 431 F. Supp. 2d 428 (D. Vt. 2006).

insurance,[24] excess and umbrella liability insurance,[25] employer's liability insurance,[26] comprehensive general liability insurance,[27] and other variations of liability or indemnity insurance.[28] The rule has been applied to builder's risk insurance.[29] It has been applied to industrial life insurance[30] and annuities issued pursuant to a structured settlement agreement.[31] And, most significantly, it has been applied to homeowners insurance policies.[32]

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[24] See *Straz v. Kansas Bankers Sur. Co.*, 986 F. Supp. 563 (E.D. Wis. 1997).

[25] See, *Viola v. Fireman's Fund Ins. Co.*, 965 F. Supp. 654 (E.D. Penn. 1997); *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 903 A.2d 1219 (2006); *In re Ambassador Ins. Co., Inc.*, 184 Vt. 408, 965 A.2d 486 (2008); *PUD 1 v. International Insurance Co.*, 124 Wash. 2d 789, 881 P.2d 1020 (1994).

[26] See, *Southwestern Bell Tel. Co. v. Ocean Acc. & Guar. Corp.*, 22 F. Supp. 686 (W.D. Mo. 1938); *Garetson-Greason L. Co. v. Home L. & A. Co.*, 131 Ark. 525, 199 S.W. 547 (1917).

[27] See, *Gopher Oil v. American Hardware*, 588 N.W.2d 756 (Minn. App. 1999); *Elat, Inc. v. Aetna Cas. and Sur. Co.*, 280 N.J. Super. 62, 654 A.2d 503 (1995).

[28] See, *Aetna Casualty & Surety Co. v. Valley National Bank*, 15 Ariz. App. 13, 485 P.2d 837 (1971); *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009) (applying New York law); *Illinois Tool Works, Inc. v. Commerce & Industry Insurance Co.*, 2011 IL App (1st) 093084, 962 N.E.2d 1042, 357 Ill. Dec. 141 (2011); *Pilkington N. Am. v. Travelers Cas. & Sur.*, 112 Ohio St. 3d 482, 861 N.E.2d 121 (2006).

[29] See *Wehr Constructors v. Assurance Co. of Am*, 384 S.W.3d 680 (Ky. 2012).

[30] See *Magers v. National Life & Accident Insurance Co.*, 329 S.W.2d 752 (Mo. 1959).

[31] See *Rumbin v. Utica Mut. Ins. Co.*, 254 Conn. 259, 757 A.2d 526 (2000).

[32] See, *Security First v. Office of Ins. Regulation*, 177 So. 3d 627 (Fla. App. 2015); *Manley v. Automobile Ins. Co. of Hartford*, 169 S.W.3d 207 (Tenn. App. 2005).

Treatises and other authoritative texts also support the rule.[33] The reason for the rule with respect to insurance policies has been explained as follows:

> Antiassignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involves a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however. As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred. *The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.*[34]

Some states have a statute which weighs on the outcome. A Louisiana law declares that "[a] right cannot be assigned when the contract from which it arises prohibits the assignment of that right."[35] In applying that law, the Supreme Court of

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[33] See, 5A John Alan Appleman & Jean Appleman, Insurance Law & Practice § 3458 (1970 & Cum. Supp. 2009); Robert E. Keeton & Alan I. Widiss, Insurance Law § 4.1 (1988); 17 Lord, *supra* note 7, § 49:126; 3 Steven Plitt et al., Couch on Insurance 3d § 35:8 (2011); 44 Am Jur. 2d *Insurance* §§ 776 to 778 (2013).

[34] 17 Lord, *supra* note 7, § 49:126 at 130-32 (emphasis supplied).

[35] La. Civ. Code Ann. art. 2653 (2008).

Louisiana determined: "There is no public policy in Louisiana which precludes an anti-assignment clause from applying to post-loss assignments. However, the language of the anti-assignment clause must clearly and unambiguously express that it applies to post-loss assignments."[36] A California statute "bars an insurer, 'after a loss has happened,' from refusing to honor an insured's assignment of the right to invoke the insurance policy's coverage for such a loss."[37] Numerous states have a statute providing that a policy may be assignable or not assignable, as provided by its terms.[38] But even the existence of such a statute has not automatically resulted in the unenforceability of an assignment when the assignment occurred after the loss.[39]

Public Policy

[6] This case presents two important but competing policies: the right to freedom of contract versus the free assignment of a chose in action. Parties to an insurance contract may

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[36] *In re Katrina Canal Breaches Litigation*, 63 So. 3d 955, 964 (La. 2011).

[37] *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 1180, 354 P.3d 302, 303, 191 Cal. Rptr. 3d 498, 501 (2015), quoting Cal. Ins. Code § 520 (West 2013).

[38] See, Ala. Code § 27-14-21(a) (2014); Alaska Stat. § 21.42.270 (2004); Ariz. Rev. Stat. Ann. § 20-1122 (2002); Ark. Code Ann. § 23-79-124(a) (2004); Del. Code Ann. tit. 18, § 2720 (1999); Fla. Stat. Ann. § 627.422 (West 2016); Ga. Code Ann. § 33-24-17 (2005); Haw. Rev. Stat. § 431:10-228(a) (2005); Idaho Code § 41-1826 (2003); Ky. Rev. Stat. Ann. § 304.14-250(1) (LexisNexis 2011); Me. Rev. Stat. Ann. tit. 24-A, § 2420(1) (2000); Mont. Code Ann. § 33-15-414(1) (2007); N.J. Stat. Ann. § 17B:24-4 (West 2006); Okla. Stat. Ann. tit. 36, § 3624 (West 2011); Or. Rev. Stat. § 743.043 (2007); S.D. Codified Laws § 58-11-36 (2004); Vt. Stat. Ann. tit. 8, § 3713(a) (2015); Wyo. Stat. Ann. § 26-15-122 (2013).

[39] See, e.g., *Lexington Ins. v. Simkins Industries*, 704 So. 2d 1384 (Fla. 1998); *Santiago v. Safeway Ins. Co., supra* note 22; *Wehr Constructors v. Assurance Co. of Am, supra* note 29 (distinguishing between assignment of policy and assignment of ripened claim and finding clause void as against public policy).

contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.[40] "While [the policy favoring free alienability of a chose in action] is significant and may reflect a public policy, it is not paramount and must be balanced against a very strong policy . . . favoring the freedom to contract."[41] But in some situations, contractual provisions may be void as against public policy.[42] Our resolution turns on whether invalidating a postloss assignment of insurance proceeds would be contrary to public policy.

[7] It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of the state.[43] But we have found no statute concerning the enforceability of a nonassignment clause in a property insurance policy when the assignment is made after the loss has been sustained. Farm Bureau does not contend that the breach-of-condition statute[44] supports its position. And the absence of such a statute bears mentioning in light of our decisions, recounted above, which have upheld postloss assignments despite a nonassignment clause.

Public policy may favor enforcement of a nonassignment clause in some situations. In *OB-GYN*, evidence established that the nonassignment clause was "a valuable tool in persuading health care providers to participate in its physician's voluntary cost effectiveness program and accept set fees for health

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[40] *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004).

[41] *OB-GYN v. Blue Cross, supra* note 6, 219 Neb. at 206, 361 N.W.2d at 555.

[42] See, e.g., *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984).

[43] *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014).

[44] Neb. Rev. Stat. § 44-358 (Reissue 2010) ("breach of . . . condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss").

services, keeping health care costs down and passing that savings on to its subscribers."[45] As the district court in the instant case noted, cases from other jurisdictions have similarly carved out an exception to the majority rule in cases involving health care insurance contracts where the purpose of the clause was to control health care costs.[46]

The record in this case contains no similar justification for the nonassignment clause. Farm Bureau presented no evidence to show why it inserted the nonassignment clause in its policy or to otherwise support its enforcement when the assignment occurs after the loss. Nor has Farm Bureau pointed to any specific risk or burden that it may face as a result of the assignment. The record simply does not demonstrate any increased risk to Farm Bureau or other adverse consequence of the assignment (other than this litigation, of course). On the other hand, the record contains evidence that in the roofing and gutter repair industry, it is customary for a homeowner to make an assignment of his or her right to proceeds from an insurance company to the contractor and for the insurer to make direct payment to the contractor. We understand that an insurer may wish to deal only with the person with whom it had reached a contract, but that does not outweigh the policy favoring free assignability of a chose in action. We further note that we are not confronted with a direct contradiction of explicit contractual language, i.e., Farm Bureau's policy did not expressly prohibit assignment of a postloss claim.

We recognize that the Legislature is best suited to make public policy determinations. In the context of a fire insurance policy, our precedent allowed postloss assignments despite the

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[45] *OB-GYN v. Blue Cross, supra* note 6, 219 Neb. at 207, 361 N.W.2d at 556.

[46] See, e.g., *Kent General Hospital v. Blue Cross, Etc.*, 442 A.2d 1368 (Del. 1982); *Abraham K. Kohl, D.C. v. Blue Cross*, 955 So. 2d 1140 (Fla. App. 2007); *Augusta Medical Complex, Inc. v. Blue Cross*, 230 Kan. 361, 634 P.2d 1123 (1981); *Somerset Ortho. v. Horizon BC & BS*, 345 N.J. Super. 410, 785 A.2d 457 (2001).

presence of a nonassignment clause in the contract. Regarding a health insurance policy, other public policy considerations dictated a different result. The Legislature has not acted to affect either result. Here, the claim for storm damage under a homeowner's insurance policy seems comparable to our fire loss precedent and distinguishable from the health claims case. If postloss assignments of storm damage claims are having a deleterious effect on insurers, they should present their concerns to the Legislature.

[8] We conclude that in the absence of a statute to the contrary, a postloss assignment of a claim under a homeowner's insurance policy for the homeowner's property damage casualty loss is valid, despite a nonassignment clause. Because the assignment in this case was valid, Millard Gutter had standing to bring its breach of contract claim and the county court did not lack subject matter jurisdiction over the action.

CONCLUSION

Under the circumstances of this case, we conclude that the postloss assignment of a claim under a homeowner's insurance policy was valid even though the policy stated any assignment made without the insurer's consent would be invalid. In Millard Gutter's brief, it requests an award of further attorney fees for services on appeal. Because we have found in Millard Gutter's favor, it will be awarded attorney fees in connection with this appeal upon a proper and timely application.[47]

Affirmed.

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[47] See Neb. Ct. R. App. P. § 2-109(F) (rev. 2014).

State of Nebraska, appellee, v. Christopher M. Garza, appellant.

888 N.W.2d 526

Filed December 30, 2016. No. S-16-231.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reason 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. **Juvenile Courts: Sentences.** Under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), a juvenile defendant may be sentenced to life imprisonment without parole, so it is immaterial whether the sentence imposed is a de facto life sentence.
4. **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.
5. **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.
6. **Homicide: Sentences: Minors: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 28-105.02(2) (Reissue 2016) contains a nonexhaustive list of mitigating factors a sentencing court must consider when imposing a sentence for first degree murder on one who was under the age of 18 when he or she committed the crime.

7. **Sentences.** In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Annie O. Hayden for appellant.

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

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

Stacy, J.

INTRODUCTION

In 1991, Christopher M. Garza was convicted of first degree murder and use of a firearm during the commission of a felony. He was sentenced to life imprisonment on the murder conviction and was given a consecutive sentence of 6⅔ to 20 years' imprisonment on the use conviction.

In 2015, Garza was granted postconviction relief as a result of the U.S. Supreme Court's decision in *Miller v. Alabama*.[1] He was resentenced on the murder conviction to a term of 90 to 90 years' imprisonment. He appeals this sentence as excessive. We affirm.

BACKGROUND

After a jury trial, Garza was convicted of first degree murder and use of a weapon to commit a felony. We affirmed

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

Garza's convictions on direct appeal.[2] In our 1992 opinion, we summarized the evidence of Garza's crimes:

> When she was killed on March 21, 1990, the victim, Christina O'Day, was a 17-year-old high school senior. Garza, having been born [i]n May . . . 1973, was then 16 years old, and Wayne K. Brewer, the other individual involved, see *State v. Brewer*[, 241 Neb.] 24, 486 N.W.2d 477 (1992), was then 18 years old.
>
> Beginning in March 1989, the victim's employer started working the night shift and thus arranged for the victim to spend the night at her house to take care of her 8-year-old daughter. The victim would drive to the employer's house between 10:45 and 11:10 p.m. and park her automobile in the garage; the employer would then go to work. On Mondays, the employer usually attended a university class from 7 to 9:45 p.m. and would go to work directly from the university.
>
> Garza had met Brewer in February 1990 at a local fast-food restaurant where they both worked. Shortly thereafter, the two became friends and began to do things together on a regular basis.
>
> Garza claimed that on Monday, March 19, 1990, he and Brewer went to visit with Garza's mother. Since it appeared that his mother was asleep, Garza drove out of the area, but missed a turn and ended up on the street where the victim was babysitting. He then saw the victim pulling into her employer's driveway and decided to stop and visit with her. Brewer, however, testified that the victim had not just pulled into her employer's driveway, but that Garza had actually driven by the employer's house before turning around and stopping. Garza knew the victim from school and claimed to have been a former boyfriend. He also knew the victim babysat overnight during the week.

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[2] *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992).

At 11:10 p.m., Garza and Brewer rang the employer's doorbell and the victim answered. She asked Garza what he was doing and told him to leave. Brewer and Garza then left. The employer, who happened to be home on this particular Monday night, had heard the doorbell ring; thinking it strange that someone would come to the house that late at night, she stood at the top of the steps in order to see who was at the door and was thus able at trial to identify Garza as the person who had been at her door.

The following Tuesday night, March 20, or early Wednesday morning, March 21, while driving to the area, Garza asked Brewer if he wanted to "rob" the employer's house. Brewer agreed to the plan, knowing full well that the victim and her employer's daughter would be in the house. Brewer and Garza then returned to the employer's house at approximately 2:30 on the morning of the 21st, with stealing as the avowed purpose.

After cutting the outside telephone line, Garza broke in through a basement window and let Brewer in through the front door. Brewer claims he immediately began looking for things to steal in the living and dining rooms. Brewer stated that sometime thereafter, he "heard the door open . . . looked down the hall and [saw] Garza and [the victim] go into the [employer's daughter's] room and [tell] her to go back to sleep." Thus, it appears that Garza had gone to the upper level of the house, as Brewer then states that sometime later, Garza went downstairs and told Brewer, "'Go have some fun.'" Brewer asserts that he originally refused to go upstairs, but after Garza mocked him, he went to the victim's bedroom. He found the victim on the bed. Her hands were tied over her head, and she was gagged with a scarf and hat but had no injuries. Brewer claims he was in the room for only 5 to 10 minutes, during which time he sexually assaulted the victim.

Brewer then went back downstairs and sat on the couch. Garza returned to the bedroom, then went back downstairs and into the kitchen to get a 14-inch knife, and returned to the bedroom. As Garza went back upstairs, Brewer asked him what he was doing but received no response. Apparently a few seconds later, Brewer went upstairs and stood in the bedroom doorway where he saw Garza pulling away from the victim and "blood spurting in the air." Garza and Brewer went back downstairs and left the house.

According to Brewer, he and Garza then went in the victim's automobile to a location where the stolen items were placed in Garza's automobile. The victim's automobile was then taken to and pushed into the Missouri River. The stolen items were later discarded.

The employer's daughter testified that she woke up at 2:30 a.m. because she heard crying coming from the bedroom where the victim slept, but that when her door was opened, she only saw one man. The daughter stated that for the next 3 hours, she "heard whispering [and] crying [and her] birdcage door slam and [the] bird squeaking." She also "heard footsteps . . . the door slam when they were leaving, and . . . the garage, the garage open and shut."

When Dr. Blaine Roffman, an Omaha pathologist and coroner, was taken into the employer's house, he saw the victim's body lying partially out of the bed in a face-down position: "[The body] was underneath the comforter when I first walked into the bedroom. And when the comforter was removed, the body was face down on the abdomen and the back being visible. . . . [T]here was a blue electrical cord wrapped around the neck, along with a blue scarf and a white hat. And the blue scarf and white hat initially were over the mouth and nose. And there was also pantyhose and a red strap of some type bound around both lower—both feet."

The autopsy evidenced numerous injuries: a deep "traumatic laceration" on the left side of the forehead; a "large area of swelling over the right forehead"; a deep blunt injury "between the eyebrows and upper portion of the nose"; "petechial hemorrhages" around the neck caused by the electrical cord; a "laceration on the . . . inside surface, of the left upper lip"; a blackened left eye "which is a result of hemorrhaging in that soft tissue that surrounds the eye"; injuries caused by vaginal and anal penetration; two dark linear-pattern bruises on the right back side; a bruise on the left shoulder; and a bruise over the right hip. According to Roffman, all of these injuries, which were not life threatening, were inflicted, as evidenced by the bruising and hemorrhaging, while the victim was still alive.

There was also a large, gaping laceration on the right wrist which extended to the bone, severing all of the superficial tendons, as well as producing a 90-percent laceration of the radial artery and a nick in the ulnar artery. In addition, there were seven superficial lacerations on the wrists. Roffman reported that the large wrist laceration was inflicted while the victim was alive and continued to bleed profusely until she died.

In Roffman's opinion, the victim died as a result of three injuries, any one of which, alone, could have killed her: bleeding to death from the laceration on her wrist; strangulation as a result of the scarf, hat, and electrical cord tightly wrapped around her neck; or asphyxiation caused by the scarf and hat covering her mouth and nose and also by the position of her body lying halfway out of the bed with her face turned against the carpet. Roffman pointed out that after any of these injuries, the victim would have been conscious at least 3 to 5 minutes and then died. Roffman also stated that the victim could have been saved by simply untying the cord around her neck, changing the position of the body and removing the

blockage to the mouth and nose, or placing a tourniquet on the arm, depending on which injury had been inflicted at the time.

Thus, if Brewer's testimony that he and Garza left the house immediately after Garza inflicted the wrist laceration and the daughter's testimony that the two left at 5:30 a.m. are accurate, the victim would have suffered for almost 3 hours before she finally died.

Garza has given three separate stories regarding his whereabouts on the morning of the murder. He gave his first version on the day of the murder. During the late morning on March 21, Garza received a telephone call from his brother's girl friend, who told Garza that the police were looking for him in connection with the murder. Before noon, Garza's mother went home in order to take her son to the police station, as she, too, had discovered that the police were looking for him. Shortly thereafter, Garza and his mother went to the Omaha Police Division, arriving there just after noon.

At the police station, Garza told Officer Frank O'Connor that he and Brewer had been with each other on the 20th and 21st and that he stayed the night at Brewer's house. O'Connor testified that Garza said he knew the victim, had dated her a "couple times," and had seen her on the 19th. Garza also told O'Connor that he and Brewer had visited several friends in Omaha and Council Bluffs Tuesday evening and early Wednesday "and then returned to Brewer's residence where they stayed the rest of the night."

After talking to O'Connor, Garza traveled with Deputies Gary Kratina and Sam Christiansen to the office of the Douglas County sheriff for further questioning. Once there, Garza was read his *Miranda* rights and signed a rights advisory form waiving those rights. Kratina testified that Garza admitted knowing the victim and seeing her on March 19. Garza told Kratina that on

the morning of the murder, he was at Brewer's house. Thereafter, Garza agreed to give saliva, fingernail, and hair samples, and to have his photograph taken. Kratina and O'Connor both saw scratches on Garza's arms. Since Garza was then not under arrest, he left the station. That evening Brewer went to the sheriff's department and discussed the killing.

Garza had disappeared but was located and arrested on April 6. After processing, Garza was taken to an interview room where O'Connor and Deputies Craig Madsen and James Westcott of the sheriff's office were present. When asked whether he wanted to talk to the officers, Garza responded "[Y]es." According to O'Connor, "He was quite adamant about that, he did want to, yes, he did want to talk to us." At this time, Westcott left the room to telephone his office with the information that Garza was going to make a statement. O'Connor began to read Garza his *Miranda* rights from a rights advisory form. When Garza was told he had a right to an attorney and to have one present, he stated that he wanted his attorney, and questioning ended.

Madsen then left the room in order to inform the sheriff's office of that development. However, O'Connor remained in the interrogation room with Garza. At the suppression hearing, O'Connor testified that after sitting there several minutes, he, upon Garza's inquiry as to whether Brewer had "spilled his guts," told Garza that Brewer had taken his opportunity to tell his side of the story and had implicated Garza. O'Connor also told Garza that the tests being conducted on blood and semen at the scene would reveal who had been there, when in fact O'Connor did not know whether such tests were then being conducted. Garza then declared that he had been with Brewer but that he, Garza, had not killed the victim. At this point, Madsen returned to the interrogation room, and O'Connor asked Garza whether

what he was saying was being said of his own free will. Garza replied that yes, he had been there, but that he had not killed the victim. O'Connor then asked Garza whether he would like to tell his side of the story, and Garza said they had gone to the house to "rob" it; that he had cut the screen and crawled in, entered the house, looked around, tied up the victim, and then gone downstairs, getting a videocassette recorder and other items while Brewer remained upstairs. Garza admitted having sexual intercourse with the victim, after which he went back downstairs, collected some items, put them in the automobile, and left. As he and Brewer were in the automobile, Brewer said he had killed the victim. In reply to O'Connor's question, Garza said that yes, he was "there when it happened." When asked whether he would be willing to give a tape-recorded statement, Garza repeated several times that it was first degree murder and "it don't make no difference," but would not permit a recorded statement.

O'Connor further testified that no promises, threats of force, or coercion was used, and Garza appeared "to be rational and understand the rights" explained to him. Madsen's testimony regarding Garza's statement harmonized with that given by O'Connor. Madsen also testified that no promises, threats, or coercion was used in an attempt to coerce Garza to give a statement.

The third and final version of Garza's whereabouts on the night of the murder occurred when he testified on his own behalf at trial. On that occasion, Garza denied ever having made any incriminating statements on April 6 and testified that he was out with Brewer on the 20th and early morning of the 21st, but that he finally dropped Brewer off at his house. Garza then went home and to bed.

Garza also testified that Brewer woke him up "early morning sometime" and told him that he had "robbed"

the employer's residence and stolen the victim's automobile. Garza agreed to Brewer's request to transfer all of the stolen goods into Garza's automobile. The two then dumped the victim's automobile into the Missouri River. Thereafter, they returned to Garza's house, where Garza's grandmother told them that a babysitter had been killed. Garza claimed that he questioned Brewer about the murder, and Brewer, for the first time, confessed to the killing.

Garza's girl friend, Donna Coffin, testified that on Monday, March 19, Garza had shown her a picture of the victim and told her that he was mad at the victim. The girl friend also stated that a day before the murder Garza had asked her to provide an alibi for him in the event the police were looking for him. The girl friend did not know whether Garza was serious or in regard to what matter she might be questioned. When Garza went to the girl friend's house in April prior to being arrested by the police, Garza told her that he had seen the victim the night of the murder and that he and Brewer had broken into the house through the basement window in order to steal. Garza further told the girl friend that it was not until after they left the employer's residence that Brewer told him he had killed the victim. The girl friend's sister, Chris Coffin, also testified that Garza told her he had broken into the employer's house through a basement window and "robbed" it, but denied killing the victim.

Garza testified that the Coffins, Brewer, Madsen, and O'Connor all lied and committed perjury in their testimony, and expressed the view that he was the casualty of a conspiracy to convict him, as only he was telling the truth.[3]

Garza was 16 years old when he committed the crimes leading to his convictions. His murder conviction was based upon

[3] *Id.* at 937-43, 492 N.W.2d at 37-41.

felony murder.[4] Garza was sentenced to life imprisonment on the murder conviction and was given a consecutive sentence of 6⅔ to 20 years' imprisonment on the use conviction. As stated earlier, we affirmed his convictions and sentences on direct appeal.[5]

In 2013, Garza filed a motion for postconviction relief seeking resentencing on his murder conviction pursuant to *Miller*.[6] In *Miller*, the U.S. Supreme Court held that a mandatory sentence of life imprisonment without parole for one who commits a homicide while under the age of 18 violates the Eighth Amendment. We determined that *Miller* applied retroactively in *State v. Mantich*.[7]

In Garza's postconviction case, the district court applied *Miller* and *Mantich* and granted postconviction relief in the form of resentencing on the murder conviction.[8] No appeal was taken from that order.

To facilitate resentencing, an evidentiary hearing was held before the district court. Garza offered three exhibits: (1) Department of Correctional Services reclassification action forms, (2) various certificates of achievement he earned while in custody, and (3) the deposition of a neuropsychologist who testified generally about adolescent brain development. Garza also offered testimony of a licensed psychologist who evaluated Garza in preparation for resentencing. The psychologist testified that while in prison, Garza has taken advantage of programs available to him, been both involved and a leader in a program which seeks to reduce recidivism by preparing inmates for successful release, mentored younger inmates, earned his diploma through the GED

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[4] See Neb. Rev. Stat. § 28-303 (Reissue 1989).

[5] *State v. Garza, supra* note 2.

[6] *Miller v. Alabama, supra* note 1.

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

[8] See, *Miller v. Alabama, supra* note 1; *State v. Mantich, supra* note 7.

program, completed a legal research class, and performed several jobs, some of which require earning trust because sharp objects are involved.

While incarcerated, Garza has amassed 182 misconduct reports. As he has grown older and matured, the reports have decreased in frequency and severity. The psychologist testified that young inmates often have a higher number of misconduct reports because they have to prove themselves but that the misconduct reports usually lessen as an inmate establishes himself or herself as someone who cannot be taken advantage of. The psychologist testified that Garza has qualified for "community custody" status every year since 2006 and opined that Garza is at low risk for future acts of violence. At the conclusion of the evidentiary hearing, the district court ordered preparation of a new presentence investigation report and set the case for resentencing.

At the resentencing hearing, the State asked the court to impose a sentence "in the realm of the maximum sentence" allowed by law. The State also reminded the court that Garza's codefendant, who was 18 at the time of the murder, is serving a life sentence. Garza's counsel asked the court to impose a sentence that would make Garza parole eligible "if not [that day], in the very near future." The court also heard remarks from the employer's daughter, now an adult, who spoke about how she and Christina O'Day's family had been affected by the murder. Garza did not make a statement at the resentencing hearing, but submitted a written statement that was included in the presentence report in which he admitted "participat[ing] in the robbery, rape, and murder of Christin[a] O'Day." The report also indicated Garza expressed remorse for his actions.

The sentencing judge stated he had reviewed the presentence report, the trial transcript and exhibits, the police reports, the letters of support offered on behalf of Garza and O'Day, and the mitigating evidence offered by Garza at the evidentiary hearing pursuant to Neb. Rev. Stat. § 28-105.02(2) (Reissue

2016). The court acknowledged and gave credence to Garza's efforts to rehabilitate himself while in prison, but stated it also had "to balance the nature of the offense and what was done to that young lady." The court then sentenced Garza to 90 to 90 years' imprisonment on the first degree murder conviction. That sentence was ordered to be served consecutively to the previously imposed sentence of 6⅔ to 20 years' imprisonment for use of a weapon to commit a felony. The court advised Garza that, assuming he lost no good time, he would be eligible for parole after serving 48 years 4 months and would be mandatorily discharged after 55 years. Garza was given credit for 9,440 days previously served. He timely appeals.

ASSIGNMENT OF ERROR

Garza's sole assignment of error is that the district court abused its discretion by imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[9] A judicial abuse of discretion exists when the reason 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.[10]

ANALYSIS

Garza presents several arguments in support of his claim that his murder sentence is excessive. First, he contends that his 90-to-90-year sentence of imprisonment amounts to a "de facto life sentence" in violation of his rights under the Eighth Amendment and Due Process Clause.[11] In that regard, he argues that while *Miller* did not categorically ban the punishment of life imprisonment without parole for minors, it did

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[9] *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016).

[10] *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

[11] Brief for appellant at 15.

note that such a sentence should be "uncommon."[12] Garza also argues that when the sentencing court imposed the 90-to-90-year sentence, it failed to make a specific finding that Garza was that "'rare juvenile offender whose crime reflects irreparable corruption'" as opposed to "'transient immaturity.'"[13] We address each argument in turn.

In *Miller*, the U.S. Supreme Court held the Eighth Amendment forbids a state sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender convicted of homicide. The *Miller* court reached its conclusion by applying two lines of precedent. First, the Court recognized two previous juvenile cases, *Graham v. Florida*[14] and *Roper v. Simmons*.[15] *Graham* held it violates the Eighth Amendment to sentence a juvenile to life imprisonment without parole for a nonhomicide offense. *Roper* held it violates the Eighth Amendment to sentence a juvenile to death. Both *Graham* and *Roper* announced categorical bans on certain sentencing practices.

In *Mantich*, we held that *Miller* applied retroactively and that therefore, any juvenile sentenced to mandatory life imprisonment without parole could have his or her sentence vacated and the cause remanded for resentencing.[16] We also recognized in *Mantich* that *Miller* did not "categorically bar" the imposition of a sentence of life imprisonment without parole, but, instead, "held that a [sentencing court] must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile" convicted of a homicide.[17]

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[12] See *Miller v. Alabama, supra* note 1, 567 U.S. at 479.

[13] See *id.*, 567 U.S. at 479-80.

[14] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[15] *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[16] *Miller v. Alabama, supra* note 1; *State v. Mantich, supra* note 7.

[17] *State v. Mantich, supra* note 7, 287 Neb. at 339-40, 842 N.W.2d at 730.

In response to *Miller*, the Nebraska Legislature amended the sentencing laws for juveniles convicted of first degree murder.[18] Those amendments changed the possible penalty for a juvenile convicted of first degree murder from a mandatory sentence of life imprisonment to a "maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment."[19] The Legislature also mandated that in determining the sentence for a juvenile convicted of first degree murder, the sentencing judge "shall consider mitigating factors which led to the commission of the offense."[20]

It is against this backdrop that Garza appeals his sentence as excessive. He describes his sentence as a "de facto life sentence" because he will not be eligible for parole until he is 64 years old and will not complete his sentence until he is 71.[21] He argues that he entered prison at age 16 and that most of his adult life will be spent behind bars.

[3] We conclude that Garza's characterization of his sentence as a de facto life sentence is immaterial to our analysis of whether his sentence is excessive. Garza was convicted of felony murder, and as we recently held on appeal from a *Miller* resentencing in *State v. Mantich*,[22] felony murder is a homicide offense. And when a juvenile is convicted of a homicide offense, our analysis is guided by *Miller*, not *Graham*.[23] As we explained in the recent *Mantich* opinion, "under *Miller* a juvenile defendant may be sentenced to life imprisonment

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[18] See § 28-105.02.

[19] § 28-105.02(1).

[20] § 28-105.02(2).

[21] Brief for appellant at 15.

[22] *State v. Mantich, ante* p. 407, 888 N.W.2d 376 (2016).

[23] *Id*. See, *Miller v. Alabama, supra* note 1; *Graham v. Florida, supra* note 14.

without parole, [so] it is immaterial whether the sentence imposed . . . was a de facto life sentence."[24]

Garza also argues the sentencing court failed to make a specific factual finding of "irreparable corruption"[25] before imposing the sentence of 90 to 90 years' imprisonment. His argument is based in part on the statement in *Montgomery v. Louisiana*,[26] quoting *Miller*, that "life without parole is excessive for all but '"the rare juvenile offender whose crime reflects irreparable corruption."'" We note that recently, in *Tatum v. Arizona*,[27] the U.S. Supreme Court repeated this quote from *Montgomery* when it remanded several first degree murder cases for reconsideration. The cases involved juveniles who were sentenced to life imprisonment without parole, were resentenced after *Miller*, and, upon resentencing, were again given life imprisonment without parole. The Court in *Tatum* vacated all the life sentences and directed that upon remand, the sentencing courts should "address[] the question *Miller* and *Montgomery* require a sentencer to ask: whether the [juvenile] was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility'" as opposed to those "whose crime reflects unfortunate yet transient immaturity."[28]

Both *Miller* and *Tatum* dealt with juvenile defendants who had been sentenced, or resentenced, to life imprisonment without parole for murder. Garza, in contrast, was resentenced to a term of years and is eligible for parole. The requirements of *Miller* were met when Garza was resentenced.

Because Garza was not sentenced to life imprisonment without parole, we find no merit to his argument that the

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[24] *State v. Mantich, supra* note 22, *ante* at 415-16, 888 N.W.2d at 383.

[25] Brief for appellant at 18. See *Miller v. Alabama, supra* note 1.

[26] *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016).

[27] *Tatum v. Arizona*, 580 U.S. 952, 137 S. Ct. 11, 196 L. Ed. 2d 284 (2016).

[28] *Id.*, 137 S. Ct. at 12 (quoting *Montgomery v. Louisiana, supra* note 26).

sentencing court was required by *Miller* or *Tatum* to make a specific finding of "irreparable corruption." We instead analyze Garza's sentence under the familiar standard of review applied to sentences claimed to be excessive.

[4] Garza was convicted of first degree murder, which is a Class IA felony.[29] The penalty for a Class IA felony offense committed by one under the age of 18 years is a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than 40 years' imprisonment.[30] 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.[31]

[5] We have stated that 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.[32]

[6] Additionally, § 28-105.02(2) contains a nonexhaustive list of mitigating factors a sentencing court must consider when imposing a sentence for first degree murder on one who was under the age of 18 when he or she committed the crime:

> In determining the sentence of a convicted person under subsection (1) of this section, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:

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[29] § 28-303(2).

[30] § 28-105.02(1).

[31] *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

[32] *Id.*

(a) The convicted person's age at the time of the offense;

(b) The impetuosity of the convicted person;

(c) The convicted person's family and community environment;

(d) The convicted person's ability to appreciate the risks and consequences of the conduct;

(e) The convicted person's intellectual capacity; and

(f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

[7] We have long held that in considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors.[33] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.[34]

In resentencing Garza, the district court reviewed the presentence report, the trial transcript and exhibits, the police reports, and all of the information submitted on behalf of Garza and O'Day. The court considered all of the mitigating factors required by § 28-105.02 and acknowledged and gave credence to the changes Garza had made in his life while imprisoned. The court ultimately concluded a lengthy term of imprisonment was warranted due to the nature of Garza's crime and the circumstances surrounding its commission.

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[33] *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[34] *Id.*

The record supports the court's conclusion that a lengthy term of imprisonment is warranted. The evidence does not suggest Garza acted impulsively; to the contrary, the evidence shows Garza was able to appreciate the risks and consequences of his conduct. He carefully planned the attack in advance and spent hours raping, beating, cutting, and strangling O'Day before she died. He then actively tried to conceal the crime, including disposing of property and lying to the police.

When resentencing Garza, the district court considered all of the relevant sentencing factors, including the considerations required by *Miller*[35] and the statutory factors under § 28-105.02. The court then imposed a sentence within the statutory limits and supported by the record. We find no abuse of discretion, and we find no merit to Garza's claim that his sentence is excessive.

CONCLUSION

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

Affirmed.

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[35] *Miller v. Alabama, supra* note 1.

State of Nebraska, appellee, v. Dustin Chauncey, appellant.

890 N.W.2d 453

Filed January 6, 2017. No. S-15-405.

1. **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.
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. **Trial: Rules of Evidence.** A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value.
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. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.
6. **Motions to Dismiss: Appeal and Error.** Any error in a ruling on a motion to dismiss under Neb. Rev. Stat. § 29-1418(3) (Reissue 2016) based on the sufficiency of evidence before a grand jury is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
7. **Prosecuting Attorneys: Appeal and Error.** The decision to appoint a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, such ruling will not be disturbed on appeal.

8. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
9. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
10. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
11. ____: ____. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.
12. **Criminal Law: Motions for Mistrial: Proof: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
13. **Motions for Mistrial: Motions to Strike: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.

Appeal from the District Court for Scotts Bluff County: Leo Dobrovolny, Judge. Affirmed.

Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

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

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

Miller-Lerman, J.

I. NATURE OF CASE

Following a grand jury investigation into the death of the 2-year-old daughter of Dustin Chauncey's girlfriend, a special prosecutor filed charges against Chauncey. Chauncey appeals

his conviction and sentence in the district court for Scotts Bluff County for intentional child abuse resulting in death. Chauncey assigns numerous errors addressed to the grand jury process and trial rulings. We affirm.

II. STATEMENT OF FACTS

1. Background and Evidence at Trial

On July 11, 2008, police officers responding to a call to a house in Gering, Nebraska, found the body of 2-year-old Juliette Geurts. Juliette had lived in the house with her twin sister, Jaelyn Geurts; their mother, Charyse Geurts; and Chauncey, who was Charyse's boyfriend. Charyse's ex-boyfriend, Brandon Townsend, also lived in the house. When the first police officer entered the house, she saw Charyse on the floor next to Juliette's body, Chauncey pacing back and forth, and Townsend standing in a doorway holding Jaelyn.

Another officer who arrived at the house observed discoloration on Juliette's abdomen and a laceration on the left side of her head. An autopsy later revealed that Juliette's death had been caused by blunt force trauma and that the manner of death was homicide. The pathologist who conducted the autopsy testified that Juliette had been beaten to death and that she had sustained several injuries—including a subarachnoid hemorrhage in the brain, a lacerated liver, and bleeding into the mesentery—any one of which might have caused her death.

The first officer who had arrived at the house was unable to immediately communicate with Charyse and Chauncey because both were too emotional. Chauncey had identified himself to the officer using the first name "Roy," but the officer later learned that his first name was actually "Dustin." The officer was able to communicate with Townsend.

As part of the investigation of Juliette's death, the clothing she was wearing was sent to the state crime laboratory for testing. A stain on Juliette's shirt, which was found to include a sperm fraction and a nonsperm fraction, was tested

for DNA. It was determined that Chauncey was included as a major contributor to the DNA of the sperm fraction and a contributor to the DNA of the nonsperm fraction.

Townsend testified as follows at the trial in this case. Townsend had briefly dated Charyse before she began dating Chauncey, and he lived at the house with them in order to care for Juliette and Jaelyn. On the evening of July 10, 2008, Townsend, Charyse, Chauncey, and the girls had all attended a carnival. Juliette did not feel well at the carnival, and after they all returned home, Townsend put the girls to bed. Charyse went to check on the girls around 2 a.m. and discovered that Juliette was having a seizure. Charyse and Townsend decided that Juliette should be taken to the hospital. Chauncey at first resisted the idea of taking her to the hospital, but eventually Charyse and Chauncey took her to the hospital while Townsend stayed at home with Jaelyn. After they left, Townsend put Jaelyn back to bed and he went to the couch where he "end[ed] up laying down and passing out."

Townsend testified that the next thing he remembered was waking up around 11 a.m. the next day. Shortly after waking, he went to check on the girls and found Jaelyn already awake. He turned to wake up Juliette, and saw that her "bed had almost been crushed down to the ground . . . almost as if something really heavy had been on the bed." He saw Juliette "kind of like in the bed folding into it [a]nd, she was very purple and very stiff." Townsend went and picked up Juliette, while attempting to prevent Jaelyn from seeing Juliette's condition. Townsend carried Juliette to the room in which Charyse and Chauncey were sleeping. When Townsend entered the room, Chauncey jumped up and asked Townsend what was going on. Townsend told them that there was something wrong with Juliette. Chauncey grabbed Juliette from Townsend's arms and held her at arm's length from himself. Townsend heard Chauncey say, "'Oh, my fucking God, she is fucking dead. I need to fucking leave.'" Chauncey handed Juliette

back to Townsend, who took her to the living room and set her on the floor. Townsend tried to find a telephone, but Charyse was "very hysterical," and Chauncey said he could not find one. Townsend ran to a neighbor's house and asked them to call the police because he thought Juliette was dead. He returned to the house and saw that Charyse was crying and screaming Juliette's name, while Chauncey was getting dressed. Townsend testified that "[t]here was a discussion if anybody asked [Chauncey's] name, his name is not Dustin, his name is Roy."

In addition to Townsend's testimony described above and other evidence presented at trial, the State called Paul Cardwell as a witness. In 2014, Cardwell had been housed in the same unit as Chauncey at the Scotts Bluff County jail. Prior to questioning Cardwell, the State read the parties' stipulation to the jury to the effect that Cardwell had been convicted in federal court of three felony offenses involving fraud and that he had the potential of having his sentence reduced if the federal court determined that he had "provided substantial assistance to the government." Cardwell testified that in August 2014, Chauncey had discussed his case with Cardwell and another prisoner. Chauncey told them about the charges for which he was in jail and described the events of July 11, 2008, to them.

Cardwell's testimony regarding Chauncey's jailhouse statements was as follows: After Charyse and Chauncey had returned from taking Juliette to the hospital, they were having sex in the bedroom when Juliette came to the door of the bedroom asking for Charyse because she did not feel well. Chauncey was angry that Juliette had interrupted them, so he got out of bed and kicked her in the stomach. While he was still naked, he picked up Juliette to return her to her room, and he speculated that his sperm got on her shirt when he picked her up. Juliette was crying because of the kick to the stomach; because Chauncey wanted "her to shut up," he punched her in the upper chest area. Chauncey returned to

finish having sex with Charyse, and then he went to sleep. He was awoken around 11 a.m. by shouts that Juliette was not breathing. As they waited for police to arrive, Charyse and Chauncey decided that they would lie about his name because he was wanted on outstanding warrants.

2. Grand Jury Proceedings

Although an autopsy was conducted on Juliette's body on July 12, 2008, and the pathologist concluded that the manner of death was homicide, the State had not filed charges against anyone in connection with Juliette's death as of mid-2012. On July 11, 2012, certain community petitioners filed a petition in the district court for Scotts Bluff County for a grand jury investigation into Juliette's death. On August 8, the court appointed James L. Zimmerman as a special prosecutor. In the appointment order, the court found that this was "an appropriate case to appoint a special prosecutor to investigate and prosecute this matter."

Zimmerman presented the case to a grand jury. On January 14, 2013, Zimmerman filed an indictment, signed by the foreperson of the grand jury, in the district court. The indictment charged Chauncey with three counts: count I, intentional child abuse resulting in death; count II, manslaughter; and count III, providing false information to a peace officer. Counts II and III were dismissed prior to trial because the statute of limitations had expired on the offenses. The portion of the indictment charging child abuse resulting in death read as follows:

> **COUNT I**
> **Sec. 28-707(1)(b)**
> **Penalty Sec. 28-707(6)**
>
> That DUSTIN CHAUNCEY on or about July 11, 2008, then in Scotts Bluff County, Nebraska did knowingly or intentionally cruelly punish a minor child, Juliette Geurts, which resulted in the death of such child contrary to the statutes of the State of Nebraska.

3. Pretrial Motions

On the motion of the Scotts Bluff County Attorney, the district court appointed Zimmerman, under the authority of Neb. Rev. Stat. § 23-1204.01 (Reissue 2012), to act as a special deputy county attorney in the prosecution of Chauncey.

On February 5, 2014, Chauncey filed a motion to dismiss the indictment pursuant to Neb. Rev. Stat. § 29-1418(3) (Reissue 2016) "for the reason that the grand jury finding of probable cause is not supported by the record." Although the grand jury had considered additional evidence, Chauncey requested that the court review only Townsend's testimony to the grand jury in order to determine whether there was evidence supporting the probable cause finding. The State agreed to the request.

After reviewing Townsend's grand jury testimony, the court concluded that the evidence showed probable cause that Chauncey committed intentional child abuse resulting in death. The court therefore overruled Chauncey's motion to dismiss that count. In reaching this conclusion, the court stated that the standard for determining whether probable cause existed for a grand jury indictment was the same as the standard for a plea in abatement challenging the sufficiency of evidence at a preliminary hearing; to wit, the test is not whether guilt is established beyond a reasonable doubt, but whether the evidence "renders the charge against the accused within reasonable probabilities." The court's rulings with regard to the two other counts in the indictment are not set forth herein because those counts were otherwise dismissed prior to trial.

On August 1, 2014, Chauncey filed a motion to quash the indictment. He listed three grounds in support of the motion: (1) The appointment of Zimmerman as special prosecutor for the grand jury proceeding was improper; (2) regarding count I, Zimmerman incorrectly advised the grand jury to review a 2012 version of the statute setting forth the offense of child abuse resulting in death, when the correct version of the statute was the one in effect in 2008 when the alleged

offense occurred, see Neb. Rev. Stat. § 28-707 (Reissue 2008 & Cum. Supp. 2012); and (3) the statute of limitations had run on counts II and III. As noted, the court ultimately dismissed counts II and III based on the statute of limitations. However, the court found that Chauncey's first and second grounds for the motion to quash were without merit and it therefore overruled his motion to quash count I—intentional child abuse resulting in death.

With regard to the appointment of Zimmerman as special prosecutor for the grand jury proceeding, the court noted that Neb. Rev. Stat. § 23-1205 (Reissue 2012) provides that a district court may appoint an acting county attorney "[d]ue to the absence, sickness, disability, or conflict of interest of the county attorney and his or her deputies . . . ." The court found that a conflict of interest existed in this case because until the petition for a grand jury investigation into Juliette's death was filed in July 2012, the county attorney's office had declined to prosecute anyone for Juliette's death since its occurrence in July 2008. The court therefore found that the appointment of Zimmerman was proper.

With regard to Zimmerman's advice regarding the different versions of § 28-707, the court noted that count I as charged in the indictment regarding intentional child abuse resulting in death used the correct language of § 28-707(6) based on the 2008 version. The court stated, "Whether the grand jury may have been given erroneous advice, or may have followed erroneous advice, does not matter if the indicted offense is supported by the evidence, which it is."

4. Motion in Limine and Evidence Regarding DNA Sperm Fraction

Prior to trial, Chauncey filed a motion in limine, which in part addressed evidence of DNA testing that showed him to be a major contributor to the sperm fraction that was found on Juliette's shirt. He requested that the State be prohibited from offering or mentioning such evidence during voir dire,

opening statements, or trial without further hearing by the court. He argued that because there was no allegation he had sexually assaulted Juliette, evidence regarding a sperm fraction would be unfairly prejudicial, and that the State could adequately prove his presence at the scene by reference to the nonsperm fraction. The State responded that the sperm fraction would be more probative of Chauncey's identity as the perpetrator; the State's theory was that the nonsperm fraction could have been on Juliette's clothing for some time but the presence of the sperm fraction indicated more recent contact, because sperm is more likely to transfer when wet than when dry. At the conclusion of a hearing on the motion in limine, the court reserved its ruling with regard to DNA evidence related to the sperm fraction until the trial. The court reasoned that the State's arguments regarding the timing of the transfer of samples would need to be developed and considered with respect to foundation before the evidence was received. The court ordered the State to notify the court and the defense in advance of offering such evidence in order to allow time for objections and rulings on the evidence.

During opening statements, the prosecutor stated that the clothing Juliette was wearing was sent to the state laboratory for testing and that "the lab found on the little undershirt some sperm and [it] tested that sperm." Chauncey objected at this point, and the court instructed the jury to disregard the prosecutor's comments about sperm on the shirt. At the conclusion of opening statements, Chauncey moved for a mistrial and argued that the State had violated the court's order when it mentioned the sperm sample. The court overruled Chauncey's motion for mistrial, noting in part that the jury had been specifically advised to disregard the comments regarding the sperm fraction and that the jury had been instructed as a general matter that the comments of counsel were not evidence.

The court overruled another motion for mistrial when the State questioned Cardwell regarding jailhouse statements

Chauncey had made to Cardwell explaining how Chauncey's sperm might have gotten on Juliette's clothing. Finally, with regard to the motion in limine, before the State's DNA expert testified at trial, the court heard arguments by the parties and allowed Chauncey to voir dire the expert. Thereafter, the court overruled the motion in limine and allowed the DNA expert's testimony regarding testing of the sperm fraction.

5. Conclusion of Trial

At the end of the trial, the court entered a judgment of conviction based on the jury's finding that Chauncey was guilty of intentional child abuse resulting in death. The court thereafter sentenced Chauncey to imprisonment for 80 years to life.

Chauncey appeals his conviction and sentence.

III. ASSIGNMENTS OF ERROR

Chauncey claims that the district court erred when it (1) overruled his motion to dismiss the indictment, because the grand jury's finding of probable cause was not supported by the record; (2) overruled his motion to quash the indictment, because (a) the appointment of the special prosecutor was improper and (b) the special prosecutor misled the grand jury with inaccurate advice regarding the applicable law and penalties; (3) overruled his motion in limine to prohibit the State from presenting evidence regarding DNA testing of the sperm fraction; and (4) overruled his motions for mistrial made (a) after the prosecutor mentioned testing of sperm found on Juliette's clothing during opening statements and (b) after the prosecutor questioned Cardwell regarding Chauncey's statements explaining how his sperm might have gotten on Juliette's clothing.

IV. STANDARDS OF REVIEW

[1-4] 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. *State v. Draper,*

ante p. 88, 886 N.W.2d 266 (2016). 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*. A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value. *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015). 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. *Id*.

[5] The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Mitchell*, 294 Neb. 832, 884 N.W.2d 730 (2016).

V. ANALYSIS

1. Grand Jury Proceedings—Motion to Dismiss: Any Error in District Court's Ruling on Chauncey's Motion to Dismiss the Indictment Based on Lack of Probable Cause Was Cured by Finding at Trial of Guilt Beyond a Reasonable Doubt

Chauncey first claims that the district court erred when it overruled his motion to dismiss the indictment on the basis that the grand jury's finding of probable cause to indict was not supported by the grand jury record. As explained below, we conclude that error, if any, in the court's ruling on the motion to dismiss was cured by the trial jury's finding of guilt beyond a reasonable doubt.

Chauncey moved the district court to dismiss the indictment pursuant to § 29-1418(3), which provides as follows:

> The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the

> grand jury finding of probable cause is not supported by the record.

Based on its review of Townsend's grand jury testimony, the court concluded that the record presented to the grand jury supported the grand jury's finding that there was probable cause that Chauncey committed intentional child abuse resulting in death, and it therefore overruled the motion to dismiss the indictment.

Both Chauncey and the State acknowledge in their briefs on appeal that we have not set forth a standard of review of a district court's ruling on a motion to dismiss an indictment under § 29-1418(3), and both parties acknowledge that with respect to the question of proof required, "probable cause" is a flexible standard. With respect to the standard of review, Chauncey urges the standard used to review a ruling on a motion to suppress whereas the State urges the standard used to review a sufficiency of the evidence claim. However, we need not resolve the standards issue, because we conclude that error, if any, in the district court's determination that the grand jury's finding that probable cause was supported by the grand jury record was cured when the trial jury found Chauncey guilty beyond a reasonable doubt.

The State notes that we have held that an error in a ruling on a plea in abatement challenging whether there was sufficient evidence to bind a case over for trial is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence. See *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014). The State suggests we apply the same reasoning to a ruling on a motion to dismiss an indictment for lack of evidence, because there is no meaningful distinction between a probable cause finding after a preliminary hearing and a probable cause finding after a grand jury proceeding. The State's argument finds support in jurisprudence elsewhere.

We note, for example, that Colorado has a statute, Colo. Rev. Stat. Ann. § 16-5-204(4)(k) (West 2016), which uses

the same language as § 29-1418(3). The Supreme Court of Colorado has said that "[t]he district court's function in reviewing the grand jury record pursuant to section 16-5-204(4)(k) is similar to the role of the court at a preliminary hearing in determining the existence or absence of probable cause." *People v. T & S Leasing, Inc.*, 763 P.2d 1049, 1050 (Colo. 1988), citing *People v. Luttrell*, 636 P.2d 712 (Colo. 1981). The Colorado Court of Appeals in *People v. Tyler*, 802 P.2d 1153, 1154-55 (Colo. App. 1990), noted this similarity and the holdings in Colorado precedent that "once a defendant has been found guilty beyond a reasonable doubt, the issue of probable cause found at a *preliminary hearing* becomes moot." The Colorado Court of Appeals in *People v. Tyler* extended this reasoning and concluded that whether there was probable cause before the grand jury became moot after a defendant has been found guilty beyond a reasonable doubt by a trial jury. *Id*.

[6] We agree with the Colorado court's reasoning and apply it here. In Nebraska, pursuant to Neb. Rev. Stat. § 29-1809 (Reissue 2016), a "plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto." A plea in abatement is used to challenge the sufficiency of the evidence at a preliminary hearing; to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it. *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009). Thus, a plea in abatement challenging evidence at a preliminary hearing has a purpose similar to a motion to dismiss under § 29-1418(3) challenging a grand jury's finding of probable cause. Because the purposes of the two procedures are similar, and because error in a ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence, see *State v. Green, supra*, we similarly hold that any error in a ruling on a motion to dismiss under § 29-1418(3) based on the sufficiency of evidence before a grand jury is cured by a

subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.

In the present case, the trial jury found Chauncey guilty beyond a reasonable doubt of intentional child abuse resulting in death. Chauncey does not dispute that there was sufficient evidence to support the conviction. We therefore conclude that error, if any, in the court's ruling on the motion to dismiss for lack of probable cause under § 29-1418(3) was cured by the trial jury's finding of guilt beyond a reasonable doubt. We reject Chauncey's first assignment of error.

2. Grand Jury Proceedings—Motion to Quash: District Court Did Not Err When It Overruled Chauncey's Motion to Quash Indictment Based on Alleged Irregularities and Prosecutorial Misconduct in Grand Jury Proceedings

Chauncey next claims that the district court erred when it overruled his motion to quash the indictment. He argues that the court erred when it rejected two of his arguments: (1) that the appointment of the special prosecutor was not proper and (2) that the special prosecutor gave the grand jury erroneous advice regarding the applicable law and penalties. He contends that these errors amounted to "irregularities and prosecutorial misconduct." Brief for appellant at 38. We conclude that neither claim has merit and that the district court did not err when it overruled the motion to quash.

As a preliminary matter, before addressing the merits of each claim, we note that similar to its arguments regarding the motion to dismiss based on the existence of probable cause, the State contends that any errors in the grand jury proceedings raised by the motion to quash were effectively cured or rendered harmless by the trial jury's finding of guilt beyond a reasonable doubt. And, as a further preliminary matter, we note that these issues were brought on by a motion to quash. It has been observed that generally, a motion in the nature to

dismiss is permitted in criminal cases in various forms, including, inter alia, a motion to quash and a plea in abatement. See *State v. Nearhood*, 2 Neb. App. 915, 518 N.W.2d 165 (1994). See, e.g., Neb. Rev. Stat. § 29-1808 (Reissue 2016) and §§ 29-1418(4) and 29-1809. No question has been raised regarding the form of Chauncey's motion, and because of our disposition, we proceed on the basis that the issues were properly before the court.

As explained below, we determine that the district court did not err when it appointed a special prosecutor, nor was there misconduct in the prosecutor's legal advice to the grand jury. Because there was nothing to cure, we need not consider the State's argument that the errors that were the subject of the motion to quash were rendered harmless by the trial jury's finding of guilt beyond a reasonable doubt.

(a) Appointment of Special Prosecutor

As the court noted in its order overruling the motion to quash, § 23-1205 provides that a district court may appoint an acting county attorney in any investigation, appearance, or trial "[d]ue to the absence, sickness, disability, or conflict of interest of the county attorney and his or her deputies . . . ." In this case, the court found a "disability or conflict" under § 23-1205. In its order overruling Chauncey's motion to quash, the court reasoned that the county attorney's office had a conflict of interest under § 23-1205, because until the petition for a grand jury investigation into Juliette's death was filed in July 2012, the county attorney's office had declined to prosecute anyone in the 4 years since her death. The inference was that the county attorney did not have confidence in the sufficiency of his evidence.

At the hearing on the motion to quash, the court received evidence, including an affidavit offered by the State, prepared by the person who was the county attorney at the time the grand jury was convened. The county attorney stated, inter alia, that he was aware that one of the primary organizers

of the petition to call the grand jury had been vocal in her dissatisfaction with his office regarding the investigation of Juliette's death. The appointment of a special prosecutor would remove this perceived unfairness and promote confidence in the judicial system. See *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

[7] The decision to appoint a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, such ruling will not be disturbed on appeal. See *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). We determine that the district court did not abuse its discretion when it found that the county attorney's office had a disability or conflict of interest as broadly understood under § 23-1205 and appointed the special prosecutor. We therefore conclude that the court did not err when it overruled the motion to quash the indictment on such basis.

(b) Special Prosecutor's Advice to Grand Jury

Chauncey asserts that the special prosecutor incorrectly advised the grand jury to review the 2012 version of § 28-707, whereas the correct version of the statute was the 2008 version in effect when the offense occurred. In its order overruling the motion to quash, the district court noted that the charge in the indictment regarding child abuse resulting in death used language consistent with § 28-707 from the 2008 version. The record also shows that the foreperson signed the indictment containing the correct version of § 28-707, intentional child abuse resulting in death.

Chauncey notes that the record of the grand jury proceeding indicates that the special prosecutor provided the grand jury with both the 2008 and the 2012 versions of § 28-707 and commented thereon. Chauncey argues that it was error for the special prosecutor to advise the grand jury to consult the 2012 version, because the alleged crime occurred in 2008 and any amendments made after 2008 would not be applicable.

As the court noted, the language in the indictment reflected the correct language from the 2008 version, which provides in relevant part as follows:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> . . . .
>
> (b) Cruelly confined or cruelly punished;
>
> . . . .
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

The indictment that was filed as a result of the grand jury proceeding provided as follows with regard to the charge for child abuse resulting in death:

> **COUNT I**
> **Sec. 28-707(1)(b)**
> **Penalty Sec. 28-707(6)**
>
> That DUSTIN CHAUNCEY on or about July 11, 2008, then in Scotts Bluff County, Nebraska did knowingly or intentionally cruelly punish a minor child, Juliette Geurts, which resulted in the death of such child contrary to the statutes of the State of Nebraska.

The charge followed the language of the statute and stated that the crime charged was "committed knowingly or intentionally [and] resulted in the death of such child." The indictment did not include the word "negligently." The indictment did not specify the grading of the offense, but the reference to "**Penalty Sec. 28-707(6)**" and the inclusion of the language "knowingly or intentionally" and "resulted in the death of such child" indicate that the offense was charged as a Class IB felony under § 28-707(6) of the 2008 version.

Although the indictment followed the 2008 language of § 28-707(1)(b), Chauncey argues that amendments reflected in the 2012 version—possibly relied on by the grand jury—could have affected how the grand jury viewed the evidence and

its determination of whether the evidence supported a charge under the statute. Intentional child abuse resulting in death remained a Class IB felony under both versions. However, the penalty subsection (6) in the 2008 version had been moved to subsection (8), and the new penalty subsection (6) addressed negligent rather than knowing and intentional child abuse resulting in death.

Chauncey argues that the grand jury's having both versions might have caused confusion, because although the grand jury agreed to a charge with a penalty under § 28-707(6), some jurors may have been referring to the 2008 version of penalty subsection (6), and some may have been referring to the 2012 version of penalty subsection (6). Chauncey also notes that the 2012 version of § 28-707 included language defining "negligently" which was not included in the 2008 version, and he contends that the special prosecutor gave the grand jury a definition of "reckless" that did not follow the statutory language.

Chauncey acknowledges that there is little precedent in this state regarding challenges to an indictment based on alleged irregularities in the grand jury proceedings, and he refers us to the U.S. Supreme Court standard for review of alleged irregularities, including prosecutorial misconduct in grand jury proceedings applicable in federal courts. In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988), the Court held that where dismissal is sought for nonconstitutional error, "as a general matter, a district court may not dismiss an indictment for errors in the grand jury proceedings unless such errors prejudiced the defendants." The Court further stated that "[t]he prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless." *Id.*, 487 U.S. at 263.

For completeness, we note that according to the U.S. Supreme Court in *Bank of Nova Scotia*, 487 U.S. at 257, a presumption of prejudice will be allowed where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair." The Court gave as examples racial discrimination in the selection of grand jurors, *Vazquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986), and the exclusion of women as grand jurors, *Ballard v. United States*, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 2d 181 (1946). This presumption of prejudice is not applicable to the instant challenge.

Under the standards from *Bank of Nova Scotia, supra*, which apply to this case, we conclude that the district court did not err when it rejected Chauncey's claim of error related to the special prosecutor's conduct and advice. Despite the potential for confusion regarding the different versions of § 28-707, we do not believe that such potential creates grave doubt as to whether the grand jury agreed on the offense on which it decided to indict Chauncey. The indictment clearly charged Chauncey with "knowingly or intentionally" committing the enumerated acts rather than committing such acts negligently or recklessly. The language in the indictment charging acts done "knowingly or intentionally" make clear that the grand jury agreed on and referred to "**Penalty Sec. 28-707(6)**" of the 2008 version. Furthermore, because the indictment did not charge the crime as being committed "negligently" or "recklessly," advice regarding the definition of those terms was not likely to have affected the jury's decision to charge the offense as having been committed "knowingly or intentionally." Chauncey's challenge regarding the proper statute before the grand jury does not, in our view, indicate that such occurrence substantially influenced the grand jury's decisions, nor was Chauncey prejudiced thereby.

In sum, we conclude that the court did not err when it overruled the motion to quash the indictment.

3. District Court Did Not Err When It Overruled Motion In Limine to Prohibit Evidence Regarding DNA Testing of Sperm Fraction

Chauncey next claims that the district court erred when it overruled his motion in limine in which he sought to prohibit the State from presenting evidence regarding DNA testing of the sperm fraction found on Juliette's shirt. He argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, because the reference to sperm might cause the jury to think this case involved the sexual assault of a child. We reject this assignment of error.

As noted earlier in this opinion, the district court reserved ruling on Chauncey's pretrial motion in limine regarding DNA evidence related to the sperm fraction until the trial. Before the State's DNA expert testified at trial, the court heard arguments by the parties and allowed Chauncey to voir dire the expert. Thereafter, the court found the DNA evidence relevant, and as we read the court's ruling, its probative value outweighed the danger of prejudice. The court overruled the motion in limine. The court found that the evidence was relevant in part because it went to the question of "[e]xactly when" the sample was deposited onto Juliette's shirt. The court stated that because Chauncey was not being charged with sexual assault of a child, the court trusted that the jury would focus on the elements of the crime being charged and make its judgment based on the evidence rather than on speculation or conjecture.

Chauncey contends the evidence should not have been allowed, based on lack of probative value and the potential for unfair prejudice. He argues the evidence lacked probative value because the DNA expert could not establish when the sample was transferred to the shirt, and he argues unfair prejudice because the mention of a sperm sample would inappropriately cause the jurors to think of sexual assault.

[8-11] Evidence is relevant if it tends in any degree to alter the probability of a material fact. *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016). Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Grant, supra*. Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party. *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016). Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *Id*. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis. *Id*.

Chauncey contends that the district court "acquiesced the 403 balancing role to the jury." Brief for appellant at 46. We disagree. Chauncey's argument misperceives the district court's reasoning, particularly the court's statement that it would trust the jury to focus on the crime being charged rather than speculating about sexual assault. We read the court's comment not as having acquiesced the balancing to the jury, but, instead, as reflecting that it had balanced probative value against the danger of unfair prejudice before determining that the evidence could be presented to the jury, which would be expected to focus on the charged crime.

We further note in regard to both probative value and unfair prejudice that the court's ruling on the motion in limine came after Cardwell had testified about Chauncey's jailhouse statements, including how Chauncey's sperm may have gotten onto Juliette's clothing. That testimony increased the relevance of the DNA evidence as to both the identity of the perpetrator and the timing of the crime. Cardwell's testimony preceding admission of the DNA evidence likely lessened the danger of unfair prejudice because the jurors had an explanation for how the sperm got onto Juliette's clothing. The court

did not abuse its discretion when it overruled the motion in limine, and we reject this assignment of error.

4. Motions for Mistrial—District Court Did Not Abuse Its Discretion When It Overruled Motions for Mistrial

Chauncey finally claims that the district court erred when it overruled his motion for mistrial after the prosecutor mentioned during opening statements the testing of sperm found on Juliette's clothing and his motion for mistrial when the prosecutor questioned Cardwell regarding Chauncey's statements explaining how his sperm might have gotten on Juliette's clothing. The bases for Chauncey's argument are that the State violated the court's pretrial rulings and that the DNA evidence was wrongly admitted. We reject Chauncey's argument that the district court erred when it overruled his motions for mistrial.

Prior to trial, the district court reserved ruling on Chauncey's motion in limine with regard to the sperm fraction. At that time, the court ordered the State to notify the court and the defense in advance of offering such evidence in order to allow Chauncey to object and the court to rule on the admissibility of the evidence. As noted in the immediately preceding section of this opinion, the court eventually overruled the motion in limine prior to the testimony of the State's DNA expert. However, as noted, on two occasions during the trial prior to that ruling, Chauncey had objected and moved for a mistrial.

[12] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Mitchell*, 294 Neb. 832, 884 N.W.2d 730 (2016). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id*.

(a) Opening Statement Regarding Sperm

The prosecutor stated during opening statements that the clothing Juliette was wearing was sent to the state laboratory for testing and that "the lab found on the little undershirt some sperm and [it] tested that sperm." Chauncey objected at this point, and the court instructed the jury to disregard the prosecutor's comments about sperm on the shirt. At the conclusion of opening statements, Chauncey moved for a mistrial and argued that the State had violated the court's order when it mentioned testing the sperm. The court overruled Chauncey's motion for mistrial, noting in part that the jury had been advised to disregard the specific comments regarding sperm and that the jury had generally been instructed that the comments of counsel were not evidence.

[13] With regard to the prosecutor's statement during opening statements, the court advised the jury to disregard the specific comments regarding sperm. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *Id*. We believe the court's admonishment was sufficient and the overruling of Chauncey's motion for mistrial was not error.

(b) Cardwell's Testimony Regarding Sperm

The court overruled another motion for mistrial when the State questioned Cardwell regarding jailhouse statements Chauncey had made to Cardwell explaining how Chauncey's sperm might have gotten on Juliette's clothing. The prosecutor asked Cardwell, "[D]o you recall in any conversation where the issue of semen or sperm was mentioned?" Chauncey objected on the basis that the court had not yet ruled on his motion in limine. The court excused the jury in order to hear argument from the parties. In addition to objecting to the questioning, Chauncey moved for a mistrial. After argument, the

court overruled Chauncey's objection and his motion for mistrial. The State continued questioning Cardwell, who testified that Chauncey said that his sperm would have been on Juliette because he had been having intercourse with Charyse immediately before he picked up Juliette.

With regard to the questioning of Cardwell, we note that when the court overruled the motion for mistrial, it also determined that Cardwell's testimony was admissible in order to establish foundation for the DNA testing evidence. The court ultimately determined that the evidence regarding DNA testing of the sperm fraction was admissible, and in the previous section of this opinion, we concluded that the district court did not abuse its discretion in that ruling. Because the DNA evidence was ultimately determined admissible, Chauncey has not shown that the State's questioning of Cardwell regarding the sperm prejudiced him. The overruling of Chauncey's motion for mistrial was not error.

VI. CONCLUSION

Having rejected Chauncey's assignments of error, we affirm his conviction and sentence.

Affirmed.

State of Nebraska, appellee, v. Felix Arizola, appellant.

890 N.W.2d 770

Filed January 6, 2017. No. S-16-077.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
4. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
5. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
6. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
7. **Constitutional Law: Statutes: Pleadings.** When a statute is utilized by the court in sentencing a defendant, the defendant is not required

to challenge the constitutionality of this statute in his or her motion to quash.

8. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
9. **Judgments: Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
10. **Constitutional Law: Statutes.** The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and may differ as to its application.
11. ____: ____. A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.
12. **Due Process.** The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.
13. **Criminal Law: Due Process: Notice.** In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself.
14. **Sentences: Due Process.** Due process requires that a sentencing judge have relevant information as the basis for a sentence imposed on a convicted defendant.
15. **Sentences: Evidence.** In a sentencing hearing, a court generally has broad discretion concerning the source of information and the type of information to be considered.
16. **Sentences: Evidence: Presentence Reports.** A sentencing judge may consider relevant information contained in a presentence report on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted.
17. **Prior Convictions: Records.** A certified or duly authenticated copy of the former judgment, from any court in which such judgment 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.

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

Joe Nigro, Lancaster County Public Defender, and Nathan Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ., and Inbody, Judge.

Heavican, C.J.

I. INTRODUCTION

Felix Arizola was found guilty of refusal of a chemical test, with two prior convictions, a Class IIIA felony under Neb. Rev. Stat. §§ 60-6,197 (Cum. Supp. 2016) and 60-6,197.03(6) (Cum. Supp. 2014). Arizola filed various pretrial and posttrial motions, including a motion to suppress, a motion to quash, a motion for plea in abatement, a second motion to quash, and a motion for plea in bar. All were denied.

The primary issues on appeal are Arizola's contention that the traffic stop was conducted without reasonable suspicion and hence should be suppressed and that Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2016) and related statutes are unconstitutional because they are void for vagueness. Arizola also argues that he was denied due process when he was denied probation under § 60-6,197.09, because the lower court failed to give him a meaningful opportunity to challenge whether he committed another driving under the influence (DUI) offense for which he was participating in criminal proceedings when the present violation was committed. This appeal is a companion case to *State v. Wagner*.[1] We affirm.

II. BACKGROUND

1. Initial Stop

On June 18, 2014, at approximately 11:46 p.m., Officer Joseph Villamonte of the Lincoln Police Department observed

[1] *State v. Wagner, ante* p. 132, 888 N.W.2d 357 (2016).

a vehicle driving westbound in the 3600 block of Adams Street. Villamonte ran the license plate number through the police department's information system to check for suspension or warrants. The license plate was registered to Arizola, who had been cited while driving the vehicle in 2013. The police report did not indicate the reason for this citation, but the record otherwise shows that Arizola was cited in 2013 for improper registration and for violating the speed limit. The system also indicated that Arizola's operator's license had been revoked. Villamonte testified that he pulled his cruiser alongside the passenger side of the vehicle at a stoplight and positively identified Arizola as the driver from his "book-in" and "DMV" photographs contained in the system.

Villamonte then initiated a traffic stop of Arizola's vehicle. He informed Arizola of the reason for the stop and requested identification. Arizola provided a Nebraska identification card. After Villamonte received identification from Arizola, he ran further checks on Arizola through the system. Villamonte checked Arizola's operator's license status and discovered that Arizola had two prior DUI convictions from 2002 and 2008, multiple convictions for driving under suspension, and a failure to appear conviction.

Villamonte asked Arizola to step out of the vehicle and proceeded to conduct a search of Arizola's pockets. Arizola smelled of alcohol, had watery and bloodshot eyes, and made statements that caused Villamonte to believe Arizola was impaired. Another officer who had arrived at the scene observed an open container of beer with a small amount of alcohol in it on the driver's side floorboard of Arizola's vehicle. A search was then conducted of the vehicle. The beer bottle was cool to the touch. A review of the record indicates that the beer bottle was the only item seized during the stop.

Villamonte took Arizola into custody for driving under a revoked license and transported Arizola to the police station. Upon arrival at the police station, Arizola was advised that he

would also be processed for a DUI. Villamonte requested that Arizola take a breath test, but Arizola refused.

2. Criminal Charges and Pretrial Motions

On August 22, 2014, Arizola was charged under Neb. Rev. Stat. § 60-6,196 (Reissue 2010) and § 60-6,197.03(6) with DUI with refusal of a chemical test, with two prior convictions, a Class IIIA felony. The two prior convictions included to enhance the sentence were a DUI on or about July 13, 2007, and another occurring on or about October 20, 2001.

On December 3, 2014, Arizola filed a motion to suppress his statements, the stop, and any evidence seized from that stop. Arizola alleged that the officers lacked probable cause or a reasonable articulable suspicion to stop his vehicle and detain him, and thus violated his rights under the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution and under Neb. Const. art. I, §§ 7 and 12.

On February 20, 2015, the State filed an amended information. The amended information charged Arizola with refusal with two prior convictions, a Class IIIA felony under §§ 60-6,197 and 60-6,197.03(6). Because the amended information charged a new crime—specifically § 60-6,197—the court held a preliminary hearing. At that hearing, Villamonte testified and the State offered evidence of Arizola's two prior DUI convictions, as well as a copy of his driver's abstract. After the hearing, the court found there was probable cause to believe that Arizola committed the crime of refusal with two prior convictions.

On March 25, 2015, Arizola filed a plea in abatement alleging that there was insufficient evidence adduced at the preliminary hearing to warrant a finding of probable cause of the felony charge of refusal of a chemical test with two prior convictions. On the same date, Arizola filed a motion to quash, alleging issues relating to the enhancement of his sentence and conviction for third-offense DUI.

On June 12, 2015, the district court denied Arizola's plea in abatement, because there was probable cause to believe that a crime had been committed and that Arizola had committed the crime. In addition, the district court overruled Arizola's motion to quash, because the issue was premature. The court reasoned that a motion to quash for enhancement issues is not ripe until there is a conviction to which the enhancement should apply.

On August 31, 2015, the district court held a hearing on Arizola's motion to suppress. At the hearing, Villamonte testified that when he works patrol, he actively runs license plate numbers through the information system "to identify registration violations, wanted vehicles or suspended drivers."

Arizola called an investigator for the Lancaster County public defender's office who had investigated, under similar conditions, whether it was possible to positively identify the driver of Arizola's vehicle through the passenger window of a vehicle alongside it. The investigator testified that due to the window tinting on Arizola's vehicle and the lighting conditions on the street at night, he was unable to positively identify the driver in Arizola's vehicle.

The district court overruled Arizola's motion to suppress, because the traffic stop was not an illegal seizure and the search incident to the traffic stop and arrest was lawful. The court reasoned that once Villamonte confirmed it was Arizola driving the vehicle and that Arizola's license was revoked, Villamonte had probable cause to arrest him. And once there was a valid arrest, the search of Arizola's person and vehicle incident to that arrest was valid because it was limited to the area within Arizola's "'immediate control.'" The court also held that Arizola's statements were voluntary and admissible because there was "no force, no threat of force or any type of coercion used by the officers to elicit responses to their questions during the stop."

On November 25, 2015, following a bench trial on stipulated facts, Arizola was found guilty of refusal of a chemical test in violation of § 60-6,197.

3. Posttrial Motions

On December 3, 2015, prior to sentencing, Arizola filed a plea in bar and a second motion to quash. The plea in bar alleged that by utilizing the single act of refusing to submit to a chemical test to "justify increasing/aggravating" the underlying offense of refusal to submit to a chemical test, the State was subjecting Arizola to multiple punishments for an identical offense, in violation of the Double Jeopardy Clauses of both the federal and state Constitutions.

The motion to quash alleged that (1) the offense of refusal to submit to a chemical test was improperly charged as a felony offense; (2) Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2016) and § 60-6,197.03(6) and related statutes are unconstitutionally vague and overbroad, in violation of the Due Process Clauses[2] and Nebraska's separation of powers clause[3]; (3) Arizola's conviction violated due process because, as alleged, the State was attempting to punish Arizola as a repeat offender despite the fact that Arizola had never previously committed the offense of refusal to submit; (4) Arizola's conviction was cruel and unusual punishment, and his punishment was disproportionate to the nature of the offense; and (5) the Class IIIA felony violated the Double Jeopardy Clauses.[4]

On January 22, 2016, the district court denied Arizola's plea in bar and motion to quash. The court found Arizola's double jeopardy claims to be without merit because the enhancement resulted from his two prior offenses, not the current offense, and there was "nothing ambiguous about the language" of § 60-6,197.03. The district court further found that there was "nothing vague about the terminology when common sense and general knowledge are applied."

In addition, the district court rejected Arizola's claims that his due process rights were violated because he was being

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[2] See, U.S. Const. amend. V; Neb. Const. art. I, § 3.

[3] See Neb. Const. art. II, § 1.

[4] See, U.S. Const. amend. V; Neb. Const. art. I, § 12.

punished as a repeat offender. Specifically, the court noted that Arizola did not cite to authority holding that due process requires that the penalty for a crime be enhanced only by a prior conviction for the same crime. Rather, case law indicated that habitual criminality in general could be used to increase the punishment.

The court further found that Arizola had been convicted of DUI on two prior occasions and therefore found Arizola guilty of refusal of a chemical test with two prior convictions. At the sentencing hearing, the court found that § 60-6,197.09 was applicable to Arizola due to proof that the proceedings for a third-offense DUI were pending when the DUI at issue was committed. Therefore, the court found that Arizola was not eligible for probation. Arizola was sentenced to 365 days in jail, he was ordered not to drive for 45 days, and his operator's license was revoked for 15 years. Arizola appeals.

III. ASSIGNMENTS OF ERROR

Arizola assigns, restated and consolidated, that the Lancaster County District Court erred in (1) overruling his motion to suppress the traffic stop, (2) overruling his plea in bar, (3) overruling his motion to quash, and (4) failing to find that § 60-6,197.09 was unconstitutional.

IV. STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[5] The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de

[5] *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016).

novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.[6]

[3,4] Issues regarding the grant or denial of a plea in bar are questions of law.[7] On a question of law, an appellate court reaches a conclusion independent of the court below.[8]

[5] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.[9]

[6] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below.[10]

V. ANALYSIS

1. Motion to Suppress

Arizola first assigns that the district court erred in overruling his motion to suppress the traffic stop because there was no reasonable articulable suspicion to justify the stop of Arizola's vehicle.

The district court found that Villamonte was able to identify Arizola after pulling his cruiser alongside Arizola's vehicle at an intersection. In the alternative, the district court held that according to *U.S. v. Chartier*,[11] it was reasonable for Villamonte to stop the vehicle when the registered owner did not have a currently valid operator's license, even without further grounds to make the stop. Accordingly, the district court held that the traffic stop was not a violation of the Fourth Amendment.

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[6] *Id.*

[7] *State v. Lavalleur*, 292 Neb. 424, 873 N.W.2d 155 (2016).

[8] *Id.*

[9] *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[10] *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

[11] *U.S. v. Chartier*, 772 F.3d 539 (8th Cir. 2014).

We need not reach the issue of whether Villamonte's computer search was sufficient, reasonable suspicion for the stop, because we conclude that Villamonte's testimony that he identified Arizola was sufficient to support the district court's finding of reasonable suspicion.

At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. In reviewing a court's ruling as the result of a suppression hearing, an appellate court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly wrong.[12] In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court recognizes the trial court as the "'trier of fact'" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.[13]

In this case, at the hearing on the motion to suppress, Villamonte and Arizola's investigator presented conflicting evidence. Villamonte testified that he pulled his cruiser along the passenger side of Arizola's vehicle and identified Arizola as the driver based on a photograph in the police department's information system. But the investigator testified that due to the window tinting on Arizola's vehicle and the lighting conditions on the street at night, Villamonte would not have been able to identify the driver of the vehicle.

When examining the district court's order, it is clear that the district court credited Villamonte's testimony and implicitly found that Villamonte was able to identify Arizola. The district court specifically noted that Villamonte was able to identify Arizola. This factual question by the district court is not clearly wrong.

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[12] *State v. Davis*, 231 Neb. 878, 438 N.W.2d 772 (1989).

[13] *State v. Dixon*, 222 Neb. 787, 795, 387 N.W.2d 682, 687 (1986).

We conclude that Villamonte had reasonable suspicion to stop Arizola. Arizola's first assignment of error is without merit.

2. Remaining Assignments of Error

(a) Plea in Bar and Motions to Quash

Arizola assigns that the district court erred in overruling his plea in bar. Arizola argues that the State used the offense of refusal to submit to a chemical test under §§ 60-6,197 and 60-6,197.03(6) both as a material element of the underlying refusal offense and as a sentencing aggravator, in violation of the Nebraska and U.S. Constitutions' Double Jeopardy Clauses.

Arizola also assigns that the district court erred in overruling his motion to quash, because the State (1) improperly charged him with a violation of § 60-6,197.03(6), as opposed to the proper charge under § 60-6,197.03(4); (2) used the same fact—the refusal to submit to a chemical test—to prove both the predicate offense of refusal to submit under § 60-6,197(3) and as an enhancement or aggravator under § 60-6,197.03(6), which violates double jeopardy; (3) used the fact of refusal to prove the predicate offense and to prove the enhancer, in violation of due process; (4) charged this conduct as a Class IIIA felony, which violates the prohibition against cruel and unusual punishment because it results in a punishment which is disproportionate to the predicate offense of refusal to submit to a chemical test; and (5) charged Arizola as a repeat offender under §§ 60-6,197.02 and 60-6,197.03(6), a violation of due process because it punishes Arizola as a repeat offender for the offense of refusal to submit to a chemical test.

All of these arguments were raised and rejected in our opinion in *State v. Wagner*.[14] We recognize that Arizola was

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[14] *State v. Wagner, supra* note 1.

charged under § 60-6,197.03(6), while the defendants in *Wagner* were charged under § 60-6,197.03(8), but we conclude that this difference in charging does not change the applicability of our reasoning in *Wagner* to this case. Arizola's second and third assignments of error are without merit.

(b) Vagueness and Overbreadth

Arizola also argues that the statutory scheme found at §§ 60-6,197.02 and 60-6,197.03(6) is unconstitutionally vague and overbroad, in violation of the Due Process Clauses[15] and in violation of the separation of powers clause.[16] We held in *Wagner* that § 60-6,197.03(8) was not unconstitutionally vague. Based on the reasoning set forth in *Wagner*, we similarly hold that § 60-6,197.03(6) is not unconstitutionally vague here.

We did not discuss overbreadth in *Wagner*. The district court did not address overbreadth in this case because while Arizola raised the issues of overbreadth and vagueness in his motion to quash, he did not further argue his claim for overbreadth. Rather, he provided support only for his vagueness argument. Therefore, we also will not discuss overbreadth in this case, because we find that it has not been preserved for review.

3. Constitutionality of § 60-6,197.09

On appeal, Arizola challenges for the first time the constitutionality of § 60-6,197.09, which the district court applied in its sentencing order denying Arizola probation. Section 60-6,197.09 states:

> Notwithstanding the provisions of section 60-6,197.03, a person who commits a violation punishable under subdivision (3)(b) or (c) of section 28-306 or subdivision

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[15] U.S. Const. amend. V; Neb. Const. art. I, § 3.

[16] Neb. Const. art. II, § 1.

> (3)(b) or (c) of section 28-394 or a violation of section 60-6,196, 60-6,197, or 60-6,198 while participating in criminal proceedings for a violation of section 60-6,196, 60-6,197, or 60-6,198, or a city or village ordinance enacted in accordance with section 60-6,196 or 60-6,197, or a law of another state if, at the time of the violation under the law of such other state, the offense for which the person was charged would have been a violation of section 60-6,197, shall not be eligible to receive a sentence of probation or a suspended sentence for either violation committed in this state.

(a) Void for Vagueness

[7] Arizola argues that § 60-6,197.09 is void for vagueness, because the terms "commits" and "criminal proceedings" are not defined and are therefore vague. Though ordinarily the failure to raise the constitutionality of a statute through a motion to quash will not preserve the issue for appellate review, we held in *State v. Prescott*[17] that a motion to quash was not required for a defendant to challenge the constitutionality of a noncharging statute. This court held that

> [w]hile ordinarily one must file a motion to quash in order to preserve a constitutional challenge to the facial validity of a statute, in this case the statute in question, § 60-6,197.04, was not the charging statute. Nor was its application in this instance apparent from the face of the record. Under such circumstances, not only was it unnecessary for [the defendant] to file such a motion, it would have been inappropriate to do so.[18]

As in *Prescott*, § 60-6,197.09 was not the charging statute. The amended information for Arizola's charge fails to reference § 60-6,197.09; rather, it was a statute the district court utilized in sentencing Arizola. In this situation, Arizola was

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[17] *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010).

[18] *Id.* at 109, 784 N.W.2d at 884-85.

not required to challenge the constitutionality of this statute in his motion to quash. We therefore address the merits of Arizola's vagueness argument.

[8-11] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[19] 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.[20] The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and may differ as to its application.[21] A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.[22]

Arizola argues that the term "criminal proceedings" is vague. He argued at sentencing that the statute should have used the term "adjudication" and that the statute in its current form was unclear. In *State v. Lamb*,[23] this court held that the phrase "while participating in criminal proceedings" used in § 60-6,197.09 was not unconstitutionally vague. We reasoned:

> In [*State v.*] *Long*,[24] we relied on the Black's Law Dictionary 1221 (7th ed. 1999) definition of "proceeding," noting that "proceeding" had been defined as "'1. [t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.'" . . . In a criminal

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[19] *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015).

[20] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

[21] *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998).

[22] *Id.*

[23] *State v. Lamb, supra* note 20.

[24] *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002).

> case, entry of judgment occurs with the imposition of a sentence. . . . Thus, the imposition of the sentence, absent the pendency of an appeal, concludes the "proceedings" referred to in § 60-6,197.09, and a defendant is no longer "participating in criminal proceedings" after the sentence is imposed.[25]

There is no merit to Arizola's argument on this point.

We turn next to the question of whether the term "commits" is vague. Arizola argues that it is unclear whether "commits" refers to the time when "a defendant has engaged in conduct that could be considered a violation of the statutes in question" or to when "a defendant was convicted of the crime alleged."[26] We disagree.

According to Black's Law Dictionary, the definition of "commit" is "[t]o perpetrate (a crime)."[27] In a criminal case then, a person commits a crime at the time he or she perpetrates a crime. Black's Law Dictionary defines "perpetrate" as "[t]o commit or carry out (an act, esp. a crime)."[28] In other words, the act is "committed" at the time it is carried out and not at the time the defendant is convicted of that act. The meaning of "commits" in the context of § 60-6,197.09 is plain, direct, and unambiguous; therefore, persons of common intelligence must neither guess at its meaning nor differ as to its application. We hold that Arizola's argument that § 60-6,197.09 is void for vagueness because of the terms "commits" and "criminal proceedings" is without merit.

(b) Due Process

Arizola next argues that he was denied due process, because the court erred in failing to provide him with an evidentiary

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[25] *State v. Lamb, supra* note 20, 280 Neb. at 745, 789 N.W.2d at 925 (citations omitted).

[26] Brief for appellant at 24.

[27] Black's Law Dictionary 329 (10th ed. 2014).

[28] *Id.* at 1322.

hearing prior to sentencing that would have given him a meaningful opportunity to challenge whether he, in fact, committed another DUI for which he was participating in criminal proceedings when the present violation was committed.

Arizola did not specifically make reference to "due process" in his argument at the sentencing hearing. Nonetheless, because Arizola referred to a need for an evidentiary hearing prior to sentencing to prove whether the crime was committed and whether Arizola committed the crime, his request for a hearing was sufficient to preserve his present argument. This argument does not involve a challenge to the constitutionality of § 60-6,197.09, as § 60-6,197.09 does not address the evidentiary burden or procedure for proving the commitment of the violations listed in § 60-6,197.09.

[12-14] The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.[29] In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself.[30] Due process requires that a sentencing judge have relevant information as the basis for a sentence imposed on a convicted defendant.[31]

On November 25, 2015, Arizola was found guilty of refusal of a chemical test. He was provided an enhancement hearing on December 17, in which the State offered into evidence the two prior DUI convictions for purposes of enhancement of the refusal conviction.

On January 15, 2016, Arizola was provided with a sentencing hearing. At the sentencing hearing, the State contended that its notes reflected that a DUI offense was filed against Arizola in March 2014, and the proceedings for that offense

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[29] *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013).

[30] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[31] *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

were pending at the time the June 2014 offense was committed. Therefore, the State argued, under § 60-6,197.09, Arizola was not eligible for a sentence of probation on the current offense. The court granted Arizola's request for a continuance so that Arizola could review the "relevant issues" and the "case law" concerning the application of § 60-6,197.09 to his case in light of the March DUI offense. The court agreed that it needed to look into the issue as well.

On January 22, 2016, the court held another sentencing hearing for Arizola. Arizola stated that he had reviewed the presentence investigation (PSI). The State noted that it had provided the court and Arizola with a copy of the PSI that included the March 2014 DUI offense prior to the hearing. The State requested that a copy of the county court file containing the March DUI offense be included as part of the PSI. Arizola objected, arguing that evidence needed "to be adduced that a crime was committed, in a formal hearing" and "follow the same kind of standard procedures that we follow with enhancement hearings for habitual criminals." The State contended that "the PSI sets forth when that action happened" and that the State was "simply providing the Court with the dates that that complaint was filed." The court stated that there was no "authority requiring a special enhancement hearing for that particular instance" and allowed the document to be placed in the PSI.

The court ruled that it could "take judicial notice of the fact of that proceeding, simply by virtue of it being in the PSI." The court then stated that it had been considering a "lengthy period of probation under intensive supervision," but that pursuant to § 60-6,197.09, Arizola was not eligible for probation in this matter.

At the sentencing hearing, the State asked that "a copy of the County Court file" from Arizola's March 2014 DUI "be included as part of the [PSI]." The court "allow[ed] the documents from [the March 2014 DUI] to be placed in the [PSI]." It was the commission of this crime which prevented Arizola

from obtaining probation under the terms of § 60-6,197.09 in this case. The issue raised by Arizola is whether the conviction as included in the PSI was sufficient, or whether an evidentiary hearing was required to establish that he did, in fact, "commit" the current violation while a violation of § 60-6,197.09 was pending.

We first note that § 60-6,197.09 does not provide for a separate evidentiary hearing for purposes of showing a separate violation. Rather, the statute only requires proof that the other violation was "committed" during the "criminal proceedings" of the current violation.

[15-17] Moreover, in this case, the PSI contained a copy of a prior DUI conviction committed by Arizola in March 2014. This record, which was certified by the clerk of the court, established proof of the prior conviction. In a sentencing hearing, a court generally has broad discretion concerning the source of information and the type of information to be considered.[32] A sentencing judge may consider relevant information contained in a PSI on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted.[33] A certified or duly authenticated copy of the former judgment, from any court in which such judgment 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.[34]

The better procedure in this hearing would have been for the State to mark as an exhibit and move to introduce copies of the county court file containing the March 2014 DUI offense into evidence. However, Arizola, in effect, had the opportunity to offer rebuttal evidence at the first sentencing hearing and, after requesting a continuance, again at the

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[32] *Id.*

[33] *State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990).

[34] Cf. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

second sentencing hearing, but chose not to do so. We therefore conclude that the prior certified conviction included in the PSI acted as a certified or authenticated record to prove the existence of the commission of the March 2014 DUI, for which Arizola was participating in criminal proceedings when he committed the June 2014 DUI. Without rebuttal evidence from Arizola, additional proceedings to further prove evidence of the commission or conviction was unnecessary.

Arizola's fourth assignment of error is without merit.

VI. CONCLUSION

The district court did not err in (1) overruling Arizola's motion to suppress the traffic stop, (2) overruling Arizola's plea in bar, (3) overruling Arizola's motion to quash, and (4) finding that § 60-6,197.09 was constitutional.

The decision of the district court is affirmed.

Affirmed.

Stacy, J., not participating.

State of Nebraska, appellee, v. Shannon L. Baxter, appellant.

888 N.W.2d 726

Filed January 6, 2017. No. S-16-237.

1. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent 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. **Motions for Continuance: Appeal and Error.** A court does not abuse its discretion in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice because of that denial.
4. **Criminal Law: Motions for Continuance: Appeal and Error.** Where the criminal defendant's motion for continuance is based upon the occurrence or nonoccurrence of events within the defendant's own control, denial of such motion is no abuse of discretion.
5. **Sentences: Appeal and Error.** A determination of whether there are substantial and compelling reasons under Neb. Rev. Stat. § 29-2204.02(2)(c) (Supp. 2015) is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.
6. **Sentences.** The court may fulfill the requirement of Neb. Rev. Stat. § 29-2204.02(3) (Supp. 2015) to state its reasoning on the record by a combination of the sentencing hearing and sentencing order.
7. **Sentences: Presentence Reports.** The court's determination of substantial and compelling reasons under Neb. Rev. Stat. § 29-2204.02(2)(c) (Supp. 2015) should be based on a review of the record, including the presentence investigation report and the record of the trial, and its determination must be supported by such record.

Appeal from the District Court for Franklin County: Stephen R. Illingworth, Judge. Affirmed.

Richard Calkins, of Calkins Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Shannon L. Baxter appeals the sentences imposed by the district court for Franklin County upon her plea-based convictions for possession of a controlled substance and unlawful acts relating to drugs. The court imposed sentences of imprisonment for each conviction and ordered the sentences to be served concurrent with one another. On appeal, Baxter claims, inter alia, that the court did not follow Neb. Rev. Stat. § 29-2204.02 (Supp. 2015), enacted as part of 2015 Neb. Laws, L.B. 605, when it found that with regard to the Class IV felony possession conviction, she was not a suitable candidate for probation and should instead be sentenced to imprisonment. We affirm Baxter's sentences.

STATEMENT OF FACTS

Pursuant to a plea agreement, the State dropped certain charges against Baxter and filed an amended information charging her with two counts: (1) possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-416(3) (Supp. 2015), a Class IV felony, and (2) unlawful acts relating to drugs, in violation of Neb. Rev. Stat. § 28-417(1)(f) (Reissue 2016), a Class III misdemeanor. The State alleged in count I that on or about September 28, 2015, Baxter had knowingly and intentionally possessed a controlled substance. The State alleged in count II that on or about May 29, 2015, Baxter had possessed a prescribed controlled substance in a

container other than that in which it was delivered to her by a practitioner.

On November 5, 2015, Baxter pled no contest to the two counts. The district court accepted her pleas and found her guilty of both offenses. The court set sentencing for February 4, 2016. On January 25, Baxter filed a motion for continuance of the sentencing "to allow [her] sufficient time to obtain an [sic] drug and alcohol evaluation, and time for the probation office to complete a presentence investigation." The court overruled the motion and confirmed that sentencing was set for February 4.

Because Baxter's conviction for possession of a controlled substance was a Class IV felony which arose from events that occurred on September 28, 2015, sentencing on that conviction was subject to § 29-2204.02, enacted as part of L.B. 605, with an effective date of August 30, 2015. Section 29-2204.02, which is set forth in full in our analysis below, provides in part that when the offense is a Class IV felony, the court shall impose a sentence of probation unless, inter alia, there are "substantial and compelling reasons" that community supervision will not be an effective and safe sentence.

Following the sentencing hearing, the court in this case found that Baxter was not a suitable candidate for probation and that there were substantial and compelling reasons why she could not effectively and safely be supervised in the community on probation. The court therefore sentenced Baxter to imprisonment for 2 years followed by 12 months of postrelease supervision following her release from incarceration for the possession conviction, and to imprisonment for 3 months for the unlawful acts conviction. The court ordered the sentences of imprisonment to be served concurrent with one another. The sentences imposed were the maximum allowable sentences under Neb. Rev. Stat. § 28-105 (Supp. 2015) for a Class IV felony and under Neb. Rev. Stat. § 28-106 (Supp. 2015) for a Class III misdemeanor.

Baxter appeals her sentences.

ASSIGNMENTS OF ERROR

Baxter claims, summarized, that the district court erred when it (1) overruled her motion to continue the sentencing hearing and (2) found that she was not a suitable candidate for probation and instead sentenced her to imprisonment.

STANDARDS OF REVIEW

[1,2] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). 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. *Id.*

ANALYSIS

District Court Did Not Abuse Its Discretion When It Overruled Baxter's Motion to Continue Sentencing.

Baxter first claims that the district court erred when it overruled her motion to continue the sentencing hearing. She contends that the court abused its discretion because it did not grant her motion which asserted that she needed a continuance to "allow [her] sufficient time to obtain an [sic] drug and alcohol evaluation." She argues that because she was not allowed additional time to complete the evaluation, the court did not have "all available and relevant information about [her] substance abuse issues" before it imposed sentence. Brief for appellant at 14. We conclude that the court did not abuse its discretion when it overruled the motion.

[3,4] We have said that a court does not abuse its discretion in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice because of that denial. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). We have also said that "[w]here the criminal defendant's motion for continuance is based upon the occurrence or

nonoccurrence of events within the defendant's own control, denial of such motion is no abuse of discretion." *State v. Eichelberger*, 227 Neb. 545, 556, 418 N.W.2d 580, 588 (1988). We determine that both these principles militate against a finding that the court abused its discretion.

With regard to prejudice, we have reviewed the presentence investigation report which included ample information regarding Baxter's substance abuse issues. Such information included a narrative of a probation officer's interview with Baxter in which she reported on her past substance use and her completion of a substance abuse treatment program. The report included the results of a "risk and needs assessment instrument" which indicated that Baxter had a low risk with respect to alcohol, but her risk with respect to drugs was in the maximum range. The report included a narrative excerpt from the assessment which stated, inter alia, that "[s]erious drug related problems are indicated" and that "[r]elapse risk is high." The probation officer noted that Baxter had been referred for a substance abuse evaluation but that the officer had not yet received the evaluation.

Baxter argues that the court had incomplete information because it did not have the substance abuse evaluation; however, she does not specify what information is lacking or how it might have affected the court's sentencing decision. We note further that at the sentencing hearing, Baxter had the opportunity to present information or argument regarding her substance abuse issues.

Regarding "the occurrence or nonoccurrence of events within the defendant's own control," see *State v. Eichelberger*, 227 Neb. at 556, 418 N.W.2d at 588, we note that the probation officer's report included the statement that Baxter "does not appear to be motivated to participate in any type of supervision" and specifically that "[b]etween November 12[, 2015,] and January 12, [2016,] this officer . . . set appointments to see [Baxter] on 12/10, 12/31 and 1/6" but that Baxter "did not show for the scheduled appointments." Baxter eventually

reported for an appointment on January 12, 2016, at which time she was referred for a substance abuse evaluation. The State argues that the lack of a completed evaluation at the time of sentencing was due to Baxter's own failure to appear for the earlier scheduled appointments with the probation officer, at which time she would normally have been referred for an evaluation.

Given Baxter's inaction until January 12, 2016, we determine that the delay in completion of the evaluation was due to events within Baxter's own control. Further, Baxter has not shown that she suffered prejudice as a result of the overruling of her motion to continue the sentencing. We therefore conclude that the district court did not abuse its discretion when it overruled Baxter's motion to continue.

District Court Did Not Abuse Its Discretion When It Determined That There Were Substantial and Compelling Reasons That Baxter Could Not Effectively and Safely Be Supervised in the Community on Probation.

Baxter next claims that the district court erred when it found that she was not a suitable candidate for probation and instead sentenced her to imprisonment. We conclude that the court did not abuse its discretion in sentencing Baxter.

Baxter's arguments implicate statutory changes resulting from the enactment of L.B. 605, and, in particular, the framework for sentencing offenders for Class IV felonies. Under § 29-2204.02, the court shall impose a sentence of probation for a Class IV felony unless, inter alia, there are substantial and compelling reasons that community supervision will not be an effective and safe sentence. We note that further amendments were made to § 29-2204.02 and other statutes with an effective date of April 20, 2016. In this opinion, we discuss and quote the version of § 29-2204.02 which is set forth by L.B. 605 and which was in effect at the relevant times in this case. Section 29-2204.02 provided in relevant part as follows:

(1) Except when a term of probation is required by law, in imposing a sentence upon an offender for a Class III, IIIA, or IV felony, the court shall:

(a) Impose a sentence of imprisonment within the applicable range in section 28-105; and

(b) Impose a sentence of post-release supervision, under the jurisdiction of the Office of Probation Administration, within the applicable range in section 28-105.

(2) If the criminal offense is a Class IV felony, the court shall impose a sentence of probation unless:

(a) The defendant is concurrently or consecutively sentenced to imprisonment for any felony other than another Class IV felony;

(b) The defendant has been deemed a habitual criminal pursuant to section 29-2221; or

(c) There are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community, including, but not limited to, the criteria in subsections (2) and (3) of section 29-2260. Unless other reasons are found to be present, that the offender has not previously succeeded on probation is not, standing alone, a substantial and compelling reason.

(3) If a sentence of probation is not imposed, the court shall state its reasoning on the record, advise the defendant of his or her right to appeal the sentence, and impose a sentence as provided in subsection (1) of this section.

Neb. Rev. Stat. § 29-2260 (Supp. 2015), to which reference is made in § 29-2204.02(2)(c), provided in relevant part as follows:

(2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds

that imprisonment of the offender is necessary for protection of the public because:

(a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;

(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) The crime neither caused nor threatened serious harm;

(b) The offender did not contemplate that his or her crime would cause or threaten serious harm;

(c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

We first address our standard of review for a court's determination under § 29-2204.02(2)(c) that there "are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community." Our general standard with respect to sentencing decisions is that an appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016). We have also said that whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015). But § 29-2204.02(2) effectively adds a general limitation on a court's discretion in choosing between probation and incarceration with respect to a Class IV felony, because it requires a court to impose a sentence of probation for a Class IV felony unless certain specified exceptions are present; one of those exceptions is "substantial and compelling reasons" described under § 29-2204.02(2)(c).

[5] Within the framework of this general limitation on the sentencing court's discretion with respect to Class IV felonies under § 29-2204.02(2), we see nothing in the statute that would cause us to conclude that the specific determination of whether there are substantial and compelling reasons under § 29-2204.02(2)(c) is not within the court's historical range of discretion. Although § 29-2204.02(2)(c) provides guidelines, a determination thereunder is essentially a part of the conventional decision whether probation or incarceration is ordered. We therefore hold that a determination of whether there are substantial and compelling reasons under § 29-2204.02(2)(c) is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.

Baxter's arguments require us to consider two other questions: (1) How does a court meet its obligation under

§ 29-2204.02(3) to "state its reasoning on the record" when it determines that probation will not be imposed? (2) What sort of facts constitute valid reasons that may be substantial and compelling under § 29-2204.02(2)(c)? To assist us in answering these questions, we review the substance and form of how the district court in this case stated its reasoning for rejecting probation.

At the sentencing hearing, the court explained the substantial and compelling reasons that led it to determine that Baxter was not a suitable candidate for probation. Regarding Baxter's history with probation, the court stated that she had been placed on probation for three prior offenses—in 1996, 1998, and 2002—and that each probation had been revoked and she had been sentenced to imprisonment. Regarding the likelihood that the circumstances that resulted in her current crimes would recur, the court stated that Baxter had scored 90 percent or higher, in the maximum risk range, for the factors "drugs," "violence," and "antisocial." The court further stated that although it had ordered Baxter to do an evaluation 3 months before the sentencing, she had "just got around to it in the last three weeks." The court further stated that after the plea and before sentencing, Baxter "did not appear for scheduled appointments," and that the probation report stated that she "did not appear to be motivated to participate in supervision."

In the sentencing order containing the court's decision to sentence Baxter to imprisonment rather than probation, the court stated as follows:

> The Court finds that [Baxter] is not a suitable candidate for probation and that there are substantial and compelling reasons why [Baxter] cannot effectively and safely be supervised in the community on probation. These reasons are as follows:
>
> (1) [Baxter] failed to comply and had probation revoked in 3 previous cases;

(2) A lesser sentence would depreciate the seriousness of [Baxter's] crime[s];

(3) A lesser sentence would promote disrespect for the law;

(4) The risk is substantial that during the period of probation, [Baxter] will engage in additional criminal conduct;

(5) [Baxter] has not lead a law-abiding life for a substantial period of her life; and

(6) The crime was not the result of circumstances unlikely to recur.

Having recited portions of the record, we now address the requirement under § 29-2204.02(3) that "[i]f a sentence of probation is not imposed, the court shall state its reasoning on the record . . . ." Section 29-2204.02 generally tips the balance in sentencing for a Class IV felony toward probation. Section 29-2204.02(3) reinforces this balance by obligating the court to state its reasoning for withholding probation on the record. This may suggest that if the court is having difficulty articulating its reasoning for imposing a sentence of imprisonment on the record, then the court should impose a sentence of probation.

Under § 29-2204.02(3), the court is required to state its "reasoning" rather than its "reasons" on the record. Baxter argues that the court in this case did not meet the requirement of § 29-2204.02(3) because, looking only at the sentencing order, the court merely listed reasons it found to be substantial and compelling, but did not explain its reasoning. We agree that "reasoning" means that the court should not simply supply a list of reasons, but, instead, should demonstrate how it reached its determination that there were substantial and compelling reasons. However, the requirement that a court state its reasoning "on the record" does not limit the expression of the court's reasoning to the sentencing order. The "record" also includes statements the court makes when it pronounces sentence.

[6] In the present case, the district court stated and explained its reasoning when it pronounced sentence by, inter alia, giving specific examples of information from the presentence investigation report that led the court to determine that certain substantial and compelling reasons were present. The written sentencing order was more conclusory than explanatory. The court may fulfill the requirement of § 29-2204.02(3) to state its reasoning on the record by a combination of the sentencing hearing and sentencing order, as the court did in this case.

We next consider whether the reasons the district court gave were substantial and compelling reasons within the meaning of § 29-2204.02(2)(c). The statute itself does not define the phrase substantial and compelling. However, the statute provides some guidance as to what sort of reasons may validly be considered substantial and compelling. In this regard, we note that § 29-2204.02(2)(c) provides that such reasons include but are not limited to "the criteria in subsections (2) and (3) of section 29-2260." In its sentencing order, the district court listed six reasons it found to be substantial and compelling; five of the six appear to be derived from subsections (2) and (3) of § 29-2260, which are set forth above. Under § 29-2204.02(2)(c), these were valid reasons to impose a sentence of incarceration rather than probation.

The other reason the district court gave was that Baxter "failed to comply and had probation revoked in 3 previous cases." Section 29-2204.02(2)(c) provides that "[u]nless other reasons are found to be present, that the offender has not previously succeeded on probation is not, standing alone, a substantial and compelling reason." We do not read this sentence to mean that a previous failure or failures to complete probation cannot be among the substantial and compelling reasons. Instead, we read it to mean that probation failure standing alone is not a sufficient reason to withhold probation. In the present case, the court found other substantial and compelling reasons, and therefore, under § 29-2204.02(2)(c),

it was not improper to consider Baxter's previous failures at probation as additional substantial and compelling reasons. We therefore determine that the reasons given by the court, which included criteria derived from § 29-2260 and other reasons, were valid reasons for the court's consideration under § 29-2204.02(2)(c).

[7] Having determined that the reasons given by the court in this case were valid reasons under § 29-2204.02(2)(c) and that the court adequately stated its reasoning on the record, we must determine whether the court abused its discretion when it determined that the stated reasons were substantial and compelling. As noted above, the statute does not specifically define the phrase "substantial and compelling." However, both terms have commonly understood meanings and it is within the court's discretion to determine that its reasons are weighty enough to be substantial and compelling. The court's determination of substantial and compelling reasons should be based on a review of the record, including the presentence investigation report and the record of the trial, and its determination must be supported by such record.

In the present case, we conclude that the record supports the court's determination that there were substantial and compelling reasons to withhold probation. In addition to the specific reasons and examples from the presentence investigation report stated by the court at the sentencing hearing and in its sentencing order set forth above, we note that in the presentence investigation report, the probation officer stated that when Baxter was asked how a term of probation would affect her life, Baxter replied, "'Won't affect my life. Didn't affect my life until I screwed up.'" From this and other observations in the presentence investigation report, it appears that if Baxter were put on probation, she would be subject to influences that gave rise to the crimes for which she was convicted and that probation would not affect her behavior. We believe the record shows that Baxter cannot effectively and safely be supervised in the community. The record supports the court's

determination, and we conclude that the court did not abuse its discretion when it determined that there were substantial and compelling reasons that probation would not be an effective and safe sentence.

CONCLUSION

We conclude that the district court did not abuse its discretion when it overruled Baxter's motion to continue sentencing. We further conclude that the court did not abuse its discretion when it determined that there were substantial and compelling reasons under § 29-2204.02(2)(c) that Baxter could not effectively and safely be supervised in the community on probation. We therefore affirm Baxter's sentences of imprisonment.

Affirmed.

In re Conservatorship of Marcia G. Abbott, a protected person.
Cynthia J. Sellon and Russell G. Abbott, appellees and cross-appellants, v. Mark D. Abbott, Conservator, appellant and cross-appellee.

In re Abbott Living Trust.
Cynthia J. Sellon and Russell G. Abbott, appellees and cross-appellants, v. Mark D. Abbott, Designated Successor Trustee, appellant and cross-appellee.

890 N.W.2d 469

Filed January 13, 2017. Nos. S-15-967, S-16-040.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews 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. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
4. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.
5. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
6. **Trusts.** Neb. Rev. Stat. § 30-3855 (Reissue 2016) does not dictate who may petition for the removal of a trustee, but, rather, describes to whom fiduciary duties are owed.

7. **Trusts: Standing.** Generally, standing in a trustee removal proceeding is governed by Neb. Rev. Stat. § 30-3862(a) (Reissue 2016).
8. **Trusts.** A serious breach of a fiduciary duty is only one of the grounds for removal of a trustee.
9. **Trusts: Intent.** The extent of the beneficiary's interest in a trust depends upon the discretionary power that the settlor intended to grant the trustee.
10. ____: ____. When the parties do not claim that the terms are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.
11. **Trusts.** In general, trustees of support trusts have discretion to determine what is needed for the beneficiary's support and to make payments only for that purpose.
12. ____. The discretion afforded to a trustee of a support trust does not preclude a beneficiary from seeking to show that the trustee has abused its discretion in failing to make support payments.
13. **Trusts: Liability.** A trustee is liable for the action of another trustee if he joins in the action, fails to prevent the cotrustee from committing a serious breach of trust, or fails to compel the cotrustee to redress a serious breach of trust.
14. **Trusts.** A trustee has the duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code.
15. ____. The Nebraska Uniform Trust Code states that trustees owe the beneficiaries of a trust duties that include loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting.
16. **Trusts: Conflict of Interest.** A cause for removal of a trustee is appropriate for the best interests of the trust estate where hostile relations exist between a trustee and beneficiaries of such a nature as to interfere with proper execution of the trust, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his or her duties as trustee under the terms of the trust.
17. **Pleadings.** The issues in a given case will be limited to those which are pled.
18. **Rules of the Supreme Court: Pleadings: Notice.** The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.
19. **Trusts: Words and Phrases.** Impartiality means that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries.

20. **Trusts.** A finding of one serious breach of fiduciary duty is enough to warrant removal of a trustee.
21. **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.
22. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
23. **Judgments: Words and Phrases.** 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.
24. **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.
25. **Final Orders: Appeal and Error.** An order affects a substantial right if the order affects the subject matter of the litigation, such as diminishing a claim or defense that the appellant had before the court entered the order.

Appeals from the County Court for Douglas County: Lawrence E. Barrett, Judge. Appeal in No. S-15-967 dismissed. Judgment and final order in No. S-16-040 affirmed.

Michael F. Coyle, Elizabeth A. Culhane, and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., and G. Rosanna Moore and, on brief, John K. Green, of Pickens & Greene, L.L.P., for appellant.

John M. Lingelbach, James A. Tews, and Minja Herian, of Koley Jessen, P.C., L.L.O., for appellees.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

I. INTRODUCTION

We decide two consolidated appeals from county court proceedings—the first from a final order appointing a conservator and the second from a county court order that acted both as a judgment in a trustee removal proceeding and as

a final order denying fees and expenses in the conservatorship proceeding.

Because the conservatorship appointment order became moot upon the protected person's death while the first appeal was pending, we dismiss the first appeal in its entirety and dismiss the cross-appeal to the extent that it pertains to the first appeal.

In the second appeal, a successor trustee appeals and two beneficiaries cross-appeal from an order removing the successor trustee, declining to surcharge him, disposing of competing attorney fee applications, and otherwise disposing of the trust and conservatorship proceedings. Applying our respective standards of review to the remaining trust and conservatorship issues, we affirm.

II. BACKGROUND

These consolidated appeals arise from proceedings initiated by Russell G. Abbott and Cynthia J. Sellon (Cynthia) to appoint a conservator for their mother, Marcia G. Abbott, and to remove Marcia as trustee of the "Abbott Living Trust"; to remove their brother, Mark D. Abbott, as successor trustee; to surcharge Mark; and for an accounting. Marcia resigned as trustee before trial, and the county court dismissed the claim seeking to remove her as moot.

Prior to oral argument, a suggestion of Marcia's death was filed in this court, accompanied by a motion to remand the conservatorship proceeding with directions to vacate and dismiss. At oral argument, we granted leave to file a written response, which we have considered. Marcia's death renders moot the issue of the appointment of her conservator, but it does not abate the cause of action.[1] Accordingly, we do not summarize the facts surrounding the appointment of a conservator, and recite only the facts relating to issues not mooted by Marcia's death.

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[1] See *In re Conservatorship of Franke*, 292 Neb. 912, 875 N.W.2d 408 (2016).

1. Abbott Living Trust Agreement

Marcia and her husband created a revocable living trust in which they named themselves cotrustees. When Marcia's husband died, the living trust assets were divided between a revocable "Survivor's Trust" and an irrevocable "Family Trust." The two trusts primarily consist of investment accounts.

The trust agreement provided that Marcia, as the surviving spouse, was entitled to the entire net income from the Survivor's Trust account. It also permitted her to withdraw from the principal of the Survivor's Trust as much as she desired.

As to the Family Trust, Marcia had four primary rights or interests. First, she was entitled to the entire net income. Second, she had a "five-and-five power," which limited her to annually withdrawing the greater of $5,000 or 5 percent of the assets from the principal. Third, the trustee could apply an "ascertainable standard." That power permitted the trustee, in his or her discretion, to pay Marcia or her and her husband's shared descendants—Russell, Mark, and Cynthia—so much of the principal as the trustee deemed proper for their health, maintenance, support, and education. Finally, she had a "sprinkling" testamentary power of appointment—that is, a limited power allowing her to dispose of Family Trust assets by will or by a living trust. With this limited power, Marcia could appoint "some or all of the principal and any accrued but undistributed net income of the Family Trust as it exist[ed] at the death of [Marcia]" to Russell, Mark, or Cynthia in "equal or unequal amounts." There is no evidence that Marcia ever exercised this limited power of appointment.

2. Marcia's Stroke

In 2011, Marcia suffered a stroke that left her paralyzed on her right side. She had difficulty with speech and communication and was ultimately diagnosed with expressive aphasia—a disorder that affects the brain's ability to use and understand language. Prior to her stroke, Marcia lived at home

and handled her own financial affairs, including management of the two trusts. After her stroke, Marcia needed assisted living and physical therapy and moved into a skilled-care facility. As a necessary result, Marcia's monthly living expenses grew from $500 to over $8,000. Since 2011, Mark has acted as Marcia's agent under a power of attorney.

3. Mark's Management of Trust Assets

In 2011, after her stroke, Marcia "resigned" as trustee over two financial accounts that were trust assets. She appointed Mark as successor trustee of both accounts. In 2015, before trial, Marcia resigned as trustee in all matters for both trusts and Mark accepted the appointment as successor trustee in all matters.

Before Mark assumed his role as successor trustee of both trusts in the entirety, he understood his roles to be that of successor trustee of two financial accounts associated with the trusts and that of Marcia's agent under the power of attorney. Evidence at trial showed that Mark performed other actions within those roles, purporting to be the trustee of the two trusts in his signature. For example, the evidence showed that Mark signed a bill of sale for a vehicle owned by one of the trusts as "Trustee" in 2013. He also signed a state severance tax return for oil and gas royalties as "Trustee" in 2012. Mark explained that he "'used [his] signatures, [Marcia's] signatures, [power of attorney]/Trustee interchangeably because it really [did]n't matter.'" He believed his power to sign as trustee came from his authority under the power of attorney executed by Marcia.

In that time, Mark also facilitated several transfers of money between different financial accounts associated with the Family Trust and the Survivor's Trust. Several of the transfers exceeded $200,000. At trial, an estate-planning attorney testified concerning the tax consequences of these transfers and opined that the transfers were a violation of the trust terms. Specifically, the witness testified that the two trusts

had substantially different terms and that as a result, the trusts' assets could not be commingled. The witness further testified that because the Family Trust was irrevocable and the Survivor's Trust was revocable, the Family Trust's assets should have been kept separate from the Survivor's Trust's assets to maintain the appropriate tax basis for the assets. Additionally, the witness opined that the assets transferred to the Family Trust would have been subject to gift taxation and that Mark appeared not to have considered these tax issues in managing the trusts' assets.

The evidence at trial also showed that in managing the trusts' assets, Mark worked with Marcia's financial advisor in making investment decisions and all of his investments were recommended by the financial advisor. During the time that Mark managed the trusts, their combined assets increased in value from $1.5 million to a little over $2 million.

4. Hostility Between Successor Trustee and Beneficiaries

Russell and Cynthia both testified that they were concerned with Mark serving as successor trustee because of his aggression and resentment toward them. The hostility apparently began after their aunt died and left a disproportionate amount of real estate to Cynthia. Both Russell and Cynthia testified that Mark repeatedly threatened to "make it even" using the assets from the trusts and that he personally blamed Cynthia for her larger share, called her a "vulture," and even claimed Cynthia manipulated and then "murdered" their aunt for her share. Evidence presented at trial showed that Mark considered Cynthia's share to be "ill gotten" and "a grossly unequal share." Separate from the issues with the aunt's estate, Mark also believed that Russell and Cynthia stole from Marcia. And he had threatened to withhold any distributions until the property was returned. Mark's own words described the situation with his siblings as "WWIII" and characterized one of his communications to them as the "2014 equivalent of the Potsdam Declaration."

Russell and Cynthia additionally presented evidence that in 2012, they had requested information from Mark, including a copy of the document creating the trusts; a copy of the periodic statements issued for each of the trusts' financial accounts for the preceding 2 years; an explanation of "any expenditure of the Trust's assets made" by Mark in the preceding 2 years; and a list of the trusts' assets, excluding financial accounts already documented. In response to the request, Mark provided balance sheets and profit-and-loss statements for the 2 years, totaling seven pages. He did not provide copies of the document creating the trusts, periodic statements of financial accounts, or any explanations of expenditures. He explained at trial that he was advised to ignore the request of information related to administration of the trusts, because he had no obligation to supply the requested information.

5. County Court's Orders

The conservatorship case and the trust case initially proceeded to a consolidated trial. At the close of Russell and Cynthia's case, Mark moved for a directed verdict, alleging that they had no standing to assert their claims against Mark, because he did not owe them any fiduciary duties. The court overruled this motion and overruled it again after it was renewed at the close of all evidence. We omit summarization of other such motions, which are not contested on appeal.

On September 9, 2015, the county court entered separate orders in the conservatorship and trust cases. We summarize each order.

In the conservatorship order, the court appointed Mark as Marcia's conservator. The order imposed other terms and conditions, but they are not relevant to the appeals before us.

In the trust case, the court concluded that Mark breached unspecified duties to Russell and Cynthia under three sections of the Nebraska Uniform Trust Code[2] but did not violate a fourth section. The order did not elaborate regarding the

[2] Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Reissue 2016).

violations. The court also determined that an accounting had already been provided but sustained the claim for accounting as a violation of another section. The court dismissed the surcharge claim, concluding that no improper moneys or property were converted to Mark for his personal use. The order stated that Mark would be removed as successor trustee upon the appointment of a new successor trustee. Thus, this first order in the trust case reserved the appointment of the new successor trustee for a later order.

Mark and Marcia timely appealed the order appointing a conservator and filed a supersedeas bond. This appeal was docketed as case No. A-15-967. At the same time, they attempted to appeal from the trust case. That appeal was docketed as case No. A-15-968.

After the order in the conservatorship case appointing Mark as conservator but before the appeal in that case was perfected, Russell and Cynthia filed an application for attorney fees, totaling $139,743.25, and costs, totaling $6,112.76, related to both the trust and conservatorship proceedings. This application was filed in both the trust case and the conservatorship case. They also filed an application for Mark to reimburse the trust for attorney fees expended in the trust case with trust moneys.

Very quickly thereafter, the Nebraska Court of Appeals dismissed the trust case appeal, case No. A-15-968, for lack of jurisdiction—no doubt for the lack of a final order because of the reserved appointment of a successor trustee. Before the remaining matters were addressed by the county court, the Court of Appeals sustained an unopposed motion to stay the conservatorship appeal pending disposition of the remaining matters. The Court of Appeals also ordered Mark and Marcia to notify it when the matter was again appealed and directed them to request consolidation of case No. A-15-967 with the new appeal.

Shortly after the Court of Appeals' dismissal of the trust case appeal, the county court appointed a successor trustee,

granted Russell and Cynthia's application for attorney fees in the sum of $44,957.98 and costs of $1,645.48 in the trust case, denied their application for attorney fees in the conservatorship case, and denied the motion to require Mark to reimburse the trust for attorney fees and costs paid from the trust. The order was treated by the county court and the parties as having been filed below in both the conservatorship case and the trust case. The order included an attachment titled "Attorney Fee Analysis" that indicated the $44,957.98 in attorney fees and $1,645.48 in costs were those incurred in the trust case after Marcia resigned as trustee of two financial accounts in April 2011 and before Marcia resigned as trustee in March 2015.

Mark and Marcia then filed the new appeal contemplated by the Court of Appeals. Both the parties and the county court treated the notice of appeal as having been filed in both cases below. The new appeal was docketed as case No. A-16-040. Mark and Marcia then moved for consolidation of cases Nos. A-15-967 and A-16-040, as they had been directed to do by the Court of Appeals. The Court of Appeals then sustained the motion and set a consolidated briefing schedule.

In due course, we moved both appeals to our docket.[3] In recognition of that action, the prefix of each case number was changed from "A" to "S."

III. ASSIGNMENTS OF ERROR

Mark and Marcia assign that the county court erred in (1) appointing a conservator for Marcia; (2) failing to dismiss Russell and Cynthia's claims in the trust case for lack of standing; (3) removing Mark as trustee; (4) finding that Mark violated §§ 30-3866, 30-3867, 30-3868, and 30-3878; (5) ordering that a portion of Russell and Cynthia's attorney fees and costs for the trust proceeding should be paid out of the trust; and (6) excluding certain evidence at trial.

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

Russell and Cynthia cross-appeal and assign that the county court erred in (1) finding that Mark did not violate § 30-3869, (2) appointing Mark as the conservator for Marcia instead of a corporate fiduciary, (3) disallowing in its entirety Russell and Cynthia's attorney fees and costs in the conservatorship proceeding, (4) reducing the amount of Russell and Cynthia's attorney fees and costs in the trust proceeding, and (5) declining to order Mark to reimburse the trust for attorney fees and costs he expended in the trust proceeding.

Marcia's death renders moot the issue of the appointment of her conservator and abates her appeal, but it does not abate the entire cause of action.[4] Because the appeal in case No. S-15-967 was taken only from the order appointing a conservator, it is dismissed. Marcia's death also moots Russell and Cynthia's assignment on cross-appeal contesting Mark's appointment as conservator. And we dismiss Marcia as a party in each appeal. The only remaining issue pertaining to the conservatorship case is Russell and Cynthia's cross-appeal in case No. S-16-040 assigning error to the denial of their application for attorney fees and costs. This issue was not mooted by Marcia's death. Thus, to the extent that it is inconsistent with our disposition of these appeals, we overrule Mark's motion to remand case No. S-15-967 with directions to vacate and dismiss.

IV. STANDARD OF REVIEW

[1,2] An appellate court reviews conservatorship proceedings for error appearing on the record in the county court.[5] 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.[6]

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[4] See *In re Conservatorship of Franke*, *supra* note 1.

[5] *Id.*

[6] *Id.*

[3] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.[7]

[4] A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.[8]

V. ANALYSIS

1. Standing to Petition for Removal of Trustee

[5,6] On appeal, Mark renews his argument that Russell and Cynthia lacked standing to petition for his removal as trustee. Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.[9] Mark argues that Russell and Cynthia did not have a real interest in the trustee removal proceeding, because, under § 30-3855, he owed fiduciary duties exclusively to Marcia. This argument confuses the issue. Section 30-3855 does not dictate who may petition for the removal of a trustee, but, rather, describes to whom fiduciary duties are owed.

[7] Generally, standing in a trustee removal proceeding is governed by § 30-3862(a). That statute does not focus on the fiduciary duties owed by a trustee. Rather, it provides that "[t]he settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative."[10] And, the Nebraska Uniform Trust Code defines a beneficiary as "a person that . . . has a present or future beneficial interest in a trust, vested or contingent[.]"[11]

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[7] *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

[8] *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006).

[9] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[10] § 30-3862(a).

[11] § 30-3803(3).

The parties do not contest that Russell and Cynthia had, at a minimum, a contingent future beneficial interest in the trusts. Accordingly, they had standing to petition the court for Mark's removal.

2. Mark's Fiduciary Duties

Having determined that Russell and Cynthia had standing to petition for Mark's removal as trustee, we now consider whether Mark owed any fiduciary duties to Russell and Cynthia. The relevant statute distinguishes between trustees' duties in administering revocable and irrevocable trusts.[12] Therefore, we will separately consider Mark's fiduciary duties owed to Russell and Cynthia in relation to the revocable Survivor's Trust and the irrevocable Family Trust.

(a) Survivor's Trust

With regard to the Survivor's Trust, though by its own terms it is now irrevocable upon Marcia's death, we must review the trust as it was when Mark served as trustee. And, it is uncontested that the Survivor's Trust was revocable during Marcia's lifetime: Marcia was entitled to the entire net income and could withdraw from the principal of the Survivor's Trust at her will. There was no limitation on this authority, and Russell, Mark, and Cynthia were contingent beneficiaries of the Survivor's Trust assets.

The statute states that "[w]hile a trust is revocable, rights of the beneficiaries are subject to the control of, and the *duties of the trustee are owed exclusively to, the settlor*."[13] Marcia was the only living settlor while Mark served as trustee of the Survivor's Trust. Accordingly, Mark owed his duties as trustee to Marcia, and no one else in administering the Survivor's Trust.[14]

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[12] § 30-3855.

[13] § 30-3855(a) (emphasis supplied).

[14] See *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014).

[8] Although Mark did not owe fiduciary duties to Russell and Cynthia in administering the Survivor's Trust, this is not the end of our analysis. A serious breach of a fiduciary duty is only one of the grounds for removal of a trustee.[15] Because of the shared beneficiaries and trust agreement creating both trusts, if removal for breach of fiduciary duty was appropriate for the trustee of the Family Trust, the county court had the power in equity to determine it was in the best interests of the beneficiaries to remove the trustee of the Survivor's Trust.[16]

(b) Family Trust

(i) Marcia's Power of Appointment

Mark argues that he did not owe any fiduciary duties to Russell and Cynthia as trustee of the Family Trust, because Marcia possessed a limited power of withdrawal that, hypothetically, could have completely divested Russell and Cynthia of their interest in the Family Trust. And, under the same statute, "the holder of a *power of withdrawal* has the rights of a settlor of a revocable trust under this section and the duties of the trustee are owed exclusively to the holder of the power to the extent of the property subject to the power."[17] We find no merit in this argument, because Marcia did not possess a power of withdrawal.

The Nebraska Uniform Trust Code defines a "power of withdrawal" as "a presently exercisable *general* power of appointment."[18] A power of appointment is general when "it is exercisable in favor of any one or more of the following: the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate."[19]

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[15] See § 30-3862.

[16] See *id.*

[17] § 30-3855(b) (emphasis supplied).

[18] § 30-3803(11) (emphasis supplied).

[19] Restatement (Second) of Property: Donative Transfers § 11.4 (1986).

It is clear from the language of the trust that Marcia did not possess a presently exercisable general power of appointment. The trust agreement provides in part:

> By either a last will or by a living trust agreement, the surviving Trustor shall have the limited testamentary power to appoint to or *for the benefit of our joint descendants* some or all of the principal and any accrued but undistributed net income of the Family Trust as it exists at the death of the surviving Trustor.

(Emphasis supplied.) By limiting the appointment power as exercisable solely in favor of their joint descendants, Marcia and her husband ensured that they would never possess a general power of appointment in the Family Trust. Because the limited power of appointment was not a general power of appointment, it was not a power of withdrawal under § 30-3855(b).

(ii) Russell and Cynthia's Present Interest in Trust

Mark additionally argues that as the trustee of the Family Trust, he owed no duties to Russell and Cynthia, because they did not have a present interest in the trust and "during the period the interest of any beneficiary not having a present interest may be terminated by the exercise of a power of appointment . . . , the duties of the trustee are owed exclusively to the holder of the power to the extent of the property subject to the power."[20] We find no merit in this argument, because Russell and Cynthia had a present interest in the trust.

[9,10] The extent of the beneficiary's interest in a trust depends upon the discretionary power that the settlor intended to grant the trustee.[21] And, when the parties do not claim that the terms are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.[22]

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[20] § 30-3855(c).

[21] *In re Trust Created by Hansen, supra* note 7.

[22] *Id.*

[11,12] The trust agreement provided for the discretionary payment of the Family Trust principal to Marcia, Russell, Mark, and Cynthia. The relevant provision states:

> At any time or times during the trust term, our Trustee *shall* pay to or apply for the benefit of the surviving Trustor and our joint descendants so much of the principal of the Family Trust as our Trustee *in its discretion* deems proper for their *health, maintenance, support and education*.

(Emphasis supplied.) Though this provision grants discretion to the trustee in determining when and how much of the principal to pay to support Marcia, Russell, Mark, or Cynthia, it is clear that this provision was meant to establish a support trust for those beneficiaries. In general, trustees of support trusts have discretion to determine what is needed for the beneficiary's support and to make payments only for that purpose.[23] But this level of discretion does not preclude a beneficiary from seeking to show that a trustee has abused its discretion in failing to make support payments.[24] For these reasons, we find that Russell and Cynthia had an enforceable, present interest in the Family Trust. As a result, § 30-3855(c) did not apply and, thus, Mark owed fiduciary duties to Russell and Cynthia as well as Marcia.

(c) Effect of Power of Attorney

Mark additionally argues that during the times that Russell and Cynthia alleged he violated duties as trustee, he owed no duties to them, because he was acting as Marcia's agent under a power of attorney and Marcia remained the trustee. The parties do not contest that Marcia resigned as trustee over two financial accounts associated with the trusts and appointed Mark as successor trustee of those accounts in 2011. Assuming that Marcia had the authority under the trust agreement to resign as trustee over part of the two trusts and that Mark

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[23] *Id.*

[24] *Id.*

could act as successor trustee over part of the two trusts, Mark was, at the very least, a cotrustee with Marcia.

[13] A trustee is liable for the action of another trustee if he joins in the action, fails to prevent the cotrustee from committing a serious breach of trust, or fails to compel the cotrustee to redress a serious breach of trust.[25] At the very least, Mark acted as cotrustee with Marcia in managing the two financial accounts and served as Marcia's agent under a power of attorney in managing all other trust affairs. Accordingly, Mark joined in all actions by Marcia in administering the trust and owed fiduciary duties to Russell and Cynthia under the Family Trust.

3. Removal of Trustee

Mark assigns that the county court erred in removing him as trustee of the trust, because the evidence does not support a finding that he owed or breached any fiduciary duties to Russell and Cynthia. The Nebraska Uniform Trust Code authorizes removal of a trustee where "the trustee has committed a serious breach of trust" or "because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."[26]

[14,15] A trustee has the duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code.[27] The Nebraska Uniform Trust Code states that trustees owe the beneficiaries of a trust duties that include loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting.[28]

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[25] See § 30-3859; Restatement (Second) of Trusts § 184 (1959).

[26] § 30-3862(b)(1) and (3).

[27] *Rafert v. Meyer*, 290 Neb. 219, 859 N.W.2d 332 (2015).

[28] *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014).

The county court found that Mark had violated several of these duties, including his duty to administer the trust in good faith, his duty of loyalty, his duty of impartiality, and his duty to inform and report. The court specifically found that Mark had not violated his duty of prudent administration.

[16] Mark's violation of his duty of impartiality is dispositive. The Nebraska Uniform Trust Code states, "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests."[29] A cause for removal of a trustee is appropriate for the best interests of the trust estate where hostile relations exist between a trustee and beneficiaries of such a nature as to interfere with proper execution of the trust, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his or her duties as trustee under the terms of the trust.[30]

[17,18] Mark contends that the court did not have the authority to consider whether he breached his fiduciary duty of impartiality under § 30-3868, because Russell and Cynthia did not plead violation of that duty in their petition. It is true that the issues in a given case will generally be limited to those which are pled.[31] However, while the Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, the touchstone is whether fair notice was provided.[32] In our de novo review of the record, we find that Russell and Cynthia alleged sufficient facts in their petition to put Mark on notice of this claim. And, notably, their counsel alleged during opening statements that Mark violated § 30-3868 and Mark's counsel did not object to this as beyond

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[29] § 30-3868.

[30] *In re Estate of Stuchlik, supra* note 28.

[31] *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb. 698, 851 N.W.2d 82 (2014).

[32] *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

the scope of the pleadings. Therefore, the issue was properly before the county court.

[19] Impartiality means that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries.[33] The evidence on the record indicates that Mark harbored significant bitterness and hostility toward Russell and Cynthia. Mark accused Russell of stealing from Marcia and accused Cynthia of murdering his aunt. He additionally threatened to "make even" the distributions from his aunt's will with trust assets, evidencing a personal interest in acquiring a larger portion of the trust assets than the other beneficiaries upon Marcia's death. Here, Mark's personal interests conflicted with his duties as trustee. For these reasons, the county court did not err in finding that Mark had violated his duty of impartiality.

[20,21] A finding of one serious breach of fiduciary duty is enough to warrant removal of a trustee.[34] And an appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[35] Accordingly, we need not review the other assigned errors concerning Mark's other fiduciary duties.

4. Attorney Fees and Costs

(a) Application for Attorney Fees and Costs

Russell and Cynthia assign that the county court erred when it reduced their application for attorney fees and costs in the trust proceeding. The application requested $139,743.25 in attorney fees and $6,112.76 in costs, and the court awarded $44,957.98 in attorney fees and $1,645.48 in costs. They also assign that the county court erred in disallowing in its

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[33] *In re Estate of Stuchlik, supra* note 28.

[34] § 30-3862(b)(1).

[35] *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

entirety their attorney fees and costs in the conservatorship proceeding.

[22,23] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[36] 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.[37] Although the county court's reasoning in reducing the award of attorney fees in the trust proceeding and disallowing the award of attorney fees in the conservatorship proceeding was not explicit, we find no abuse of discretion in the county court's order.

(b) Application for Trustee to Reimburse Trust

Russell and Cynthia additionally assign that the county court erred when it declined to order Mark to reimburse the trust for his attorney fees and costs paid out of the trust. We again review for abuse of discretion and find none.

5. Exclusion of Certain Evidence

Finally, Mark assigns that the county court abused its discretion in excluding certain evidence. He alleges that the excluded evidence would have established Russell and Cynthia's wrongful motives for bringing the two lawsuits: namely, that they "brought these lawsuits out of concern for their potential inheritance and not due to any concerns for [Marcia]."[38] Mark argues that two pieces of evidence were wrongfully excluded.

The first piece of evidence was an e-mail sent by Russell to Cynthia that was not produced during pretrial discovery to

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[36] *In re Guardianship & Conservatorship of Karin P., supra* note 8; *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003).

[37] *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

[38] Brief for appellant at 38.

Mark but was discovered when it was attached to a guardian ad litem's report. The county court excluded the evidence at trial when Mark offered it, because he did not produce the e-mail in response to pretrial discovery. Mark argues that the county court erred in excluding this evidence, because Neb. Ct. R. Disc. § 6-334(a)(1) requires parties to produce documents only "which are in the possession, custody, or control of the party upon whom the request is served" and, at the time he received discovery requests, he was not in possession of the e-mail.

The second piece of evidence was a contact log created by Cynthia that detailed events surrounding her aunt's death and wrapping up her estate. The county court excluded the log as irrelevant, and Mark argues this was prejudicial error. He asserts that the log included a party admission that contradicted Russell and Cynthia's theory that Mark was trying to turn Marcia against them and equalize the distributions for their aunt's estate.

[24,25] Assuming, without deciding, that the county court erred in excluding these two pieces of evidence, the error was harmless. 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.[39] An order affects a substantial right if the order affects the subject matter of the litigation, such as diminishing a claim or defense that the appellant had before the court entered the order.[40] Here, the subject matter of the litigation was Mark's actions as trustee and not Russell and Cynthia's motives in petitioning for his removal. And, to the extent that their conflicting motivations would bear on their attorney fees, it is clearly harmless where the county court disallowed attorney fees in the conservatorship case and substantially reduced the award of attorney fees

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[39] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

[40] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

in the trust case. Accordingly, the exclusion of the evidence did not affect a substantial right and was, at most, harmless error.

VI. CONCLUSION

We dismiss the appeal and cross-appeal in case No. S-15-967 as moot, because that appeal pertained only to the order appointing a conservator for Marcia. Turning to the appeal and cross-appeal in case No. S-16-040, we find no abuse of discretion in the county court's dispositions of attorney fees and costs in both the conservatorship case and the trust case. We determine that any evidentiary error was harmless. And upon our de novo review, we affirm the removal of Mark as trustee and the appointment of his successor. Thus, we affirm the county court's December 29, 2015, final order in the conservatorship case and affirm the court's judgment in the trust case.

Appeal in No. S-15-967 dismissed.
Judgment and final order in
No. S-16-040 affirmed.

Miller-Lerman, J., not participating.

In re Guardianship and Conservatorship of Loyola Jane Kaiser, an incapacitated and protected person. Heartland Trust Company, Conservator, appellant, v. Paula Kaiser-Asmus and Carol Harris, appellees.

891 N.W.2d 84

Filed January 13, 2017. No. S-16-219.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Legislature: Presumptions.** In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law.
5. **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.
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.

Appeal from the County Court for Fillmore County: Michael P. Burns, Judge. Affirmed.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellant.

Joseph N. Bixby and Paul N. Bixby, Senior Certified Law Student, of Bixby Law Office, for appellees.

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

Miller-Lerman, J.

NATURE OF CASE

The appellant, Heartland Trust Company (Heartland), was appointed as the conservator for Loyola Jane Kaiser. After the death of Loyola's husband, Albert A. Kaiser, Heartland filed an application in the county court for Fillmore County seeking authority to file the elective share it stated was due to Loyola as Albert's surviving spouse. After a hearing, the county court denied Heartland's application. Heartland appeals. We affirm.

STATEMENT OF FACTS

Albert and Loyola were married and had one child together, Paula Kaiser-Asmus (Paula). Loyola had two children from a previous marriage, James Votipka (James) and Carol Harris (Carol). The record does not specifically indicate when Albert and Loyola were married, but the county court noted in its order that "Paula was born in 1959, suggesting that the marriage between Albert and Loyola . . . spanned over many decades."

Albert and Loyola both executed wills on December 16, 2005, and these wills appear to mirror each other. The wills provided a life estate to the surviving spouse for certain property and devised all the residue of their property interests to the surviving spouse. They both also devised remainder interests in certain property to James, Carol, and Paula.

Loyola did not modify her 2005 will, but Albert executed a new will and a living trust on March 19, 2014. Albert's 2014

will named Loyola as his spouse, Paula as his child, and Carol as his spouse's child, and it stated that "[a]ll references to 'my children' in this Will are to these children." Albert's 2014 will further stated: "My spouse has a son, JAMES . . . ; that I have intentionally and with full knowledge chosen not to provide for him or his descendants." Albert's 2014 will distributed all of his property into his living trust.

Similar to his 2014 will, Albert's living trust identified Loyola as his spouse, Paula as his child, and Carol as his spouse's child, and it stated that "[a]ll references to 'my children' in this Agreement are to these children." The living trust specifically excluded James, stating that Albert had "intentionally and with full knowledge chosen not to provide for [James] or his descendants." "Article Nine" of Albert's living trust is titled "Distribution of My Trust Property," and it specifically designated Paula and Carol as the only two beneficiaries of the trust, with each receiving a 50-percent share of the trust upon Albert's death. Neither Loyola nor James were included as a beneficiary of Albert's trust.

On July 23, 2014, while Albert was still alive, the county court filed an order and letters in which it appointed Heartland as the conservator for Loyola.

Albert died in January 2015. On April 24, Heartland, as Loyola's conservator, filed an application in which it sought an order authorizing it to elect the statutory share due to Loyola as Albert's surviving spouse. Heartland alleged that pursuant to Neb. Rev. Stat. § 30-2313 (Reissue 2016), Loyola, as the surviving spouse, had a right of election to take an elective share in any fraction not in excess of one-half of Albert's augmented estate. In its application, Heartland additionally requested authorization to claim homestead, exempt property, and family allowances on behalf of Loyola.

A hearing was held at which Heartland offered and the county court received 12 exhibits. The president of Heartland, Lucas Swartzendruber, testified on behalf of Heartland. Swartzendruber testified that Loyola was approximately 88

years old at the time of the hearing. He stated that generally the life expectancy of an 88-year-old person is approximately 6 years, "but that could vary based on health." Swartzendruber noted that Loyola was in hospice care and that he had not been given any indication from Loyola's doctor as to how long the doctor expected Loyola to live.

Swartzendruber testified that he attempted to locate all of Loyola's assets, which are reflected in exhibit 8. The value of the assets listed in exhibit 8 is in excess of $1 million, and exhibit 8 states that Loyola's only liabilities are her current expenses. Swartzendruber also testified that he prepared an estimate of Loyola's anticipated income and expenses on an annual basis, which is reflected in exhibit 13. Loyola's estimated annual income totaled $90,597.77, which included Social Security payments, long-term care insurance, and rent from certain properties. Loyola's estimated annual expenses totaled $82,509.63. This estimate did not include conservator or attorney fees, which Swartzendruber noted would vary depending on pending legal actions.

Swartzendruber also stated at the hearing that Loyola had been named as a beneficiary of Albert's single premium annuity in the principal sum of $200,000, but that at some point, the beneficiary was changed and Loyola was no longer listed as a beneficiary. Swartzendruber further testified that Loyola had been listed as a beneficiary of Albert's life insurance policy in the amount of $25,000, but that she was no longer listed as a beneficiary at the time of Albert's death.

After the hearing but before the county court ruled on Heartland's application, Heartland, as Loyola's conservator, filed a petition for the elective share in Albert's separate probate matter, case No. PR-15-42. In the petition, Heartland recognized that the county court had not yet ruled on its application for authorization to file a petition for the elective share. However, Heartland stated that a petitioner is required to file a petition for elective share within 9 months of the decedent's death and Heartland was concerned that the right

to petition for elective share would be waived if it failed to file in a timely manner. In the separate probate matter, Paula subsequently filed a motion to dismiss Heartland's petition for elective share, because Heartland did not have authorization to file the petition.

On February 10, 2016, the county court filed its order in which it denied Heartland's application. In its decision, the county court considered Neb. Rev. Stat. § 30-2315 (Reissue 2016), which provides:

> The right of election of the surviving spouse may be exercised only during his or her lifetime by him or her. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his or her property are pending, after finding that exercise thereof in the fraction designated or proposed is in the best interests of the protected person during his or her probable life expectancy and of the children, family members, or other successors to the decedent or to the protected person, due regard being given by the court to the other assets and resources of the protected person, the extent and nature of any dependent, mutual, or otherwise related estate planning of the decedent and the protected person, the present and likely future financial impact upon the estate of the decedent, the protected person or the estate of the protected person, or such successors of any federal or state estate, excise, gift, income, inheritance, succession, or other tax consequent upon such exercise, and the existence or nonexistence of any other factors deemed by the court to be relevant to the exercise or nonexercise of the right of election.

The county court stated in its order:

> In consideration of the factors set forth in . . . § 30-2315, it seems contrary to the estate planning done by the decedent (Albert) in 2014, as well as unnecessary when considering the current, plentiful financial

> circumstances of the protected person (Loyola . . .), to approve the request of the conservator for authorization to file an elective share, of any percentage, within [Albert's] estate . . . .

The county court stated that when Albert modified his estate in 2014 and excluded Loyola and James as beneficiaries of his living trust, he presumably took into consideration Loyola's assets, including income-generating resources that were accessible to Loyola. The county court noted that if Loyola's "current financial circumstances were not as stable and plentiful, then this Court would have little, if any, regard for the inferred primary intent of Albert's 2014 estate planning." However, the county court recognized that § 30-2315 provides that the court must give due regard "to the other assets and resources of the protected person, the extent and nature of any dependent, mutual, or otherwise related estate planning of the decedent and the protected person." The county court went on to state that "it is the application of this statutory provision which leads this Court to deny the request of the conservator to file for an elective share of [Albert's] estate."

In its February 10, 2016, order, the county court also granted Heartland's request for authority to claim homestead allowance, exempt property, and family allowance on behalf of Loyola. These determinations are not challenged on appeal.

Heartland appeals from the portion of the county court's order which denied the request to file an elective share.

ASSIGNMENTS OF ERROR

Heartland claims that the county court erred because its decision denying the application of the conservator to file for an elective share "does not conform to the law, is not supported by competent evidence, and is arbitrary, capricious and unreasonable."

STANDARDS OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in

the county court. *In re Conservatorship of Franke*, 292 Neb. 912, 875 N.W.2d 408 (2016). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

ANALYSIS

Heartland claims that the county court erred when it denied its application for authority to file, on Loyola's behalf, for the elective share of Albert's augmented estate. Heartland argues that the county court's determination does not conform to the applicable law and is not supported by competent evidence. We disagree and affirm the order of the county court.

Section 30-2313 of the Nebraska Probate Code provides that after a married person dies, the person's surviving spouse has the right of election. Section 30-2313(a) states that "if a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share in any fraction not in excess of one-half of the augmented estate." The right of election allows a person who survives his or her spouse to elect to take a share of the deceased spouse's augmented estate, instead of taking what the surviving spouse would receive under the deceased spouse's will.

The Nebraska Probate Code limits the right of election for a surviving spouse who is a protected person. See § 30-2315. For purposes of the Nebraska Probate Code, a protected person is "a minor or other person for whom a conservator has been appointed or other protective order has been made." Neb. Rev. Stat. § 30-2601(3) (Reissue 2016). Loyola is a protected person for the purposes of our analysis.

The right to elect by a surviving spouse who is a protected person must be exercised in conformity with § 30-2315, which is the controlling statute applicable to this case. Section 30-2315 provides:

> In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his or her property are pending, after finding that exercise thereof in the fraction designated or proposed is in the best interests of the protected person during his or her probable life expectancy and of the children, family members, or other successors to the decedent or to the protected person, due regard being given by the court to the other assets and resources of the protected person, the extent and nature of any dependent, mutual, or otherwise related estate planning of the decedent and the protected person, the present and likely future financial impact upon the estate of the decedent, the protected person or the estate of the protected person, or such successors of any federal or state estate, excise, gift, income, inheritance, succession, or other tax consequent upon such exercise, and the existence or nonexistence of any other factors deemed by the court to be relevant to the exercise or nonexercise of the right of election.

Heartland claims that the county court erred in its application of § 30-2315 when it denied Heartland authorization to file for the elective share on Loyola's behalf. Heartland argues that the county court did not properly consider the factors set forth in § 30-2315, and it asserts that it would be in Loyola's best interests if she were allowed to file for the elective share. Heartland specifically contends that "[t]he unmistakable conclusion is that the best interests of [Loyola] can only be served by permitting her to make the full statutory election of fifty percent . . . of [Albert's] augmented estate." Brief for appellant at 11. Heartland relies on *Clarkson v. First Nat. Bank of Omaha*, 193 Neb. 201, 226 N.W.2d 334 (1975), to support

its contention that allowing Loyola to file for the elective share would be in her best interests, because filing for the elective share would provide her with the greatest monetary value. However, as explained below, Heartland's reliance on *Clarkson, supra*, is misplaced primarily because the statute on which that case was decided has been significantly revised and replaced by § 30-2315; the language of the controlling statute dictates different principles and, in this case, a different outcome.

The question before this court in *Clarkson, supra*, was whether it was in the best interests of an incompetent surviving spouse to take under her deceased husband's will or for the court to authorize her to take the elective share. The case was controlled by Neb. Rev. Stat. § 30-108(2) (Reissue 1964), the centerpiece of which provided that

> [t]he court [after conducting a] hearing shall make such election [either to take as provided by the will or to take by inheritance and descent and distribute as provided by law] as it deems the best interests of such surviving husband or wife shall require, which election shall be entered upon the records of said court.

In *Clarkson*, the county court determined that the surviving spouse's best interests would not be served by filing for the elective share and that therefore, the surviving spouse should take under the will. On appeal, the district court disagreed and found that allowing the surviving spouse to file for the elective share would be of greater value to the surviving spouse. In a 4-to-3 decision, this court affirmed.

On appeal from the district court, this court in *Clarkson* was faced with the question of what factors were to be considered in determining the "best interests" of the incompetent spouse under § 30-108(2). In deciding what factors were to be considered under § 30-108(2), this court noted that there was a split among the jurisdictions regarding the approach to determine whether to authorize filing for the elective share. Essentially, the courts were split on the meaning of "best

interests." We noted that the minority of jurisdictions believed that the best interests of the surviving incompetent or protected spouse will be served by electing the method—either taking under the decedent spouse's will or filing for the elective share—which is most valuable to the surviving spouse. See *Clarkson, supra*. Following this approach usually means that the method which has the greater pecuniary value will be the method that is ordered. See, *id.*; *Spencer v. Williams*, 569 A.2d 1194 (D.C. App. 1990). This approach followed by the minority of jurisdictions is sometimes referred to as the "pecuniary approach." See Susan P. Barnabeo, Note, *The Incompetent Spouse's Election: A Pecuniary Approach*, 18 U. Mich. J.L. Reform 1061, 1070 (1985).

Contrary to the "pecuniary approach," the majority of jurisdictions are of the view that all the surrounding facts and circumstances should be taken into consideration by the court in order to determine whether to authorize the filing for the elective share. See, *Clarkson, supra*; *Kinnett v. Hood*, 25 Ill. 2d 600, 185 N.E.2d 888 (1962). Courts that follow the majority approach believe the minority approach is too narrow by focusing only on the pecuniary value. The majority approach values the flexibility afforded by considering all the surrounding facts and circumstances, such as the testator's intent and the choice the surviving spouse would have made had he or she been competent. See, *Spencer, supra*; Barnabeo, *supra*. In *Clarkson*, this court adopted the minority pecuniary approach.

The dissent in *Clarkson* found the pecuniary approach to be "too restrictive." *Clarkson v. First Nat. Bank of Omaha*, 193 Neb. 201, 209, 226 N.W.2d 334, 339 (1975) (McCown, J., dissenting; Newton and Clinton, JJ., join). The dissent stated that "[t]he rule adopted by the majority of courts offers a much broader and sounder basis for making the appropriate election on behalf of an incompetent surviving spouse. It likewise permits an equitable approach on an individual case basis." *Id*. at 210, 226 N.W.2d at 339. The dissent also noted that

§ 30-108 was to be replaced by a new statute, Neb. Rev. Stat. § 30-2315 (Cum. Supp. 1974), but the new statute was not yet in effect. The version of § 30-2315 to which the dissent made reference had been adopted as a part of the Nebraska Probate Code by 1974 Neb. Laws, L.B. 354; however, the 1974 version of § 30-2315 differs from the version of § 30-2315 that is currently in place. The 1974 version of § 30-2315 was patterned after a section of the Uniform Probate Code, then identified as § 2-203, and provided:

> The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is in the best interests of the protected person during his probable life expectancy.

After *Clarkson* was decided in 1975, the Legislature, by 1980 Neb. Laws, L.B. 694, amended the 1974 version of § 30-2315 that had been adopted as part of the Nebraska Probate Code. The 1980 version of § 30-2315 is the same as the version currently in place, and it provides that in the case of a protected person, a court may order that the right of election may be exercised

> after finding that exercise thereof in the fraction designated or proposed is in the best interests of the protected person during his or her probable life expectancy and of the children, family members, or other successors to the decedent or to the protected person, due regard being given by the court to the other assets and resources of the protected person, the extent and nature of any dependent, mutual, or otherwise related estate planning of the decedent and the protected person, the present and likely future financial impact upon the estate of the decedent, the protected person or the estate of the protected person, or such successors of any federal or state estate, excise, gift, income, inheritance, succession, or other

tax consequent upon such exercise, and the existence or nonexistence of any other factors deemed by the court to be relevant to the exercise or nonexercise of the right of election.

[4] In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law. *Trumble v. Sarpy County Board*, 283 Neb. 486, 810 N.W.2d 732 (2012). By specifically amending § 30-2315 to include numerous factors that are to be considered by the court before ordering that a protected person may exercise the right of election, the Legislature obviously responded to this court's decision in *Clarkson v. First Nat. Bank of Omaha*, 193 Neb. 201, 226 N.W.2d 334 (1975), and rejected this court's adoption of the minority pecuniary approach. By the plain language of § 30-2315, the Legislature delineated a number of factors that are to be considered by the court. The Legislature thus has indicated its intention that this court use the majority approach and consider numerous facts and circumstances relevant to determine whether to authorize a protected person to file for the elective share. Our reading of the amendment to § 30-2315 is confirmed by the legislative history, wherein an attorney testifying in support of L.B. 694 stated that the purpose of the amendment to § 30-2315 was "to overcome the Supreme Court decision in [*Clarkson*]." Judiciary Committee Hearing, L.B. 694, 86th Leg., 1st Sess. 18 (Jan. 30, 1980).

We have not squarely addressed the issue of what factors are to be considered by a court in determining whether to authorize a protected person to file for the elective share, because this issue was decided in *Clarkson* under a different statute. The Legislature's 1980 amendment to § 30-2315 lists numerous considerations to be evaluated when deciding whether to authorize the filing for an elective share, and those considerations reflect the majority view. Those factors include other assets and resources of the protected person, related estate planning of the decedent, and tax consequences of the exercise or nonexercise of the right of election. See § 30-2315.

Thus, to the extent *Clarkson* adopted the minority "pecuniary approach," that holding has been superseded by statute, specifically § 30-2315.

[5,6] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016). 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. *Id*. Based on the plain language of § 30-2315, we adopt the majority approach that the surrounding facts and circumstances should be taken into consideration by the court in order to determine whether to authorize the filing for the elective share in the case of a protected person.

Having determined that the majority approach applies, we turn to the facts of this case. Heartland argues that the county court failed to properly consider the factors set forth in § 30-2315. Heartland asserts that Loyola's assets and other resources do not provide her with the necessary income for the remainder of her life; Albert and Loyola had mutual estate planning in 2005, but Albert later modified his estate planning to exclude Loyola; and allowing Loyola to file for the elective share would not have a financial impact on Albert's estate.

After reviewing the record and the county court's order, we disagree with Heartland's assertions. The record indicates that the value of Loyola's assets at the time of the hearing exceeded $1 million and that her only liabilities were her current expenses. The evidence shows that Loyola's anticipated annual income totaled $90,597.77 and that her estimated annual expenses totaled $82,509.63. This evidence regarding Loyola's assets and income was considered by the county court in making its determination. The county court also recognized that Albert modified his estate in 2014, at which time he executed a new will which distributed all of his property

into a living trust, from which he excluded Loyola as a beneficiary. The county court stated when Albert excluded Loyola as a beneficiary of his living trust, Albert presumably took into consideration Loyola's ongoing one-half interest in certain assets and income-generating resources that were accessible to Loyola.

In considering the evidence presented and the factors set forth in § 30-2315, the county court stated in its order:

> [I]t seems contrary to the estate planning done by the decedent (Albert) in 2014, as well as unnecessary when considering the current, plentiful financial circumstances of the protected person (Loyola . . .), to approve the request of the conservator for authorization to file an elective share, of any percentage, within [Albert's] estate . . . .

The county court further stated that if Loyola's "current financial circumstances were not as stable and plentiful, then this Court would have little, if any, regard for the inferred primary intent of Albert's 2014 estate planning." However, the county court went on to state that

> as set forth in . . . § 30-2315, "due regard being given by the court to the other assets and resources of the protected person, the extent and nature of any dependent, mutual, or otherwise related estate planning of the decedent and the protected person," it is the application of this statutory provision which leads this Court to deny the request of the conservator to file for an elective share of [Albert's] estate.

(Emphasis in original.)

Based upon our review of the record, we cannot say that the county court's decision to deny Heartland's request to file for an elective share on behalf of Loyola was contrary to the law, specifically § 30-2315. The county court's decision is supported by the evidence set forth in the record regarding Loyola's assets and income and the estate planning completed by Albert in 2014, and we cannot say that the county

court's decision was arbitrary, capricious, or unreasonable. Accordingly, we reject Heartland's assignment of error, and we affirm the order of the county court.

CONCLUSION

The county court did not err when it denied Heartland's request for authorization to file, on Loyola's behalf, for the elective share of Albert's estate, and we therefore affirm the order of the county court.

Affirmed.

State of Nebraska, appellee, v. Juan E. Castaneda, appellant.

889 N.W.2d 87

Filed January 13, 2017. No. S-16-273.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Sentences: Due Process: Appeal and Error.** Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
5. **Sentences.** When imposing a sentence, a sentencing judge should consider the following factors related to the defendant: (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, (6) motivation for the offense, (7) nature of the offense, and (8) amount of violence involved in the commission of the crime.
6. **Criminal Law: Sentences: Minors: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 28-105.02(2) (Reissue 2016) includes a nonexhaustive list of mitigating factors that a sentencing court must take into consideration when sentencing a juvenile for a Class IA felony.
7. **Sentences.** In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.
8. ____. 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.

9. ____. It is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.
10. **Constitutional Law: Minors: Sentences.** Life imprisonment without the possibility of parole for juveniles convicted of nonhomicide offenses is unconstitutional; such juvenile offenders must be given some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.
11. **Constitutional Law: Homicide: Minors: Sentences.** There is no categorical bar against life sentences without parole for juveniles convicted of homicide offenses; instead, the sentencing court must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile.
12. **Due Process: New Trial: Convictions: Sentences.** Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.
13. **Sentences: Presumptions: Appeal and Error.** There is no presumption of vindictiveness when a sentence is increased after a successful appeal of the prior conviction if a different judge or jury handed down the second, harsher sentence.
14. **Sentences: Presumptions: Proof.** When the presumption of vindictiveness is not applied, the burden remains with the defendant to prove actual vindictiveness.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Annie O. Hayden for appellant.

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

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

Funke, J.

INTRODUCTION

In October 2010, the appellant, Juan E. Castaneda, was convicted by a jury of two counts of first degree felony

murder, one count of attempted second degree murder, one count of attempted robbery, one count of criminal conspiracy, and three counts of use of a deadly weapon to commit a felony. He was sentenced as follows: life imprisonment for each first degree murder; 10 to 20 years' imprisonment for attempted second degree murder, to be served concurrently with all; 10 to 15 years' imprisonment for attempted robbery, to be served concurrently with all but its respective weapon conviction; 10 to 15 years' imprisonment for criminal conspiracy, to be served concurrently with all; and 10 to 15 years' imprisonment for each weapon conviction, to be served consecutively only with each respective first degree murder or attempted robbery conviction.

On direct appeal, we affirmed Castaneda's convictions, vacated all his sentences, and remanded the cause for resentencing.[1] We vacated Castaneda's life sentences under the U.S. Supreme Court's decision in *Miller v. Alabama*.[2] We also vacated his other sentences because the sentencing court committed plain error by ordering Castaneda's weapon sentences to run concurrently with other sentences, instead of consecutively with all other sentences as required by law.[3]

Following a full evidentiary hearing and arguments, Castaneda was resentenced in accordance with Nebraska statutes. Castaneda appeals his resentencing. We affirm.

BACKGROUND

The events underlying Castaneda's eight convictions and sentences involve three shootings that occurred in three separate locations in Omaha, Nebraska, within an hour. In our opinion on Castaneda's direct appeal, we set forth the facts of the case in detail.[4]

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

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

[3] See Neb. Rev. Stat. § 28-1205(3) (Reissue 2016).

[4] See *Castaneda, supra* note 1.

The individuals responsible for the crimes were Edgar Cervantes, Eric Ramirez, and Castaneda. The State entered into a plea agreement with Cervantes to dismiss the murder charges against him in exchange for his testimony.

According to Cervantes, in November 2008, he asked Ramirez if he wanted "to go rob some people." That same evening, Castaneda accompanied Cervantes and Ramirez when they left a party to give Jacob Shantz a ride home. While Cervantes was driving to Shantz' residence, he removed a gun from under his seat and gave it to Ramirez.

After dropping Shantz off at his home, the three men drove to 13th and Dorcas Streets in Omaha. While at that location, Cervantes stayed in the vehicle and Ramirez and Castaneda exited the vehicle. Ramirez and Castaneda approached two males, later identified as Mark and Charles McCormick. According to the McCormicks, the two men, one of them armed, came up to them as they were leaving their cousin's residence. The men demanded money but retreated after Charles threatened them with a "piece of wood" or "tree stump."

Shortly thereafter, at about 10:45 p.m., all three men drove to 16th and Dorcas Streets where they encountered Luis Silva inside his vehicle outside of his home. Ramirez and Castaneda approached Silva to rob him. Castaneda pulled Silva from his vehicle, and Ramirez fatally shot him.

Then, at about 11 p.m., Cervantes, Ramirez, and Castaneda drove to 50th Street and Underwood Avenue where they observed a man, later identified as Charles Denton, walk up to an automatic teller machine. When Denton saw two men approaching, he returned to his vehicle and started to drive away with his passenger. The two men, Ramirez and Castaneda, ran toward Denton's vehicle, and one reached the driver's side window and demanded money. The man also fired his gun at the vehicle, striking Denton. Denton survived his injuries.

The three men then drove south until they reached 52d and Leavenworth Streets. At that location, they saw Tari Glinsmann

leaving a gas station. Cervantes stopped the vehicle, and Ramirez and Castaneda got out. According to Cervantes, Castaneda pulled Glinsmann from her vehicle and Ramirez fatally shot her. The statement about Glinsmann's murder was supported by video evidence and Castaneda's handprint on the hood of her car. While Cervantes said that Ramirez told him Glinsmann had no money, she was found with cash, jewelry, and the keys to the gas station, where she had worked and had just finished her shift.

At the time of the shootings, Castaneda was 15 years 11 months old. As previously mentioned, Castaneda was convicted of two counts of first degree felony murder, one count of attempted second degree murder, one count of attempted robbery, one count of criminal conspiracy, and three counts of use of a deadly weapon to commit a felony. Castaneda was sentenced to life imprisonment for each first degree murder and 10 to 20 years' imprisonment for attempted murder, with each sentence to run concurrently with the other. He was further sentenced to 10 to 15 years' imprisonment for attempted robbery, to be served concurrently with all but its respective weapon conviction; 10 to 15 years' imprisonment for criminal conspiracy, to be served concurrently with all; and 10 to 15 years' imprisonment for each weapon conviction, to be served consecutively only with each respective first degree murder or attempted robbery conviction.

On direct appeal, we affirmed Castaneda's convictions.[5] While the appeal was pending, however, the U.S. Supreme Court decided *Miller*.[6] We rejected the State's argument that *Miller* should not apply to Castaneda's life in prison sentences, because Nebraska's penalty statute did not contain the qualifier "without parole." We held that a sentence of life in prison in Nebraska essentially contains no possibility of parole, because parole is available only upon a sentence's

[5] See *Castaneda, supra* note 1.

[6] See *Miller, supra* note 2.

being commutated, which—as "'an ad hoc exercise of executive clemency'"[7]—is a distinctly different concept than parole as a matter of law. Accordingly, we vacated Castaneda's life sentences for first degree felony murder. We also vacated his other sentences, because the sentencing court committed plain error by ordering Castaneda's use of a deadly weapon to commit a felony sentences to run concurrently with his other sentences, instead of consecutively with all other sentences as required by § 28-1205(3). We remanded the cause for resentencing.

Upon remand, the cause was assigned to a different district judge, as the original judge had retired. Before resentencing, a full evidentiary resentencing hearing was held. At that hearing, Castaneda called three witnesses: Beverly Shields, a juvenile detention specialist at the Douglas County Youth Center at the time Castaneda was housed there prior to trial; Dr. Kirk Newring, a psychologist who interviewed Castaneda shortly before resentencing; and Dr. Colleen Conoley, an adolescent neuropsychologist who completed an evaluation on Castaneda in 2014.

Shields testified that Castaneda was a model prisoner and "was the best kid [she] ever worked with" during her employment at the youth center. Newring testified as to the prison culture and the effects of segregation on a person. Conoley testified about Castaneda's current mental status, having been diagnosed as schizophrenic; the maturation process of the adolescent brain; and her belief that Castaneda is not a high risk to reoffend "at this point of his development."

Additionally, a presentence report was ordered for sentencing. The presentence report included, in part, the following information: Conoley's evaluation of Castaneda; the police reports of the crimes; letters from the victims' friends and families; Castaneda's age at the time of his crimes; Castaneda's prior criminal history of graffiti, theft by unlawful taking,

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[7] See *Castaneda, supra* note 1, 287 Neb. at 313, 842 N.W.2d at 758.

shoplifting, and disorderly conduct; Castaneda's overall grade point average from seventh to ninth grades of 3.58, high school diploma, and paralegal studies certificate; Castaneda's involvement in the "Must Be Criminal security threat group"; Castaneda's score as a high risk to reoffend on the "LS/CMI," a risk/needs assessment tool; a summary of Castaneda's 56 misconduct reports from his incarceration: 45 reports between February 4, 2011, and January 21, 2012, and 11 reports between September 14, 2012, and March 24, 2015; and Castaneda's probation officer's recommendation that Castaneda be incarcerated "for a very long time to come."

At the resentencing hearing, the court heard arguments by counsel for Castaneda and the State. The court pronounced the following prison sentences: 40 to 50 years for each first degree murder conviction, 10 to 10 years for attempted second degree murder, 5 to 5 years for the attempted robbery, 5 to 5 years for criminal conspiracy, and 5 to 5 years for each weapon conviction. The criminal conspiracy and attempted robbery sentences were ordered to run concurrently with each other and with the attempted murder sentence. All other sentences were ordered to run consecutively to each other. The total combined sentence was 105 to 125 years' imprisonment. Castaneda was given credit for 2,652 days served. Castaneda appeals.

ASSIGNMENTS OF ERROR

Castaneda assigns, restated, that the district court erred in imposing (1) excessive sentences, (2) an aggregate de facto life sentence prohibited under due process and the Eighth Amendment, and (3) more severe sentences than Castaneda originally received.

STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[8] A judicial abuse of discretion exists when

[8] *State v. Mantich, ante* p. 407, 888 N.W.2d 376 (2016).

the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[9]

[3,4] Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.[10] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[11]

ANALYSIS

Excessive Sentences

Castaneda argues that his aggregate sentence of 105 to 125 years' imprisonment is excessive because the court failed to adequately consider the required sentencing factors. Specifically, he alleges that the court did not give adequate consideration to his age. Castaneda also argues the sentencing was tailored only to his crimes rather than to him as an individual, as required by *State v. Harrison*.[12] Finally, he contends that the court did not give sufficient consideration to the aggregate length of the sentences; this argument is essentially the same as Castaneda's second assignment of error that the court imposed an aggregrate de facto life sentence.

[5,6] There is no contention that Castaneda's sentences were outside the permissible statutory ranges. Accordingly, the question is whether the court abused its discretion in the sentences it imposed upon Castaneda. We have stated that when imposing a sentence, a sentencing judge should consider the following factors related to the defendant: (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record

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[9] *Id.*

[10] *State v. Miller*, 284 Neb. 498, 822 N.W.2d 360 (2012).

[11] See *State v. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016).

[12] See *State v. Harrison*, 255 Neb. 990, 1005, 588 N.W.2d 556, 565 (1999) ("a sentence should fit the offender and not merely the crime").

of law-abiding conduct, (6) motivation for the offense, (7) nature of the offense, and (8) amount of violence involved in the commission of the crime.[13] Additionally, Neb. Rev. Stat. § 28-105.02(2) (Reissue 2016), which was amended by the Legislature after *Miller*, includes the following nonexhaustive list of mitigating factors that a sentencing court must also take into consideration when sentencing a juvenile for first degree murder, a Class IA felony:

> (a) The convicted person's age at the time of the offense;
>
> (b) The impetuosity of the convicted person;
>
> (c) The convicted person's family and community environment;
>
> (d) The convicted person's ability to appreciate the risks and consequences of the conduct;
>
> (e) The convicted person's intellectual capacity; and
>
> (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.[14]

[7,8] In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.[15] 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.[16]

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[13] See *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

[14] See *Castaneda, supra* note 1.

[15] See *State v. Raatz*, 294 Neb. 852, 885 N.W.2d 38 (2016).

[16] *Id.*

We note in the present case that the sentencing judge, in fact, considered each of these factors and discussed them at the sentencing hearing. The sentencing judge acknowledged that he was not the original trial or sentencing judge and, instead, relied on the presentence report, evidentiary hearing, and arguments of counsel in sentencing Castaneda. The court stated that it considered two main factors: the nature of the crimes committed and Castaneda's age when he committed the crimes.

The court specifically identified numerous mitigating factors that it considered—including the fact that Castaneda was not the shooter, his minimal criminal history, his studiousness, and his reasonable behavior as a prisoner. Most significantly, the court gave great weight to Castaneda's age at the time of the offense, the impulsivity of the crimes, and the fact that as a result of his age, he could not fully appreciate the consequences of his actions.

Conversely, the court also gave significant weight to the nature of the offenses Castaneda was convicted of and the impact it had on the victims' friends and families. The court specifically discussed that because of Castaneda's age, it wanted to assume that he was naive to the violence that would occur that night; however, the court could not make such an assumption because of Castaneda's continued participation after being presented with opportunities to remove himself from the crime spree as the violence escalated. Ultimately, the court concluded that the several and disconnected crimes warranted individual punishment by running his sentences consecutively. The court's reasoning reflects sentences tailored to both Castaneda and his crimes.

The sentencing range for Castaneda's first degree murder convictions, Class IA felonies, is 40 years to life in prison.[17]

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[17] § 28-105.02(1). See *Castaneda, supra* note 1 (holding that sentencing changes to penalty provisions for Class IA felonies committed by persons under 18 years of age, enacted by 2013 Neb. Laws, L.B. 44, § 2, codified as § 28-105.02, should apply to Castaneda's resentencing).

Castaneda's convictions for attempted murder in the second degree, criminal conspiracy, and use of a deadly weapon to commit a felony are each Class II felonies subject to a sentence of 1 to 50 years' imprisonment,[18] and attempted robbery is a Class III felony that, when committed, was subject to a sentence of 1 to 20 years' imprisonment, a $25,000 fine, or both.[19] Castaneda was resentenced as set forth above. Each of his sentences were on the low end of their respective statutory sentencing ranges. Further, the attempted robbery and criminal conspiracy sentences were made concurrent with the attempted second degree murder sentence.

[9] The court gave sufficient consideration to each of the relevant factors, determining that leniency was warranted in Castaneda's sentences, evidenced by each being on the low end of the potential range. But, the court determined that both murders and the attempted murder were each distinct and separate incidents, offering Castaneda the choice to participate or flee at each scene. Under our prior holdings, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.[20] Therefore, Castaneda's separate decision to commit each crime warranted a distinct punishment for each. In light of these facts, we cannot conclude that the district court abused its discretion in sentencing Castaneda.

De Facto Life Sentence

In Castaneda's second assignment of error, he argues that the aggregate of his sentences constitutes a de facto life sentence. Further, he contends that this aggregate sentence does not provide a "meaningful opportunity for release," under *Miller*,[21]

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[18] See Neb. Rev. Stat. § 28-105 (Supp. 2015).

[19] See § 28-105 (Reissue 2008).

[20] *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[21] *Miller, supra* note 2.

and that the court failed to make a finding he was "[i]rreparably [c]orrupt."[22]

In *Miller*, the U.S. Supreme Court held that a mandatory life sentence without parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishment.[23] *Miller* went on to hold that although a sentencer could still institute a sentence of life imprisonment in homicide cases, the sentencing court was required to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[24]

In *State v. Mantich*,[25] the defendant, Douglas M. Mantich, a juvenile at the time of his crimes, was convicted of first degree felony murder and use of a firearm to commit a felony. When Mantich was sentenced, Nebraska's statutes provided that a juvenile convicted of first degree murder was subject to mandatory life imprisonment. Accordingly, Mantich was initially sentenced to life imprisonment for the first degree murder conviction and 5 to 20 years' imprisonment for the firearm conviction, to be served consecutively.[26] Mantich appealed, and we affirmed Mantich's convictions and life imprisonment sentence and vacated and remanded his firearm sentence for resentencing.[27]

At the same time we decided Castaneda's direct appeal,[28] we also considered Mantich's appeal of his motion for postconviction relief.[29] In Castaneda's direct appeal, we held that

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[22] Brief for appellant at 26, 28.

[23] *Miller, supra* note 2.

[24] *Id.*

[25] *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

[26] *Id.*

[27] *Id.*

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

[29] *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.

"Nebraska's sentence of life imprisonment is effectively life imprisonment without parole under the rationale of *Miller* . . . because it provides no meaningful opportunity to obtain release."[30] Accordingly, we vacated Mantich's life sentence and remanded the cause for resentencing.[31] After a full evidentiary hearing, Mantich was resentenced to 90 to 90 years' imprisonment for his first degree murder conviction. Mantich appealed.

[10,11] In Mantich's most recent appeal,[32] we addressed the issue of *Miller* and its application, and we determined that felony murder is a homicide offense. We also explained that in *Graham v. Florida*,[33] the U.S. Supreme Court held that "life imprisonment without the possibility of parole for juveniles convicted of nonhomicide offenses was unconstitutional."[34] We noted the Court further held that "such juvenile offenders must be given 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[35] However, we reasoned that in *Miller*, "the Court declined to extend the categorical bar of no life sentences without parole to juveniles convicted of homicide."[36] Instead, *Miller*'s requirement that a juvenile have a meaningful opportunity for release required that "'a sentencer must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile.'"[37] Accordingly, we rejected Mantich's de facto life sentence argument, "[b]ecause under *Miller* a juvenile defendant may be sentenced to life

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[30] *Castaneda, supra* note 1, 287 Neb. at 313-14, 842 N.W.2d at 758. See, also, *Mantich, supra* note 8.

[31] *Mantich, supra* note 29.

[32] *Mantich, supra* note 8.

[33] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[34] *Mantich, supra* note 8, *ante* at 413, 888 N.W.2d at 381.

[35] *Id.*, quoting *Graham, supra* note 33.

[36] *Id.*

[37] *Id.*, quoting *Mantich, supra* note 29.

imprisonment without parole, [therefore,] it is immaterial whether the sentence imposed upon Mantich was a de facto life sentence."[38]

Here, the court held a full evidentiary hearing concerning Castaneda's resentencing. Before issuing the sentences, the court discussed the individualized factors it was required to consider and how they impacted its decision. Even assuming, without deciding, that a court was required to find a juvenile "irreparably corrupt" before issuing him or her a life imprisonment without parole sentence, the court here gave Castaneda no such sentence; instead, it sentenced Castaneda on the low end of the statutory range for each of his eight convictions. Accordingly, Castaneda received the protections required by *Miller* for a juvenile convicted of a homicide offense.

Vindictive Sentences

In his third assignment of error, Castaneda argues that his new sentences are more severe than his original sentences. While he concedes that the length of his sentences has decreased, he contends that changing his murder and attempted murder sentences from concurrent[39] to consecutive made them inherently more severe. Accordingly, he argues that his resentencing was presumptively vindictive under *North Carolina v. Pearce*.[40]

The State argues that Castaneda's aggregate sentence is not more severe upon resentencing, because he is now eligible for parole after 52½ years, when he was originally sentenced to life in prison without parole. Further, it contends Castaneda

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[38] *Id.* at 415-16, 888 N.W.2d at 383.

[39] See *State v. Berney*, 288 Neb. 377, 383, 847 N.W.2d 732, 737 (2014) (stating that "[u]nless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other").

[40] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

is not entitled to a presumption of vindictiveness, because the resentencing judge was not the same judge that sentenced him originally. Lastly, the State contends that because Castaneda had the burden to prove actual vindictiveness and failed to argue actual vindictiveness, his assignment of error is without merit.

[12] We discussed vindictive resentencing most recently in *State v. Miller*.[41] We explained:

> "Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."[42]

Accordingly, we recognized that to relieve a defendant of the apprehension of vindictiveness, *Pearce* required that courts apply a presumption of vindictiveness whenever a sentence is increased after a successful appeal of the prior conviction.

[13,14] However, we also recognized that the U.S. Supreme Court has limited this presumption since *Pearce* to "cases which pose a reasonable likelihood that the increased sentence is the product of actual vindictiveness."[43] Accordingly, we stated: "[The] Court has limited the presumption of vindictiveness to cases that involve the same judge or jury handing down both the initial sentence and the second, harsher sentence. . . . [Alternatively, w]hen the presumption of vindictiveness is not applied, the burden remains with the defendant to prove actual vindictiveness."[44]

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[41] *Miller, supra* note 10.

[42] *Id.* at 501, 822 N.W.2d at 364, quoting *Pearce, supra* note 40.

[43] *Id.* at 502, 822 N.W.2d at 364, citing *Smith, supra* note 40.

[44] *Id.* at 502, 504, 822 N.W.2d at 364, 366, citing *Smith, supra* note 40.

Here, Castaneda was sentenced by two different judges. Therefore, we agree with the State that Castaneda is not entitled to a presumption of vindictiveness.

Further, Castaneda made no argument of actual vindictiveness, and our review of the record does not reveal any impermissible considerations or vindictiveness by the court. Instead, the court weighed the required factors under the relevant case law and § 28-105.02. The court also took into consideration the fact that Castaneda was not the shooter and that he had decreased cognitive ability due to his age and immaturity. However, the court could not overlook the fact that Castaneda was involved in three distinct incidents of gun violence that resulted in the deaths of two people and the wounding of a third. Ultimately, the court believed that Castaneda's youth entitled him to sentences on the low end of the statutory range, but that his actions required he serve the sentences consecutively. Consequently, we conclude Castaneda's assignment of error is without merit.

CONCLUSION

The sentences of the district court are affirmed.

Affirmed.

State of Nebraska, appellee, v. Jose D. Cerritos-Valdez, appellant.

889 N.W.2d 605

Filed January 13, 2017. No. S-16-314.

1. **Sentences: Probation and Parole.** Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
2. **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.
3. **Judges: Sentences: Due Process.** Due process requires that sentencing judges consider only relevant information as the basis for a sentence.
4. **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.
5. **Sentences: Probation and Parole.** When deciding if it is appropriate to withhold a sentence of imprisonment and grant probation, a sentencing court is guided by the statutory grounds set forth in Neb. Rev. Stat. § 29-2260 (Reissue 2008).
6. ____: ____. A defendant's status as an undocumented immigrant cannot be the sole factor on which a court relies when determining whether to grant or deny probation; however, a sentencing court need not ignore a defendant's undocumented status.
7. ____: ____. When deciding whether to grant probation, a defendant's undocumented status may properly be considered by a sentencing court as one of many factors so long as it is either relevant to the offense for which sentence is being imposed, relevant to consideration of any of

the required sentencing factors under Nebraska law, or relevant to the defendant's ability or willingness to comply with recommended probation conditions.

8. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Samantha D'Angelo, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, George R. Love, and Erin E. Tangeman for appellee.

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

Stacy, J.

Jose D. Cerritos-Valdez appeals his jail sentences and contends he was denied probation based solely on his status as an undocumented immigrant. Contrary to his contention, the record shows the trial court relied on more than just his undocumented status when imposing sentence, and based its sentencing decision on relevant sentencing factors. Finding no abuse of discretion, we affirm.

FACTS

On May 25, 2015, Cerritos-Valdez was stopped by law enforcement after the vehicle he was driving crossed over and straddled the centerline for approximately 200 feet. During the traffic stop, a small plastic baggie containing a white powdery substance was found in his wallet. Cerritos-Valdez admitted the substance was cocaine. He smelled of alcohol, admitted to the officer he had been drinking, and showed signs

of impairment on standardized field sobriety tests. Cerritos-Valdez was placed under arrest, and a subsequent breath test showed he had a breath alcohol content of .203 grams of alcohol per 210 liters of his breath.

Cerritos-Valdez was charged in a five-count information with possession of a controlled substance (a Class IV felony); driving under the influence of alcohol, .15 or over (a Class W misdemeanor); driving under suspension (a Class III misdemeanor); no proof of insurance (a Class II misdemeanor); and a traffic infraction for failure to signal a turn. Pursuant to a plea agreement, Cerritos-Valdez plead guilty to an amended information charging two misdemeanors: attempted possession of a controlled substance and driving under the influence, .15 or over.

At the sentencing hearing, the court acknowledged receiving and reviewing the presentence investigation report (PSI). Because the information in the PSI was relied upon by the court, we describe it in some detail. The PSI shows Cerritos-Valdez is not "in the United States legally" and describes him as "[u]ndocumented." According to the PSI, Cerritos-Valdez does not have a valid Social Security number or valid U.S. driver's license, and "[d]ue to [his] immigration status, he has not been able to hold a permanent job." The PSI indicates Cerritos-Valdez has been arrested previously for driving without a license and has prior convictions for driving under suspension and "Illegal Entry." With respect to the latter, the PSI states Cerritos-Valdez "was arrested in February 2013 in Laredo, Texas for Illegal Entry [and] was jailed on this charge for 15 days." Notes from the PSI interview indicate that in 2013, Cerritos-Valdez was stopped crossing into the U.S. from Mexico, spent 15 days in jail, and was "sent back to Mexico" but "came back in [the] same year" with an "illegal status."

The PSI makes no recommendation regarding sentencing, but notes Cerritos-Valdez' "legal standing here in the U.S. could be a barrier for his success if placed on probation. This

is due in main part to his lack of permanent employment." However, the PSI also states that "should the court wish to place [Cerritos-Valdez] on a term of probation," several terms and conditions would "reduce his risk of recidivism," including drug and alcohol testing, treatment and aftercare, community service, a waiverable jail sentence, and "full-time employment during the course of probation."

At the commencement of the sentencing hearing, the court asked the parties whether they had "any additions, corrections or objections" to the PSI. No objections were raised, and no corrections requested; but defense counsel provided the court with documents indicating Cerritos-Valdez had completed an alcohol education class and a victim impact panel, and the court included those documents in the PSI. The State waived the opportunity to comment on sentencing. Cerritos-Valdez requested sentences of probation.

The district court noted Cerritos-Valdez' limited criminal history, and then stated:

> [H]e's not in the United States legally and that becomes problematic for the Court when probation is being requested because were he here legally, the Court might entertain probation but it's very difficult, if not impossible, for the Court to impose probation when the first term of probation is that you obey all laws; and to obey all laws, you would have to leave this country, which would then conversely make it impossible for you to be supervised by probation.
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> . . . [F]rankly, I wouldn't mind having some guidance on this issue from the appellate courts. I don't think we have any at this time.
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> But based on those factors, as well as some of the other factors that are included in the PSI, which the Court has reviewed completely, the Court finds that the Court cannot place the — should not, at least, place [Cerritos-Valdez] on probation; that a straight sentence must be imposed.

The court's written sentencing order further specifies the factors it considered and the reasons Cerritos-Valdez was found not to be an appropriate candidate for probation:

> In determining what sentence ought to be imposed, the Court has considered [Cerritos-Valdez'] age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, the motivation for the offense, as well as the nature of the offense and the amount of violence involved in the commission of the crime. The Court has considered the information presented in the [PSI] as well as any further documents presented by the parties and received by the Court for purposes of sentencing. The Court, being fully advised in the premises, finds imprisonment is necessary for the protection of the public because [Cerritos-Valdez] would likely engage in additional criminal conduct if placed on probation, and because a lesser sentence will depreciate the seriousness of the offense or promote disrespect for the law.

The court sentenced Cerritos-Valdez to 200 days in jail for the conviction of attempted possession and 30 days in jail for the conviction of driving under the influence, the jail sentences to be served consecutively. Additionally, on the conviction of driving under the influence, he was fined $500 and any driving privileges were revoked for 1 year. Cerritos-Valdez filed a timely appeal. We moved this case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Cerritos-Valdez assigns, restated, that it was error for the district court to deny him probation based solely on his status as an undocumented immigrant.

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

STANDARD OF REVIEW

[1,2] Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.[2] 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.[3]

ANALYSIS

[3] Cerritos-Valdez argues the district court erred in denying him probation based on "its erroneous interpretation that his immigration status prohibited probation." The essence of his argument is that the sentencing court relied upon an irrelevant factor—his status as an undocumented immigrant—to conclude he was an inappropriate candidate for probation. Because due process requires that sentencing judges consider only relevant information as the basis for a sentence,[4] we begin our analysis by reciting the factors a court is to consider when imposing sentence generally, and when deciding whether to withhold a sentence of incarceration specifically.[5]

[4] It has long been the rule that 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.[6]

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[2] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

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

[4] *State v. Pattno,* 254 Neb. 733, 579 N.W.2d 503 (1998).

[5] Because all of Cerritos-Valdez' offenses occurred prior to August 30, 2015, our analysis is unaffected by 2015 Neb. Laws, L.B. 605.

[6] *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

[5] Additionally, when deciding if it is appropriate to withhold a sentence of imprisonment and grant probation, a sentencing court is guided by the statutory grounds set forth in Neb. Rev. Stat. § 29-2260 (Reissue 2008):

> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;
>
> (e) The victim of the crime induced or facilitated commission of the crime;
>
> (f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;
>
> (g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;
>
> (h) The crime was the result of circumstances unlikely to recur;
>
> (i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;
>
> (j) The offender is likely to respond affirmatively to probationary treatment; and
>
> (k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

Section 29-2260(2) further provides that sentencing courts may withhold imprisonment and impose probation

> unless, having regard for the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of

> the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for law.

This case presents the narrow question of whether a defendant's undocumented status is a relevant consideration when determining whether to grant or deny probation. We have not previously considered this question, but other courts have.

While the law in this area is not well settled, a consensus has developed that it is impermissible for a sentencing court to deny probation based solely on a defendant's undocumented status.[7] Beyond that broad proposition, courts differ on when, or for what purpose, a sentencing judge may properly consider a defendant's undocumented status when deciding whether to impose probation.[8]

Generally, in discussing whether it was proper to consider a defendant's undocumented status in connection with deciding whether to impose a sentence of probation, other courts have focused on whether the defendant's status implicated other relevant sentencing considerations. For instance, some courts have held it is appropriate to consider the effect of a defendant's undocumented status on his or her ability or

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[7] See, *People v. Cesar*, 131 A.D.3d 223, 14 N.Y.S.3d 100 (2015); *Trujillo v. State*, 304 Ga. App. 849, 698 S.E.2d 350 (2010); *People v. Hernandez-Clavel*, 186 P.3d 96 (Colo. App. 2008); *State v. Martinez*, 38 Kan. App. 2d 324, 165 P.3d 1050 (2007); *People v. Cisneros*, 84 Cal. App. 4th 352, 100 Cal. Rptr. 2d 784 (2000); *State v. Morales-Aguilar*, 121 Or. App. 456, 855 P.2d 646 (1993).

[8] See *id*.

willingness to comply with conditions of probation.[9] Other courts have reasoned that a defendant's undocumented status or a history of repeated illegal reentry into the U.S. may demonstrate an "unwillingness to conform his or her conduct to the conditions of probation" or show that a probation sentence would not "be at all effective" for that defendant.[10] Still others have held that the undocumented status of defendants may be considered as it relates to their criminal history.[11] At least one court has noted that a defendant's undocumented status is properly considered as it relates to the defendant's employment history or legal employability.[12] And we note that in some instances, defendants have specifically asked the sentencing court to consider their undocumented status, arguing it would be error not to consider it.[13]

[6,7] Based on the foregoing, we agree that a defendant's status as an undocumented immigrant cannot be the sole factor on which a court relies when determining whether to grant or deny probation[14]; however, a sentencing court need not ignore a defendant's undocumented status.[15] When deciding whether to grant probation, a defendant's undocumented status may properly be considered by a sentencing court as one of many factors so long as it is either relevant to the offense for which sentence is being imposed,[16] relevant to consideration of any of the required sentencing

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[9] See, *Trujillo, supra* note 7; *Hernandez-Clavel, supra* note 7; *State v. Zavala-Ramos*, 116 Or. App. 220, 840 P.2d 1314 (1992); *People v. Sanchez*, 190 Cal. App. 3d 224, 235 Cal. Rptr. 264 (1987).

[10] *Hernandez-Clavel, supra* note 7, 186 P.3d at 99-100. Accord *Morales-Aguilar, supra* note 7.

[11] *Yemson v. U.S.*, 764 A.2d 816 (D.C. 2001); *Zavala-Ramos, supra* note 9.

[12] *Cesar, supra* note 7.

[13] See *U.S. v. Meza-Lopez*, 808 F.3d 743 (8th Cir. 2015).

[14] See cases cited *supra* note 7.

[15] See, *Yemson, supra* note 11; *Zavala-Ramos, supra* note 9.

[16] See, e.g., *State v. Gayton*, 370 Wis. 2d 264, 882 N.W.2d 459 (2016).

factors under Nebraska law, or relevant to the defendant's ability or willingness to comply with recommended probation conditions.[17]

Here, Cerritos-Valdez argues that the sole reason the district court denied him probation was his immigration status. Our review of the record shows the court relied on more than just his undocumented status when imposing sentence.

In both open court and in its written sentencing order, the court stated it had considered Cerritos-Valdez' age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, the motivation for the offenses, as well as the nature of the offenses and the amount of violence involved in the commission of the crimes. The court expressly stated it had considered the information presented in the PSI, much of which was directly relevant to these factors. We conclude the court's sentencing comments, considered collectively, show the court did not rely solely on Cerritos-Valdez' undocumented status in deciding not to impose probation.

Cerritos-Valdez also argues that the court's remarks during sentencing suggest it was under the mistaken impression that it could not grant probation due to his immigration status. The record refutes this argument. When explaining its sentencing decision, it is true the court initially remarked it "cannot" place Cerritos-Valdez on probation, but it promptly clarified that it "should not, at least" place him on probation. Nothing else in the record suggests the court was operating under the mistaken belief that a defendant's undocumented status prohibits a court from imposing a sentence of probation. During the plea hearing, the court talked with Cerritos-Valdez about the possibility of probationary sentences. The PSI suggested probation conditions for Cerritos-Valdez in the event the court determined he was an appropriate candidate

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[17] See, *Trujillo, supra* note 7; *Hernandez-Clavel, supra* note 7; *Morales-Aguilar, supra* note 7; *Zavala-Ramos, supra* note 9; *Sanchez, supra* note 9.

for probation. And the court's remarks during sentencing, as well as the language of its sentencing order, both demonstrate it considered probation but found Cerritos-Valdez to be an inappropriate candidate.

[8] 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] Here, the district court expressed concern that due to Cerritos-Valdez' undocumented status, it would be difficult for him to comply with the standard terms of probation. Generally speaking, this is an appropriate sentencing consideration; it was a concern shared by the probation officer who completed the PSI, and it was one which was supported by the information contained in the PSI.

We find no abuse of discretion in the court's decision not to place Cerritos-Valdez on probation for his convictions of attempted possession of a controlled substance and driving under the influence, .15 or over. Drunk driving is a serious crime that threatens public safety, and when Cerritos-Valdez was arrested, he was not only operating a motor vehicle with an alcohol level more than twice the legal limit, but he was also driving without a license, a crime for which he had been arrested just a few months earlier. The PSI showed Cerritos-Valdez had been jailed for illegally entering the United States, was returned to Mexico, and now was back in the United States again without documentation. The PSI further showed it is difficult for Cerritos-Valdez to maintain permanent employment in Nebraska because his immigration status prevents him from working legally. These factors are related to his undocumented status, but also are relevant to the sentencing factors the district court was required to consider when deciding whether to impose sentences of probation.

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[18] *State v. Raatz*, 294 Neb. 852, 885 N.W.2d 38 (2016). See, *Bauldwin, supra* note 3; *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

Given all the facts and circumstances surrounding Cerritos-Valdez' life, and considering the nature and circumstances of the crimes for which he was sentenced, we find no abuse of discretion in the sentences imposed. The district court did not abuse its discretion in finding that if Cerritos-Valdez were placed on probation, the risk was substantial that he would engage in additional criminal conduct or that jail sentences were appropriate because lesser sentences would depreciate the seriousness of the crimes and promote disrespect for the law.

CONCLUSION

Finding no abuse of discretion on the record before us, we affirm the judgment of the district court.

Affirmed.

Kelch, J., not participating.

State of Nebraska, appellee, v. Decabooter Williams, appellant.

889 N.W.2d 99

Filed January 20, 2017. No. S-16-083.

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: 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.
3. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.
5. **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.
6. **Postconviction: Records.** Neb. Rev. Stat. § 29-3001(2) (Reissue 2016) requires that the court grant a prompt hearing unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief.
7. **Postconviction: Constitutional Law: Proof: Records.** Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016), 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.

8. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.
9. **Postconviction: Appeal and Error.** On postconviction relief, a defendant cannot secure review of issues which were or could have been litigated on direct appeal. A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
10. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is represented both at trial and on appeal by the same lawyers, the defendant's first opportunity to assert the ineffective assistance of trial counsel is in a postconviction motion.
11. **Effectiveness of Counsel: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant has the burden to show that (1) counsel performed deficiently—that is, counsel did not perform at least as well as a lawyer with ordinary training and skill in criminal law—and (2) this deficient performance actually prejudiced the defendant in making his or her defense.
12. ____: ____. The prejudice prong of the ineffective assistance of counsel test requires that the defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.
13. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
14. **Effectiveness of Counsel: Appeal and Error.** An appellate court may address the two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, in either order.
15. **Trial: Effectiveness of Counsel: Appeal and Error.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
16. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.

17. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
18. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
19. **Right to Counsel.** When a defendant becomes dissatisfied with court-appointed counsel, unless he or she can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if he or she is competent to do so.
20. ____. An indigent defendant's right to counsel does not give the defendant the right to choose his or her own counsel.
21. **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. If it concludes that the prosecutor's acts were misconduct, it next considers whether the misconduct prejudiced the defendant's right to a fair trial.
22. ____: ____: ____. 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.
23. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.
24. **Insanity: Proof.** The two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.
25. **Insanity: Intoxication.** Insanity immediately produced by intoxication does not destroy responsibility when the defendant, when sane and responsible, made himself or herself voluntarily intoxicated.
26. **Criminal Law: Intoxication: Intent.** Voluntary intoxication is no justification or excuse for crime unless the intoxication is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent.

27. **Criminal Law: Intoxication: Mental Competency.** As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces psychosis or delirium.
28. **Insanity: Intoxication.** A defendant may not assert an insanity defense when the insanity was temporary and brought on solely by voluntary intoxication through the use of drugs.
29. **Homicide: Intent.** 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.
30. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.
31. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
32. **Trial: Photographs: Homicide: Intent.** In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
33. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction proceeding.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Reversed and remanded with directions.

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

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

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

Heavican, C.J.

I. INTRODUCTION

Decabooter Williams was convicted of two counts of first degree murder. His convictions and sentences were affirmed on

direct appeal.[1] A subsequent postconviction motion was denied, and the appeal from that denial was dismissed for the failure to file a brief. Williams then filed a second motion for postconviction relief, which was granted in part and in part denied. Williams appeals. We reverse, and remand with directions.

II. BACKGROUND

Williams was convicted of two counts of first degree murder in connection with the deaths of Victoria Burgess and LaTisha Tolbert in a 2003 house fire. Eyewitness testimony and surveillance video presented at Williams' trial, in addition to Williams' taped confession, established the following overwhelming evidence that Williams committed the crimes for which he was charged.

According to the evidence, Burgess and Williams had an argument at Burgess' house. Following the argument, Williams went to a convenience store where he filled a wine bottle with gasoline and obtained matches. Williams woke Diane Williams (Diane), his former girlfriend who lived with Burgess, and warned her to leave because he was going to burn the house down. Williams then poured gasoline around the interior of the house and lit it. Diane escaped through a window, but Burgess and Tolbert perished in the fire. A more detailed summary of the facts can be found in our opinion on direct appeal.

1. Trial

Following a jury trial, Williams was convicted of two counts of murder in the first degree. He was sentenced to life without parole on both counts. Williams was represented at trial by counsel from the Douglas County public defender's office.

2. Direct Appeal

Williams appealed his convictions.[2] He was represented on appeal by different counsel than at trial. His direct appeal

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[1] *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

[2] *Id.*

counsel was appointed by the court. On appeal, Williams contended that (1) he did not voluntarily waive his *Miranda* rights, because he was sleep deprived and intoxicated and therefore his confession should be suppressed; (2) he should have been allowed to use a transcript of a taped statement to refresh a witness' recollection; and (3) the court improperly instructed the jury that Williams had been charged with arson.[3]

On May 27, 2005, this court affirmed Williams' convictions, holding that the trial court did not err in allowing Williams' confession into evidence, because "[h]e waived any argument about the use of a police transcript to refresh Diane's recollection or to impeach her testimony, and he was not denied effective assistance of counsel."[4]

3. First Motion for Postconviction Relief

On August 5, 2009, Williams, by and through court-appointed direct appeal counsel, filed his first petition for postconviction relief. Williams argued that he was denied due process of law, the right to effective assistance of counsel, and the right to properly cross-examine and confront all witnesses against him because of trial counsel's failure to (1) take the deposition of Diane, (2) make an offer of proof and preserve the record as to Diane's prior inconsistent statements in her recorded police interview, (3) object to improper jury instructions that Williams was charged with arson and make a record of the same, (4) assert a "drug psychosis/insanity" defense, and (5) object to the playing of the taped confession. The State filed a motion to dismiss.

On December 8, 2010, the district court filed an order sustaining the State's motion to dismiss Williams' petition for postconviction relief without an evidentiary hearing. The district court rejected the claims, holding that (1) trial counsel's failure to depose Diane would have been apparent to Williams at the

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[3] *Id.*

[4] *Id.* at 925, 697 N.W.2d at 280.

time of appeal or apparent from the record, because Diane's deposition was not in the record; (2) trial counsel's failure to make an offer of proof or otherwise preserve the record would not have resulted in not guilty verdicts, because there was significant other evidence that would support the jury's verdicts; (3) trial counsel's failure to object to improper jury instructions that Williams was "'charged' with arson" and make record of the same was not prejudicial error, because the jury instructions, when taken together, were not prejudicial; (4) trial counsel's failure to assert a drug psychosis/insanity defense was an issue that would have been apparent to Williams at the time of appeal or apparent from the record, because Williams' drug and alcohol abuse was raised in his motion to suppress a statement; and (5) trial counsel's failure to object to the playing of a taped confession would have been apparent to Williams at the time of appeal or apparent from the record.

4. Appeal of First Postconviction

Williams appealed from the denial of his first postconviction motion. The district court again appointed direct appeal counsel to represent Williams in his postconviction appeal. On April 25, 2011, in case No. S-11-035, this court dismissed the appeal, because Williams' counsel failed to file a brief. Williams sought discharge of counsel due to counsel's failure to file a brief, and direct appeal counsel filed a motion to withdraw.

5. Second Motion for Postconviction Relief

Williams filed a second motion for postconviction relief. The district court granted counsel's motion to withdraw as counsel for Williams, and the court appointed the Nebraska Commission on Public Advocacy to represent Williams in his motion for postconviction relief.

In his second motion, Williams argued that he was denied the right to effective assistance of both trial counsel and direct appeal counsel. Williams filed a second amended motion for

postconviction relief that incorporated the arguments from Williams' first motion for postconviction relief and his second motion prior to amendment.

Williams argued that his direct appeal and first postconviction counsel was operating under a conflict of interest when he represented Williams on postconviction after representing him on direct appeal, because he could not raise his own ineffectiveness. Therefore, if granted a new direct appeal, Williams would argue, in addition to the arguments in his first motion for postconviction relief, there was an unconstitutional breakdown in the attorney-client relationship at the trial, direct appeal, and postconviction levels.

Additionally, Williams argued that counsel, when representing Williams as direct appeal counsel, erred in failing to assign as error trial counsel's failure to (1) take Diane's deposition; (2) make an offer of proof or otherwise preserve the record regarding Diane's inconsistent statements; (3) object to the playing of a redacted version of Williams' postarrest statement; (4) investigate a college student witness who had conducted a survey at the jail where Williams was incarcerated; (5) withdraw following Williams' oral motion for new counsel at his sentencing hearing; (6) object to the testimony of Officer Barry DeJong as to an admission that implied the existence of Williams' propensity for criminal activity; (7) timely object and move for a mistrial due to improper statements during the closing arguments presented by the State; (8) assert a drug psychosis/insanity or drug impairment defense; (9) present a defense that the fire was started accidentally or due to provocation; (10) comply with Williams' request to view discovery; and (11) communicate with Williams.

Williams also argued the following claims solely against direct appeal counsel: (1) an unconstitutional breakdown in the attorney-client relationship at the direct appeal level and (2) a failure to present and preserve for review the claim that two gruesome photographs were received over trial counsel's objections. Williams further contended that appellate counsel

failed to (1) withdraw from the case prior to the initial postconviction proceeding and (2) file Williams' brief in the appeal of the initial postconviction proceeding.

The State filed a motion to dismiss, arguing that Williams' claims were procedurally barred. In addition, the State argued that any remaining issues that were not procedurally barred should be overruled, as the motion alleged only conclusions of fact or law, or the records and files affirmatively show that Williams was not entitled to relief.

On January 20, 2016, the district court partially granted Williams' amended successive postconviction motion without an evidentiary hearing. The district court's order stated in pertinent part:

> In his Second Amended Motion for Post-conviction Relief [Williams] raises other issues which almost entirely relate to the issues that [he] was not able to raise in the first post-conviction relief proceedings due to the aforementioned failure to timely file a brief.
>
> . . . [F]ailure to raise the issue of whether trial counsel was ineffective in [Williams'] appeal and post-conviction proceedings for failing to make an offer of proof as to the contents of the police transcript which was objected to by the State at trial and the Court sustained the objection . . . would not likely have made any difference even if it was in the record as an offer of proof because there was significant other evidence that would support the jury's verdict including [Williams'] own confession to starting the fire . . . .
>
> While the Court generally agrees with the State's argument that [Williams] does not have a constitutional right to effective post-conviction counsel (see State v. Becerra, 263 Neb. 753[, 642 N.W.2d 143] (2002)[)], where [Williams] was denied the opportunity to present issues in his appeal of the Court's Order on post-conviction due to alleged ineffective assistance of counsel, [he] was denied an important opportunity which should be restored.

> While Neb. Rev. Stat. Sec. 29-3001 (3) provides that the Court "need not" entertain a second motion or successive motions for post-conviction relief, it does not bar the Court from such consideration.
>
> On [Williams'] Second Motion for Post-conviction Relief the Court orders that [Williams] is allowed to appeal the Court's Order of December 10, 2010 overruling [his] Motion for Post-conviction Relief to the Nebraska Supreme Court.

The district court relied largely on Neb. Rev. Stat. § 29-3001 (Reissue 2016) in its opinion. That statute states in pertinent part:

> (2) Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence the prisoner or grant a new trial as may appear appropriate. . . .
>
> (3) A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

The district court held that Williams was "allowed to appeal the Court's Order of December 10, 2010 overruling [his] Motion for Post-conviction Relief to the Nebraska Supreme Court." Williams appealed from the district court's order.

III. ASSIGNMENTS OF ERROR

Williams assigns, restated and consolidated, that the district court erred in (1) granting postconviction relief without an evidentiary hearing, (2) granting limited postconviction relief of a reinstated appeal of the denial of postconviction relief under the first postconviction motion, and (3) denying the remainder of Williams' allegations of ineffective assistance of trial and appellate counsel.

IV. STANDARD OF REVIEW

[1-3] 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] In appeals from postconviction proceedings, we review 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.[6] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[7]

V. ANALYSIS

Williams makes various arguments on appeal, but the crux of his argument is that the district court should have never permitted direct appeal counsel to also represent Williams in Williams' first postconviction motion. Williams additionally contends that the relief granted by the district court—a reinstated appeal from the denial of Williams' first postconviction motion—was erroneous.

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[5] *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[6] *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

[7] *Id.*

1. District Court's Authority

(a) Lack of Evidentiary Hearing

We turn first to Williams' assertion that the district court erroneously granted limited postconviction relief without an evidentiary hearing. The district court ruled—without holding an evidentiary hearing—that Williams was "allowed to appeal the Court's Order of December 10, 2010 overruling [his] Motion for Post-conviction Relief to the Nebraska Supreme Court."

Williams contends that because § 29-3001(2) of the Nebraska Postconviction Act[8] gives the district court the option to either determine that the defendant is entitled to no relief based on a review of the record or grant a hearing on the motion, the district court erred in granting a new appeal from Williams' first postconviction motion without holding an evidentiary hearing. Williams also cites to *State v. Jim*.[9]

This court held in *Jim* that a court commits reversible error if postconviction relief is granted without an evidentiary hearing and the making of findings of fact and conclusions of law. In addition, Williams notes, this court is clear in *Jim* that the relief should be a "new" direct appeal, and not a "reinstated" direct appeal.[10]

The State agrees that the district court had no authority to grant such relief without an evidentiary hearing. However, the State argues that the district court had no authority to grant such relief, with or without an evidentiary hearing, because it was successive relief so the court's failure to comply with necessary procedure is immaterial.

[4-7] Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[11] In a motion for postconviction relief, the defendant

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[8] See Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[9] *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

[10] Brief for appellant at 16.

[11] *State v. Bazer*, 276 Neb. 7, 17, 751 N.W.2d 619, 627 (2008).

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.[12] Section 29-3001(2) requires that the court grant a prompt hearing "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief . . . ." Under the act, 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.[13]

The record indicates that the district court did not grant Williams an evidentiary hearing prior to awarding Williams the limited relief of an appeal from the denial of the first postconviction motion. But, as we make clear in *Jim*, and as the plain language of § 29-3001 states, in order to award relief, a prompt hearing must first be held "'[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief . . . .'" The failure to hold such a hearing before ordering reinstatement was error.

(b) Whether Williams' Claims Were Procedurally Barred

We turn next to the question of whether the district court had the authority to grant any postconviction relief at all. The State contends that it did not, as all of Williams' claims were procedurally barred.

[8,9] As noted above, 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

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[12] *State v. Jim, supra* note 9.

[13] *Id.*

hearing is required.[14] A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.[15] On postconviction relief, a defendant cannot secure review of issues which were or could have been litigated on direct appeal.[16] A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.[17]

(i) Trial Counsel

We first address Williams' claims of ineffective assistance of trial counsel. Williams was represented by different counsel on direct appeal than at trial. Williams brought one ineffective assistance of trial counsel argument in his direct appeal. All of Williams' allegations of ineffective assistance of trial counsel could have been raised on direct appeal because he had different appellate counsel than trial counsel. The claims of ineffective assistance of trial counsel are procedurally barred.

(ii) Direct Appeal Counsel

We turn next to Williams' claims of ineffective assistance of his direct appeal counsel. Williams argues that he could not raise the ineffective assistance of appellate counsel claims because of the continued representation of direct appeal counsel in his first postconviction relief proceedings. The State argues that although Williams had the same counsel for direct appeal and for his first postconviction proceeding, this was

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[14] *Id.* at 487, 747 N.W.2d at 415.

[15] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[16] See *State v. Bazer, supra* note 11.

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

not his first opportunity to raise claims against direct appeal counsel, because he could have raised those claims pro se in the prior postconviction.

[10] In *State v. Payne*,[18] this court held that the defendant's claims of ineffective assistance of trial counsel were not procedurally barred, despite his failure to raise them on direct appeal, because trial counsel was still engaged as counsel during the critical appeal period. This court reasoned that "[i]f trial counsel was still engaged as counsel, trial counsel could not be expected to raise or address his or her own ineffectiveness, and the failure to file such an appeal would not result in those claims being procedurally barred in a later postconviction action."[19] If the court required counsel to raise his or her own ineffectiveness, it "would create the potential for a conflict of interest."[20] This court ultimately held that "where a defendant is represented both at trial and on appeal by the same lawyers, the defendant's first opportunity to assert the ineffective assistance of trial counsel is in a postconviction motion."[21]

In *State v. Bazer*,[22] this court held that the defendant's claims of ineffective assistance of trial counsel were not procedurally barred in his motion for postconviction relief, despite the defendant's failure to file a direct appeal or to allege that his counsel was ineffective for failing to file a direct appeal. The court reasoned:

> When a defendant was represented both at trial and on direct appeal by the same lawyers, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. The same is

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[18] *State v. Payne, supra* note 6.

[19] *Id.* at 472, 855 N.W.2d at 787.

[20] *Id*. at 471, 855 N.W.2d at 786.

[21] *Id*. at 472, 855 N.W.2d at 787.

[22] *State v. Bazer, supra* note 11.

true where trial counsel elects not to file a direct appeal at all.[23]

Williams was represented by the same counsel on both direct appeal and in his first postconviction motion. Counsel then failed to file an appeal to Williams' first postconviction motion. Different counsel was appointed to Williams for his second postconviction motion. As in *Payne*, Williams' first postconviction counsel "could not be expected to raise or address his or her own ineffectiveness."[24] This is true even though, ordinarily, the failure to raise the ineffective assistance of direct appeal counsel in a postconviction proceeding would make those claims procedurally barred.

The State argues that Williams had a pro se duty to raise his ineffective assistance of counsel claims against appellate counsel. We reject that assertion in the context of appointed counsel in this case. The State has provided no support for its claim, and we find it to be without merit. Williams has a Sixth Amendment right to the effective assistance of counsel on direct appeal.[25] And Williams' first meaningful opportunity to raise the issue of ineffective assistance of appellate counsel was in his second postconviction motion, after he was appointed different counsel that could allege the ineffectiveness of appellate counsel.

We therefore hold that under these facts, Williams may raise his ineffective assistance of appellate counsel claims in his second postconviction motion in this case. Because Williams was appointed the same counsel by the court on both direct appeal and on his motion for postconviction relief, the second motion was Williams' first opportunity to raise a claim of violation of his constitutional right to effective assistance of appellate counsel. Williams' claims of ineffective assistance concerning counsel's representation on direct appeal, including

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[23] *Id.* at 18, 751 N.W.2d at 627.

[24] See *State v. Payne, supra* note 6, 289 Neb. at 472, 855 N.W.2d at 787.

[25] See U.S. Const. amend. VI.

his "layered claims" of failure to raise ineffectiveness of trial counsel, are not procedurally barred.[26]

This ruling does not expand the Nebraska Postconviction Act. Williams did not have a meaningful opportunity to challenge his assistance of appellate counsel prior to his second motion for postconviction relief, as he was represented by the same appointed counsel on direct appeal in his first motion for postconviction, and on the appeal of his first postconviction relief. We discourage courts from appointing the same counsel for direct appeal and postconviction relief in order to avoid situations in which a defendant's ineffective assistance of counsel claims are preserved until the second postconviction relief motion.

2. Analysis of Claims Under Strickland

[11-14] Because we have determined that Williams' claims of ineffective assistance of direct appeal counsel are not procedurally barred, we analyze the claims under the two-prong test set forth in *Strickland v. Washington*.[27] Under *Strickland*, a defendant has the burden to show that (1) counsel performed deficiently—that is, counsel did not perform at least as well as a lawyer with ordinary training and skill in criminal law—and (2) this deficient performance actually prejudiced the defendant in making his or her defense.[28] The prejudice prong of the ineffective assistance of counsel test requires that the defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.[29] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[30]

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[26] Brief for appellant at 29.

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

[28] See *State v. Jackson, supra* note 15.

[29] *Id.*

[30] *Id.*

An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[31]

[15-18] In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[32] Trial counsel is afforded due deference to formulate trial strategy and tactics.[33] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[34] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[35]

(a) Claims of Ineffective Assistance of Direct Appeal Counsel Failing to Allege Ineffectiveness of Trial Counsel

(i) Failure to Take Diane's Deposition

Williams argues that appellate counsel failed to assign as error the failure of trial counsel to make an offer of proof concerning the disparity between Diane's statements to the police and her trial testimony as to when the fire started.

Diane's statements to the police were inconsistent with her trial testimony that Williams woke her and warned her to leave prior to burning down the house. Diane was never deposed, and her statements in the police report were ruled inadmissible at trial.

We find that Williams was not prejudiced by any alleged deficient conduct. Other evidence introduced at trial, in addition to Diane's testimony, included (1) a neighbor's testimony

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[31] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[32] *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

[33] *Id.*

[34] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[35] *State v. Jim, supra* note 9.

that following an argument with Burgess, one of the victims, Williams went to the neighbor's house and asked for a gun, which request the neighbor refused; (2) a convenience store employee's testimony that Williams went to a convenience store, where he filled a bottle with gasoline and obtained matches; (3) surveillance footage of Williams at the convenience store filling a bottle with gasoline; and (4) the neighbor's testimony that Williams returned to the neighbor's home and stated that he was going to burn Burgess' house down.[36] In addition, Williams confessed to starting the fire.

In light of the evidence outside of Diane's testimony, there is not a reasonable probability that any discrepancy in Diane's testimony would have affected the jury's finding that Williams started the fire intentionally. Any deficient conduct was not prejudicial, and as such, counsel's performance was not ineffective.

(ii) Failure to Make Offer of Proof or Otherwise Preserve Record

Williams argues that direct appeal counsel failed to assign as error the failure of trial counsel to make an offer of proof of the police transcript of Diane's statements for the purpose of impeachment or to refresh her memory.

On direct appeal, this court held that the issue was waived as to whether the "trial court erred when it denied the use of a police transcript of Diane's statements for the purpose of impeachment or to refresh her recollection," because Williams failed to make an offer of proof and the transcript was not in the record.[37] In its order denying Williams' first postconviction motion, the district court held that the disparity of Diane's in-court testimony and statement in the police report would not have made any difference in the jury verdicts, because there was "significant other evidence that would support the jury's

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[36] *State v. Williams, supra* note 1.

[37] *Id.* at 923, 697 N.W.2d at 279.

verdict[s], including [Williams'] own confession to starting the fire."

We agree that based on the evidence admitted at trial, aside from Diane's testimony, even if trial counsel performed deficiently by failing to make an offer of proof of Diane's testimony, Williams was not prejudiced by that failure. Appellate counsel's performance was not ineffective.

(iii) Failure to Object to Playing of Taped Confession

Williams argues that trial counsel failed to object to the playing of a redacted version of a videotape of Williams' interrogation. Williams contends that the officer had already testified as to Williams' statements recorded on the tape, so the admission of the tape was cumulative evidence. Additionally, Williams contended in his motion for postconviction relief that the redaction did not accurately portray the interview, because it eliminated the "'down time'" between questions and failed to show the "drowsy and weary state of mind that . . . Williams exhibited during the interview."

Even assuming that Williams' trial counsel performed deficiently when he failed to object to the admission of Williams' taped police interview after the officer had already testified to the interview, we do not find that trial counsel was ineffective. Williams does not contend that his statements on the video differed from the officer's testimony of Williams' statements. He only contends that it was unduly cumulative. This court has held that "[g]enerally, 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."[38] Williams was not prejudiced by any failure on the part of his appellate counsel to object to the taped confession.

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[38] *State v. Jenkins*, 294 Neb. 475, 487, 883 N.W.2d 351, 361 (2016).

(iv) Failure to Investigate Witness From Jail

Williams contends that trial counsel failed to investigate a college student who was conducting a survey at the jail prior to Williams' police interview. Williams argues in his motion for postconviction relief that he told the student that he could not take part in the survey because his mind was "'messed up.'" Williams contends that this interaction could substantiate a defense of his inability to make a knowing, intelligent, and voluntary waiver of his rights before giving a statement to law enforcement. Williams claims that he told trial counsel about this interaction and that trial counsel failed to investigate it further.

The police officer conducting the interview following Williams' alleged conversation with the college student testified that Williams stated that he had consumed "'a bunch of beer and gin'" and that he fell asleep "on a couple of occasions" during the interview. The officer further testified that despite this, during the interview, it did not appear Williams was under the influence of alcohol or drugs and he appeared to understand the questions and respond appropriately. Additional testimony from the college student that Williams claimed he was "messed up" would not have affected the jury's decision. The conversation would likely have been inadmissible, and even if it were admissible, it would not have proved that Williams was unable to waive his *Miranda* rights. We fail to see how Williams could have been prejudiced by any failure of trial counsel to investigate this alleged conversation with a college student.

(v) Counsel's Continued Representation of Williams Following Oral Motion for New Counsel at Sentencing Hearing

Williams made an oral motion for new counsel during the sentencing hearing, because (1) counsel and Williams had numerous conflicts, (2) counsel did not provide discovery when Williams requested it, (3) counsel did not call an expert

witness to testify as to Williams' substance abuse, (4) counsel failed to inform Williams that the probation officer would conduct an interview, and (5) counsel may have failed to review the presentence investigation report with Williams prior to sentencing. No ruling on this motion is apparent on the record, and the sentencing proceeded with continued representation from trial counsel.

[19] When a defendant becomes dissatisfied with court-appointed counsel, unless he or she can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if he or she is competent to do so.[39]

[20] Williams has a right to counsel, but he does not have a right to counsel of his own choosing.[40] Williams' allegations merely indicate dissatisfaction with his appointed counsel. We conclude that counsel's failure to withdraw did not prejudice Williams' defense.

Williams also contends that the district court erred in failing to appoint new counsel following his oral motion. For the reasons stated above, we find no prejudice.

(vi) Testimony of Officer DeJong

Williams argues that trial counsel failed to object to the admission of testimony from Officer DeJong. He testified that when he asked Williams to go downtown to the police station for an interview, Williams stated that he did not have a problem with it, but that the last time he went with the police, he ended up going to jail. Williams argues in his motion for postconviction relief that admission of the evidence of prior crimes was unduly prejudicial and that "[w]ithout the taint of this evidence, the results of the proceedings would have been different."

Even assuming counsel was deficient in not objecting, we find that Williams suffered no prejudice. Because of the overwhelming evidence to support Williams' convictions, including

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[39] *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988).

[40] *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007).

Williams' confession to starting the fire, surveillance video of him filling a bottle with gasoline, and eyewitness testimony, we conclude that Williams was not prejudiced by any alleged failure of trial counsel to object. Williams has not alleged facts which, if true, would entitle him to postconviction relief.

(vii) Failure to Timely Object and Move for Mistrial Due to Improper Statements During Closing Arguments Presented by State

Williams argues that trial counsel failed to object to improper statements made by the State during closing arguments. During those arguments, the prosecutor stated that opposing counsel was "blowing smoke," and called Williams a "punk," a "thief," and a "murderer."

[21-23] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[41] If we conclude that the prosecutor's acts were misconduct, we next consider "whether the misconduct prejudiced the defendant's right to a fair trial."[42] 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 convictions.[43] This court has held that "[p]rosecutors are not to inflame the prejudices or excite the passions of the jury against the accused."[44]

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[41] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[42] *Id.* at 223, 854 N.W.2d at 602.

[43] *Id.*

[44] *State v. Barfield*, 272 Neb. 502, 512, 723 N.W.2d 303, 312 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

In his rebuttal closing arguments, the prosecutor stated that Williams "is a punk." The prosecutor further stated, "I thought we had had enough smoke in this courtroom and in this case. But defense counsel gets up and we have more." The prosecutor then referenced a quote from another prosecutor that "[i]f you don't have the courage to point to the defendant and call him what he is — he's a thief and he's a murderer — you can't ask the jury to find him guilty." The prosecutor then closed his argument telling the jury, "[G]o back and do your duty. The cries of Victoria Burgess, you answer them. You answer them, ladies and gentlemen of the jury."

While these statements appeal to the jury's passions and prejudices, we cannot conclude that these statements were of such a nature as to mislead the jury. Moreover, considered in light of the evidence at trial, the statement that Williams was a "punk" was likely in reference to Diane's testimony that Williams told her after the fire that he "wasn't going to be treated like a punk." First, the remarks were isolated in nature in the context of the prosecutor's rebuttal argument. The prosecutor's entire rebuttal argument consisted of just 172 lines of the record. In addition, there is significant evidence supporting the convictions: testimony from Diane, the neighbor, and the convenience store employee, and the surveillance video of Williams filling a bottle with gasoline.

Any taint that resulted from the allegedly improper statements made by the prosecutor were outweighed by the significant weight of evidence that supported Williams' convictions. Therefore, any improper conduct did not prejudice Williams' right to a fair trial. Finding no prejudice, we cannot conclude that counsel was ineffective for failing to object to the statements.

(viii) Failure to Assert Drug Psychosis/Insanity or Drug Impairment Defense

Williams argues that direct appeal counsel should have raised trial counsel's failure to present evidence or a psychiatrist

to show that Williams did not have the requisite intent to commit the crime of arson due to his prolonged substance abuse and his drug use prior to the fire and the subsequent police interview.

[24-28] Under our current common-law definition, the two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.[45] Insanity immediately produced by intoxication does not destroy responsibility when the defendant, when sane and responsible, made himself or herself voluntarily intoxicated.[46] Voluntary intoxication is no justification or excuse for crime unless the intoxication is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent.[47] As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces psychosis or delirium.[48] A defendant may not assert an insanity defense when the insanity was temporary and brought on solely by voluntary intoxication through the use of drugs.[49]

As we understand Williams' arguments, Williams contends that he suffered from a mental defect at the time of the crime due his prolonged drug use. Williams has not submitted any further details of the effect of this alleged mental defect. Nor does the evidence indicate that Williams did not know or understand the nature and consequences of his actions or that he did not know the difference between right and wrong.

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[45] *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

[46] *Id.*, citing *Schlenker v. The State*, 9 Neb. 241, 1 N.W. 857 (1879), *reversed* 9 Neb. 300, 2 N.W. 710.

[47] See *State v. Hotz, supra* note 45.

[48] *Id.*

[49] *Id.*

Rather, the evidence proves the contrary. According to Diane's testimony, Williams woke her and warned her to leave the house prior to setting the house on fire. According to the neighbor's testimony, Williams asked him for a gun, and when he refused to provide the gun, Williams made a statement to the neighbor that he intended to burn the house down. Williams then borrowed the neighbor's telephone, called Williams' mother, and told her that "'[t]he next time you hear from me, you'll be hearing from me from the penitentiary.'" Furthermore, Diane testified that after Williams poured gasoline around the house and on one of the victims, he lit a match that didn't catch fire, and proceeded to light two more matches which he threw on the gasoline in the house. This is strong evidence of Williams' intent to commit arson, that he understood the nature of his actions, and that he knew the difference between right and wrong.[50]

Williams contends that the evidence contained in the police interview that he had consumed beer and gin in excess prior to the time of the interview supports his argument regarding intent. It is unclear from the record whether Williams was intoxicated at the time of the interview or at the time he set the fire. However, Williams alleges that he voluntarily became intoxicated, which resulted in drug impairment and a drug-induced psychosis. Since this court has found that a defendant may not assert an insanity defense when the insanity was temporary and brought on solely by voluntary intoxication, Williams' claim is not an actionable claim.

Therefore, Williams' trial counsel was not deficient in failing to introduce evidence or call a psychiatrist to produce evidence of Williams' mental state as a result of drug and alcohol use the day of the fire as well as his prolonged substance abuse. We conclude that Williams was not prejudiced by any failure of trial counsel to pursue his suggested insanity defense.

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[50] See *State v. Williams, supra* note 1.

(ix) Failure to Present Defense That Fire Was Started Accidentally or Due to Provocation

Williams also alleges that trial counsel was ineffective for failing to present a defense that the fire was not started intentionally but was an accident or set as a result of provocation.

[29] This court has held that "[i]t 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."[51]

According to testimony and surveillance video, following an argument with Burgess at Burgess' house, Williams went to a neighbor's house and asked for a gun, and when the neighbor refused, Williams proceeded to the convenience store, where he filled a bottle with gasoline. Williams then returned to Burgess' house and used the gasoline to set fire to her house. We find that Williams' argument that he started the fire due to provocation is without merit. This string of events does not constitute a "sudden happening" of which Williams was "incapable of reflection."

[30] Williams further argues that trial counsel failed to present a defense that the fire was started accidentally. Significant evidence of Williams' intent to commit arson was presented at trial. In addition to the evidence listed above, according to Diane's testimony, Williams poured gasoline around Burgess' house, lit a match, and threw the match at Burgess' feet, setting the house on fire; lit another match that went out; and lit a third match to set the kitchen on fire. Because of the overwhelming evidence that Williams intentionally set the fire, we conclude that Williams has not alleged facts which, if true, might entitle him to postconviction relief. As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.[52]

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[51] *State v. Smith*, 284 Neb. 636, 642, 822 N.W.2d 401, 408 (2012).

[52] *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015).

Therefore, Williams was not prejudiced by any failure by counsel to raise the defense that he started the fire accidentally.

(x) Failure to Comply With Williams' Requests to View Discovery and Failure to Communicate With Williams

Williams next argues that he made numerous requests to trial counsel to see discovery in the case and that he was only permitted to see his statement to law enforcement. Williams also contends that trial counsel insufficiently communicated to him during the trial and that thus, he was not informed of the case against him or make a knowing waiver of the right to testify.

Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify.[53] Williams states that during trial, counsel ignored Williams' notes and conversation. Williams also claims that if he had received adequate advice from counsel, he would have testified that "either the deaths were not caused intentionally because of the impairment [of] drugs or a drug-induced psychosis; by accident; or that the deaths were caused during the provocation of a sudden quarrel necessitating lesser included offense instructions for second degree murder and manslaughter."

This court takes very seriously a defendant's right to testify. However, as we discussed above, there was strong evidence to rebut the claims Williams would have asserted in his testimony. The evidence presented at trial clearly showed that Williams was not under a drug-induced psychosis from prolonged drug use, because he understood the nature and consequences of his actions and understood the difference between right and wrong. Furthermore, Williams' psychosis and intoxication defense based on drug and alcohol use the day of the fire would not have been actionable, because it was temporary

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[53] *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994).

and brought on solely by voluntary intoxication. Finally, there is strong evidence of Williams' actions from the time of the argument until he set the house on fire which shows that he was not incapable of reflection and that the crimes did not happen suddenly. Based on the overwhelming evidence supporting Williams' convictions, we find that Williams' testimony would not have affected the verdicts. Therefore, Williams was not prejudiced by any alleged failure by trial counsel to communicate.

(b) Claims of Ineffective Assistance That Center Solely on Direct Appeal Counsel

Williams also asserts ineffective assistance of counsel claims that center solely on appellate counsel's alleged failures, not on any failure to raise trial counsel's ineffectiveness. Williams argues that he received ineffective assistance of counsel in his direct appeal for the following reasons.

(i) Unconstitutional Breakdown in Attorney-Client Relationship at Direct Appeal Level

Williams argues in his motion for postconviction relief that there was an unconstitutional breakdown in the attorney-client relationship with his direct appeal counsel, because counsel "failed to communicate with [Williams] in order to effectively select challenges to the validity of [his] conviction[s] and sentence[s]." Williams does not provide any support beyond this statement for his claim of counsel's failure to communicate. Williams does not allege any facts that show that he may be entitled to relief. As such, Williams is not entitled to relief.

(ii) Failure to Present and Preserve Claim That Two Photographs Were Received Over Trial Counsel's Objections

Williams argues that his direct appeal attorney failed to assign as error on appeal Williams' claim that two gruesome photographs of the bodies of Burgess and a dog were not

relevant and were unduly prejudicial. The photographs were admitted over the objection of trial counsel.

[31,32] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[54] In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[55]

At trial, the State argued that the photographs show corroboration of witnesses, where the bodies were located, and the burning of the body. The district court found that the prejudice did not substantially outweigh the probative value.

We agree with the State that the admission of these photographs was not prejudicial. The photograph of Burgess' body showed the condition of the body or the nature and extent of the wounds, and the court did not abuse its discretion in admitting the photograph. And while the photograph of the burned dog's body might have lacked probative value, we cannot conclude that such was prejudicial, given the other evidence offered against Williams. We conclude that counsel was not ineffective for failing to assign the admission of the photographs on direct appeal.

(c) Postconviction Counsel

Finally, we turn to Williams' claims of ineffective assistance of postconviction counsel. Williams contends that his first postconviction counsel failed to (1) withdraw from the case and request new counsel to be appointed and (2) file Williams' brief and proceed with the appeal of the postconviction proceeding.

[33] Section 29-3001 requires evidentiary hearings only if the motion contains factual allegations which, if proved,

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[54] See *State v. Dubray, supra* note 41.

[55] See *id.*

constitute an infringement of the movant's rights under the Nebraska or federal Constitution. This court stated in *State v. Hessler*[56] that "[t]here is no constitutional guarantee of effective assistance of counsel in a postconviction action . . . ." As such, Williams' claims of ineffective assistance in the first postconviction and the appeal of the first postconviction are without merit.

3. Limited Postconviction Relief

Williams argues that the district court erroneously granted the limited postconviction relief of a reinstated appeal of the denial of postconviction relief under the first postconviction motion rather than a new direct appeal. Williams further argues that the district court order ruled on issues contained only in the first motion for postconviction relief and that thus, the court did not rule on the second motion for postconviction relief. The State contends that the district court had no authority to reinstate Williams' right to appeal from the denial of his first postconviction motion, because the district court only has authority to reinstate a civil appeal in postconviction cases when an appeal has been lost solely due to a mistake by the clerk or the court, not when the mistake is attributable to the parties or his or her agent. The State argues that all of Williams' claims were implicitly denied in the district court order.

Under § 29-3001(2), "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ."

We have established above that none of the files or records of the case show that Williams is entitled to relief on any of his claims of ineffective assistance of counsel. Therefore, Williams is not entitled to a hearing on his claims. As such, Williams' argument that the lower court may not grant a reinstated appeal is irrelevant in the current proceedings.

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[56] *State v. Hessler, supra* note 17, 288 Neb. at 679, 850 N.W.2d at 785-86.

Finally, we read the trial court's decision as disposing of all of Williams' claims. Williams' second assignment of error is without merit.

VI. CONCLUSION

We conclude that the district court erred in granting postconviction relief without conducting an evidentiary hearing, because failing to hold such a hearing before ordering reinstatement is improper under the requirements set forth in § 29-3001(2). However, based on our reading of Williams' second motion for postconviction relief and our review of the record, Williams is not entitled to an evidentiary hearing, either because he failed to allege sufficient facts to demonstrate a violation of his constitutional rights or because the record and the files affirmatively show that he is entitled to no relief.

Therefore, under § 29-3001(2), Williams is not entitled to a hearing on his claims. The decision of the district court is reversed, and the cause is remanded with directions to overrule Williams' second motion for postconviction relief.

Reversed and remanded with directions.

State of Nebraska, appellee, v. Nicholas J. Ely, appellant.

889 N.W.2d 377

Filed January 20, 2017. No. S-16-471.

1. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
3. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
4. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in a postconviction proceeding is not error in the absence of an abuse of discretion.
5. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
6. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
7. **Postconviction: Appeal and Error.** 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.
8. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same counsel, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
9. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective

assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.

10. ____: ____: ____: ____. To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
11. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.
12. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
13. **Trial: Prosecuting Attorneys.** A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.
14. **Jury Instructions.** In construing an individual jury instruction, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
15. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.
16. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.
17. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.
18. **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.

19. **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.
20. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11.
21. ____: ____: ____. In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.
22. **Right to Counsel: Waiver.** A waiver of counsel need not be prudent, just knowing and intelligent.
23. **Rules of Evidence: Presumptions.** References to "presumptions" in Neb. Rev. Stat. § 27-303 (Reissue 2016) necessarily include "inferences."
24. **Constitutional Law: Trial: Witnesses.** The right to confrontation is not unlimited, and only guarantees an opportunity for effective cross-examination, not examination that is effective in whatever way and to whatever extent the defense may wish.
25. **Trial: Testimony.** When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of the inquiry is ordinarily subject to the discretion of the trial court.
26. **Postconviction: Justiciable Issues: Right to Counsel.** When the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.
27. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
28. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed in part, and in part reversed and remanded with directions.

Brian S. Munnelly for appellant.

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

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

Cassel, J.

I. INTRODUCTION

Nicholas J. Ely appeals from an order denying his motions for postconviction relief, appointment of counsel, leave to proceed in forma pauperis, and recusal of the trial judge. The district court determined that Ely's postconviction claims were procedurally barred. We agree that some were barred. And the files and records affirmatively show that Ely was entitled to no relief on many of the other claims. But two claims were not barred and warranted an evidentiary hearing. This, in turn, drives our disposition of the other issues on appeal.

II. BACKGROUND

Ely was involved in an attempted robbery with several other individuals in which the target of the robbery was killed. Because of his involvement, Ely was ultimately convicted by a jury of first degree murder (felony murder) and use of a deadly weapon to commit a felony. He was sentenced to life in prison on the murder conviction and to a consecutive sentence of 5 to 5 years' imprisonment on the use of a deadly weapon conviction. The circumstances which led to Ely's convictions and sentences may be found in our opinion on direct appeal.[1]

1. Direct Appeal

On direct appeal, represented by the same counsel as he was at trial, Ely assigned that (1) there was insufficient evidence to sustain the guilty verdicts, (2) the district court erred in sustaining the State's motion in limine and excluding evidence of

[1] *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

prior illegal conduct by a codefendant, and (3) the district court erred in giving a "flight" instruction to the jury. We affirmed his convictions and sentences, modifying only his credit for time served by applying it to the use of a deadly weapon sentence.[2] Ely has since filed a motion and an amended motion for postconviction relief and now appeals from the denial of his motions.

2. Postconviction Proceeding

Ely filed his first pro se motion for postconviction relief and alleged numerous claims of ineffective assistance of trial counsel, several claims of district court error, and numerous claims of ineffective assistance of appellate counsel. He stated in his motion for postconviction relief that his counsel on direct appeal was the same counsel he had at trial. Ely also filed a motion for appointment of counsel, a motion for leave to proceed in forma pauperis, and a poverty affidavit in support of his motions.

While his first motion was pending and before the State filed a response, Ely filed a motion for leave to file an amended motion for postconviction relief. He additionally filed a motion for the court to recuse itself from his postconviction proceeding and his amended motion for postconviction relief. In his amended motion, Ely again alleged numerous claims of ineffective assistance of trial counsel, several claims of district court error, and numerous claims of ineffective assistance of appellate counsel. Comparing the amended motion to the original motion, Ely did not allege any new claims and did not state any new facts in support of his claims. The district court ruled on both the original and the amended motions for postconviction relief. The 29 errors assigned in the amended motion are summarized and reordered as follows:

(1) The district court abused its discretion by (a) denying Ely's request to dismiss counsel and proceed pro se,

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[2] *Id.*

(b) sustaining the State's oral motion in limine to prevent Ely from cross-examining codefendants about the possible life sentences they faced, (c) denying Ely's motion to have personal access to his discovery, and (d) denying Ely his privilege to depose the State's witnesses.

(2) Ely was denied effective assistance of trial counsel when trial counsel (a) failed to advise Ely of his right to testify in his own behalf; (b) failed to object to testimony concerning prior bad acts; (c) failed to suppress the search of a cell phone linked to Ely, due to an illegal search warrant; (d) failed to inform the jury of Nicholas Palma's deal to testify for the State; (e) failed to object to or move to strike Palma's prejudicial testimony after it did not fulfill what the State said it would; (f) failed to make reasonable investigations involving defense witnesses; (g) failed to object to the State's prejudicial remarks during closing arguments; (h) failed to object and/or add to the jury instruction regarding intent; (i) failed to object to jury instruction No. 20, regarding "accomplice testimony," for leaving out certain language; (j) failed to object to jury instruction No. 17 for leaving out language that would pertain to Ely; (k) failed to depose witnesses Ely had asked them to depose; (l) failed to cross-examine State witnesses efficiently; (m) failed to object to or move to strike Jacob Wilde's testimony after it was discovered Wilde did not know about Ely's involvement in the robbery and homicide; (n) failed to go over all the evidence with Ely before trial; (o) failed to adequately explain Ely's defense during opening statements and closing arguments; and (p) had a conflict of interest with Ely.

(3) Ely was denied effective assistance of counsel on direct appeal when appellate counsel (a) failed to argue that the district court erred by denying Ely his right to proceed pro se, (b) argued on appeal a jury instruction that did not reflect the instruction given at trial, (c) failed to argue relevant issues pertaining to the prejudicial "flight" instruction given at trial, (d) failed to argue Ely's confrontation rights were violated,

(e) failed to argue that evidence was ruled admissible pursuant to Neb. Rev. Stat. § 27-404 (Reissue 2016) in a codefendant's first trial but inadmissible in Ely's trial, (f) failed to argue that Palma's testimony did not fulfill what the State said it would, (g) failed to argue that the district court erred by denying Ely's motion to have personal access to his discovery, (h) failed to argue that the district court erred by denying Ely his privilege to depose the State's witnesses, and (i) had a conflict of interest with Ely.

The district court, without holding an evidentiary hearing, denied Ely's motions, finding that the issues raised in the motions for postconviction relief "were known and/or knowable at the time of his direct appeal and, therefore, the motions . . . should be overruled and denied." The court denied Ely's other motions for appointment of counsel, to proceed in forma pauperis, and for recusal. The court's order denying Ely's motions did not state that Ely had failed to allege sufficient facts to demonstrate a violation of his constitutional rights or that the record and files affirmatively showed that he was entitled to no relief. The order instead seems to rest entirely on the court's finding that the issues raised in the motion for postconviction relief were procedurally barred.

Ely timely appeals.

III. ASSIGNMENTS OF ERROR

Ely assigns, restated, renumbered, and reordered, that the district court erred in (1) denying his motion for postconviction relief without an evidentiary hearing, (2) denying his motion to proceed in forma pauperis, (3) denying his motion for appointment of counsel, and (4) denying his motion for recusal.

IV. STANDARD OF REVIEW

[1,2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[3] When reviewing

[3] *State v. Harris*, 294 Neb. 766, 884 N.W.2d 710 (2016).

questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[4]

[3] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.[5]

[4] Failure to appoint counsel in a postconviction proceeding is not error in the absence of an abuse of discretion.[6]

[5] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.[7]

V. ANALYSIS

1. Motion for Postconviction Relief

[6,7] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[8] Therefore, 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.[9] Ely alleged claims of district court error that, as he notes in his other assignments of error, were known and could have been litigated on direct appeal by his appellate counsel. Accordingly, Ely's claims of district court error were procedurally barred and the district court did not err in denying postconviction relief on the basis of those claims.

[8] We reach a different conclusion concerning Ely's claims of ineffective assistance of trial counsel and appellate counsel. When a defendant was represented both at trial and on direct

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[4] *Id.*

[5] *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

[6] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[7] *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[8] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[9] *Id.*

appeal by the same counsel, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[10] As the State concedes, the record shows that Ely was represented by the same counsel on direct appeal as he was at trial. Therefore, Ely's motion for postconviction relief was his first opportunity to assert such a claim. For this reason, Ely's claims of ineffective assistance of counsel are not procedurally barred.

[9] When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[11] We shall address each allegation of ineffective assistance of counsel in turn.

(a) Ineffective Assistance of Trial Counsel

[10] To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*,[12] 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.[13] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[14] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been

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[10] See *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

[11] *State v. Robertson, supra* note 6.

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

[13] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[14] *Id.*

different.[15] A court may address the two prongs of this test, deficient performance and prejudice, in either order.[16]

(i) Failure to Advise Ely of Right to Testify

Ely alleged that trial counsel "failed to provide objectively reasonable advice" so that he could waive his right to testify. His motion included reference to specific testimony that he would have given, had trial counsel properly advised him of his right to testify. As the State concedes, these allegations are sufficient to raise a factual issue of whether a Sixth Amendment violation occurred and the files and records do not affirmatively show Ely is entitled to no relief. Accordingly, an evidentiary hearing is warranted on this claim.

(ii) Allegations Concerning Text Message Evidence

Ely asserted two allegations of inefficiency of trial counsel related to text messages entered into evidence. First, he alleged that trial counsel failed to object to testimony concerning text messages sent to and from his cell phone the day before the robbery. Ely asserted that the text messages were prior bad acts testimony and inadmissible pursuant to § 27-404(2). He additionally asserted that the State improperly used the text messages to show his intent and that the text messages were prejudicial to the outcome of his trial.

One of the text message exchanges read: "'Wsup wita lick bro.' ["Lick" is slang for a robbery.] 'Don't know man. I'm not out and about that much.' 'Me either but I need some $$.'" Another text message, sent from Ely's cell phone, read: "'and shit hard cuz being broke aint fun, bills gotta be paid and I aint trying to go to prison for robbing but I feel like there aint many other choices.'"

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[15] *Id.*

[16] *Id.*

Second, he alleged that trial counsel failed to suppress the same text messages as the product of a search of his cell phone obtained from an illegal search warrant. He argued that there was no probable cause to search the cell phone or the "SIM" memory card. He also argued that the search warrant was improper because it applied to six other individuals' cell phones and did not specify, with particularity, the place to be searched. The record shows that the investigating sergeant obtained the cell phone records for Ely's cell phone directly from his cell phone provider by submitting a search warrant to the company. A separate data download was performed on Ely's cell phone, but all the evidence was provided by the cell phone provider.

In reviewing the record and these text messages, it is clear that they were properly admitted and were not improper prior bad acts testimony used to prove Ely's character. The text messages were obtained from the cell phone provider. And Ely did not allege that the search warrant to the cell phone provider was illegal. Furthermore, the testimony concerning the text messages was properly admissible to show proof of motive, intent, and a plan. Therefore, the files and records affirmatively show that Ely is entitled to no relief on this claim.

(iii) Allegations Concerning Palma's Testimony

Ely alleged that trial counsel failed to inform the jury that the State promised Palma that the "mother of his child" would not have to testify if he testified. He argued that this weighed on Palma's credibility as a witness when Palma initially refused to testify, because the State "broke" the deal. Ely also alleged that trial counsel later failed to object to Palma's testimony after he did not testify to knowing why Ely left Omaha, Nebraska, and went to Sioux City, Iowa, after the robbery. We find that Ely has failed to allege facts that would support either claim and that the files and records affirmatively show that he is entitled to no relief on either claim.

First, the record shows that the State made the identified deal with Palma to testify as a witness at a codefendant's trial, but that the deal did not continue to Ely's trial. Thus, the deal in the previous trial was irrelevant. Furthermore, when Palma eventually testified, trial counsel elicited testimony that he had been granted immunity in exchange for his testimony. This was confirmed by the State outside of the presence of the jury. Palma additionally testified that the State threatened to charge him with accessory to murder if he did not testify. This deal would certainly weigh on the witness' credibility to testify truthfully—more so than a deal that was not relevant to Ely's trial.

Second, Palma testified that Ely told him "they had gone to do a robbery . . . and things went wrong." Palma also testified that sometime after this conversation, Ely called him and said that he was getting ready to leave Omaha. This evidence goes directly to the occurrence of a crime and Ely's voluntary flight after the occurrence of a crime—evidence of Ely's consciousness of guilt. Therefore, the testimony was proper and Ely's trial counsel had no grounds on which to object to Palma's testimony.

(iv) Allegation Concerning Failure to Investigate Defense Witnesses

Ely alleged that trial counsel failed to make reasonable investigations involving defense witnesses. Ely argued that trial counsel should have investigated Steve Kaiser and Taylor Sporven as possible defense witnesses and that their testimony would have changed the outcome of the trial. Ely alleged that if Kaiser had been called to testify, he would have testified that Ely was not the one who texted him, "'Wsup wita lick bro.'" And, if Sporven had been called to testify, she would have testified that Ely's text message stating, "'I aint trying to go to prison for robbing but I feel like there aint many other choices,'" was simply "venting" and did not actually communicate intent to commit the robbery the next day. Ely

also argued that trial counsel failed to present the full text message conversation with Sporven and that had it been presented, it would have established that the conversation was merely venting.

Ely never suggested at trial that the text messages sent from his cell phone the day before the robbery were not from him. Accordingly, he has not alleged sufficient factual allegations to amount to ineffective assistance concerning the investigation of Kaiser as a possible witness. Additionally, Ely cannot demonstrate prejudice in failing to have Sporven testify or introduce additional text messages, because, even if he was venting, it does not change the fact that he texted her about committing a robbery 1 day before he was involved in a deadly robbery.

(v) Allegation Concerning Prosecutorial Misconduct

[11,12] Ely alleged that trial counsel failed to object to three incidents of prosecutorial misconduct during closing arguments. Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.[17] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[18] We therefore turn to the incidents that Ely has described as prosecutorial misconduct.

First, Ely argued that the State's comments that "if you believe that Emily [G.] and Drake Northrop [two testifying codefendants] were involved in this robbery and are guilty of a robbery, then you have to find . . . Ely guilty as well" and that "if based on the testimony you've heard today from Northrop and [Emily G.] and if you think, yeah, those two are in the

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

[18] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

thick of it, those two are guilty, than so is [Ely]" were misleading and amounted to prosecutorial misconduct.

Second, Ely argued that the State's comments concerning the text messages as evidence of Ely's intent were prejudicial and amounted to prosecutorial misconduct, because the text messages "had no relevance to this case." The prosecutor stated at closing arguments, "You don't have to look into his mind because he flat out tells you what his intent was from text messages that he sent out." He continued and said, "At 8:00 p.m. he sends a text message to . . . Kaiser, asks about a lick . . . because he needs some money. The idea about doing a robbery is already in . . . Ely's mind before . . . they leave to go to [the victim's] house."

Third, Ely argued that the State's comments concerning his alleged flight and guilty conscience were prejudicial, unsupported by the evidence, and thus amounted to prosecutorial misconduct.

[13] The jury was instructed that the "attorneys may draw legitimate deductions and inferences from the evidence." It is clear that the prosecutor's comments did not amount to prosecutorial misconduct, because the prosecutor was entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.[19] The inferences were not unduly misleading, because the jury was properly instructed in the use of these inferences. Because we find no prosecutorial misconduct, Ely's trial counsel could not be ineffective in failing to object to the State's closing argument.

(vi) Allegation Concerning Jury Instruction No. 13 (Intent)

Ely alleged that trial counsel failed to object to or add to the jury instruction concerning intent. The instruction given read: "Intent is an element of the crimes charged against the

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[19] See, *id.*; *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

defendant. In deciding whether the defendant acted with intent you should consider his words and acts and all the surrounding circumstances." Ely argued in his motion for postconviction relief that the instruction did not adequately define "intent," because it left out the following language found in other first degree murder trials:

> "Intent is a material element of the crime charged against the Defendant. Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely —if ever— susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the Defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the Defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not Defendant committed the acts complained of and whether at such time he had the criminal intent. If you have any reasonable doubt with respect to either, you must find Defendant not guilty."

Ely argued that this language explained that the State must prove intent beyond a reasonable doubt and that without it, the jury was never informed that they must find the State proved intent beyond a reasonable doubt. This argument misstates the record, because, at the end of each instruction concerning the material elements of the crimes charged against Ely, the jury was instructed that "[t]he burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts." And intent is a material element in each charge. The jury was also given the definition of "reasonable doubt" in a separate instruction. Accordingly, the files and records affirmatively show that Ely is entitled to no relief on this claim.

(*vii) Allegation Concerning Jury Instruction No. 20 (Accomplice Testimony)*

Ely alleged that trial counsel failed to object to the jury instruction concerning accomplice testimony for leaving out certain language. The instruction given at trial read: "There has been testimony from Emily [G.] and Drake Northrop, claimed accomplices of [Ely]. You should closely examine his or her testimony for any possible motive he or she might have to testify falsely." Ely argued that the instruction should have included language stating: "'You should hesitate to convict [Ely] if you decide that Emily [G.] or Drake Northrop testified falsely about an important matter and that there is no other evidence to support his/her testimony.'" He states this language is necessary "[w]hen [Ely] is being tried solely on the word of an accomplice . . . ."

[14,15] In construing an individual jury instruction, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.[20] Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.[21] Instruction No. 19 instructed the jury: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony." The instruction listed a number of criteria the jury was to consider in determining the weight of testimony. These criteria included, among others: "Their interest in the result of the suit, if any"; "[t]he extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses"; and "[a]ll other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses." In reviewing the jury instructions as a whole, it is clear that the instructions correctly stated the law, were not misleading, and addressed the same issues in Ely's proposed

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[20] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[21] *State v. Iromuanya, supra* note 17.

instruction. Accordingly, the files and records affirmatively show that Ely is entitled to no relief on this claim.

(viii) Allegation Concerning Jury Instruction No. 17 (Flight)

[16] Ely alleged that trial counsel failed to object to the jury instruction concerning the voluntary flight of a person for leaving out language that would pertain to him. This court has already upheld this specific jury instruction on direct appeal.[22] And, as a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.[23] Therefore, the files and records affirmatively show that Ely is entitled to no relief on this claim.

(ix) Allegations Concerning State's Witnesses

Ely alleged that trial counsel failed to depose three State witnesses that he had asked his counsel to depose. He argued that, had trial counsel deposed the witnesses, counsel "would have been able to prove [Ely's] mere acquiescence, instead of encouragement." However, Ely did not allege how the witnesses' testimony would have shown his "mere acquiescence" rather than encouragement. He also failed to demonstrate prejudice in light of the other evidence showing his involvement as beyond "mere acquiescence."

Ely additionally alleged that trial counsel failed to cross-examine witnesses efficiently. Specifically, he alleged trial counsel erred by (1) not questioning a State witness as to why a codefendant was texting from other people's cell phones and (2) not being able to provide a page number for the deposition of codefendant Drake Northrop when impeaching him for a prior inconsistent statement. He argued that no witnesses testified that he was the one who texted about a "lick" from his

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[22] See *State v. Ely, supra* note 1.

[23] *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015).

cell phone and that testimony of another codefendant texting from other people's cell phones would have made it so "the state could not have efficiently used the texts to prove [Ely's] intent." He also argued that counsel's being unprepared in impeaching Northrop caused the jury to believe he was a credible witness.

Ely has not alleged that anyone else ever used his cell phone besides him. Instead, he only makes vague suggestions that a jury could have concluded he was not the one who sent the incriminating texts from his cell phone. Furthermore, Ely did not demonstrate how he was prejudiced by trial counsel's not citing to an exact line and page number when attempting to impeach Northrop, despite trial counsel's alerting the jury to the prior inconsistent statement. As a result, Ely failed to allege sufficient facts and he is entitled to no relief on these claims.

(x) Allegation Concerning Jacob Wilde's Testimony

Ely alleged trial counsel failed to object to Wilde's testimony after Wilde testified that he did not know of Ely's involvement in the crimes charged. He argued that he was prejudiced by Wilde's testimony which only "'speculates'" that he was involved in the robbery. Ely points to the following exchange during the cross-examination of Wilde to support his argument:

> [Defense counsel:] Was it your understanding [Ely] was not a participant in it — in the robbery?
>
> [State:] I'll object to that on foundation. He doesn't know what . . . Ely's involvement was, other than what . . . Ely told him.
>
> [Court:] I'm uncomfortable with him understanding, so sustained.

We note that on redirect, Wilde then testified to what Ely told him about the plan for the robbery. According to Wilde, Ely said he and the others "were supposed to go in, and the kid

wasn't supposed to put up a fight, and they were going to get the weed and leave."

Ely admits that "Wilde is allowed to testify to what he got out of the conversation between him and [Ely]." However, we find that Wilde testified to what Ely said was the plan for the robbery and not what "he got out of the conversation"; therefore, his testimony is admissible nonhearsay. As such, Ely's counsel had no grounds on which to object to Wilde's testimony and the files and records affirmatively show that Ely is entitled to no relief on this claim.

(xi) Allegation Concerning Failure to Review Evidence

Ely alleged trial counsel failed to review all the evidence with him before trial. He asserted that counsel neither prepared a defense with him nor showed him all of the evidence that was used against him before trial. He argued that if counsel had, he would have accepted the State's initial plea bargain and pled guilty to second degree murder. Despite making this argument, Ely admitted that the State offered him a second plea bargain at trial after the evidence was introduced. And, the second plea bargain differed from the initial plea bargain in only one respect—it also required a plea of use of a deadly weapon. He voluntarily did not accept that plea bargain.

The record reflects that prior to trial, Ely attempted to dismiss his counsel and proceed pro se, because he had not seen his discovery in a year. Trial counsel responded that counsel had gone over all the discovery with Ely and had shared all the information disclosed by the State. Moreover, Ely's own postconviction motion includes a letter from his trial counsel in response to an apparent bar complaint filed by Ely against counsel. That letter states that trial counsel "spent an inordinate amount of time going through . . . Ely's entire discovery file with him on more than one occasion." The files and records affirmatively show that he is entitled to no relief on this claim.

(xii) Allegation Concerning Failure to Explain Defense During Opening Statements and Closing Arguments

Ely alleged that trial counsel failed to adequately explain his defense during opening statements and closing arguments. Ely argued that trial counsel attempted to assert the defense that Ely only acquiesced to the robbery but failed to define acquiescence, because the jury had to ask for the definition during its deliberation. The record shows that the court gave a supplemental jury instruction defining acquiescence as "conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction or permit it to be carried into effect." The record also reflects that the jury was instructed on "acquiescence" during the trial.

During opening statements, Ely's trial counsel clearly stated that "[m]ere presence and acquiescence at the time a crime occurs is not enough for a conviction of guilty." Counsel also asserted that Ely was not active in the robbery. Then, at closing argument, trial counsel stated that "mere presence, that mere acquiescence or silence does not meet the State's highest burden in this case. The State must prove intentional encouragement or intentional assistance." Trial counsel also asserted that Ely's "hanging out with these people, being around these people, being present and going along with what these people were planning to do is much different than intentionally participating or intentionally planning to participate in a robbery."

We find that trial counsel effectively explained Ely's defense. That the defense was unsuccessful does not amount to ineffective assistance. For these reasons, the files and records affirmatively show that Ely is entitled to no relief on this claim.

(xiii) Allegation Concerning Conflict of Interest

[17] Ely alleged that trial counsel and he had a conflict of interest because he had attempted to dismiss his counsel on two

prior occasions. He argued that the conflict of interest was born out of his claiming trial counsel failed to do counsel's job, that counsel lied to him, and that the client-attorney trust had been broken. However, Ely failed to allege any actual conflict. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.[24] Ely did not allege, and the record does not reflect, that trial counsel had any divided loyalties or acted against Ely's interests. As such, Ely made insufficient factual allegations and is entitled to no relief on this claim.

(b) Ineffective Assistance of Appellate Counsel

[18,19] A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.[25] 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.[26]

(i) Allegation Concerning Right to Proceed Pro Se

[20-22] Ely alleged that appellate counsel failed to argue that the district court erred when it denied his right to proceed pro se. He argued that his Sixth Amendment rights were violated "by being forced into trial with unwanted counsel." A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the

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[24] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[25] *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

[26] *Id.*

Sixth Amendment and Neb. Const. art. I, § 11.[27] In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.[28] A waiver of counsel need not be prudent, just knowing and intelligent.[29]

The record shows that Ely moved to dismiss counsel on two separate occasions before trial and that both motions were denied. In denying his first motion to dismiss counsel and proceed pro se, the trial court observed: "I don't see — quite honestly, I don't see any benefit to you proceeding pro se between now and [the trial] without the advice of counsel. It is a serious — or these are serious charges. And I still think you need the advice of counsel."

Given the seriousness of the constitutional rights at issue, the denial is not subject to harmless error review.[30] We conclude that the failure to argue the denial is likewise not subject to harmless error review. And, the files and records do not affirmatively show Ely is entitled to no relief. Accordingly, as the State concedes, an evidentiary hearing is warranted on this claim.

(ii) Allegations Concerning "Flight" Instruction

Ely alleged that appellate counsel was ineffective in arguing on appeal against the "flight" jury instruction in three ways. First, he alleged that appellate counsel argued a jury instruction that did not reflect the instruction given at trial. He argued that he was prejudiced when appellate counsel raised issues concerning the "flight" instruction that did not pertain to his case.

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[27] See *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[28] *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

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

[30] See *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

Second, he alleged that appellate counsel failed to argue that the "flight" instruction given at trial was prejudicial, because there must have been "unexplained" circumstances that evidenced his consciousness of guilt. He argued that his alleged flight was explained by evidence that he left Omaha to "catch up on old times" and not out of consciousness of guilt.

[23] Third, Ely alleged that appellate counsel failed to argue that the "flight" instruction amounted to a presumption and that the jury should have received an instruction on presumptions in criminal cases pursuant to Neb. Rev. Stat. § 27-303 (Reissue 2016). The instruction given at trial stated:

> You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime is a circumstance . . . which the jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person.

We note that this instruction does not create a presumption—at most it created an inference. However, references to "presumptions" in § 27-303 necessarily include "inferences."[31]

In addressing the first two allegations, we note that Ely is correct that appellate counsel did argue against certain language in the "flight" instruction that was not included in the instruction at trial. However, after noting this mistake on direct appeal, we nonetheless reviewed the entire instruction and found no error.[32] On direct appeal, we also determined that the evidence given at trial necessitated the "flight" instruction, thereby inferring there were unexplained circumstances.[33] Therefore, Ely has failed to demonstrate prejudice on these first two claims.

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[31] See *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

[32] See *State v. Ely, supra* note 1.

[33] See *id.*

In addressing the third allegation, we find that to the extent that § 27-303 applies to the "flight" instruction, the failure to comply with the statute is harmless error. First, as a "circumstance for consideration," the instruction "simply inform[ed] the jury concerning correct use of circumstantial evidence."[34] Second, the court also instructed the jury that all material elements of the crimes charged were to be proved beyond a reasonable doubt and that Ely was presumed innocent until he has been proved guilty beyond a reasonable doubt. Thus, in reading the jury instructions as a whole, we find that they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence. The files and records affirmatively show that Ely is entitled to no relief on this claim.

(iii) Allegation Concerning Violation of Confrontation Rights

Ely alleged that appellate counsel failed to argue that his confrontation rights were violated when the court prohibited cross-examination of Emily G. and Northrop concerning the possible life sentences they faced if they did not testify. At trial, Ely's counsel timely objected to this limitation on the scope of cross but the objection was overruled. Ely argued that, had such cross-examination been allowed, the jury "would have received a significantly different impression of the witness' credibility."

[24,25] We addressed a nearly identical assignment of error concerning the same restriction on cross-examining Emily and Northrop in a codefendant's direct appeal.[35] In that case, we held that the right to confrontation is not unlimited, and only guarantees an opportunity for effective cross-examination, not examination that is effective in whatever way and to whatever extent the defense may wish.[36] And, when the object of the

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[34] See *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 861 (1991).

[35] See *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014).

[36] See *id.*

cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of the inquiry is ordinarily subject to the discretion of the trial court.[37]

Both Emily and Northrop testified that they were charged with first degree murder and that they hoped for leniency in exchange for testifying. Even without knowing the specific penalty for first degree murder, a reasonable juror would understand from this testimony that the testifying codefendants were hoping to obtain a substantial benefit from their cooperation with the prosecution. Therefore, there is no prejudice and the files and records affirmatively show that Ely is entitled to no relief on this claim.

(iv) Allegation Concerning Failure to Argue Issue of Evidence Admitted Pursuant to § 27-404

Ely alleged that appellate counsel failed to argue that evidence was ruled admissible pursuant to § 27-404 in a codefendant's first trial but inadmissible in his trial. In our review of that codefendant's appeal, we note that the evidence was not admitted; rather, the defense had made an offer of proof and appealed the court's order.[38] We found no error in the court's ruling that evidence was inadmissible pursuant to § 27-404 in that case,[39] and, therefore, appellate counsel could not have been ineffective for failing to make such an argument in this case. The files and records affirmatively show that Ely is entitled to no relief on this claim.

(v) Remaining Assignments of Ineffective Assistance of Appellate Counsel

Ely's remaining four assignments of ineffective assistance of appellate counsel essentially restate earlier arguments of ineffective assistance of trial counsel. We have already found

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[37] *Id.*

[38] See *id.*

[39] See *id.*

that the files and records affirmatively show Ely is entitled to no relief on those claims. Because his trial counsel and appellate counsel are the same, we also conclude that he is entitled to no relief on these claims.

2. Motion to Proceed In Forma Pauperis

Ely assigns and argues that the district court erred when it denied his motion to proceed in forma pauperis. An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application has sufficient funds to pay costs, fees, or security, or is asserting legal positions which are frivolous or malicious.[40] Here, there was no objection from the State but the court objected on its own motion. In so doing, the court was required to provide a written statement of its reasons, findings, and conclusions for denial of the application.[41] The court failed to do so, and we review the denial de novo on the record.

Ely filed an affidavit of poverty with his motion to proceed in forma pauperis, and the record does not show that he has any other funds to pay costs, fees, or security. If Ely's motion for postconviction relief had stated no claims requiring an evidentiary hearing, the court's denial of his motion to proceed informa pauperis would have been moot. But, as stated above, the record shows that two of Ely's claims warranted an evidentiary hearing and were therefore not frivolous or malicious. Because we have no written statement from the district court of any other reasons for denial of the application, we conclude that it was error to deny Ely's application.

3. Motion to Appoint Counsel

[26] Ely assigns and argues that the district court erred when it denied his motion for appointment of counsel. When the

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[40] § 25-2301.02.

[41] See *id.*

defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.[42] As we have noted, Ely has alleged two claims that warranted an evidentiary hearing. Therefore, he was entitled to the appointment of counsel and the district court's denial of his motion was an abuse of discretion.

4. Motion to Recuse

Finally, Ely assigns and argues that the district court erred in denying his motion asking the court to recuse itself from the case. Ely argues that the district court judge "has been prejudiced against him since before trial, when the Court denied Ely's motion to dismiss counsel and to proceed Pro Se."[43] He additionally argues that the district court judge has become biased and prejudiced against him, because Ely has argued multiple claims of district court error in his motion for postconviction relief.

[27,28] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[44] A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.[45] Ely has not demonstrated, nor does the record show, actual bias or prejudice, or that a reasonable person would question the judge's impartiality. Therefore,

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

[43] Brief for appellant at 12.

[44] *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 290 Neb. 798, 862 N.W.2d 294 (2015).

[45] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

the district court did not abuse its discretion in denying Ely's motion to recuse.

VI. CONCLUSION

For the reasons set forth above, we conclude that Ely was entitled to an evidentiary hearing on his claims that (1) his trial counsel was ineffective in failing to advise him of his right to testify and (2) his appellate counsel was ineffective in failing to argue that the district court erred in denying him the right to proceed pro se. We therefore reverse, and remand with directions that an evidentiary hearing be held on these two claims. We also direct the district court to grant Ely's motions to proceed in forma pauperis and for appointment of counsel. In all other respects, we affirm the district court's order.

Affirmed in part, and in part reversed and remanded with directions.

Rebecca G. Addy, Personal Representative of the Estate of Raven J. Addy-Cruz, deceased, appellant, v. Carlos J. Lopez et al., appellees.

890 N.W.2d 490

Filed January 27, 2017. No. S-15-934.

1. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
3. **Final Orders: Appeal and Error.** A party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Appeal dismissed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Robert S. Keith, of Engles, Ketcham, Olson & Keith, P.C., for appellee Werner Construction, Inc.

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

Heavican, C.J.

INTRODUCTION

Raven J. Addy-Cruz was killed in an automobile accident caused by Lyle J. Carman. Carman was employed by Lopez Trucking. Lopez Trucking, in turn, had been hired by Werner

Construction, Inc. (Werner), to haul debris from a construction site. At issue in this appeal is whether Werner is liable for wrongful death, because Carman was working on a Werner jobsite prior to the accident. We dismiss for lack of a final, appealable order.

BACKGROUND

Addy-Cruz was the victim of an automobile accident on June 7, 2012. She died of her injuries on June 9. The accident was caused when a dump truck driven by Carman rear-ended the vehicle driven by Addy-Cruz, causing it to leave the roadway and overturn in a ditch. Carman was employed by Lopez Trucking and acting within the scope of that employment at the time of the accident.

Rebecca G. Addy, the personal representative of Addy-Cruz' estate, filed a wrongful death suit against Carman; Carlos J. Lopez, owner of Lopez Trucking; and Werner. Werner sought summary judgment, which was granted.

Shortly after Werner was dismissed, Addy moved for judgment on the pleadings, but apparently that order was never ruled upon. Instead, it appears that Addy agreed to dismiss the cause without prejudice, but initially failed to do so. On July 1, 2015, the district court dismissed the case for exceeding case progression standards. The case was reinstated on July 17.

On September 8, 2015, Addy, Carman, and Lopez entered a joint stipulation to dismiss without prejudice. The stipulation provided that the dismissal was "for the purpose of moving forward with an appeal of the Court's order . . . granting the motion for summary judgement filed by . . . Werner." The case was dismissed on September 9. Addy filed a notice of appeal on October 6, indicating that she was appealing from the order sustaining summary judgment in favor of Werner, which "became a final appealable order upon the entry of the 'Order' dismissing the case filed on September 9, 2015."

ASSIGNMENTS OF ERROR

Addy assigns, restated and consolidated, that the district court erred in (1) sustaining Werner's motion for summary

judgment and (2) finding that Carman was not Werner's common-law or statutory employee.

STANDARD OF REVIEW

[1] An appellate court is without jurisdiction to entertain appeals from nonfinal orders.[1]

[2] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.[2]

ANALYSIS

As an initial matter, Werner contends that Addy is not appealing from a final order. We agree and dismiss Addy's appeal.

In this case, Addy acknowledges that her voluntary dismissal without prejudice of her only cause of action is an attempt to obtain interlocutory review of an order that would not otherwise be appealable,[3] namely, the order of the district court granting Werner's motion for summary judgment.

We were presented with a similar procedural tactic in *Smith v. Lincoln Meadows Homeowners Assn.*[4] In *Smith*, the plaintiff, Michelle Smith, filed a premises liability action alleging that a fall from a swing set owned by a homeowners association caused broken bones, spinal injuries, disability, lost wages, and multiple sclerosis. The association sought, and was granted, partial summary judgment as to the allegation that the fall from the swing caused Smith's multiple sclerosis. The basis of that summary judgment was the granting of a motion in limine with respect to the expert testimony offered by Smith to support that allegation.

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[1] *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007).

[2] See *Purdie v. Nebraska Dept. of Corr. Servs.*, 292 Neb. 524, 872 N.W.2d 895 (2016).

[3] See *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[4] *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

Smith subsequently filed a motion to dismiss her sole cause of action, without prejudice, seeking to reserve in that motion the right to appeal from the partial summary judgment. The district court granted Smith's motion to dismiss without prejudice and noted in the order of dismissal that Smith had "'expressly reserve[d] her right to appeal this Court's Order . . . granting partial summary judgment on the issue of multiple sclerosis.'"[5]

[3] We concluded that we lacked jurisdiction over Smith's appeal because the appeal was not from a final order. We held that "a party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order."[6] We then vacated the district court's dismissal of Smith's cause of action, noting that the district court was without power to voluntarily dismiss an action on the condition that Smith could then appeal from the district court's order of partial summary judgment.

We find *Smith* dispositive. Here, Addy seeks to dismiss without prejudice her one cause of action as to the two remaining parties. As in *Smith*, we conclude that she cannot do so in order to create finality and confer appellate jurisdiction where there would normally be none. To find appellate jurisdiction in such cases would "effectively abrogate our long-established rules governing the finality and appealability of orders, as 'the policy against piecemeal litigation and review would be severely weakened.'"[7]

CONCLUSION

Addy's voluntary dismissal of her cause of action without prejudice did not create a final order from which an appeal could be brought. As such, we dismiss Addy's appeal.

Appeal dismissed.

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[5] *Id.* at 850, 678 N.W.2d at 728-29.

[6] *Id.* at 856, 678 N.W.2d at 732.

[7] *Id*. at 855, 678 N.W.2d at 731.

Guardian Tax Partners, Inc., a Nebraska corporation, appellee, v. Skrupa Investment Company, a Nebraska corporation, appellant, and Frank S. Skrupa et al., appellees.

889 N.W.2d 825

Filed January 27, 2017. No. S-15-999.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Final Orders: Appeal and Error.** A trial court's decision to certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) is reviewed for an abuse of discretion.
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. **Jurisdiction: Final Orders: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order.
5. **Final Orders: Appeal and Error.** To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2016) and, additionally, where implicated, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).
6. **Partition: Final Orders.** When a partition action involves a dispute over ownership or title as well as a dispute over the method of partition, the parties have a right to have title determined first, and, if they elect to do so, an order resolving only the title dispute is a final, appealable order.
7. **Summary Judgment: Final Orders.** Partial summary judgments are usually considered interlocutory. They must ordinarily dispose of the whole merits of the case to be considered final.
8. **Actions: Partition.** Partition actions are unique in that when title is contested, the action has two distinct stages: first, the title determination and, second, the division of the real estate, i.e., the "partition."

9. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Reissue 2016), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2016) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
10. **Actions.** Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief.
11. **Final Orders: Time: Appeal and Error.** An appeal must be filed within 30 days of the final order from which an appeal is taken.

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

Kristopher J. Covi and Jay D. Koehn, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Steven G. Ranum, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee Guardian Tax Partners, Inc.

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

Cassel, J.

INTRODUCTION

The district court entered a judgment in partition,[1] albeit one styled as a partial summary judgment order, confirming ownership shares and implicitly directing partition to be made. More than 30 days later, a party obtained the court's

[1] See Neb. Rev. Stat. § 25-2179 (Reissue 2016).

certification of the order as final under the statute governing cases involving multiple claims or parties.[2] Because the partition presented only a single cause of action and the order settled the title claims of all parties, the statute was not implicated and the appeal time ran from the entry of the order. We therefore lack jurisdiction and dismiss the appeal.

BACKGROUND

At a treasurer's tax sale, Guardian Tax Partners, Inc. (Guardian), purchased a 1-percent interest in certain Douglas County real estate owned by Skrupa Investment Company (Skrupa Investment). Later, Guardian obtained and recorded a treasurer's tax deed to the 1-percent interest in the real estate.

Guardian then filed a complaint for partition against Skrupa Investment, alleging that Guardian owned 1 percent and Skrupa Investment owned 99 percent. The complaint also named as defendants Frank Skrupa (using three versions of his name with different middle initials) and Mary A. Skrupa, and asserted that Frank and Mary may claim an interest in the real estate. And the complaint also included the usual formulation for unknown persons as additional parties. Mary and the unknown parties were served by publication.

Skrupa Investment and Frank filed an answer, alleging that Guardian's tax deed was invalid because of Guardian's failure to comply with certain statutory notice requirements. With the answer, Skrupa Investment (but not Frank) filed a counterclaim to quiet title, claiming 100-percent interest in the property. The title determination depended upon whether Guardian possessed a valid tax deed, which, in turn, depended upon whether it gave the required statutory notice to the record owner.

Guardian filed a "Motion for Partial Summary Judgment" on Skrupa Investment's counterclaim and on the issue of whether Guardian had a valid tax deed. After a hearing, the district court entered an order on July 24, 2015, finding that the tax

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[2] Neb. Rev. Stat. § 25-1315 (Reissue 2016).

deed was valid "regardless of whether [Skrupa Investment] successfully rebutted the presumption of the Tax Deed's validity, [because Guardian] complied with all of the necessary statutory requirements." Thus, the July 24 order resolved all title issues and determined that Guardian owned a 1-percent interest and Skrupa Investment owned a 99-percent interest in the real estate.

On the 28th day after entry of the July 24, 2015, order, Skrupa Investment filed a motion asking the court to certify the July 24 order as a final order pursuant to § 25-1315. After a hearing, the court sustained the motion, certifying the July 24 order as a final and appealable order. Both the hearing and entry of the certification order occurred more than 30 days after July 24. The court found that the July 24 order had determined title to the real estate and left nothing to the court but partition and the sale of real estate. The court additionally found no just reason for delay, noting "if the reviewing court reverses the Court's . . . Order post-sale, the invalidation of the Tax Deed at issue would even be effective as to a purchaser for value at the partition sale."

Skrupa Investment appealed from the order that certified the July 24, 2015, order. We moved the appeal to our docket.[3]

ASSIGNMENTS OF ERROR

Skrupa Investment assigns, restated, that the district court erred in (1) deciding as a matter of law that the tax deed was valid, (2) deciding that Guardian complied with the required statutory notice provisions, and (3) granting Guardian's motion for partial summary judgment.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[4] A trial court's decision to certify a final

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[4] *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

judgment pursuant to § 25-1315(1) is reviewed for an abuse of discretion.[5]

ANALYSIS

[3-5] 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] In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order.[7] To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2016) and, additionally, where implicated, § 25-1315(1).[8] At oral argument, the parties seemed to concede that the July 24, 2015, order would have been appealable under our partition jurisprudence. Thus, the question is whether § 25-1315(1) was implicated—in other words, whether the adoption of § 25-1315 modified our case law governing the finality of partition judgments and orders. Before turning to that question, we recall our past cases addressing final orders in partition actions.

Finality of July 24, 2015, Order

For over 100 years, our decision in *Peterson v. Damoude*[9] has stood as the seminal case on the issue of appealability of orders in a partition action. In that case, we explained that the appealability of orders in partition actions depends on the nature of the controversy resolved and that such orders can be arranged into three classes:

> (1) Where there is no controversy as to the ownership of the property in common and the right of partition, but the controversy is as to something relating to

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[5] *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015).

[6] *Id.*

[7] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[8] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[9] *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914).

> the partition, as whether the property can be equitably divided or must be sold, one party contending that it can be equitably divided and asking for a distinct portion of the property, and the other party contending that it cannot be equitably divided and asking that the whole property be sold, or some similar controversy in regard to the partition itself. When that is the case, the partition alone is the subject of litigation, and of course is not final until the partition is made.
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> (2) The second class is where there is the same issue as above indicated as to the method of partition, and at the same time a distinct issue as to the title and ownership of the property. In such cases the parties would have a right to have their title first tried and determined, and, if that was done, the order thereon would be a final order, within the *per curiam* in [*Sewall v. Whiton*[10]], but if the matter is tried to the court, and the parties do not ask that their title be first determined, and there is no indication that the court proceeded first to determine the title, the parties should be held to have waived their right to appeal before the partition is completed.
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> (3) The third class is where everything depends upon the title and the nature of the title, and where, when that question is determined, the whole thing is determined. In such case there can be no doubt under the *per curiam* in the *Sewall* case that, when that question is determined, such determination is a final order, within the meaning of the statute, and is appealable.[11]

[6] We have not strayed from applying *Peterson v. Damoude* to determine when orders in partition actions are final and appealable. And we recently adhered to this framework.[12] We reiterated that when a partition action involves a dispute over

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[10] *Sewall v. Whiton*, 85 Neb. 478, 123 N.W. 1042 (1909).

[11] *Peterson v. Damoude, supra* note 9, 95 Neb. at 471, 145 N.W. at 848.

[12] See *Schlake v. Schlake*, 294 Neb. 755, 885 N.W.2d 15 (2016).

ownership or title as well as a dispute over the method of partition, the parties have a right to have title determined first, and, if they elect to do so, an order resolving only the title dispute is a final, appealable order.[13] This is consistent with the statutory scheme in partition actions, which contemplates the rendition of a "judgment" after "all the shares and interests of the parties have been settled in any of the methods aforesaid."[14] We have recognized that one of these "methods" is a trial upon issues joined in the pleadings.[15] The pleadings, where not denied or contradicted, provide another "method."[16] Summary judgment provides another method for determining title under very limited circumstances, where 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.[17]

In *Schlake v. Schlake*,[18] we described the title determination phase of a partition action as a special proceeding. This is consistent with the nomenclature of *Peterson v. Damoude*. But practitioners should not assume this description will apply to every title determination in a partition action. Section 25-2179 makes it clear that the title determination phase of a partition action is concluded only after "*all* the shares and interests of the parties have been settled." (Emphasis supplied.) Here, the July 24, 2015, order "settled" all of the parties' shares and interests. Another partition case might present multiple disputes of title. It is likely that the second *Peterson* category would not apply until all of the title disputes were determined. Thus, the *Peterson* language harmonizes the final

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[13] *Id*.

[14] § 25-2179.

[15] See *Fairley v. Kemper*, 174 Neb. 565, 118 N.W.2d 754 (1962).

[16] See Neb. Rev. Stat. § 25-2178 (Reissue 2016).

[17] See *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015).

[18] *Schlake v. Schlake, supra* note 12.

order language of § 25-1902 with the partition procedure mandated by § 25-2179.

In reviewing the categories enumerated in *Peterson v. Damoude*, it is clear that the July 24, 2015, order falls within the second class. The parties contest both the partition itself and the title and ownership of the property. Guardian properly requested that the district court resolve the sole issue of title and ownership first in its "motion for partial summary judgment." And, the district court did just that. Accordingly, the July 24 order determining the title of the property was a final order.

[7,8] We note that our analysis under *Peterson v. Damoude* does not change, even though the relevant order resulted from a "motion for partial summary judgment." It is true that partial summary judgments are usually considered interlocutory.[19] They must ordinarily dispose of the whole merits of the case to be considered final.[20] However, partition actions are unique in that when title is contested, the action has two distinct stages: first, the title determination, and second, the division of the real estate, i.e., the "partition." The July 24, 2015, order resolved the first stage of this partition action and disposed of all matters at issue in that stage. Accordingly, the district court did not err in concluding that it was a final order within the second class of orders in *Peterson v. Damoude*.

But the district court also determined that § 25-1315 was implicated because it was a case involving multiple causes of action or multiple parties. The court did not explain its reasoning in determining that the case involved multiple causes of action or multiple parties. And the parties disagree as to whether the district court could properly certify the July 24, 2015, order as a final, appealable order pursuant to § 25-1315(1). Therefore, we next consider whether § 25-1315 was in fact implicated.

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

[20] *Id.*

Applicability of § 25-1315

[9] With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.[21] We have not yet addressed how the enactment of § 25-1315 affects the rules for the appealability of orders in partition actions outlined in *Peterson v. Damoude*.

Section 25-1315 is implicated where there are multiple causes of action or multiple parties and the court enters a final order as to one or more but *fewer than all* of the causes of action or parties. We first discuss multiple parties and then turn to multiple causes of action.

Although there were multiple parties, the July 24, 2015, order completely determined the title dispute as to all of them. The named defendants included Skrupa Investment, Frank, Mary, and the unknown persons. However, the court entered a final order as to the rights and liabilities of all the parties in determining the title of the property. In holding that Skrupa Investment had a 99-percent interest and Guardian had a 1-percent interest in the property, the court not only completely determined their ownership shares but effectively held that the other named and unknown parties had no interest in the property. In other words, even though the judgment in partition was styled as a partial summary judgment, it disposed of the title claims of all parties. It did not "adjudicate . . . the rights and liabilities of *fewer than all* the parties."[22]

And we are not persuaded that there was more than one cause of action present in the case. Skrupa Investment contends

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[21] *Castellar Partners v. AMP Limited, supra* note 5.

[22] § 25-1315(1) (emphasis supplied).

that § 25-1315 applies because there are multiple causes of action present and argues that its counterclaim for quiet title is a separate cause of action from the partition. In its reply brief, it cites to *Sewall v. Whiton* to support its proposition that quiet title is a separate cause of action because "if partition is denied because the plaintiff cannot establish clear title, another cause of action must be maintained to clear the title, then the plaintiff may resume the partition action."[23]

We do not find this argument persuasive for two reasons. First, our per curiam opinion in *Sewall v. Whiton* clearly held the contrary and stated that if "the parties unite the issues and litigate the question of title and the right to partition at the same time, and the court determines both questions in the same judgment, such a judgment or order is only one step in the partition proceedings."[24] This was later classified as the second class of partition actions in *Peterson v. Damoude*. And, in asserting its action to quiet title as a counterclaim, Skrupa Investment united the issue of its right to quiet title with Guardian's right to partition.

[10] Second, we do not find more than one cause of action because, in this case, recovery on the quiet title claim would have barred recovery on the complaint for partition. Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief.[25] Here, if Skrupa Investment prevailed in quiet title, it would likewise prevail against Guardian's complaint for partition because the same facts were at issue for both claims. Thus,

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[23] Reply brief for appellant at 4.

[24] *Sewall v. Whiton, supra* note 10, 85 Neb. at 479, 123 N.W. at 1043.

[25] *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

the claim to quiet title was not a separate cause of action from the partition.

Moreover, we observe that in enacting § 25-1315, the Legislature did not amend the partition statutes or attempt to change the effect of our prior jurisprudence. Both before and after the adoption of that statute, § 25-2179 characterized the settlement of the parties' ownership interests as a "judgment" and our case law characterizes the order as a final order. Had the Legislature intended to change the well-settled law governing finality of partition judgments and orders, it would have done so explicitly.

[11] For these reasons, it is clear that the July 24, 2015, order was a final order under § 25-1902 and did not implicate § 25-1315. Accordingly, the July 24 order was the final order from which Skrupa Investment should have appealed. An appeal must be filed within 30 days of the final order from which an appeal is taken.[26] Skrupa Investment appealed 94 days after its entry. Therefore, the appeal was out of time.

CONCLUSION

Because we find that the July 24, 2015, order was a final, appealable order not subject to certification under § 25-1315, Skrupa Investment's appeal was out of time. We conclude that we lack jurisdiction and must dismiss the appeal.

Appeal dismissed.

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[26] See *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

Ann Kelly, in her own behalf and on behalf of the Estate of Stephen Kelly, deceased, appellant, v. Saint Francis Medical Center, a corporation organized under the laws of the State of Nebraska, et al., appellees.

889 N.W.2d 613

Filed January 27, 2017. No. S-16-051.

1. **Pleadings: Appeal and Error.** An appellate court reviews a district court's decision on a motion for leave to amend a complaint for an abuse of discretion.
2. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
3. **Rules of the Supreme Court: Pleadings: Appeal and Error.** An appellate court reviews the district court's denial of a motion to amend under Neb. Ct. R. Pldg. § 6-1115(a) for an abuse of discretion. However, an appellate court reviews de novo any underlying legal conclusion that the proposed amendments would be futile.
4. **Attorneys at Law: Rules of the Supreme Court.** No nonlawyer shall engage in the practice of law in the State of Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in the State of Nebraska except as may be authorized by published opinion or court rule.
5. **Attorneys at Law: Rules of the Supreme Court: Words and Phrases.** The term "nonlawyer" means any person not duly licensed or otherwise authorized to practice law in the State of Nebraska. The term also includes any entity or organization not authorized to practice law by specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law.
6. ____: ____: ____. The practice of law or to practice law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge,

> judgment, and skill of a person trained as a lawyer. This includes, but is not limited to selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Affirmed.

Nichole S. Bogen and Tyler K. Spahn, of Sattler & Bogen, L.L.P., for appellant.

Patrick G. Vipond, Brian J. Brislen, and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellee Saint Francis Medical Center.

James A. Snowden and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Jeff S. Burwell.

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

Heavican, C.J.

I. INTRODUCTION

Ann Kelly filed, in her own behalf and on behalf of the estate of Stephen Kelly, a pro se wrongful death action against Saint Francis Medical Center (Saint Francis), Dr. Jeff S. Burwell, and other "fictitious entities." Ann later filed, through counsel, a motion for leave to file an amended complaint. The district court concluded that an amended complaint could not relate back to the date of the original filing and dismissed the action as untimely. Ann appeals. We affirm.

II. BACKGROUND

On March 9, 2013, Stephen suffered a fall in his home. He was transported to Saint Francis' emergency department on March 10. Burwell attended to Stephen and ordered an x ray of Stephen's shoulder, a CT scan of his head, and an injection

of pain medication. Based on the results of the tests, Burwell prescribed Toradol and discharged Stephen. Two days later, on March 12, Ann found Stephen unresponsive. Stephen was transported to Saint Francis, where he died on March 16.

On March 10, 2015, Ann filed a pro se complaint in her own behalf and on behalf of the estate of Stephen against Saint Francis, Burwell, "John and Jane Does I-X; ABC Corporations; and XYZ Partnerships." In Ann's complaint, she alleged that (1) Burwell provided negligent medical care to Stephen, which was the direct cause of his death, and (2) Saint Francis provided negligent medical care to Stephen, which was the direct cause of his death. Ann signed the complaint as a "Pro Se Plaintiff." A law firm located in Arizona assisted Ann in drafting the complaint. It is undisputed that at the time of filing, Ann was not a licensed attorney.

On April 22, 2015, Saint Francis filed its answer, denying Ann's allegations seeking dismissal of her complaint. On August 12, Saint Francis and Burwell filed a motion to dismiss, alleging that (1) the complaint fails to state facts sufficient to state a cause of action, (2) Ann was engaged in the unauthorized practice of law, and (3) the complaint showed on its face that any claim was barred by the statute of limitations.

Ann subsequently retained counsel. On August 28, 2015, counsel entered an appearance. On that same date, Ann, through counsel, filed a motion to continue. On September 1, Ann filed a motion for leave to file an amended complaint. In the motion, Ann stated that she was the special administrator of the estate of Stephen when the complaint was filed. Ann further stated that she filed her pro se complaint within the 2-year statute of limitations, that she had retained counsel for her amended complaint, and that she sought leave to file an amended complaint that would relate back to the date of the original complaint and cure any defects in the original complaint, including any unauthorized practice of law. Ann argued that an amended complaint should relate back to the date of the original complaint, because it would change only

her capacity as the personal representative of the estate of Stephen, or, in the alternative, it should relate back, because all defendants received notice of this action and would not be prejudiced by the filing of an amended complaint.

Following a hearing, the district court denied Ann's motion for leave to file an amended complaint and dismissed the motions filed against Saint Francis and Burwell. The court reasoned that "any pleadings filed by nonattorneys are of no effect." They are a "nullity" and "because they are a nullity, it is as if they never existed and therefore no amendment can relate back to them or save an action from a valid statute of limitations defense." Applying this reasoning to the facts of the case, the court held that the original complaint filed by Ann was a nullity and that "an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected."

Ann appeals.

III. ASSIGNMENTS OF ERROR

Ann assigns, restated, that the district court erred in determining that (1) the prior complaint was a nullity and (2) an amended complaint, prepared and signed by counsel on Ann's behalf, could not relate back to the filing of the original pro se complaint.

IV. STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's decision on a motion for leave to amend a complaint for an abuse of discretion.[1] An appellate court reviews a district court's order granting a motion to dismiss de novo.[2]

[3] An appellate court reviews the district court's denial of a motion to amend under Neb. Ct. R. Pldg. § 6-1115(a) for an abuse of discretion. However, we review de novo any

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[1] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[2] *Id.*; *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

underlying legal conclusion that the proposed amendments would be futile.[3]

V. ANALYSIS

1. Whether Prior Complaint Was Nullity

(a) Unauthorized Practice of Law

First, to find whether the prior complaint was a nullity, we must determine whether the filing of the pro se complaint by Ann on behalf of the estate was the unauthorized practice of law, as was found by the district court.

[4-6] No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule.[4] The term "'[n]onlawyer'" is defined by the rules as "any person not duly licensed or otherwise authorized to practice law in the State of Nebraska," including "any entity or organization not authorized to practice law by specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law."[5] The term "'practice of law'" is defined as "the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer."[6] This includes, but is not limited to, "[s]election, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person . . . ."[7]

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[3] See *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007).

[4] Neb. Ct. R. § 3-1003.

[5] Neb Ct. R. § 3-1002(A).

[6] Neb Ct. R. § 3-1001.

[7] § 3-1001(B).

In *Waite v. Carpenter*,[8] the Nebraska Court of Appeals held that a nonattorney was engaged in the unauthorized practice of law when he filed a wrongful death action on behalf of the estate for which he was a personal representative. The court noted that under Neb. Rev. Stat. § 30-2464(a) (Reissue 1989), a personal representative "'is a fiduciary who shall observe the standards of applicable trustees . . . '" and "one who seeks to represent the legal interests of the personal representative must be an attorney."[9] In addition, "[Neb. Rev. Stat.] § 7-101 [(Reissue 1991)] prevents the filing of any paper in any action 'unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding.'"[10] The court reasoned that

> the pleadings were not signed by an admitted attorney, but, rather, by [the personal representative], and it is only where a party acts in a nonrepresentative capacity that he may file his own pleadings. There can be no question that [the personal representative] was engaged in the practice of law in violation of § 7-101.[11]

Similarly, this court held in *Back Acres Pure Trust v. Fahnlander*[12] that the trustees of a trust were engaged in the unauthorized practice of law when they filed complaints pro se on behalf of the trust. This court reasoned that

> a trustee's duties in connection with his or her office do not include the right to present argument pro se in courts of the state, because in this capacity such trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law. See *In re Ellis*, 53 Haw. 23, 487 P.2d 286 (1971).

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[8] *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992).

[9] *Id.* at 325, 328, 496 N.W.2d at 4,5.

[10] *Id.* at 328, 496 N.W.2d at 5.

[11] *Id.*

[12] *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989).

> Because [the nonlawyer] had no authority to file a brief in this matter, either in his own behalf or on behalf of appellants, appellants' briefs are ordered stricken, and the appeal is dismissed.[13]

In the present case, both parties agree that Ann was a nonattorney at the time she filed a complaint on behalf of the estate. In her complaint, Ann sought to represent the interests of the estate. Ann drafted the complaint and signed it as a pro se plaintiff, though she apparently had the help of Arizona counsel in doing so. With this legal document, Ann is seeking to "affect the legal rights" of the estate.[14] This constitutes the unauthorized practice of law.

(b) Dismissal of Ann's Unauthorized Practice of Law Because It Was "nullity"

Ann argues that her pro se complaint should not have been dismissed as a "nullity" because (1) there was no flagrant and persistent unauthorized practice of law, (2) the basis for the prohibition against unauthorized practice is not promoted by dismissal in this case, and (3) dismissal should not be required based on the harsh consequences to litigants. Saint Francis and Burwell argue that the district court did not abuse its discretion when it dismissed Ann's complaint, because a legal proceeding in which a party is represented by a person not admitted to practice law is a nullity and is subject to dismissal.

(i) Flagrant and Persistent Unauthorized Practice

Ann contends that the term "nullity" has a technical definition of "'legally void,'" but that it has been applied in similar Nebraska cases with discretionary language.[15] Furthermore,

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[13] *Id.* at 29, 443 N.W.2d at 605.

[14] See § 3-1001(B).

[15] Brief for appellant at 9.

Ann argues that courts have consistently premised dismissal only on flagrant and persistent unauthorized acts.

In *Niklaus v. Abel Construction Co.*,[16] this court held that "[t]he flagrant and persistent unlawful practice of law" committed by a disbarred attorney "require[d] that the proceedings be held to be a nullity and the action dismissed." The disbarred attorney prepared and filed the summons, submitted the documents to the court, and was "actively, openly, and persistently performing the duties and exercising the powers of a member of the bar of this state."[17] We stated that "'[p]roceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed.'"[18] This court reasoned that "[t]he dismissal of a proceeding for such a cause is a drastic remedy and may not be required in all cases. The extent of the unlawful practice . . . in this case requires that it be done."[19]

This court subsequently decided *Steinhausen v. HomeServices of Neb.*,[20] in which the plaintiff, a nonlawyer, filed a pro se complaint to the district court in his own behalf and on behalf of the limited liability company of which he was the sole member. The complaint was dismissed on summary judgment, and he filed a brief on appeal. This court ruled that a licensed member of the Nebraska bar must represent a company in the courts of this state. Therefore, this court held that the pro se complaint filed by the plaintiff in his own behalf and on behalf of the company he owned was a nullity to the extent that he had appealed on behalf of the company, but was valid as to the errors assigned in his own behalf. In its analysis, this court did not discuss whether the acts constituted flagrant and persistent

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[16] *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 852-53, 83 N.W.2d 904, 911 (1957).

[17] *Id.* at 848, 83 N.W.2d at 909.

[18] *Id.* at 852, 83 N.W.2d at 911.

[19] *Id.*

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

unauthorized acts in determining that the complaint as to the company was a nullity. Rather, the unauthorized practice of law was sufficient to find that the pro se complaint on behalf of the company was a nullity.

Ann argues that the opinion in *Niklaus* indicates that this court has the discretion to hold that an unauthorized practice of law is a nullity depending on the extent of the unlawful practice. However, this court's more recent decision in *Steinhausen* shows that the extent of the unauthorized practice of law is not a consideration in a court's determination of whether the unauthorized filing of a legal document is a nullity.

Similarly to *Steinhausen*, Ann drafted and filed a complaint that constituted the unauthorized practice of law. While she later obtained counsel to file her motion for leave to file an amended complaint and her subsequent appeal of the court's ruling on the motion, the single act constituting the unauthorized practice of law was sufficient for the court to rule that her complaint was a nullity, as we found in *Steinhausen*. The court was not required to find that Ann's acts constituted flagrant and persistent unauthorized acts.

(ii) Whether Basis for Prohibition Against Unauthorized Practice of Law Is Promoted by Dismissal

Ann contends that the policy supporting the prohibition against the unauthorized practice of law is not promoted by dismissal in this case. Burwell argues that any other result would not serve the policy considerations at issue, because this protects the estate and discourages the unauthorized practice of law. Saint Francis does not address this issue.

In *Waite*, the Court of Appeals held that policy considerations for the rule against nonattorneys practicing law for others was not "to perpetuate a professional monopoly," but, rather,

> (1) to protect citizens from injury caused by the ignorance and lack of skill on the part of those who are untrained

> and inexperienced in the law, (2) to protect the courts in their administration of justice from interference by those who are unlicensed and are not officers of the court, and (3) to prevent the unscrupulous from using the legal system for their own purposes to the harm of the system and those who may unknowingly rely upon them.[21]

The court further stated in *Waite* that in wrongful death actions, "one who seeks to represent the legal interests of the personal representative must be an attorney" and "[t]his rule protects the estate, its heirs, and its creditors."[22] By dismissing the case based on the unlawful filing of a wrongful death complaint by a nonlawyer on behalf of the estate, the lower court clearly promoted the policy reasons behind the prohibition against the unlawful practice of law and essentially sought to protect the estate. The policy considerations behind the prohibition of the unauthorized practice are furthered by the lower court's decision that the prior complaint was a nullity.

(iii) Whether Dismissal Should Not Be Required Based on Harsh Consequences to Litigants

Ann contends that in cases such as this, in which the unauthorized practice of law was minimal and the party has taken steps to cure the unauthorized practice, the court should be permitted to allow the party to cure the unauthorized practice.

There is a split of authority on the question of whether the unauthorized practice of law renders a proceeding a nullity or merely amounts to an amendable defect.[23] Some courts hold that the unauthorized practice of law amounts to a nullity and find that the "proscription on the unauthorized practice of law is of paramount importance in that it protects the public from

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[21] *Waite v. Carpenter, supra* note 8, 1 Neb. App. at 330, 496 N.W.2d at 6.

[22] *Id.* at 328, 496 N.W.2d at 5.

[23] *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002).

those not trained or licensed in the law."[24] Other jurisdictions find that it merely amounts to an amendable defect in "an attempt to avoid what they deem to be the unduly harsh result of dismissal on technical grounds."[25]

In *Steinhausen*,[26] this court did not address any harsh consequences that would result from dismissing the plaintiff's claims as related to his limited liability company. Rather, this court reasoned:

> The prohibition of the unauthorized practice of law is not for the benefit of lawyers. Prohibiting the unauthorized practice of law protects citizens and litigants in the administration of justice from the mistakes of the ignorant on the one hand and the machinations of the unscrupulous on the other.[27]

This court then simply held that "because [the plaintiff] is not licensed to practice law in Nebraska, his appeal . . . is a nullity."[28] Thus, while we have not explicitly addressed the issue of whether the harsh consequence to litigants should be taken into account, we have shown that our paramount concern

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[24] *Id.* at 160, 72 S.W.3d at 93. See, *Jones ex rel. Jones v. Correctional Med. Services*, 401 F.3d 950 (8th Cir. 2005); *Ex parte Ghafary*, 738 So. 2d 778 (Ala. 1998); *Ratcliffe v. Apantaku*, 318 Ill. App. 3d 621, 742 N.E.2d 843, 252 Ill. Dec. 305 (2000); *Garlock Sealing Technologies, LLC v. Pittman*, Nos. 2008-IA-01572-SCT, 2008-IA-01584-SCT, 2008-IA-01599-SCT, 2010 WL 4009151 (Miss. Oct. 14, 2010).

[25] *Davenport v. Lee, supra* note 23, 348 Ark. at 160, 72 S.W.3d at 93. See, *Operating Eng. Local 139 Health v. Rawson Plumbing*, 130 F. Supp. 2d 1022 (E.D. Wis. 2001); *Boydston v. Strole Development Co.*, 969 P.2d 653 (Ariz. 1998); *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040, 979 N.E.2d 50, 365 Ill. Dec. 684 (2012); *Richardson v. Dodson*, 832 S.W.2d 888 (Ky. 1992); *First Wholesale v. Donegal*, 143 Md. App. 24, 792 A.2d 325 (2002); *Mikesic v. Trinity Lutheran Hosp.*, 980 S.W.2d 68 (Mo. App. 1998); *Starett v. Shepard*, 606 P.2d 1247 (Wyo. 1980).

[26] *Steinhausen v. HomeServices of Neb., supra* note 20.

[27] *Id.* at 935, 857 N.W.2d at 825.

[28] *Id.* at 948, 857 N.W.2d at 833.

in such cases is to protect the public from the unauthorized practice of law.

In order to sufficiently address this paramount concern, it is not necessary for this court to engage in a calculation as to whether the consequences for the unauthorized practice of law are proportional to the gravity of the harm done to the public. We regard the unauthorized practice of law as a serious offense, and we therefore favor the approach of those jurisdictions that have found that any unauthorized practice is a nullity.

Under a de novo standard of review, the district court correctly held that Ann's complaint was a nullity and the district court was not required to find flagrant and persistent unauthorized acts. Ann's first assignment of error is without merit.

2. Whether Amended Complaint Could Relate Back and Cure Defects of Initial Complaint

Ann contends that under *Genthon v. Kratville*,[29] an amended complaint filed by counsel could have related back to her pro se complaint and cured any defects. But Saint Francis and Burwell, consistent with their earlier arguments, argue that under *Waite*[30] and Neb. Rev. Stat. § 7-101 (Reissue 2012), pro se pleadings filed on behalf of others are a nullity, thus they have no legal effect and are the same as if they have never existed. Saint Francis and Burwell further argue that *Genthon* is distinguishable, because it merely addressed whether the substitution of a correct party could relate back to the original complaint when the attorney committed malpractice, not if the amended complaint could relate back in circumstances involving the unauthorized practice of law. Saint Francis and Burwell also contend that *Genthon* was based on Neb. Rev. Stat. § 25-852 (Reissue 1995), which has since been repealed.[31]

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[29] *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

[30] *Waite v. Carpenter, supra* note 8.

[31] See 2002 Neb. Laws, L.B. 876, § 92 (operative Jan. 1, 2003).

In *Genthon*,[32] this court held that an amended complaint for a wrongful death action related back to cure the defects of the complaint deemed a nullity. In that case, the plaintiff retained an attorney to represent his family in a wrongful death action against the nursing home where the plaintiff's mother had died. After the attorney withdrew from the case, the plaintiff filed a pro se wrongful death petition. The wrongful death petition was brought in the plaintiff's name, individually, instead of in the name of a personal representative for the benefit of the next of kin, as required by Neb. Rev. Stat. § 30-810 (Reissue 1995).

The attorney resumed representation of the case 2 days before the service deadline and agreed to serve the defendant prior to the service deadline, but failed to do so. The special administrator of the estate brought a legal malpractice action against the attorney. The attorney demurred, asserting that the statute of limitations barred the action. That motion was sustained. The special administrator filed an amended legal malpractice petition, relying on the attorney's second period of representation, appointed new counsel, and sought to file an amended complaint to cure the defects of the original plaintiff's pro se complaint.

This court stated that § 25-852 was to be "liberally construed so as to permit amendments when proposed at opportune times in furtherance of justice."[33] This court held that the plaintiff's pro se wrongful death petition was defective because it named the wrong plaintiff, but the court allowed for the substitution of a new party in the complaint because, under § 25-852, "[it] would not introduce a new cause of action or, in other words, result in an attempt to state facts giving rise to a wholly distinct and different legal obligation against the defendant or change the liability sought to be enforced."[34]

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[32] *Genthon v. Kratville, supra* note 29.

[33] *Id.* at 81, 701 N.W.2d at 343.

[34] *Id.* at 82, 701 N.W.2d at 344.

This court further held that the amended petition would relate back to the filing date of the original petition, because the amendment did not "introduce a new cause of action, but, rather, relie[d] upon the same set of facts as the original pleading and the defendant is not prejudiced by the amendment."[35]

However, since § 25-852 has been repealed, it is more instructive to look at recent cases that discuss the current pleading amendment statute, Neb. Rev. Stat. § 25-201.02 (Reissue 2016).

In *Gibbs Cattle Co. v. Bixler*,[36] the defendant argued that the word "'*changes*'" in the phrase contained in § 25-201.02(2), "'[i]f the amendment [to a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading . . . ,'" should be construed to include the addition of a party. This court analyzed the split in federal case law as to whether "changes" included the "addition" of parties and reasoned, "[t]hough certain courts and commentators advocate for a different approach—premised on the overriding importance of notice—that approach ignores that the relation-back rule 'plainly sets forth an exclusive list of *requirements*,' rather than factors to be weighed."[37]

Based on this court's approach that the "language of the rule controls," we held that § 25-201.02(2) expressly applies only to amendments which "'change[] the party or the name of the party against whom a claim is asserted'" and does not allow for the "addition of parties."[38]

In *Reid v. Evans*,[39] this court held that an amended complaint did not relate back to the original complaint under § 25-201.02

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[35] *Id.* at 83, 701 N.W.2d at 344.

[36] *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 963, 831 N.W.2d 696, 704 (2013).

[37] *Id.* at 970, 831 N.W.2d at 708 (emphasis in original).

[38] *Id*. at 969-70, 831 N.W.2d at 708.

[39] *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007).

because the original complaint was a nullity. The plaintiff filed a negligence action against the defendant who had died prior to the filing of the action. Thus, service was not completed on the defendant and a complaint naming his estate as defendant was not served within the 6-month statutory timeframe for service of a complaint. The plaintiff argued that under § 25-201.02, she should have been allowed to amend her complaint, and that such an amendment would have been effective as of the date she commenced her lawsuit.

This court disagreed, reasoning that § 25-201.02 "only allows an amendment to relate back to the original filing date if the party who is being added by the amendment was aware of the claim during 'the period provided for commencing an action' against such party."[40] Because the defendant did not receive notice prior to the expiration of the statute of limitations, the court held that the plaintiff could not benefit from the relation back statute. The court further held that because the plaintiff's lawsuit had been dismissed, her subsequent motion to amend and take advantage of relation back was a nullity and the court lacked jurisdiction to make any further orders other than to formalize the dismissal.

Saint Francis cites the concurrence in *Reid*, which states that "there is a more fundamental reason in relation-back jurisprudence why [the plaintiff's] motion to amend by invoking relation back was inapplicable."[41] The concurrence further explains that

> [i]n order for an amendment to relate back to the original filing date, there must be an action pending at the time the proposed amendment is filed. If a lawsuit has already been dismissed, there is nothing for a subsequent amendment to relate back to. . . . Because [the plaintiff's]

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[40] *Id.* at 721, 733 N.W.2d at 190.

[41] *Id.* at 722, 733 N.W.2d at 191 (Miller-Lerman, J., concurring; McCormack, J., joins).

lawsuit had been dismissed, there was nothing for her proposed amendment to relate back to.[42]

Burwell cites *Galaxy Telecom v. SRS, Inc.*,[43] in which the Court of Appeals held that if pleadings are a nullity, the court should not give them "any effect." In *Galaxy Telecom*, a nonlawyer member of the defendant corporation timely filed a pro se answer to the plaintiff's complaint. The court held that it would "not give any effect to the papers signed and filed" by the nonlawyer member on behalf of the corporation because it was an unauthorized practice of law.[44] And "the responsive letter filed by [the defendant] on behalf of [the corporation] was a nullity and did not constitute an answer."[45] The stipulation signed by the nonlawyer member was thus "also of no effect."[46] The court analyzed the facts as though the corporation had not filed an answer and held default judgment was appropriate.

Burwell also cites the Arkansas Supreme Court's decision in *Davenport v. Lee*,[47] mentioned above, in which a nonattorney personal representative filed a pro se complaint in a wrongful-death action on behalf of the decedent's estate. The Arkansas Supreme Court found that the defect "rendered the complaint a nullity" and held that "the original complaint, as a nullity never existed, and thus, an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected."[48]

In *Genthon*, this court analyzed the relation-back issue under § 25-852. We stated that it "liberally construed" the

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[42] *Id.* at 722-23, 733 N.W.2d at 192.

[43] *Galaxy Telecom v. SRS, Inc.*, 13 Neb. App. 178, 185, 689 N.W.2d 866, 873 (2004).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Davenport v. Lee, supra* note 23.

[48] *Id.* at 157, 160, 72 S.W.3d at 89, 94.

relation-back statute to permit amendments when in furtherance of justice.[49] But as noted above, that statute has since been repealed. Therefore, this court's analysis in *Genthon* is no longer controlling.

In *Gibbs Cattle Co. v. Bixler* and *Reid v. Evans*, this court strictly interpreted the current pleading amendment statute, § 25-201.02, and held that the amended complaint could not relate back to the original complaint to cure the defects of the original complaint. The concurrence in *Reid* further explains that there must be an action pending at the time in order for § 25-201.02 to allow relation back. And if, as the Court of Appeals held in *Galaxy Telecom*, a complaint deemed a nullity due to the unauthorized practice of law is not given "any effect" and does not "constitute" a complaint,[50] then there is nothing for an amended complaint to relate back to under this court's interpretation of § 25-201.02.

Similarly to the Arkansas Supreme Court's reasoning in *Davenport*, Ann's amended complaint, which would be filed by counsel after the statute of limitations had run, cannot relate back to her pro se complaint. The pro se complaint constituted an unauthorized practice of law; thus, it was "something that never existed," and, as a nonexistent complaint, it cannot be corrected.

Ann's second assignment of error is without merit.

VI. CONCLUSION

The district court did not err in holding that (1) the prior complaint was a nullity and (2) an amended complaint could not relate back to the filing of the original pro se complaint.

The decision of the district court is affirmed.

Affirmed.

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[49] See *Genthon v. Kratville, supra* note 29, 270 Neb. at 81, 701 N.W.2d at 343.

[50] See *Galaxy Telecom v. SRS, Inc., supra* note 43, 13 Neb. App. at 185, 689 N.W.2d at 873.

Valerie A. Mansuetta, appellant, v. Nicholas T. Mansuetta, appellee.

890 N.W.2d 485

Filed January 27, 2017. No. S-16-116.

1. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
2. **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.
3. **Declaratory Judgments.** The general rule is that an action for a declaratory judgment will not be entertained when another equally serviceable remedy has been provided.
4. **Declaratory Judgments: Jurisdiction.** Jurisdiction of a declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, and in which are involved, and may be adjudicated, the same identical issues that are involved in the declaratory action.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Judgment vacated, and cause remanded with directions.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Heather Swanson-Murray, of Swanson Murray Law, L.L.C., P.C., for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Nicholas T. Mansuetta, the appellee, filed a complaint for dissolution of marriage in the district court for Buffalo County, case No. CI14-172. During the pendency of the dissolution case, Valerie A. Mansuetta, the appellant, filed a separate complaint for declaratory judgment in the same court, seeking an order regarding the parties' rights under their prenuptial agreement. This separate action gives rise to this appeal. Valerie appeals from the order in the declaratory judgment action, in which the district court found the agreement to be wholly valid and enforceable. We determine that the district court abused its discretion by entertaining Valerie's declaratory judgment action when another action was pending involving the same parties and the same issues. Therefore, we vacate the order of the district court and remand the cause with directions to enter an order dismissing Valerie's complaint for declaratory judgment.

STATEMENT OF FACTS

Nicholas and Valerie were married on February 14, 2008. On February 13, the day before they were married, Nicholas and Valerie executed a prenuptial agreement. The parties dispute the events leading up to the execution of the prenuptial agreement. Generally, Valerie asserts that she did not see a copy of the agreement until it was placed in front of her on February 13 and that she and Nicholas never discussed a prenuptial agreement prior to its execution. In contrast, Nicholas generally contends that he and Valerie had many discussions regarding executing a prenuptial agreement, that Valerie had received a draft of the agreement several days before they executed it, and that Valerie had the opportunity to review the agreement and obtain the advice of independent counsel before the parties executed the agreement.

In April 2014, Nicholas filed for the dissolution of the parties' marriage in case No. CI14-172. In September 2014, Valerie filed a separate action for declaratory judgment, in which she sought an order from the same court declaring that the parties' prenuptial agreement was invalid and unenforceable or, in the alternative, that portions of the prenuptial agreement were invalid, void, and unenforceable. In her declaratory judgment complaint, Valerie acknowledged the pendency of the dissolution of marriage action. She further acknowledged that enforcement of the prenuptial agreement was an issue in the dissolution action when she alleged that in Nicholas' complaint to dissolve the marriage, Nicholas had stated that the parties had "entered into a prenuptial agreement and that the Court should enforce the contents thereof."

After Valerie filed her complaint for declaratory judgment, Nicholas filed a motion to dismiss or, in the alternative, to consolidate the declaratory judgment action with the dissolution of marriage action. The court denied Nicholas' motions in an order filed January 13, 2015. In its January 13 order, the district court stated its reasoning as follows:

> In the divorce action case [No. CI14-172], the Court [had previously overruled] Valerie's Motion to Bifurcate [and] focused on the fact that a preliminary bifurcated determination of the validity of the prenuptial agreement would not be a final appealable order and that evidence would still have to be taken on the balance of divorce and economic issues, albeit limited to those which were not foreclosed by a prenuptial agreement which the Court might determine is valid. Such a circumstance would create for the appellate courts, which might disagree after a *de novo* review of the facts, a significant problem as no evidence would have been developed which might assist the appellate court in remanding the matter or otherwise making determinations with regard to whether alimony is appropriate, even if not foreclosed by the prenuptial agreement.

The district court further reasoned in its January 13, 2015, order that a determination of the validity of the prenuptial agreement in the declaratory judgment action would be a final, appealable order and that "[a]n appeal could occur before final hearing occurred in the dissolution action and without the necessity of considering evidence at the final hearing on economic and alimony issues which would be largely irrelevant."

After a trial was held in this declaratory judgment action, on January 12, 2016, the district court filed an order in which it stated that it generally believed Nicholas' version of events over Valerie's version. The district court concluded that the prenuptial agreement is not ambiguous and that it is "wholly valid and enforceable in all aspects."

Valerie appeals.

ASSIGNMENTS OF ERROR

Valerie claims that the district court erred in numerous respects, including when it determined that the parties' prenuptial agreement is "wholly valid and enforceable in all aspects." However, because we determine that the district court abused its discretion when it entertained this declaratory judgment action, we do not reach the merits of Valerie's assigned errors. See *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 750, 868 N.W.2d 334, 348 (2015) ("[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] Whether to entertain an action for declaratory judgment is within the discretion of the trial court. *Polk Cty. Rec. Assn. v. Susquehanna Patriot Leasing*, 273 Neb. 1026, 734 N.W.2d 750 (2007). 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. *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016).

ANALYSIS

Valerie raises various assignments of error, including that the district court erred when it determined that the parties' prenuptial agreement is wholly valid and enforceable in all respects. We do not reach the merits of Valerie's claims, because we determine that the district court abused its discretion when it entertained this declaratory judgment action.

[3] Actions for declaratory judgments are governed by Nebraska's Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016). Section 25-21,154, in particular, provides as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." We have long noted that this provision indicates discretionary rather than mandatory power. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004). We have stated that "the general rule is that an action for a declaratory judgment will not be entertained when another equally serviceable remedy has been provided." *Scudder v. County of Buffalo*, 170 Neb. 293, 296, 102 N.W.2d 447, 450 (1960).

[4] In *Strawn v. County of Sarpy*, 146 Neb. 783, 789, 21 N.W.2d 597, 600 (1946), we adopted the rule that

> "'jurisdiction of a declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action.'"

See *Sim v. Comiskey*, 216 Neb. 83, 341 N.W.2d 611 (1983). Thus, we have stated: "'Where an action or proceeding is

already pending in another forum involving the same issues, it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in [a new] suit.'" *Strawn v. County of Sarpy*, 146 Neb. at 788, 21 N.W.2d at 600. Indeed, we have concluded that "[a] court abuses its discretion when it entertains jurisdiction over a declaratory judgment action in such a situation." *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 350, 549 N.W.2d 172, 175 (1996). See, also, *Slosburg v. City of Omaha*, 183 Neb. 839, 165 N.W.2d 90 (1969); *Strawn v. County of Sarpy, supra*.

In a case somewhat similar to the instant case, we have previously considered the propriety of the district court's decision to entertain a declaratory judgment action in which the enforceability of a contract clause was raised, notwithstanding the pendency of another action involving the same issue. See *Woodmen of the World Life Ins. Soc. v. Yelich, supra*. In *Woodmen of the World Life Ins. Soc.*, upon our own analysis, we stated that the enforceability issue was not properly before the district court in the declaratory action and that the district court had abused its discretion when it considered the issue. As we stated in *Phelps County v. City of Holdrege*, 133 Neb. 139, 142, 274 N.W. 483, 485 (1937), the trial court should "'refuse a declaration where another court has jurisdiction of the issue [or] where a proceeding involving identical issues is already pending in another tribunal.'" The situations identified in *Phelps County* are present here.

In the instant case, as was recited on the face of Valerie's complaint, the dissolution of marriage action was pending when Valerie filed her complaint for declaratory judgment. Valerie further alleged in her complaint that Nicholas had requested that the dissolution court enforce the terms of the prenuptial agreement. Accordingly, the record shows that the identical issue regarding the validity and enforceability of the parties' prenuptial agreement had been raised in the dissolution of marriage action that was pending prior to the filing of

Valerie's declaratory judgment action, and the issue will necessarily be determined in the earlier case.

Although the district court acknowledged the pendency of the dissolution action, it abused its discretion when it stated in its January 13, 2015, order that a new and separate declaratory judgment action would be the "more serviceable" mechanism by which to resolve and make appealable one of the issues in the pending dissolution action. (Emphasis omitted.) We cannot endorse this approach, which artificially creates piecemeal appeals. We continue to adhere generally to the principle that "a declaratory judgment action cannot be used to supersede pending proceedings in which the rights of the parties can be determined." *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 661, 156 N.W.2d 794, 798 (1968).

Under the circumstances of this case, it was "manifestly unwise and unnecessary to permit" the declaratory judgment action to go forward. *Strawn v. County of Sarpy*, 146 Neb. 783, 788, 21 N.W.2d 597, 600 (1946).

CONCLUSION

Because we determine that the district court abused its discretion when it entertained this declaratory judgment action, we vacate the order of the district court and remand the cause with directions that the district court enter an order dismissing Valerie's complaint for declaratory judgment.

Judgment vacated, and cause
remanded with directions.

Douglas County, Nebraska, a political subdivision of the State of Nebraska, appellant, v. Daniel Archie and the Douglas County Civil Service Commission, appellees.

891 N.W.2d 93

Filed February 3, 2017. No. S-15-322.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
4. **Administrative Law: Judgments: Words and Phrases.** An administrative agency decision must not be arbitrary and capricious. Agency action is "arbitrary and capricious" if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
5. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
6. **Administrative Law.** The interpretation of regulations presents questions of law.
7. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
8. **Civil Service: Administrative Law: Appeal and Error.** A civil service commission acts in a judicial manner when deciding employee appeals.

9. **Judgments: Records: Appeal and Error.** The purpose of a proceeding in error is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law.
10. **Administrative Law: Words and Phrases.** Agency action taken in disregard of the agency's own substantive rules is arbitrary and capricious.
11. **Administrative Law: Appeal and Error: Words and Phrases.** A review using the "arbitrary and capricious" standard requires considerable deference to the judgment and expertise of the agency.
12. **Administrative Law: Judgments: Words and Phrases.** A decision is arbitrary and capricious if the agency has relied on factors that the Legislature has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
13. **Administrative Law: Evidence: Appeal and Error.** The proper inquiry for an appellate court when reviewing the decision of an administrative agency on a petition in error is whether there was sufficient, relevant evidence to support the conclusion that the agency did make and not whether the evidence would support a contrary conclusion.
14. ____: ____: ____. When reviewing a decision of an administrative agency, as in reviewing a jury verdict, if there is sufficient evidence to support the decision, the reviewing court must affirm even if it may be of the opinion that had it been the trier of the case, it would have reached a different conclusion.
15. **Courts: Appeal and Error.** On a petition in error, the district court acts in an appellate capacity and employs the same deferential standard of review that an appellate court uses.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Irwin and Bishop, Judges, on appeal thereto from the District Court for Douglas County, Marlon A. Polk, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Donald W. Kleine, Douglas County Attorney, Meghan M. Bothe, and Timothy K. Dolan for appellant.

Rick G. Wade, of Norby & Wade, L.L.P., for appellee Daniel Archie.

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

Wright, J.

I. NATURE OF CASE

Douglas County Youth Center (DCYC) terminated Daniel Archie's employment. Archie brought an administrative appeal to the Douglas County Civil Service Commission (the Commission). Following an evidentiary hearing, the Commission reversed the termination and ordered that Archie be reinstated. Douglas County filed a petition in error with the district court. The district court affirmed the Commission's order. Douglas County then appealed to the Nebraska Court of Appeals. In a split decision, the Court of Appeals reversed the district court's affirmance of the Commission's order. We granted Archie's petition for further review.

In the case at bar, our decision is controlled by our standard of review. We examine the decision of the Commission to determine whether there was sufficient, relevant evidence to support its decision that Archie should be reinstated and whether the decision was arbitrary and capricious. In light of the deference that our standard of review requires us to give the Commission's decision, we now reverse the order of the Court of Appeals and remand the cause with directions to affirm the judgment of the district court which affirmed the order of the Commission.

II. BACKGROUND

In February 2003, Archie was hired by DCYC as a juvenile detention specialist. Just over a year later in May 2004, he was hired as a physical education teacher at DCYC. Archie worked for over 11 years at DCYC, and by all accounts in the record, he was an exemplary employee at DCYC. According to DCYC superintendent Brad Alexander, Archie was a good employee

with an excellent work history. Former DCYC detention manager Robert Bryant, who knew Archie in his roles as a juvenile detention specialist and a physical education teacher, described him as a "model employee" who was "very professional" and had an "excellent work relationship with not only the kids but the staff [and] supervisor[s]." Bryant stated that Archie's direct supervisor told Bryant that "Archie was above and beyond" and that "he wished all his teachers [were] like Archie."

1. Termination of Archie's Employment

In August 2014, Alexander received a telephone call from a woman claiming to have information about Archie. She said that her daughter had been a student at Omaha South High School (Omaha South) when Archie was a teacher there prior to his employment at DCYC. She stated that Archie and her daughter had engaged in a sexual relationship and that she had an audio clip to substantiate her claims. Alexander asked for and received a copy of the clip.

The audio clip was a 4-minute segment of a telephone conversation that took place in August 2014 between the former student and Archie, apparently recorded without Archie's knowledge. In the clip, Archie did not dispute that there had been a sexual relationship between him and the former student, but he did dispute whether the relationship began before she graduated from high school. The policy of Omaha Public Schools (OPS), Archie's employer at the time, prohibited sexual relationships between a teacher and former student within 2 years of that student's enrollment.

After Alexander listened to the audio clip, he placed Archie on paid administrative leave and issued him a predisciplinary hearing notice. The notice alleged that Archie violated the Commission's personnel policy manual (the Manual), article 22, § 5(13) and (19). A predisciplinary hearing was held, which Archie attended with his attorney. After the hearing, DCYC terminated Archie's employment.

The two reasons given were that Archie had violated the Manual, article 22, § 5(19), "Has engaged in criminal, dishonest, immoral, or notoriously disgraceful conduct, which is prejudicial to the county or to [the] County's reputation," and § 5(13), "Falsification, fraud or intentional omission of required information on the employment application/resume." The subsection (19) violation was based on Archie's relationship with the former student. The subsection (13) violation was based on Archie's failure to include the full reason behind leaving OPS on his job applications with DCYC. The reasons given by Archie for leaving OPS were "spend time w/ kids" and "Family."

The notice of termination stated that Archie had engaged in a sexual relationship with a former student while she was a senior in high school. It also stated that Archie was under administrative leave and under investigation by OPS when he first applied at DCYC and that his two DCYC applications contained "willful misrepresentation."

2. Archie's Appeal to the Commission

Archie appealed the termination of his employment to the Commission. Douglas County called the former student, her mother, Archie, and Alexander to testify. Archie called former DCYC detention manager Bryant. Documentary evidence was also admitted, including Archie's DCYC applications, a letter from OPS to Archie, the audio clip, a reprimand from the Nebraska Board of Education, the predisciplinary hearing notice, and the notice of termination.

The Commission admitted a letter addressed to Archie, dated shortly before his resignation, from OPS' assistant superintendent for human resources. The letter, dated January 3, 2003, states:

> Dear Mr. Archie:
>
> On November 15, 2002, subsequent to investigation of allegations of misconduct made against you that you had engaged in a sexual relationship with a former student

> within two years of that student's enrollment in [OPS], I recommended that your contract with [OPS] be cancelled for engaging in such a relationship and for lying to me as to your whereabouts on October 10, 2002, the date it was alleged you were found with the student in a potentially compromising sexual situation.
>
> Based upon advice from legal counsel, after their review of [OPS] files and witness interviews, that there is insufficient evidence upon which the Board could rely that you were in a compromising sexual situation on October 10, 2002, I am withdrawing my recommendation that your contract be cancelled for said action.
>
> However, the fact remains that there is clearly admissible and persuasive evidence that you did lie about your whereabouts during the time period in question. Accordingly, the administration will proceed with the hearing you requested before the Board of Education as previously scheduled on January 9, 2003, unless a letter of resignation has been received from you prior to such date.

Archie testified that when he received this letter, he believed the investigation into his relationship with the former student had been completed and believed the only ongoing investigation at the time of his resignation was of whether he had lied about his whereabouts on October 10, 2002. On January 6, 2003, he submitted his resignation, which was accepted by OPS on January 9. He explained that at the time he first applied at DCYC, there was no investigation ongoing and he was not on administrative leave, because he had previously resigned.

Archie testified that he resigned rather than going through with the hearing in order to spare his children from the negative rumors and attention that the situation would bring. He testified he resigned because he did not feel like OPS was listening to his side of the story and because of the "whole situation." He did not think that he would lose his job for lying

about his whereabouts, but resigned because of the rumors and because "it was the easiest thing to do." He believed he was being accurate and honest when he wrote on his application that he left OPS to "spend time w/ kids." Since he had been the head basketball coach, Archie assumed that people at DCYC knew about the situation surrounding his leaving Omaha South.

Archie testified that he had received a public reprimand from the Nebraska Department of Education in November 2003 and was no longer under investigation when he applied for the physical education teacher position at DCYC in May 2004. The reprimand was issued for lying about his whereabouts during the OPS investigation. He explained that the DCYC physical education teacher application did not ask about prior investigations or reprimands and that therefore, he did not describe his reprimand. He testified that when he had applied for other positions as a public school teacher and the applications did inquire about reprimands, he did set forth that he had received a reprimand and described the surrounding circumstances.

The Commission admitted the audio clip of the telephone conversation between Archie and the former student. Archie testified that the 4-minute clip, from August 2014, was part of a 30-minute conversation and that hearing the conversation in its entirety "would help out tremendously." In the clip, Archie did not deny that the two engaged in a sexual relationship or that it occurred when she was 17, but he did dispute that it occurred before her graduation.

Testifying before the Commission, Archie was asked, "Okay. So are you denying that you had a relationship with her at all?" Archie replied, "Absolutely." This denial occurred shortly after a series of questions and answers about whether the relationship occurred during the school year. Archie denied that the relationship occurred while the former student had been a student at Omaha South. Archie admitted that a sexual relationship occurred between him and the former student

sometime after her graduation: Asked "Did you engage in sexual activity with [the former student] when she was in high school," Archie replied, "No I did not." Asked "At some time after she graduated you did engage in sexual activity with her," Archie replied, "Yes I did."

Archie testified that the former student would call him when she needed someone to talk to. The frequency of the contact had increased in the past 5 years because "she was determined that . . . she was going to do whatever it took to be with me." In July 2014, he tried to cut off contact with her. Archie testified that after the conversation in August 2014 (from which the audio clip was recorded), he did not know if she was going to try to harm him, because "she was saying so many different things." He said, "She threatened . . . to take me to court and . . . [t]hat she would do whatever it takes to take me down so that she could get rid of her love that she had for me because that's what she had to do." Archie testified that she told him, "You're going to be with me," and that "she was determined that that was going to happen . . . at all costs. No matter what."

The former student, now 31 years old, testified that she was a student at Omaha South from 1998 to 2001. She knew Archie because he was her physical education teacher. She could not recall what age she was when the relationship began, either 16 or 17, or what grade in school she was, either a junior or a senior, but she was sure that she was a student at the time. She said that she did not cooperate with OPS' investigation into the allegations about her relationship with Archie. She said that the reason she did not cooperate was because she "was manipulated and mentally . . . wasn't able to make good sound decisions."

The former student testified that she had gone to great efforts to keep in contact with Archie in the years after the relationship. She testified that in the prior year, she had gone to Archie's workplace and waited for him in the parking lot and had done so on multiple occasions. She said that Archie

had moved and would not tell her where he lived. He changed his telephone number and would not give her his number. She testified that in August 2014, she called him late at night even though she was involved romantically with someone else, and that she still wanted Archie to be with her.

Her mother testified that she first became aware of the relationship when an OPS human resources manager asked whether she had heard anything about a relationship between her daughter and Archie. She confronted Archie about the rumor, and he denied it. She testified that in October (she could not remember the year), she went to her daughter's father's house and found Archie there with her daughter. She reported this to OPS. She later said that this occurred in 1999 and that her daughter was a junior at the time. The letter from OPS to Archie indicates that this event actually occurred in October 2002, more than a year after the former student had graduated in 2001. The mother also explained the 11-year delay in contacting DCYC by saying that she needed her daughter "to be the driving force behind holding him accountable for his actions" and that her daughter "finally woke up."

Alexander testified that he supervised the hiring decisions at DCYC, but did not sit in on every job interview. He admitted that, contrary to the notice of termination, Archie was not actually under investigation by OPS at the time he first applied to DCYC on February 4, 2003. He testified that at the time of Archie's hiring, he was not aware of the rumors about Archie. He said that he would not have hired Archie if he had known about the whole situation at Omaha South. He testified that during the predisciplinary hearing, Archie said that his reason for resigning from Omaha South was to spare his children from the embarrassment of the rumors about Archie. Alexander agreed that protecting his children from rumors was part of Archie's reason for resigning from OPS.

Alexander explained that applicants would sometimes list "personal" as their reason for leaving prior employment on a job application. He said that if a person lists spending time

with kids or family as the reason, it is "fairly clear" that means the reason is personal. This type of reason on an application prompts a followup question in the interview to gain a better understanding of the reason.

Alexander could not remember whether Bryant had told him about the situation leading to Archie's resignation at Omaha South, nor could he remember any conversations between the two about Archie's hiring at DCYC. He was certain, however, that Bryant would have been involved in Archie's hiring as the detention manager.

Bryant oversaw the day-to-day operations of DCYC, including making hiring decisions; oversaw the supervisors; and reported to Alexander. He testified that he made the decision to hire Archie as a juvenile detention specialist at DCYC. Bryant knew Archie for 3 or 4 years before Archie applied at DCYC, from when Bryant was a basketball official and Archie was a basketball coach at Omaha South. While officiating a game at Omaha South, he was told that Archie had resigned "due to something that happened with a former student." Bryant later encouraged Archie to apply for the open juvenile detention specialist position at DCYC.

Before hiring Archie, Bryant let Alexander know that "Archie resigned from [Omaha] South . . . due to something with a former student." He recalled Alexander's saying something like, "Give him a shot." Bryant also agreed that listing "spend time w/ kids" as the reason for leaving a prior job on an application could mean that the reason is personal or that applicants wanted to avoid exposure for their kids. He said, "[W]hen you see things like spending time with kids [on an application], you know there's some issues there."

Near the end of the hearing, the Commission asked whether DCYC was subject to the Prison Rape Elimination Act (PREA) guidelines; Alexander replied that it was. After the final witness testified, the Commission delayed making a decision "until [the] issue of whether . . . Archie would be able to be employed at [DCYC] pending a review of PREA and any other

similar applicable rules and regulations." The Commission resumed on November 25, 2014, and noted that its members had reviewed the PREA juvenile facility standards and a PREA frequently-asked-questions document.

The Commission voted 3 to 0 to reverse the decision of DCYC to terminate Archie's employment and "for him to be made whole as of August 29, 2014."

After the Commission made its decision, Douglas County requested that the Commission include specific findings of fact and conclusions of law in its order, which request the Commission denied.

3. Douglas County's Appeal to District Court and Court of Appeals

Douglas County filed a petition in error with the district court for Douglas County. The district court affirmed the Commission's order. Douglas County appealed from the district court to the Court of Appeals. The Court of Appeals reversed the decisions of the district court and the Commission and ordered that the termination of Archie's employment be reimposed.[1] Judge Bishop dissented. The majority concluded that "the district court's order was arbitrary, capricious, and unsupported by sufficient, relevant evidence."[2]

The majority found that Archie's testimony, which it characterized as "contradictory," could not be accepted in light of the rest of the evidence.[3] It concluded that "no reasonable and honest person could reach the conclusion of the district court that Archie's behavior was not a violation of [a]rticle 22, § 5(19)" of the Manual.[4]

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[1] *Douglas County v. Archie*, No. A-15-322, 2016 WL 3964767 (Neb. App. July 19, 2016) (selected for posting to court website).

[2] *Id.* at *1.

[3] *Id.* at *5.

[4] *Id.* at *6.

It concluded that "the evidence was legally insufficient to support the district court's conclusion that Archie's conduct was not a violation" of article 22, § 5(13), of the Manual, and it found that "Archie's reason for leaving OPS was broader than"[5] the reasons provided on his applications.

The majority also dismissed the fact that DCYC mistakenly believed—as it stated in its notice of termination—that Archie was under active investigation by OPS and on administrative leave when he first applied at DCYC. It concluded that "the exact dates of the investigation are immaterial to the larger question of whether Archie's statements constitute '[f]alsification, fraud or intentional omission.'"[6] It found that regardless of the timing, Archie's "failure to mention the situation with the student as a reason for leaving his OPS job was nevertheless an 'intentional omission of required information.'"[7] The majority found that the evidence was legally insufficient to support the conclusion that Archie had not violated subsection (13). It concluded that "no reasonable person could determine that Archie's termination was not warranted under both [a]rticle 22, § 5(13) and (19)."[8]

Finally, the Court of Appeals did not consider Douglas County's assignment of error that the Commission had exceeded its statutory authority by considering matters outside the record, specifically the materials on the applicability of the PREA. The Court of Appeals did not reach this issue because of its disposition in Douglas County's favor on its first assignment of error.

In her dissent, Judge Bishop reasoned:

> [T]he district court's and this court's standard of review requires giving the Commission considerable deference by limiting our review to whether or not there is

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at *7.

> sufficient, relevant evidence to support the Commission's decision, and to ensure its decision is not arbitrary or capricious. Contrary to that limited standard of review, the majority instead seems to rely on its own interpretation of some of the evidence which the majority suggests supports DCYC's decision to terminate Archie's employment. However, our standard of review does not permit us to reverse the Commission's decision simply because there is evidence that may support a different outcome. Rather, like the district court, our role is only to determine whether there is sufficient evidence to support the Commission's decision.[9]

The dissent pointed out that the job applications contained a notice warning applicants that the applications may be considered public records and be publicly available. And this "would certainly give an applicant pause about providing personal details on the application."[10] Alexander testified that there had been other instances in which applicants had stated "personal" as their reason for leaving a prior job. Alexander indicated that providing the reason "spend time w/ kids" or "Family" would mean the reason is personal. The dissent reasoned that "[s]ince writing 'personal' as an explanation for leaving a former job is not an intentional omission of required information, it seems incongruous that writing 'spend time w/kids' is somehow so substantially different from writing 'personal' that it constitutes an intentional omission of required information . . . ."[11]

The dissent also noted that DCYC's termination of Archie's employment appeared to be based on erroneous information. In its notice of termination, DCYC stated it believed that Archie had conceded the relationship occurred while

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[9] *Id.* at *8 (Bishop, Judge, dissenting).

[10] *Id.* at *12.

[11] *Id.*

the former student was at Omaha South and that Archie was under investigation and on administrative leave when he first applied to DCYC. In fact, Archie never made that concession. He was not under investigation for the relationship when he resigned. He was not on administrative leave when he applied to DCYC.

The dissent concluded that because "there is sufficient, relevant evidence in the record to support that Archie did not intentionally omit required information on his 2003 and 2004 applications,"[12] the Commission's decision should stand.

We granted Archie's petition for further review.

III. ASSIGNMENTS OF ERROR

In his petition for further review, Archie asserts that the Court of Appeals erred by finding there was insufficient evidence for the Commission to conclude that Archie did not violate article 22, § 5(13) and (19), of the Manual.

IV. STANDARD OF REVIEW

[1-3] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.[13] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.[14] The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.[15]

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[12] *Id.* at *13.

[13] *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[14] *Id.*

[15] *Id.*

[4] An administrative agency decision must not be arbitrary and capricious.[16] Agency action is "arbitrary and capricious" if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.[17]

[5-7] Appellate courts independently review questions of law decided by a lower court.[18] The interpretation of regulations presents questions of law.[19] Whether an agency decision conforms to the law is by definition a question of law.[20]

V. ANALYSIS

1. Review of Civil Service Commission Appeals by Petition in Error

[8] The Commission is governed by Neb. Rev. Stat. §§ 23-2501 to 23-2516 (Reissue 2012). These statutes provide the Commission with various powers and responsibilities, including rulemaking and adjudicatory powers.[21] The Commission acts in a judicial manner when deciding employee appeals.[22]

When a county employee is terminated, suspended, or demoted, the department head must provide the employee with a written order explaining the reason for the discipline.[23] The employee then has the opportunity to appeal that decision to the Commission.[24] The Commission, acting in an

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[16] See *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[17] *Fleming v. Civil Serv. Comm. of Douglas Cty., supra* note 13.

[18] See *id.*

[19] See *id.*

[20] See *id.*

[21] §§ 23-2507 and 23-2511.

[22] See *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[23] § 23-2510.

[24] *Id.*

adjudicatory fashion akin to a trial court, holds an appeal hearing "at which the employee shall be entitled to appear personally, be represented by counsel, cross-examine witnesses and produce evidence."[25] The Commission has the authority "to affirm, modify or revoke the order appealed from."[26] The Commission's decisions are final and binding on all parties.[27] A party adversely affected by a decision of the Commission is entitled to appeal to the district court through the petition in error statutes.[28]

[9] The purpose of a proceeding in error is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law.[29]

An agency's decision must be supported by sufficient, relevant evidence.[30] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.[31] The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.[32]

In *Eshom v. Board of Ed. of Sch. Dist. No. 54*,[33] we explained that the "sufficient evidence" standard used to review an administrative body's decision in a proceeding in error is the

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[25] § 23-2511.

[26] *Id.*

[27] *Id.*

[28] *Id.*; § 23-2515.

[29] *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985).

[30] *Fleming v. Civil Serv. Comm. of Douglas Cty., supra* note 13.

[31] *Id.*

[32] *Id.*

[33] See *Eshom v. Board of Ed. of Sch. Dist. No. 54, supra* note 29, 219 Neb. at 471, 364 N.W.2d at 11.

same standard as the "substantial evidence" and "competent evidence" standards used in administrative law. We explained that this inquiry is akin to the inquiry as to the sufficiency of the evidence to sustain a jury verdict: "[T]he evidence is 'substantial' or 'sufficient as a matter of law,' or constitutes 'some competent evidence,' if a judge could not, were the trial to a jury, direct a verdict."[34] The standard "is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions."[35]

Similarly, the U.S. Supreme Court has stated:

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." . . . "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[36]

Another authority has explained the substantial evidence standard of review:

> The reviewing court's task on appeal is to determine if there is substantial evidence to support the agency's decision, not to determine if there is substantial evidence that contradicts the agency's decision. Accordingly, in determining whether an administrative decision is supported by substantial evidence, *the question for the appellate court is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made*. In other words, even if there is evidence in the record which tends to contradict an agency's factual determinations, so long as there is some substantial evidence in the record which supports the agency's determination, the court will affirm. . . . The mere possibility that the administrative record might support another

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[34] *Id.*

[35] *Id.*

[36] *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 619-20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citations omitted).

conclusion does not permit the reviewing court to make a finding inconsistent with the agency finding so long as there is substantial evidence to support it.[37]

[10-12] An agency's decision must not be arbitrary and capricious.[38] Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis that would lead a reasonable and honest person to the same conclusion.[39] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[40] A review using the "arbitrary and capricious" standard requires considerable deference to the judgment and expertise of the agency.[41] A decision is arbitrary and capricious if the agency has relied on factors that the Legislature has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[42]

2. The Commission's Reinstatement of Archie

The record shows sufficient, relevant evidence for the Commission's decision to reinstate Archie and that this decision was not arbitrary and capricious.

The majority concluded that "in light of all the evidence, Archie's conduct violated [a]rticle 22, § 5(13) and (19)[,] of the . . . Manual, thereby constituting a basis for his termination."[43]

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[37] 73A C.J.S. *Public Administrative Law and Procedure* § 531 at 383 (2014) (emphasis supplied).

[38] *Blakely v. Lancaster County, supra* note 16.

[39] *Id.*

[40] *Id.*

[41] *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996) (White, C.J., concurring).

[42] *Id.*

[43] *Douglas County v. Archie, supra* note 1 at *5.

It found that the district court's decision affirming the Commission's reinstatement of Archie was arbitrary, capricious, and unsupported by sufficient, relevant evidence.

[13] Whether Archie's conduct violated the two relevant provisions of the Manual is not the relevant inquiry. The proper inquiry for an appellate court when reviewing the decision of an administrative agency on a petition in error is whether there was sufficient, relevant evidence to support the conclusion that the agency *did make* and not whether the evidence would support a contrary conclusion.[44]

[14] In the case at bar, there was conflicting evidence. But as the U.S. Supreme Court has explained, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[45] As in reviewing a jury verdict, if there is sufficient evidence to support the decision, the reviewing court must affirm even if it "may be of the opinion that had it been the trier of the case, it would have reached a different conclusion."[46]

[15] The majority on the Court of Appeals panel concluded that "[t]he *district court's* decision affirming the Commission's reinstatement of Archie [was] arbitrary, capricious, and unsupported by sufficient, relevant evidence."[47] On a petition in error, the district court acts in an appellate capacity and employs the same deferential standard of review that an appellate court uses.[48] Thus, the question for the Court of Appeals was whether the district court erred in finding that the Commission's

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[44] See, *Eshom v. Board of Ed. of Sch. Dist. No. 54, supra* note 29; 73A C.J.S., *supra* note 37.

[45] *Consolo v. Federal Maritime Comm'n., supra* note 36, 383 U.S. at 620.

[46] *Myers v. Platte Val. Pub. Power & Irr. Dist.*, 159 Neb. 493, 507, 67 N.W.2d 739, 746 (1954). See, also, *Prescott v. Jones*, 13 Neb. 534, 14 N.W. 536 (1882).

[47] *Douglas County v. Archie, supra* note 1 at *5 (emphasis supplied).

[48] See *Fleming v. Civil Serv. Comm. of Douglas Cty., supra* note 13.

decision was supported by sufficient, relevant evidence and was not arbitrary and capricious.

The Commission issued a brief written order reversing Archie's termination, but it did not articulate the precise reasons behind its decision. Thus, in our review, we will consider whether there was sufficient evidence to conclude that Archie did not violate the two relevant provisions of the Manual.

(a) Subsection (19): Dishonest, Immoral, or Notoriously Disgraceful Conduct That Is Prejudicial to County

We conclude that there was sufficient, relevant evidence and that it was not arbitrary and capricious for the Commission to determine Archie did not violate article 22, § 5(19), by "engag[ing] in criminal, dishonest, immoral, or notoriously disgraceful conduct, which is prejudicial to the County or to [the] County's reputation."

To fall within the ambit of subsection (19), an employee's conduct must not only be "criminal, dishonest, immoral, or notoriously disgraceful," but must also be "prejudicial to the County or to [the] County's reputation." As an initial matter, no one suggests that Archie's conduct was criminal. Assuming, for the sake of argument, that Archie's conduct was "immoral" or "notoriously disgraceful," we conclude that the Commission could have reasonably determined that Archie's conduct was not prejudicial to the county or its reputation. Archie had been an exemplary employee with DCYC for 11 years.

It is not clear whether subsection (19) even applies to preemployment conduct. Subsection (19) can reasonably be understood to govern only the conduct of employees during their employment. The grounds for discipline listed in the Manual—with the exception of subsection (19) relating to information on an application or resume—"all relate to conduct *while employed by the County*."[49] The Manual states

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[49] *Douglas County v. Archie, supra* note 1 at *14 (Bishop, Judge, dissenting) (emphasis supplied).

that "[t]he purpose of a disciplinary policy is to acquaint all employees with the rules that serve to guide their conduct in order that they can be contributing team members helping to achieve the objectives of better and more efficient service to the citizens of Douglas County." This stated purpose implies that the goal of the disciplinary provisions is to guide employee conduct *in the employees' positions as county employees*, and not to punish the employees for past bad behavior that occurred before they were hired by the county. To the extent that preemployment conduct is harmful to the county or its reputation, the county could have addressed this issue prior to employing Archie.

Conduct of an employee occurring during the course of employment is categorically distinct from conduct occurring prior to employment with regard to the prejudice to the county. While the county has no ability to prevent the prejudicial effect of a current employee's conduct prior to its occurrence, it does have the ability to inquire about past conduct prior to hiring an applicant.

Even assuming that article 22, § 5(19), of the Manual could apply to preemployment conduct, the Commission could have reasonably concluded that Douglas County was not prejudiced by Archie's conduct. Bryant's testimony before the Commission showed that DCYC had knowledge that Archie had resigned due to something involving a former student. It also was aware that Archie listed "spend time w/ kids" as his reason for leaving a teaching job in the middle of the school year. The Commission could have reasonably determined that the county did not suffer any prejudice when, knowing these facts, it apparently failed to conduct any further inquiry into his reason for leaving OPS and decided to "[g]ive him a shot." When, after over 11 years of exemplary service at DCYC, Archie's preemployment conduct was discovered, it was not unreasonable for the Commission to determine that the county was not unfairly prejudiced.

To the extent that the Commission's decision to reinstate Archie was premised upon the conclusion that Archie did

not violate subsection (19), that conclusion was supported by sufficient, relevant evidence and was not arbitrary and capricious.

(b) Subsection (13): Intentional Omission of Required Information on Employment Application/Resume

We conclude that there was sufficient, relevant evidence and that it was not arbitrary and capricious for the Commission to determine Archie did not violate article 22, § 5(13), by engaging in "[f]alsification, fraud or intentional omission of required information on the employment application/resume."

The primary question was whether Archie engaged in an "intentional omission of required information" on his two DCYC applications. The evidence strongly supports the conclusion that Archie did not engage in "[f]alsification" or "fraud" because of his statement that he left OPS to spend more time with his family.

We give deference to the Commission's determination of what level of detail was "required" of Archie when explaining his reason for leaving a previous position. Given the fact that all information was a matter of public record, a generic reason such as "personal" was not considered an intentional omission. The reasons could then be explained to DCYC in a private interview.

The facts surrounding Archie's resignation were complex. The investigation into his relationship with the former student was part of the background of his resignation, but that investigation had ended before his resignation. The only ongoing investigation was whether he had lied about his whereabouts to OPS investigators. His desire to protect his children from rumors and negative attention was a part of his reason for leaving. It was not clear how much of this "whole situation" leading to Archie's resignation he was required to explain on the applications.

Alexander's testimony supports the fact that it was not considered an omission of required information to provide a

generic, but incomplete, reason for leaving a prior job, such as "personal," rather than providing a detailed explanation. He also stated that providing a reason such as "spend time w/ kids" or "Family" was the equivalent of writing "personal." Archie's reasons for leaving his job at OPS should have prompted further questions by DCYC in his interview. The record contains evidence that DCYC was aware he resigned due to "something with a former student" and that it decided to "[g]ive him a shot." The Commission could have reasonably concluded that Archie was not "required" to give a detailed answer as to his reason for leaving OPS and that his answers "spend time w/ kids" and "Family" were the same as stating the reasons were "personal."

Not only must the information omitted be required information to violate article 22, § 5(13), but the applicant must intentionally omit required information. Archie testified that he believed the reasons provided were accurate and honest. The Commission could have reasonably concluded that Archie did not believe he was omitting any required information on his applications, but that he instead believed he was giving all that was required. We will give deference to the Commission's determinations of credibility of the witnesses it observed.

To the extent that the Commission's decision to reinstate Archie was premised upon the conclusion that Archie did not violate subsection (13), that conclusion was supported by sufficient, relevant evidence and was not arbitrary and capricious.

3. Douglas County's Remaining Assignments of Error

In its appeal to the Court of Appeals, Douglas County also asserted that the district court erred by upholding the Commission's refusal to make factual findings in its order as requested and by exceeding its statutory authority by considering information outside the record and not presented by either party (the material on the applicability of the PREA).

Douglas County did not seek review of the Court of Appeals' conclusion that it had failed to preserve its claim that the Commission erred by denying Douglas County's request to make specific findings of fact. Because this issue was not preserved, we do not address it further.

The Court of Appeals did not address Douglas County's remaining assignment of error—that the Commission erred by considering the material related to the applicability of the PREA. We conclude it is clear from the record that the material did not form the basis of the Commission's decision to reinstate Archie. Thus, Douglas County suffered no prejudice from the Commission's consideration of this material.

After hearing the evidence, the Commission delayed its decision "until [the] issue of whether . . . Archie would be able to be employed at [DCYC] pending a review of PREA and any other similar applicable rules and regulations." The fact that the Commission reinstated Archie, after its review, demonstrates that it concluded the PREA would not prohibit Archie's continued employment at DCYC. Therefore, the Commission's decision to reinstate Archie shows that it did not make its decision based on the PREA materials, but on the merits of the evidence presented by the parties.

Because the PREA materials were not part of the Commission's decision to reinstate Archie, Douglas County suffered no resulting prejudice.

VI. CONCLUSION

Based upon our standard of review, we conclude that the Commission's decision was supported by sufficient, relevant evidence and was not arbitrary and capricious. We reverse the opinion of the Court of Appeals and remand the cause with directions to reinstate the judgment of the district court which affirmed the order of the Commission.

Reversed and remanded with directions.

Joel D. Woodward, appellant, v.
Rhonda K. Lahm, director,
Nebraska Department of
Motor Vehicles, appellee.

890 N.W.2d 493

Filed February 3, 2017. No. S-15-928.

1. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial 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. ____: ____. When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Appeal dismissed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Milissa D. Johnson-Wiles for appellee.

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

Stacy, J.

SUMMARY

Joel D. Woodward asked the director of the Nebraska Department of Motor Vehicles (DMV) to reinstate his commercial driver's license (CDL). The director refused, and Woodward filed an appeal pursuant to Neb. Rev. Stat. § 60-4,105 (Reissue 2010). The district court dismissed the appeal on several grounds, including that it lacked subject matter jurisdiction because the appeal was not from a "final decision or order."[1] We agree with the district court and dismiss the appeal for lack of jurisdiction.

FACTS

In 2010, Woodward was convicted of driving under the influence (DUI) and sentenced to probation. He was convicted of DUI a second time in 2013, and again was sentenced to probation.

After Woodward's second DUI, the DMV issued an order revoking his CDL for life. The lifetime revocation was imposed pursuant to Neb. Rev. Stat. §§ 60-4,168(3)(a) (Cum. Supp. 2012) and 60-4,169 (Reissue 2010). Section 60-4,169 requires the director to "summarily revoke . . . the [CDL] and privilege . . . to operate a commercial motor vehicle" whenever it comes to the director's attention that the person has "committed an offense for which disqualification is required." Section 60-4,168(3) provides: "A person shall be disqualified from driving a commercial motor vehicle for life if . . . he or she: (a) Is convicted of . . . a second or subsequent violation of any of the offenses described in subsection (1) . . . ." DUI is among the offenses listed in subsection (1). One may appeal from a lifetime revocation,[2] but Woodward did not do so.

After Woodward completed both terms of probation, he filed motions asking the sentencing court to set aside both DUI

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[1] See § 60-4,105.

[2] See *id*.

convictions pursuant to Neb. Rev. Stat. § 29-2264 (Reissue 2016). Section 29-2264 allows a sentencing court to set aside a conviction if it finds doing so is in the best interest of the offender and consistent with the public welfare. Section 29-2264(4) provides that an order setting aside a conviction shall: "(a) Nullify the conviction; and (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction." The sentencing court set aside both DUI convictions in separate orders entered January 8, 2015.

On March 30, 2015, Woodward's attorney wrote a letter to the director of the DMV, advising that Woodward's DUI convictions had been set aside and asking either that his CDL be "reinstated" or that he be deemed eligible to reapply for a CDL. Woodward explained the basis for his request as follows:

> Woodward's position is that if a conviction is set aside and nullified and that all civil disabilities and disqualifications resulting from the conviction are removed, that conviction cannot be counted for purposes of a life time disqualification [under § 60-4,168]. The Director's action in entering the life time disqualification of . . . Woodward's CDL is of course a civil action. Thus, at this time, [Woodward] has only a single [administrative] adjudication which will affect his [CDL] which was the refusal [of a chemical test] adjudication on November 30, 2010. [Woodward] should be eligible for reinstatement.

In a letter dated April 10, 2015, the director responded:

> The lifetime CDL disqualification is based on valid convictions for offenses as provided in Neb.Rev.Stat. [§] 60-4,168, and 49 CFR 383.51 which has been adopted by Nebraska pursuant to Neb.Rev.Stat. [§] 60-462.01. These are laws with specific application to CDL holders and which require the state to disqualify CDL holders with a history of unsafe driving demonstrated by convictions for the offenses enumerated in the statute. Nothing

> in the applicable laws allows the state to lift a CDL disqualification imposed as a result of valid convictions even if the conviction is [s]et [a]side. . . . Woodward's lifetime CDL disqualification will not be removed.

On May 6, 2015, Woodward filed what he captioned a "Petition on Appeal" in the district court for Buffalo County, seeking to appeal from the director's April 10 letter. Woodward asserts the appeal was authorized by § 60-4,105, which sets forth the appeal procedure for "any person aggrieved by a final decision or order of the director or the [DMV] to cancel, suspend, revoke, or refuse to issue or renew any operator's license." Woodward's petition alleged he was eligible for reinstatement of his CDL because his DUI convictions had been set aside, and further alleged the director had denied his request for reinstatement in the April 10 letter, a copy of which was attached to the petition.

The DMV filed a timely answer generally denying the allegations of Woodward's petition and raising the affirmative defense that the district court lacked subject matter jurisdiction over the appeal and that Woodward's petition failed to state a claim upon which relief could be granted.

After a hearing, the district court dismissed Woodward's petition. The court generally agreed with the DMV's argument that the director's letter did not constitute a "final decision or order" under § 60-4,105, and the court concluded the petition failed to allege facts establishing subject matter jurisdiction over the appeal. The court also agreed with the DMV's position that Woodward's petition was seeking declaratory relief and was barred by the doctrine of sovereign immunity. Finally, the court agreed with the DMV that the director's letter, if considered appealable, was substantively correct, because any removal of civil disabilities Woodward was entitled to as a result of having the DUI convictions set aside would be prospective only, not retrospective.

Woodward timely appealed the order of dismissal. We moved this case to our docket on our own motion pursuant to

our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

ASSIGNMENTS OF ERROR

Woodward assigns that the district court erred in (1) failing to set aside the lifetime disqualification and revocation of his CDL, (2) failing to enter an order requiring the director to reissue his CDL, (3) finding it did not have jurisdiction over his appeal, (4) finding his appeal was barred by the doctrine of sovereign immunity, and (5) finding the appeal was not taken from a final order.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[4]

[2] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[5]

ANALYSIS

[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]

Section 60-4,105(1) provides for appeals from certain orders of the DMV:

> [A]ny person aggrieved by a final decision or order of the director or the [DMV] to cancel, suspend, revoke, or refuse to issue or renew any operator's license . . . may

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[3] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[4] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011); *Kroll v. Department of Motor Vehicles*, 256 Neb. 548, 590 N.W.2d 861 (1999).

[5] *Klug v. Nebraska Dept. of Motor Vehicles*, 291 Neb. 235, 864 N.W.2d 676 (2015).

[6] *Kroll v. Department of Motor Vehicles, supra* note 4.

> appeal to either the district court of the county in which the person originally applied for the license or the district court of the county in which such person resides or, in the case of a nonresident, to the district court of Lancaster County within thirty days after the date of the final decision or order.

Woodward appealed from the letter dated April 10, 2015. To determine whether his appeal is authorized by § 60-4,105, we must decide if he has appealed from a "final decision or order" of the DMV to "cancel, suspend, revoke, or refuse to issue or renew" his CDL.

The Legislature has not defined a "final decision or order" for purposes of § 60-4,105 beyond specifying that it must "cancel, suspend, revoke, or refuse to issue or renew" an operator's license. However, in *Buettner v. Sullivan*,[7] we held that a letter from the DMV referencing a prior revocation is not a final decision or order from which appeal can be taken. In that case, a driver was notified his operator's license had been revoked for a period of 1 year because he accumulated too many points. The driver's most recent offense was a speeding violation. He originally paid a fine for this violation, but after receiving notification that his license had been revoked, he approached a justice of the peace and somehow obtained an amended abstract of conviction indicating he was given 90 days of probation for the speeding offense instead of the fine. The driver then submitted the amended abstract to the DMV. The DMV responded with a letter notifying the driver that the previously ordered revocation was still "'in effect,'" explaining: "'The matter of a probation and the amended abstract that you presented . . . ha[ve] been viewed as invalid by the Director of our Department after consultation with the State's Court Administrator and the Attorney General's office.'"[8]

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[7] *Buettner v. Sullivan*, 191 Neb. 592, 216 N.W.2d 872 (1974).

[8] *Id.* at 593, 216 N.W.2d at 874.

The driver attempted to appeal from this letter under Neb. Rev. Stat. § 60-420 (1943), a predecessor to § 60-4,105. At that time, § 60-420 provided: "'Any person who feels himself aggrieved because of any order of the director on account of his refusal to issue any license contemplated under sections 60-418 and 60-419, may appeal therefrom to the district court . . . .'"[9] The procedure under § 60-420 required the appellant to file a $200 cost bond within 20 days of the order from which appeal was being taken, a requirement we held was jurisdictional.[10] The driver did not file his bond until 23 days after the order of revocation, so he argued the appeal was not from the order of revocation, but, rather, from the DMV's letter notifying him the revocation was still in effect. We held the DMV's letter was not an appealable order within the meaning of § 60-420, and concluded the district court correctly dismissed the appeal for lack of jurisdiction.

In *Kroll v. Department of Motor Vehicles*,[11] we again considered whether a driver could appeal from a letter sent by the DMV. The driver received a letter from the DMV notifying him that because his Georgia operator's license had been revoked or suspended, his recently issued Nebraska operator's license would be summarily revoked if he did not take certain action by a specified date. The driver filed an appeal from this letter in the district court pursuant to § 60-4,105. The district court entered an order affirming the DMV's action. The driver appealed, and we dismissed the appeal for lack of jurisdiction. We concluded the letter from the DMV was not "a formal, final action by the Department,"[12] but instead was conditional and contemplated further action by the parties. We reasoned that because "there was no final, appealable

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[9] *Id.* at 594, 216 N.W.2d at 874, quoting § 60-420.

[10] *Buettner, supra* note 7.

[11] *Kroll v. Department of Motor Vehicles, supra* note 4.

[12] *Id*. at 552, 590 N.W.2d at 863.

administrative order, the district court never acquired [subject matter] jurisdiction" under § 60-4,105.[13]

Like the letters in *Buettner* and *Kroll*, the DMV's April 10, 2015, letter to Woodward was not a "final decision or order" for purposes of § 60-4,105. The letter did not affect or change the status of Woodward's operator's license, but instead merely explained the DMV's position that the applicable laws did not permit it to either remove Woodward's lifetime CDL disqualification or permit reinstatement of his CDL. Even if the letter could fairly be characterized as a "final decision" of the director or the DMV in that regard, it was not one which pertained to "cancel[ing], suspend[ing], revok[ing], or refus[ing] to issue or renew" any operator's license.[14] Rather, the April 10 letter pertained to the reinstatement of a lifetime revocation or disqualification, and that is not one of the decisions from which the Legislature has authorized an appeal under § 60-4,105.

[4] Here, the district court correctly concluded it lacked subject matter jurisdiction over Woodward's appeal under § 60-4,105 and dismissed the appeal. When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim.[15] And, because we lack jurisdiction over the appeal, we do not reach the merits of the alternative grounds on which the district court dismissed the appeal.

CONCLUSION

The letter from which Woodward appeals is not a "final decision or order" of the director or the DMV under § 60-4,105. The district court correctly dismissed the appeal for lack of subject matter jurisdiction, and we dismiss the appeal for the same reason.

Appeal dismissed.

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[13] *Id.*

[14] See § 60-4,105.

[15] *Kroll v. Department of Motor Vehicles, supra* note 4.

Donna Tryon and Ryan Sellers, appellants, v. City of North Platte, Nebraska, et al., appellees.

890 N.W.2d 784

Filed February 3, 2017. No. S-15-1156.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. ____: ____. When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
4. **Actions: Pleadings: Notice.** Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
5. **Actions: Pleadings.** The rationale for a liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.
6. ____: ____. A plaintiff's allegations do not need to be set forth as a separate claim in the complaint to sustain a cause of action.
7. **Motions to Dismiss.** Even novel issues may be determined on a motion to dismiss for failure to state a claim where the dispute is not as to the underlying facts but as to the interpretation of the law.

8. **Motions to Dismiss: Records.** As a general rule, important questions of novel impression should not be decided on a motion to dismiss when the underlying facts are unclear and development of the record will aid in resolving the legal issues.

Appeal from the District Court for Lincoln County: Donald E. Rowlands, Judge. Reversed and remanded for further proceedings.

J.L. Spray and Ryan K. McIntosh, of Mattson Ricketts Law Firm, for appellants.

Douglas L. Stack for appellee City of North Platte.

David Pederson, of Pederson & Troshynski, for appellees Trent Kleinow, Dr. James Smith, and Priority Medical Transport, L.L.C.

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Funke, J.

INTRODUCTION

Donna Tryon and Ryan Sellers (collectively appellants) appeal from a district court order dismissing with prejudice their amended complaint. Appellants seek to invalidate a contract between the City of North Platte, Nebraska (North Platte), and Priority Medical Transport, L.L.C., because North Platte provided insufficient notice of its conflict of interest with Priority Medical Transport before awarding the contract. We conclude the court erred in dismissing appellants' amended complaint, because it contains causes of action under both Neb. Rev. Stat. § 84-1411 (Reissue 2014) of the Open Meetings Act and Neb. Rev. Stat. § 49-14,102 (Cum. Supp. 2016) of the Nebraska Political Accountability and Disclosure Act. Therefore, the court's order dismissing appellants' amended complaint is reversed, and the cause is remanded for further proceedings.

FACTS

Priority Medical Transport is an ambulance company owned, in two-thirds part, by two employees of the North Platte Fire Department: Trent Kleinow—the assistant fire chief—and Dr. James Smith—the medical director. (Priority Medical Transport, Kleinow, and Smith are hereinafter collectively referred to as "Priority Medical.") In July 2015, Priority Medical applied for a $500,000 grant from the North Platte Quality Growth Fund (Quality Growth Fund). The Quality Growth Fund Citizens Review Committee (CRC) reviews Quality Growth Fund applications and provides recommendations to the North Platte City Council (City Council) on what Quality Growth Fund applications should be approved.

The CRC met, ad hoc, to consider Priority Medical's application. Despite that the application was for a $500,000 grant, the CRC provided a recommendation to the City Council to provide Priority Medical a $350,000 loan. Priority Medical did not revise or refile its application with the Quality Growth Fund to reflect the changes. At its July 2015 meeting, the City Council awarded Priority Medical the $350,000 loan contract.

Appellants filed a complaint in August 2015 alleging that both the CRC and the City Council violated § 49-14,102 by failing to award the contract through an open and public process. Appellants alleged that both the CRC and the City Council provided "bare legal notice" of their meetings. However, appellants specifically contended that neither body provided notice that the contract to be discussed concerned a business owned by public employees. Appellants' complaint neither quoted nor attached the notices provided by the CRC or the City Council.

The court dismissed appellants' complaint without prejudice for failure to state a claim upon which relief could be granted, but allowed them leave to file an amended complaint. The court specifically instructed appellants to make paragraph 28 of their complaint more specific to allege how § 49-14,102(2) was violated.

In November 2015, appellants filed an amended complaint that made substantive changes only to paragraph 28 and again did not include the CRC or the City Council notices or their language. In response, North Platte and Priority Medical (hereinafter collectively appellees) both filed motions to dismiss, under Neb. Ct. R. Pldg. § 6-1112(b)(6), for failure to state a claim upon which relief could be granted. Appellees argued that appellants' admission that North Platte provided "bare legal notice" of the City Council meeting in paragraph 28 showed that North Platte complied with § 49-14,102's notice requirement for an open and public process as a matter of law.

The court dismissed the case with prejudice, explaining that "Plaintiffs cannot amend their Complaint to state a cause of action against any of the Defendants." Appellants perfected a timely appeal.

ASSIGNMENTS OF ERROR

Appellants assign, restated, that the court erred in (1) implicitly finding the process used and notice given by North Platte in awarding the contract to Priority Medical was through an "open and public process" under § 49-14,102, (2) granting the motion to dismiss with prejudice, and (3) not allowing appellants leave to amend their complaint.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss is reviewed de novo.[1]

ANALYSIS

[2] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact

[1] *First Neb. Ed. Credit Union v. U.S. Bancorp*, 293 Neb. 308, 877 N.W.2d 578 (2016), citing *SID No. 1 v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015).

which may be drawn therefrom, but not the plaintiff's conclusions.[2] Accordingly, for the purpose of reviewing the court's dismissal of the amended complaint, the facts that we have set out in this opinion appear as alleged by appellants.

[3] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[3] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[4]

[4,5] Nebraska is a notice pleading jurisdiction.[5] Civil actions are controlled by a liberal pleading regime.[6] A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[7] The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.[8] The rationale for this liberal notice pleading standard is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.[9]

Appellants argue that the court erred in dismissing their amended complaint, because they are entitled to relief under both § 84-1411 and § 49-14,102.

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[6] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016), citing *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[7] *Id.*

[8] *Id.*

[9] *Id.*

Appellants Set Forth Sufficient Facts for Claim Under § 84-1411

Appellants contend that while they admitted "bare legal notice" was provided under § 84-1411, they still have a plausible cause of action that the description of Priority Medical's loan on the meeting agenda was not "sufficiently descriptive."[10]

Priority Medical points out that appellants did not refer to § 84-1411 in their complaint or at the hearings before the court; so, it argues that the court could not have erred in concluding that appellants failed to state a cause of action under the statute.

[6] Priority Medical is correct in stating that appellants failed to make any reference to § 84-1411 in their amended complaint or at the hearing on the motion to dismiss before the court. However, allegations do not need to be set forth as a separate claim in the complaint to sustain a cause of action.[11] As stated above, fair notice that a claim exists, not the authorizing statute or legal theory, is all that is required to carry a valid claim at the pleading stage. Section 84-1411(1) requires a public body to provide notice of the time and place of its meeting and an agenda that is "sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." Neb. Rev. Stat. § 84-1409(1)(a) (Reissue 2014) defines public bodies as "(i) governing bodies of all political subdivisions of the State of Nebraska [and] (v) advisory committees of the bodies referred to in subdivision[] (i)."

In their amended complaint, appellants made the following allegations regarding the CRC and the City Council:

> 4. Defendant North Platte ("North Platte") is a city of the First Class in Lincoln County, Nebraska.
>
> . . . .

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[10] § 84-1411(1).

[11] See *deNourie & Yost Homes, supra* note 5, citing *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010). Cf. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

> 14. The application was first heard by a group called [the] Quality Growth Fund [CRC].
>
> . . . .
>
> 20. There is no publically available information on the . . . North Platte municipal website regarding the existence of the [CRC] despite its role in recommending who will receive favorable funding from the North Platte taxpayers. . . .
>
> . . . .
>
> 27. At Quality Growth Fund Administrator['s] request, the . . . City Council placed the Priority Medical loan [on] the . . . City Council agenda for its meeting . . . .

As the governing body of North Platte, the City Council is a public body. While appellants did not allege that the CRC is a public body, appellees do not deny that status. Additionally, CRC's role to provide recommendations to the City Council also supports a reasonable inference that it is an advisory committee of the City Council or, at a minimum, an expectation that discovery will provide such evidence. Therefore, for the purposes of the motion to dismiss, arguably both the CRC and the City Council are public bodies that would be required to provide notice under § 84-1411.

Appellants also alleged the following facts about the notice provided by the CRC and the City Council:

> 15. Other than bare legal notice of the meeting of the Quality Growth Fund [CRC], no notice or publicity was ever provided that public employees were seeking funds from the Quality Growth Fund.
>
> . . . .
>
> 28. Other than bare legal notice of the actual . . . City Council meeting itself, no notice or publicity was ever made that would give notice to the public that a business with which an individual who is also a public employee was seeking funds from the Quality Growth Fund prior.

Both of these allegations suggest that appellants, while admitting that the other notice requirements of § 84-1411 were met,

claim that the agenda items were not sufficiently descriptive to provide notice that a contract containing a conflict of interest would be discussed at the meetings. Because the amended complaint focused on notice of public meetings, we believe appellees had fair notice that the Open Meetings Act notice requirements were also at issue.

While setting out the appropriate statute and the allegations regarding each element required therein would have been helpful to appellees and the court, appellants' failure to do so does not defeat the presence of valid claims. While the actual character of the CRC and the actual notice provided by the CRC and the City Council will be essential to the resolution of the case, the factual allegations suggest a reasonable expectation that discovery will reveal them.

Therefore, because appellants have stated claims against the CRC and the City Council under § 84-1411 which are plausible on their face, the court erred in dismissing appellants' complaint with prejudice for failure to state a claim.

Appellants Set Forth Sufficient Facts for Claim Under § 49-14,102

Appellants also claim that North Platte did not award the contract through an open and public process pursuant to § 49-14,102.

Both appellants and appellees request that we interpret the term "notice" in § 49-14,102(2)'s definition of an open and public process. Appellants contend it should be interpreted to require, at a minimum, that the public be informed of the presence of a conflict of interest before a contract is awarded. Appellees argue that the plain language requires only notice of the meeting and that therefore, appellants' admission of "bare legal notice" on the face of their complaint provides an affirmative defense precluding recovery.

[7,8] We recognize that this court has not previously interpreted the term "notice" in § 49-14,102(2). Even novel issues may be determined on a motion to dismiss where the dispute is not as to the underlying facts but as to the interpretation of

the law.[12] However, as a general rule, important questions of novel impression should not be decided on a motion to dismiss when the underlying facts are unclear and development of the record will aid in resolving the legal issues.[13] The Legislature has not presented a mandatory definition of notice or the language required to satisfy it. Accordingly, analysis of the sufficiency of the notice will necessarily require an evaluation of the actual notice provided. The absence of the actual notices or the language thereof requires that we allow further development of the record before construing the meaning of the statute.

Instead, without interpreting § 49-14,102(2), we consider whether appellants' allegations may support a claim capable of prevailing against a motion to dismiss. Section 49-14,102 includes the following language:

> (1) Except as otherwise provided by law, no . . . public employee . . . or business with which the individual is associated shall enter into a contract valued at two thousand dollars or more, in any one year, with a government body unless the contract is awarded through an open and public process.
>
> (2) For purposes of this section, an open and public process includes prior public notice and subsequent availability for public inspection . . . of the proposals considered and the contract awarded.
>
> . . . .
>
> (6) This section prohibits . . . public employees from engaging in certain activities under circumstances creating a substantial conflict of interest. This section is not intended to penalize innocent persons, and a contract shall not be absolutely void by reason of this section.

In their amended complaint, appellants alleged the following: North Platte is a city of the first class in Nebraska;

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[12] See *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013), citing *Madison v. American Home Products Corp.*, 358 S.C. 449, 595 S.E.2d 493 (2004).

[13] See *Madison, supra* note 12. See, also, *Estate of Teague, supra* note 12.

Kleinow and Smith are public employees; Priority Medical Transport is a business with which Kleinow and Smith are associated; the City Council awarded a contract to Priority Medical; the contract awarded to Priority Medical was for $350,000; and the contract was not awarded through an open and public process, because the notice provided was insufficient. Accepting each of these allegations as true, appellants have sufficiently alleged that the contract at issue falls under § 49-14,102 and that the City Council failed to comply with the notice requirement of the statute.

Additionally, Neb. Rev. Stat. § 49-1424 (Reissue 2010) defines a government body as a "council . . . of one or more political subdivisions."

At this stage, appellants' admission that "bare legal notice" of the meeting was provided does not preclude them from recovery, because the statute does not explicitly say an open and public process requires only notice of the meeting.

Therefore, because appellants have stated a claim against the City Council under § 49-14,102, the court erred in dismissing appellants' complaint with prejudice for failure to state a claim.

Because our resolution of this assignment of error necessitates that we reverse the court's order and remand the cause for further proceedings, we do not reach appellants' third assignment of error that the court should have granted them leave to file a second amended complaint.

CONCLUSION

Appellants' amended complaint contains valid claims under both § 84-1411 and § 49-14,102. Accordingly, the court erred in dismissing appellants' amended complaint for failure to state a claim. Therefore, the court's order dismissing appellants' amended complaint is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for
further proceedings.

Cassel, J., not participating.

State of Nebraska, appellee, v. Eric O. Rocha, Sr., appellant.

890 N.W.2d 178

Filed February 3, 2017. No. S-16-009.

1. **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, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.
2. ____: ____. In reviewing a sufficiency of the evidence claim, 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. ____: ____. A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
4. **Trial: Evidence: Words and Phrases.** To be admitted at trial, evidence must be relevant, meaning evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
5. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), even evidence that is relevant is not admissible 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.
6. **Rules of Evidence: Testimony.** Under Neb. Evid. R. 701 and 702, Neb. Rev. Stat. §§ 27-701 and 27-702 (Reissue 2016), opinion testimony, whether by a lay or expert witness, is permissible only if it is helpful to the trier of fact in making a determination of a fact in issue.

7. **Witnesses: Judgments.** The credibility of witnesses is a determination within the province of the trier of fact.
8. **Rules of Evidence: Witnesses: Testimony.** While certain prescribed methods of impeaching a witness' credibility are allowed under the rules of evidence, it is improper for a witness to testify whether another person may or may not have been telling the truth in a specific instance.
9. **Prosecuting Attorneys: Testimony.** A prosecutor may not express personal opinions as to the credibility or veracity of the defendant's testimony, but may make comments resting on reasonably drawn inferences from the evidence.
10. **Criminal Law: Prosecuting Attorneys.** It is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his or her personal belief in the guilt of the defendant, unless such belief is given as a deduction from evidence.
11. **Extrajudicial Statements.** Where the proponent of evidence offers an interrogator's out-of-court statements that comment on a person's credibility for the purpose of providing context to a defendant's statements, the interrogator's statements are only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proffered purpose.
12. **Trial: Rules of Evidence: Police Officers and Sheriffs: Evidence: Extrajudicial Statements.** Statements by law enforcement officials on the veracity of the defendant or other witnesses, made within a recorded interview played for the jury at trial, are to be analyzed under the ordinary rules of evidence. Such commentary is not admissible to prove the truth of the matter asserted in the commentary.
13. **Evidence: Words and Phrases.** To be relevant, evidence must be probative and material. Evidence is probative if it has any tendency to make the existence of a fact more or less probable than it would be without the evidence. A fact is material if it is of consequence to the determination of the case.
14. **Prosecuting Attorneys: Juries.** When a prosecutor asserts his or her personal opinions, the jury might be persuaded by a perception that those opinions are correct because of counsel's position as prosecutor, rather than being persuaded by the evidence. The 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.
15. **Evidence: Police Officers and Sheriffs.** Admitting statements by a law enforcement officer calling into question a defendant's honesty and stating conclusions about a defendant's guilt carries with it a risk of unfair prejudice.

16. **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.
17. **Motions to Suppress: Pretrial Procedure: Trial: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
18. **Constitutional Law: Search and Seizure.** The ultimate touchstone of the Fourth Amendment, and article I, § 7, of the Nebraska Constitution, is reasonableness.
19. **Search and Seizure: Warrantless Searches.** Searches and seizures must not be unreasonable. Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.
20. **Warrantless Searches: Arrests: Motor Vehicles.** Among the exceptions to the warrant requirement are searches incident to a lawful arrest and the automobile exception.
21. **Warrantless Searches: Motor Vehicles.** It is the characteristic mobility of all automobiles, not the relative mobility of a car in a given case, that justifies the automobile exception to the warrant requirement.
22. **Warrantless Searches: Motor Vehicles: Words and Phrases.** The test for ready mobility under the automobile exception to the warrant requirement is whether a vehicle is readily capable of being used on the highways and is stationary in a place not regularly used for residential purposes.
23. ____: ____: ____. The requirement of ready mobility for the automobile exception to the warrant requirement is met whenever a vehicle that is not located on private property is capable or apparently capable of being driven on the roads or highways.
24. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
25. **Probable Cause: Search and Seizure.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
26. **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 court abused its discretion.

27. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
28. **Constitutional Law: Criminal Law: Due Process: Proof.** Under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the Nebraska Constitution, in a criminal prosecution, the State must prove every ingredient of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming an ingredient upon proof of the other elements of the offense.
29. **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.
30. **Jury Instructions: Judgments: Appeal and Error.** Whether the jury instructions given by a trial court are correct is a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
31. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
32. **Lesser-Included Offenses.** To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.
33. ____. The test for determining whether a crime is a lesser-included offense is whether the offense in question cannot be committed without committing the lesser offense.
34. **Criminal Attempt.** Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.
35. **Controlled Substances.** A person 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.
36. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
37. **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.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed in part, and in part vacated.

Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

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

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

I. NATURE OF CASE

Eric O. Rocha, Sr., appeals his convictions of possession of a controlled substance, methamphetamine, and of driving under suspension. We conclude that there was insufficient evidence for his conviction of driving under suspension and vacate that conviction. Because we find all of his other assignments of error to be either without merit or harmless error, we affirm the judgment of the district court in all other respects.

II. BACKGROUND

1. Police Report, Arrest of Rocha, and Search of Vehicle

On January 17, 2015, a Scottsbluff Police Department officer, William Howton, was dispatched on a call of suspicious activity. The caller reported that a male individual kept coming up to the door and asking for the caller's son, who was not at home. The individual's vehicle was parked in the alleyway.

Howton drove toward the scene. About a block from the house, he observed a vehicle matching the description given

to Howton, traveling in the opposite direction. He turned around, and before he reached the vehicle, it had pulled over and parked. The driver, Rocha, and his passenger, Constance Trejo, exited the vehicle. Howton pulled up behind the parked vehicle. He approached Rocha and instructed Trejo to step back by his police car.

Howton noticed that Rocha appeared to be "really nervous" and was putting his hands in his pockets, trying to text on his cell phone. Howton asked for and obtained Rocha's consent to search his person and conducted a search. In Rocha's front sweatshirt pocket, he found residue of some green leafy substance that appeared to be marijuana. Howton checked to see if there were any warrants for Rocha's arrest or a suspended license. He was told that Rocha's license was suspended and arrested Rocha for driving under suspension. Rocha was handcuffed and placed in the back of a police car.

Another police officer who had arrived on the scene questioned Trejo. The officer obtained consent to search Trejo's person and purse and conducted the search. A capsule containing what appeared to be marijuana, a glass smoking device with what appeared to be burnt marijuana, and a black digital scale with white crystal-like residue were found in the purse. According to the officer, the white residue on the scale appeared to be methamphetamine. Trejo was arrested and placed in the back of a police car.

After Rocha's arrest, Howton searched the vehicle. He did not request consent from Rocha for the search of the vehicle. Howton's basis for the search was the "narcotics that were located on [Rocha] and the search of . . . Trejo." Howton planned on impounding the vehicle after Rocha's arrest, but conceded that the search was not an inventory search.

Between the vehicle's center console and driver's seat, Howton found a small canister with a cover design like a Wyoming license plate and the word "GANGSTA" on it. In the canister were found two glass vials and two small plastic bags containing a crystal-like substance later confirmed to be methamphetamine. Between the center console and the

driver's seat was a plastic bag containing what appeared to be marijuana and a glass pipe with what appeared to be burnt marijuana on it.

A shaving-kit-style bag was found in the center console of the vehicle. Inside the bag was a clear glass pipe, the type often used for smoking methamphetamine or other narcotics. Also inside the bag were two digital scales, a blue pouch with two plastic bags containing what appeared to be marijuana, rolling papers, and a red plastic container with what appeared to be marijuana.

Howton also found a vehicle registration from Wyoming in the name of an individual who was neither Rocha nor Trejo. It was reported that Rocha may have had the vehicle because the registration's owner had been arrested in Wyoming.

2. Police Interview of Rocha

After his arrest, Rocha was taken to the Scottsbluff Police Department for an interview, which was videotaped. Before the interview, Howton advised Rocha of his *Miranda*[1] rights, which he waived in writing.

Rocha initially denied knowing about the canister found in the vehicle. He later told Howton in the following exchange that he had loaned his cousin $700 and that she gave him "some stuff" as collateral:

> [Rocha]: It feels like I am being pressured into . . .
>
> [Howton]: And, I've told you several times . . .
>
> [Rocha]: But see, not, not by you, by the same person, Howton, the same person who said that she was my family, the same person that this morning told me I love you, I love you mijo, stay out of trouble. But can you help me out, because she needed a come up, because her and [another individual] don't have no money. So, yeah, I gave her 700 as a loan. I was given some stuff to hold until she got the money back.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> [Howton]: So you were holding that, that meth as, like, collateral?
>
> [Rocha]: Yeah, as a guarantee to get my money back. And I, I don't know. She got more than what she was looking for or whatever and was either that or she didn't have the money to pay me back.

At trial, Rocha's attorney argued that while he may have received the Wyoming canister as collateral, he did not know that it contained methamphetamine.

3. Howton's Interview of Rocha and Rocha's Motion in Limine

During the interview, Howton made several statements to Rocha that the methamphetamine found in the vehicle belonged to Rocha, that Howton could prove it belonged to Rocha, and that Rocha was not being honest with Howton. In Rocha's amended motion in limine, he objected to the admission of several portions of the interview recording on the basis that it constituted impermissible opinion testimony as to whether the methamphetamine belonged to Rocha and whether Rocha was being honest. He also objected on the basis of rule 403.[2] While the court sustained other portions of the motion in limine based on other grounds, the motion was denied with regard to the portions of the interview in which Howton made these statements about Rocha's ownership of the drugs and his honesty. Howton's statements and Rocha's responses include the following:

> [Howton]: I know the little blue container of meth is yours.
>
> [Rocha]: No, how?
>
> [Howton]: I know it is yours [Rocha]. I, looking right now, all I am just asking is for your honesty. To be honest with me.
>
> [Rocha]: I am being honest[.]
>
> [Howton]: I already know it is yours man.

---

[2] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016).

And:

> [Howton]: . . . What I'm saying is, is, I know that canister is yours, alright? I know it's yours. And this point, man, you just, I'm asking for your honesty, and
>
> [Rocha]: I am telling you, that canister, not mine.
>
> [Howton]: Ok, well, I'm not gonna, I'm not buying that.
>
> [Rocha]: But, see . . .
>
> [Howton]: . . . I know it's yours.
>
> [Rocha]: How?
>
> [Howton]: . . . I know it's yours, man.
>
> [Rocha]: Everything.
>
> [Howton]: You, you can tell me, you can tell me a hundred times over that this belongs to [another individual]. And I know it's not. I know it's yours.

And:

> [Howton]: Right, but you're, you're not being honest though, you're not . . .
>
> [Rocha]: No. I'm saying I'll, I'll, I'm being honest with you.

In its order denying these portions of the motion in limine, the court explained that "[t]his is an interview technique best explained by Howton at trial." Before the above portions of the interview were admitted at trial and before the video was played to the jurors, the court gave the following limiting instruction:

> You are about to see and hear a recording of an interview with . . . Rocha . . . and . . . Howton. I have ordered parts of the recording to be deleted for efficiency purposes and because the deleted portions are not relevant for purposes of this trial. You are not to concern yourself concerning the contents of the deleted portions, consider them at all in your deliberations, or speculate as to their content. During the interview you will hear assertions by . . . Howton that he knows the alleged controlled substance[] belongs to . . . Rocha . . . and that he does not

> believe . . . Rocha . . . is being honest with him. These statements are part of interview techniques and should not be considered as substantive evidence in any way in determining if . . . Rocha [was in] possession of the alleged controlled substance, nor should they be given any weight when considering the truthfulness of any statements made by . . . Rocha . . . .

At trial, Rocha objected to the playing of the video, which objection was overruled. And an instruction substantially similar to the one given before the playing of the video was included in the jury instructions at the end of the trial.

4. Motion to Suppress: Search of Vehicle

Before trial, Rocha moved to suppress any evidence referring to the search of the vehicle and any evidence found or statements made as a result thereof. The court denied Rocha's motion. The court found that the initial encounter between Howton and Rocha was not a Fourth Amendment seizure because Rocha had already parked the vehicle and begun exiting with Trejo before Howton pulled up behind them. The court said it was a "First-Tier Police-Citizen Encounter."

The court concluded that the police had probable cause to believe that contraband could be located in the vehicle based on the suspected drugs and drug paraphernalia found on Rocha and Trejo. The court agreed with Rocha's argument that under *Arizona v. Gant*,[3] the search was not permissible as a search incident to lawful arrest because Rocha was arrested for driving under suspension. But the court concluded that the search was permissible as a search under the "'automobile exception'" to the warrant requirement because there was probable cause to search the vehicle and the vehicle was readily mobile. The court denied Rocha's motion in limine in its entirety.

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[3] *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

5. Rocha's Trial and Conviction

Rocha was charged with (1) possession of a controlled substance (methamphetamine), a Class IV felony; (2) driving under suspension, a Class III misdemeanor; (3) possession of a controlled substance (marijuana), a Class IV misdemeanor; and (4) possession of drug paraphernalia, an infraction. The information alleged that Rocha was a habitual criminal for the purpose of enhancement. The charges of possession of marijuana and drug paraphernalia were not tried.

(a) Questioning and Testimony About Testing of Evidence

At trial, Howton conceded on cross-examination that he did not request any fingerprint or DNA testing of the items found in the vehicle. On redirect, the prosecution questioned Rocha:

> Q. And you didn't have any intention of sending this stuff down for DNA or print testing?
>
> A. If he wouldn't have admitted to it, well, I would have consulted with my sergeant or someone to see if they wanted us to send for DNA.
>
> Q. And as far as the testing, you didn't send it down but it's available at your office, right, in the evidence locker?
>
> A. Yes.
>
> Q. So if somebody wants to have their own independent test done on that stuff you'll send it out for them, right?
>
> [Rocha's attorney]: Judge, I'm going to object at this time, it's shifting the burden.
>
> THE COURT: Sustained.
>
> Q. Well, let me ask you this, did you send it out to anyone else for testing?
>
> A. No.
>
> Q. At the request of anyone else?
>
> [Rocha's attorney]: Judge, again, the same objection, shifting the burden, trying to allude.

The Court: Overruled.

Q. Did you send it out on behalf of or at the request of anyone other than the Scottsbluff Police Department?

A. No.

Rocha moved for mistrial on the basis of the State's "shifting the burden," which motion was denied. The court included the following jury instruction with regard to the burden of proof: "There was testimony at trial that Rocha never requested any scientific testing of evidence. You must disregard that testimony in its entirety. Rocha has pleaded not guilty and is presumed to be innocent. The State's burden to prove each element of a crime charged never shifts to a defendant."

(b) Rocha's Driving Record

At trial, the State offered a "Complete Abstract of Record" and complete file of Rocha's driving record from the Nebraska Department of Motor Vehicles, along with a cover letter from that department's director. The district court sustained some of Rocha's objections to the admission of his driving record and admitted a redacted version that included the cover letter and part of the abstract. The court received both the unredacted and redacted versions into the record. Only the redacted version was given to the jury.

(c) Redacted Record

The abstract was printed on June 11, 2015, and it lists Rocha's driving status as revoked. It indicates that his license was issued on January 23, 2009, and had an expiration date of March 23, 2014. The cover letter, which is also dated June 11, 2015, states that the record is a complete driving record for Rocha and that his driving privilege had not been reinstated. It also states that Rocha did not have a "Work or Ignition Interlock Permit" on January 17, 2015. Unlike the complete and unredacted version, the redacted version does not indicate when Rocha's license was suspended. Most importantly, while the redacted version indicates that his license was suspended on the date the abstract was printed, June 11, 2015, it does not

indicate whether the suspension occurred before or after the date of Rocha's arrest, January 17.

(d) Jury Instructions

Before the case was submitted to the jury, Rocha objected to the court's proposed jury instructions. Rocha requested that the court include in an instruction on the possession of a controlled substance charge the lesser-included offense of *attempted* possession of a controlled substance. The court denied the request because it concluded that the evidence did not warrant an attempt instruction.

(e) Verdicts and Sentences

Rocha was found guilty of possession of methamphetamine and driving under suspension. With the habitual criminal enhancement, Rocha was sentenced to a mandatory minimum of 10 years' imprisonment to a maximum of 15 years' imprisonment on the possession of a controlled substance conviction and 90 days' imprisonment for driving under suspension.

III. ASSIGNMENTS OF ERROR

Rocha assigns the following errors on appeal: (1) There was insufficient evidence to prove venue; (2) the district court erred in denying Rocha's amended motion in limine, allowing the jury to hear portions of the recorded police interview in which Howton asserted that Rocha was not being honest, that the methamphetamine belonged to Rocha, and that he could prove the methamphetamine belonged to Rocha; (3) the district court erred in denying Rocha's motion to suppress the evidence found by police in the warrantless search of the vehicle after Rocha's arrest; (4) the district court erred in overruling Rocha's objection to questions by the prosecution that switched the burden of proof and in denying Rocha's motion for mistrial on the same grounds; (5) there was insufficient evidence to sustain Rocha's conviction for driving under suspension; and (6) the court erred in denying Rocha's request for a jury instruction on the lesser-included offense of attempted possession of a controlled substance.

IV. ANALYSIS

1. Insufficiency of Evidence: Venue and Driving Under Suspension

Rocha raises two assignments of error challenging the sufficiency of the evidence: There was insufficient evidence for both convictions because the prosecution failed to prove venue, and there was insufficient evidence to support the driving under suspension conviction. At oral argument, Rocha's attorney conceded that there was sufficient evidence to prove venue.

(a) Standard of Review

[1,2] 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, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.[4] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

(b) Driving Under Suspension

Rocha argues that there was insufficient evidence to prove him guilty beyond a reasonable doubt on the charge of driving under suspension. The relevant statute provides, "It shall be unlawful for any person to operate a motor vehicle (a) during any period that his or her operator's license has been suspended, [or] (b) after a period of revocation but before issuance of a new license . . . ."[6]

The evidence presented at trial was Howton's testimony that Rocha was driving on January 17, 2015, the redacted version

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[4] *State v. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016); *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

[5] *Id.*

[6] Neb. Rev. Stat. § 60-4,108(2) (Cum. Supp. 2016).

of the abstract of Rocha's driving record, and the cover letter from the director of the Department of Motor Vehicles.

The abstract indicates that at the time it was printed, June 11, 2015, Rocha's license was suspended. The cover letter also indicates that Rocha's driving privilege had not been reinstated. But what the redacted version of the abstract presented to the jury does not show is that Rocha's license was suspended prior to January 17, 2015, the date Rocha was alleged to have driven under suspension. But without evidence when the suspension of Rocha's license occurred, the evidence was insufficient to establish that his license was suspended on January 17. At most, the redacted abstract shows that Rocha had no interlock devices on his vehicle as of January 17 and that his license was expired on January 17. It does not show when his license was suspended or that it had been suspended prior to that date. Moreover, while there was evidence presented at the hearing on the motion to suppress that Howton was told by dispatch that Rocha's license was suspended, this evidence was not presented at trial.

Because there was no evidence that Rocha's license was suspended on January 17, 2015, we conclude that even viewing the evidence in the light most favorable to the prosecution, no rational jury could have found beyond a reasonable doubt that Rocha was operating a motor vehicle "during any period that his . . . operator's license has been suspended" or "after a period of revocation but before issuance of a new license."[7] The mere fact of Rocha's arrest for driving under suspension is insufficient, standing alone, to sustain his conviction. We vacate Rocha's conviction for driving under suspension.

2. Denial of Motion in Limine: Police Statements on Credibility of Defendant in Recorded Interrogation

Rocha argues that the district court erred in not granting his motion in limine to exclude portions of the recorded

[7] See *id.*

interview of Rocha by Howton from being played for the jury. In these portions of the interview, Howton stated that the methamphetamine belonged to Rocha, that he could prove it belonged to Rocha, and that Rocha was not being honest with him. Rocha argues that this is equivalent to one witness' testifying about the credibility of another witness.

(a) Standard of Review

[3] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[8]

(b) Comments on Credibility of Witnesses

[4] Before addressing Rocha's arguments, we review some of our foundational rules of evidence. To be admitted at trial, evidence must be relevant,[9] meaning "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[10] We have explained the relevancy rule, stating:

> Relevance is a relational concept and carries meaning only in context. A right to introduce evidence depends upon there being an issue of fact that is of consequence to the determination of an action. . . . First, evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case. . . . Second, if the evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.[11]

[5] Under rule 403, even evidence that is relevant is not admissible if its probative value is substantially outweighed

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

[9] See Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016).

[10] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2016).

[11] *State v. Harrold*, 256 Neb. 829, 852, 593 N.W.2d 299, 317 (1999).

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.[12]

[6] Lay witnesses may testify only as to factual matters based upon their personal knowledge.[13] Under rules 701 and 702,[14] opinion testimony, whether by a lay or expert witness, is permissible only if it is helpful to the trier of fact in making a determination of a fact in issue.[15] The "'ultimate issue'" rule was an evidentiary rule in many jurisdictions that prohibited witnesses from giving opinions or conclusions on an ultimate fact in issue because such testimony, it was believed, "'usurps the function' or 'invades the province' of the jury."[16] The ultimate issue rule was abolished in Nebraska by rule 704, which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[17] Under rule 704, the basic approach to opinions, lay and expert, is to admit them when helpful to the trier of fact.[18] But the abolition of the ultimate issue rule does not lower the bar so as to admit all opinions, because under rules 701 and 702, opinions must be helpful to the trier of fact, and rule 403 provides an additional basis

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[12] § 27-403.

[13] Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 2016).

[14] Neb. Evid. R. 701 and 702, Neb. Rev. Stat. §§ 27-701 and 27-702 (Reissue 2016).

[15] See *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

[16] See 1 McCormick on Evidence § 12 at 80-81 (Kenneth S. Broun et al. eds., 7th ed. 2013 & Supp. 2016). See, also, *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826, 94 N.W. 1007 (1903); R. Collin Mangrum, Mangrum on Nebraska Evidence 760 (2016); Fed. R. Evid. 704.

[17] Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 2016). See, also, Fed. R. Evid. 704.

[18] *State v. Reynolds, supra* note 15 (quoting Fed. R. Evid. 704 advisory committee notes); R. Collin Mangrum, *Opinion and Expert Testimony in Nebraska*, 27 Creighton L. Rev. 85 (1993).

of exclusion.[19] Under these rules, a witness may not give an opinion as to a defendant's guilt or how the case should be decided, but, rather, must leave the conclusions to be drawn by the trier of fact, because such opinions are not helpful.[20]

[7,8] The credibility of witnesses is a determination within the province of the trier of fact.[21] Because making credibility determinations is the role of the trier of fact, testimony that usurps that role is not helpful and thus is improper opinion testimony under rules 701 and 702.[22] While certain prescribed methods of impeaching a witness' credibility are allowed under the rules of evidence,[23] it is improper for a witness to testify whether another person may or may not have been telling the truth in a specific instance.[24] Thus, we have said, "it is totally improper for one witness to testify as to the credibility of another witness [because the] question of any witness' credibility is for the jury."[25]

[9,10] We have also said that a prosecutor may not express personal opinions as to the credibility or veracity of the defendant's testimony, but may make comments resting on reasonably drawn inferences from the evidence.[26] One of the

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[19] *State v. Reynolds, supra* note 15.

[20] See, *id.*; *State v. Kozisek*, 22 Neb. App. 805, 861 N.W.2d 465 (2015); *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006).

[21] See *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). See, also, *United States v. Bailey*, 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980).

[22] See *State v. Beermann, supra* note 21 (quoting *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988)).

[23] E.g., Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2016).

[24] *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007); *State v. Beermann, supra* note 21. See, also, 31A Am. Jur. 2d *Expert and Opinion Evidence* § 16 (2012).

[25] *State v. Beermann, supra* note 21, 231 Neb. at 396, 436 N.W.2d at 509.

[26] See *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016). See, also, Neb. Ct. R. of Prof. Cond. § 3-503.4.

rationales for this prohibition is that "[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."[27] We have similarly said that it is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his or her personal belief in the guilt of the defendant, unless such belief is given as a deduction from evidence.[28]

Rocha argues that allowing the portions of the recorded interview in which Howton asserts that the methamphetamine belonged to Rocha, that Rocha knew the container contained methamphetamine, that he could prove the methamphetamine belonged to Rocha, and that Rocha was not being honest, is akin to allowing testimony as to Rocha's truthfulness or his guilt. Rocha reasons that because Howton could not testify in court that the methamphetamine belonged to Rocha, that Rocha knew the container contained methamphetamine, or that Rocha was not being honest about whether the methamphetamine was his, it is likewise improper for these statements to be presented to the jury in the video of the interview. One court has also analogized similar statements to a prosecutor's personal opinion about the defendant's guilt, which is inadmissible at trial.[29]

We have not addressed the issue of whether a statement made by law enforcement about the defendant's credibility or guilt, in the context of a recorded interview played for the jury at trial, is permissible. Courts in other jurisdictions have addressed and "have struggled with the issue of whether credibility statements made by interrogating officers in the course of a videotaped interrogation should be played for the jury."[30]

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[27] *State v. Gonzales, supra* note 26, 294 Neb. at 646, 884 N.W.2d at 117-18.

[28] See *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

[29] *State v. Elnicki*, 279 Kan. 47, 105 P.3d 1222 (2005).

[30] *State v. Cordova*, 137 Idaho 635, 640, 51 P.3d 449, 454 (Idaho App. 2002). See, also, *Lanham v. Com.*, 171 S.W.3d 14 (Ky. 2005); *State v. Gaudreau*, 139 A.3d 433 (R.I. 2016).

Some courts have found such statements to be inadmissible.[31] In *State v. Elnicki*,[32] the Supreme Court of Kansas considered whether the trial court erred in admitting statements by police in a recorded interview in which the police made such statements as "'you just told me a flat out lie,'" "'[y]ou're sitting here bullshitting me,'" and "'[y]ou're weaving a web of fucking lies, man,'" among others. The court began its analysis with the rule that a witness may not express an opinion on the credibility of another witness.[33] It concluded that it was error to allow the jury to hear these comments, explaining that "[a] jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics."[34] In light of this and other trial errors, the court reversed, and remanded for a new trial.[35]

Similarly, in *State v. Demery*,[36] the Supreme Court of Washington concluded in a divided opinion that it was error to admit a recorded interview in which police detectives suggested the defendant was lying.[37] The controlling opinion on the issue of whether admitting the statements was error wrote:

> The [plurality opinion] concludes a recorded expression of an officer's opinion that a suspect is lying is admissible at trial even though the same officer would not be permitted to offer such an opinion in live testimony.

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[31] *Com. v. Kitchen*, 730 A.2d 513 (Pa. Super. 1999); *Sweet v. State*, 234 P.3d 1193 (Wyo. 2010).

[32] *State v. Elnicki, supra* note 29, 279 Kan. at 51-52, 105 P.3d at 1226 (emphasis omitted).

[33] *State v. Elnicki, supra* note 29.

[34] *Id.* at 57, 105 P.3d at 1229.

[35] *State v. Elnicki, supra* note 29.

[36] *State v. Demery*, 144 Wash. 2d 753, 30 P.3d 1278 (2001).

[37] See, also, *State v. Cordova, supra* note 30 (explaining holding in *State v. Demery, supra* note 36); *Lanham v. Com., supra* note 30 (explaining holding in *State v. Demery, supra* note 36).

> I see no distinction between the two. It matters not whether the opinion was rendered in the context of an interrogation interview or in context of direct testimony in open court. The end result is the same: The jury hears the officer's opinion.[38]

Other courts have concluded that credibility statements by law enforcement in a recorded interview are generally admissible or are admissible in certain circumstances to provide context to the defendant's answers.[39] In *State v. O'Brien*,[40] the Supreme Court of Missouri concluded that a police officer's in-court testimony that he told the defendant in the interrogation that the officer thought the defendant was lying was not error. The court reasoned that "[t]he witness was not telling the jury that, in his opinion, the defendant is a liar. Rather, the witness was describing the give-and-take of his interrogation of" the defendant.[41]

Similarly, in *State v. Cordova*,[42] the Court of Appeals of Idaho considered whether the trial court erred in admitting a videotaped interview in which police stated that the victim was telling the truth and that the defendant was lying. In the video, one of the officers told the defendant that the officer was trained in detecting deception and could tell that the defendant was lying.[43] After reviewing case law from various jurisdictions on this issue, the court determined that

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[38] *State v. Demery, supra* note 36, 144 Wash. 2d at 767, 30 P.3d at 1286 (Sanders, J., dissenting).

[39] *U.S. v. Finley*, 477 F.3d 250 (5th Cir. 2007), *abrogated on other grounds, Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014); *State v. Boggs*, 218 Ariz. 325, 185 P.3d 111 (2008); *Lanham v. Com., supra* note 30; *State v. Castaneda*, 215 N.C. App. 144, 715 S.E.2d 290 (2011); *State v. Gaudreau, supra* note 30; *State v. Miller*, 341 Wis. 2d 737, 816 N.W.2d 331 (Wis. App. 2012).

[40] *State v. O'Brien*, 857 S.W.2d 212 (Mo. 1993).

[41] *Id.* at 221.

[42] *State v. Cordova, supra* note 30.

[43] *Id.*

the officer's comments that he was an expert in deception detection were not necessary to give context to the defendant's answers.[44] The court concluded that the officer's comments could have been easily redacted without harming the context of the defendant's later admissions. However, the court concluded that the officer's comments that the defendant was lying were admissible for the purpose of providing context to the defendant's inculpatory answers, but not as substantive evidence.[45] The court also concluded that the trial court's denial of the defendant's request for a limiting instruction was error, but concluded that the error in the trial was not prejudicial.[46]

Finally, the approach taken by the Supreme Court of Michigan in *People v. Musser*[47] was to decline to adopt a bright-line rule, but instead to analyze such statements under Michigan's existing rules of evidence. A detective's lengthy statements about the credibility of the victim were included in a recorded interview played for the jury.[48] The court first considered whether the statements violated the hearsay rule.[49] It concluded that the statements were not hearsay because they were not offered, and could not be offered, for the truth of the matter asserted (i.e., to prove that, in fact, the victim was telling the truth or the defendant was lying in the interview).[50]

Because the statements were not hearsay offered for their truth, but were offered for the separate purpose of "plac[ing] the defendant's statements in context for the jury," the court focused on the precise issue in the case:

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *People v. Musser*, 494 Mich. 337, 835 N.W.2d 319 (2013).

[48] *Id.*

[49] *Id.*

[50] *Id.*

> whether the rule precluding a witness from commenting on another person's credibility at trial is triggered by an interrogator's statements that are offered to provide context to a defendant's statements, rather than offered to prove the truth of the matter asserted, or whether the interrogator's statements that actually provide context to a defendant's statements have some probative value, unlike statements commenting on the credibility of another person that are offered for their truth.[51]

The court reviewed case law from other courts on this issue, noting that "other jurisdictions have come to divergent conclusions."[52]

[11] The conclusion reached by the court was that under the facts of the case, it was not necessary to adopt a bright-line rule prohibiting such statements, but, instead, the court would analyze the statements under the existing rules of evidence.[53] The court held that

> where the proponent of the evidence offers an interrogator's out-of-court statements that comment on a person's credibility for the purpose of providing context to a defendant's statements, the interrogator's statements are only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proffered purpose.[54]

To show the statements to be relevant and admissible, the court explained, the prosecution must do more than offer "a mechanical recitation . . . that an interrogator's statements are necessary to provide 'context' for a defendant's responses without explaining how the statements relate to the recited purpose."[55] Rather, the trial court must analyze

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[51] *Id.* at 351, 835 N.W.2d at 328-29.

[52] *Id.* at 351, 835 N.W.2d at 329.

[53] *People v. Musser, supra* note 47.

[54] *Id.* at 353-54, 835 N.W.2d at 330.

[55] *Id.* at 354-55, 835 N.W.2d at 330.

whether the statements are both material and probative. The court explained:

> Under these inquiries, if an interrogator's out-of-court statement is offered to provide context to a defendant's statement that is not "in issue," it follows that both the interrogator's and the defendant's statements are immaterial and, thus, not relevant. . . . Likewise, the interrogator's out-of-court statements or questions have no probative value if those statements or questions, when considered in relationship to a defendant's statements, do not actually provide context to the defendant's statements. . . . Accordingly, an interrogator's out-of-court statements must be redacted if that can be done without harming the probative value of a defendant's statements.[56]

Even if a statement is relevant, the court said, it may be excluded under Michigan's rule 403 if its "'probative value is substantially outweighed by the danger of unfair prejudice'" or other considerations.[57] Thus, trial courts must weigh the probative value of the statements in recorded interviews by law enforcement in providing context to a defendant's statements and the resulting prejudice to a defendant.[58] The court said that trial courts must give special consideration to the risk that juries may have a difficult time limiting consideration of the statements to their proper purpose and may give undue weight to the statements of a law enforcement officer.[59] Finally, the court said that when admitting such evidence, trial courts should give limiting instructions to the jury about the proper use of the evidence.[60]

The court concluded that the majority of the statements of the detective were not probative to provide context to

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[56] *Id.* at 355-56, 835 N.W.2d at 331.

[57] *Id.* at 356 n.15, 835 N.W.2d at 331 n.15 (quoting Mich. R. Evid. 403).

[58] *People v. Musser, supra* note 47.

[59] *Id.*

[60] *Id.*

the defendant's statements.[61] It determined that the limiting instruction given after the recording was played was insufficient, reversed the trial court's judgment, and remanded the cause for a new trial.[62]

We find the approach of the Michigan Supreme Court in *Musser*[63] to be the most persuasive. A rule that would render categorically inadmissible all statements by law enforcement in a recorded interview that happened to implicate the defendant's credibility would run the risk of excluding important and necessary context to the defendant's admissible responses. On the other hand, a rule that categorically allowed all such statements to be admitted would run the risk of allowing the admission of irrelevant and potentially unfair prejudicial statements. The approach articulated in *Musser* avoids both of these pitfalls. It also has the added virtue of not creating any new evidentiary rules, but, rather, analyzing these types of statements within the framework of the existing rules of evidence.

[12] We hold that statements by law enforcement officials on the veracity of the defendant or other witnesses, made within a recorded interview played for the jury at trial, are to be analyzed under the ordinary rules of evidence. Such commentary is not admissible to prove the truth of the matter asserted in the commentary. But it may be independently admissible for the purpose of providing necessary context to a defendant's statements in the interview which are themselves admissible. The police commentary must be probative and material in light of that permissible purpose of providing context to the defendant's responses.[64] And even statements that are otherwise admissible may be excluded under rule 403.[65]

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] See §§ 27-401 and 27-402.

[65] § 27-403.

Upon request, a defendant is entitled to a limiting instruction that such statements are to be considered only for the permissible purpose of providing context to the defendant's statements in the interview.[66]

[13] To be relevant, evidence must be probative and material.[67] Evidence is probative if it has any tendency to make the existence of a fact more or less probable than it would be without the evidence.[68] A fact is material if it is of consequence to the determination of the case.[69]

To determine whether a statement by a law enforcement official in a recorded interview is relevant for the purpose of providing context to a defendant's statement, we first consider whether the defendant's statement itself is relevant, whether it makes a material fact more or less probable. If the defendant's statement is itself relevant, then we must consider whether the law enforcement statement is relevant to provide context to the defendant's statement. To do this, we consider whether the defendant's statement would be any less probative in the absence of the law enforcement statement. If the law enforcement statement does not make the defendant's statement any more probative, it is not relevant. To be clear, by allowing admission, under certain circumstances, of law enforcement statements in recorded interviews that comment on the veracity of the defendant, we are not opening a "back door" to allow the admission of improper opinion testimony by simply labeling it as "context." Trial courts have a serious responsibility to ensure that statements are relevant for the permissible purpose of providing necessary context to a defendant's statements or that such statements do not run afoul of rule 403.

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[66] Neb. Evid. R. 105, Neb. Rev. Stat. § 27-105 (Reissue 2016).

[67] § 27-401.

[68] See *id.*

[69] See *id.*

Finally, we note that nothing about our holding today should be read to effect the operation of the rule of completeness, under which a party is entitled to admit the entirety of an act, declaration, conversation, or writing when the other party admits a part and when the entirety is "necessary to make it fully understood."[70]

(c) Application

Under our deferential abuse of discretion standard of review, and in light of the limiting instructions given, we conclude that the district court's admission of Howton's statements did not rise to the level of an abuse of discretion.

(i) Relevance

Howton's statements about Rocha's honesty or possession of the methamphetamine have minimal probative value for the only permissible purpose for which they could be admitted: to provide context for Rocha's statements. They would not be admitted to prove that Rocha was, in fact, being dishonest or guilty of knowingly possessing methamphetamine, which would invade the province of the jury.

First, we must consider whether Rocha's statements were relevant. Many of Rocha's statements were denials of ownership of the drugs or denials that he was being dishonest. Rocha's statements are relevant to the issue of whether he knowingly possessed the methamphetamine. But the relevance of Rocha's statements does not automatically render Howton's statements relevant or admissible.

Next, we must consider whether Howton's statements were relevant for the limited purpose of providing context to Rocha's statements. We consider whether Rocha's statements would be any less probative of a material fact in issue in the absence of Howton's statements. If Rocha's admissible

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[70] Neb. Evid. R. 106(1), Neb. Rev. Stat. § 27-106(1) (Reissue 2016). See, also, *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993).

statements are no less probative in the absence of Howton's statements' context (as compared to Rocha's statements with Howton's statements' context), then Howton's statements are not relevant. If Howton's statements have any probative value for the purpose of providing context to Rocha's statements, it is minimal.

(ii) Rule 403

Even relevant evidence is not automatically admissible. It must pass muster under rule 403. The probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

[14,15] The risk of unfair prejudice is heightened when the statements are made by a law enforcement officer.[71] In *State v. Gonzales*, we stated:

> [W]hen a prosecutor asserts his or her personal opinions, the jury might be persuaded by a perception that counsel's opinions are correct because of his position as prosecutor, rather than being persuaded by the evidence. The 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.[72]

Similarly, the opinion of a law enforcement officer carries with it the "imprimatur of the government" and can induce improper reliance by a jury. Admitting statements by a law enforcement officer calling into question a defendant's honesty and stating conclusions about a defendant's guilt carries with it a risk of unfair prejudice. The risk of unfair prejudice in the instant case is that the jury could have been influenced, based on Howton's statements, into believing that Rocha did knowingly possess the methamphetamine and that he was lying

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[71] Cf. *State v. Gonzales, supra* note 26.

[72] *Id.* at 646, 884 N.W.2d at 117-18. See, also, *People v. Musser, supra* note 47; *State v. Demery, supra* note 36 (Sanders, J., dissenting).

when he denied it, even though the statements were not admissible for that purpose.

But in considering the risk of unfair prejudice in a rule 403 analysis, we also consider the effect of limiting instructions given by the trial court. In this case, the district court instructed the jury that Howton's statements were "part of interview techniques and should not be considered as substantive evidence in any way in determining if . . . Rocha [was in] possession of the alleged controlled substance, nor should they be given any weight when considering the truthfulness of any statements made by . . . Rocha." Not only was this unambiguous instruction given, but it was given twice: once immediately before the video was shown to the jury and a second time with the other jury instructions. This instruction made clear to the jurors that they were not to consider Howton's statements for determining Rocha's guilt. It also explained that Howton's statements were merely an interview technique, making it less likely that the jurors would improperly rely on the statements based on Howton's aura of reliability as a law enforcement officer. While a limiting instruction or an instruction to disregard does not automatically eliminate any risk of unfair prejudice, it did mitigate the risk in this case.

(iii) Abuse of Discretion

While this is a close call, we cannot say, under our deferential standard of review, that it was an abuse of discretion for the district court to admit Howton's statements under a relevance and rule 403 analysis. These statements had minimal probative value, at best. And statements made by law enforcement carry a special risk of unfair prejudice because they carry the imprimatur of the government. But the limiting instruction twice given by the court reduced the risk of unfair prejudice from this evidence. While this case approaches the line and is fact specific, we do not conclude that the district court abused its discretion.

The State correctly points out that "there is nothing improper with the interrogation techniques in question."[73] We do not question the propriety of the interview technique used by Howton. Nor do we believe that Howton was doing anything but proper police work. But the propriety of an interview technique does not render the interrogator's statements automatically admissible in a court of law.[74] Our discussion here relates only to the admissibility of evidence, not the propriety of Howton's actions.

3. Denial of Motion to Suppress: Search of Vehicle

Rocha argues that the warrantless search of the vehicle violated his right to be free from unreasonable searches and seizures under the U.S. and Nebraska Constitutions. He argues that the district court erred in denying his motion to suppress the evidence found in the search of the vehicle.

(a) Standard of Review

[16,17] 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.[75] 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.[76] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[77]

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[73] Brief for appellee at 14.

[74] See *State v. Elnicki, supra* note 29.

[75] *State v. Rothenberger, supra* note 4.

[76] *Id.*

[77] *Id.*

The ultimate determination of probable cause to perform a warrantless search is reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.[78]

(b) Right Against Unreasonable Searches and Seizures

This court typically construes the enumerated rights in the Nebraska Constitution consistently with their counterparts in the U.S. Constitution as construed by the U.S. Supreme Court,[79] and we do so today.

[18,19] The ultimate touchstone of the Fourth Amendment, and article I, § 7, of the Nebraska Constitution, is reasonableness.[80] Searches and seizures must not be unreasonable. Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.[81]

[20] Among the exceptions to the warrant requirement are searches incident to a lawful arrest[82] and the "automobile exception."[83] Rocha argues that the warrantless search of his vehicle does not fall within either the search incident to lawful arrest exception or the automobile exception. The State focuses on the automobile exception, arguing that it does apply, but does not address the search incident to lawful arrest exception. As did the district court, we conclude that the

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[78] *State v. Dalland*, 287 Neb. 231, 842 N.W.2d 92 (2014).

[79] See, e.g., *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015); *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986). But see *State v. Havlat, supra* note 79 (Shanahan, J., dissenting).

[80] See *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). See, also, *State v. Rothenberger, supra* note 4.

[81] *Arizona v. Gant, supra* note 3.

[82] *Id.*

[83] *California v. Carney*, 471 U.S. 386, 390, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985).

search was justified under the automobile exception. We do not consider whether the search could have been justified as a search incident to lawful arrest.

(c) Automobile Exception

The automobile exception to the warrant requirement was first articulated by the U.S. Supreme Court in 1925 in the case *Carroll v. United States*.[84] Therein, the Court considered whether a warrantless search of an automobile, found to be smuggling illegal whisky and gin during the Prohibition Era, violated the Fourth Amendment.[85] While this was the first case to articulate the automobile exception, the Court noted that the First Congress—the same Congress that proposed the adoption of the Fourth Amendment—drew a distinction in law between searches of homes and searches of ships or movable vessels, with the latter not requiring a warrant.[86]

The Court held:

> [I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.[87]

A key rationale for the Court's holding was that in "a search of a ship, motor boat, wagon or automobile, for contraband goods, . . . it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[88] The mobility

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[84] *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

[85] *Id.*

[86] *Id.*

[87] *Id.*, 267 U.S. at 149.

[88] *Id.*, 267 U.S. at 153.

of automobiles continued to be the primary rationale behind the automobile exception.[89]

Rocha relies on *Coolidge v. New Hampshire*[90] in claiming that the search of his vehicle was not within the automobile exception. Therein, the Court stated the rule that "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'"[91] The Court examined the rationale for the automobile exception provided in *Carroll*, the mobility of automobiles and the risk that "'the car's contents may never be found again if a warrant must be obtained.'"[92] The Court concluded that the application of the automobile exception could not be justified under the facts of the case because "[t]here was no way in which [the defendant] could conceivably have gained access to the automobile after the police arrived on his property."[93]

Soon after *Coolidge* was decided, the Court distinguished the decision in *Cardwell v. Lewis*.[94] The Court said that because in *Coolidge*, the car "was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property."[95] It distinguished these facts from the facts of its case, in which "the automobile was seized from a public place where access was not meaningfully restricted."[96]

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[89] See, e.g., *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970).

[90] *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

[91] *Id.*, 403 U.S. at 474-75 (emphasis omitted).

[92] *Id.*, 403 U.S. at 460.

[93] *Id.*

[94] *Cardwell v. Lewis*, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974).

[95] *Id.*, 417 U.S. at 593.

[96] *Id.*

These early U.S. Supreme Court cases discussing the automobile exception relied primarily on the rationale of the mobility of automobiles and the risk that they might be driven away before a search could be conducted. But later cases articulated an additional rationale: the reasonable expectation of privacy in an automobile is less than in one's home.[97] Thus,

> [e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. . . .
>
> These reduced expectations of privacy derive . . . from the pervasive regulation of vehicles capable of traveling on the public highways.[98]

As the additional rationale for the automobile exception developed, the exception became more categorical and less dependent on the likelihood in each case that the automobile might be driven away. In *Michigan v. Thomas*,[99] the Court said:

> It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.

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[97] *Pennsylvania v. Labron*, 518 U.S. 938, 116 S. Ct. 2485, 135 L. Ed. 2d 1031 (1996); *California v. Carney, supra* note 83; *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *Cardwell v. Lewis, supra* note 94.

[98] *California v. Carney, supra* note 83, 471 U.S. at 391-92.

[99] *Michigan v. Thomas*, 458 U.S. 259, 261, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982). See, also, *California v. Carney, supra* note 83.

The Court has made clear that if probable cause and ready mobility are present, no additional showing of exigent circumstances is required.[100]

Rocha argues that exigent circumstances are still a viable requirement of the automobile exception. He relies on our decision in *State v. Neely*,[101] wherein we stated, relying on *Coolidge*[102] and other U.S. Supreme Court cases, that the automobile exception requires probable cause and exigent circumstances consisting of "the mobility of the automobile and the possibility that the suspect may take himself and the evidence in the vehicle out of the jurisdiction before a warrant can be obtained." We found that the warrantless search in that case was not within the automobile exception because there was no possibility the defendant could have moved the vehicle when it was stored at the police station and there were no circumstances preventing police from obtaining a warrant prior to searching the vehicle.[103]

Rocha attempts to distinguish *Maryland v. Dyson*,[104] in which the Court stated that there is no separate exigency requirement for the automobile exception so long as the vehicle is readily mobile and there is probable cause. In *State v. Alarcon-Chavez*,[105] we stated that the requirements of the automobile exception are probable cause and ready mobility of the vehicle. Rocha claims the ready mobility requirement is an exigent circumstance.

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[100] *Maryland v. Dyson*, 527 U.S. 465, 119 S. Ct. 2013, 144 L. Ed. 2d 442 (1999).

[101] *State v. Neely*, 236 Neb. 527, 536, 462 N.W.2d 105, 110 (1990).

[102] See *Coolidge v. New Hampshire, supra* note 90.

[103] *State v. Neely, supra* note 101.

[104] *Maryland v. Dyson, supra* note 100.

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

Rocha also cites cases[106] from other states which have continued to use the "two part requirement"[107] for the automobile exception even after *Dyson*. Some of these cases have adopted stricter requirements for the automobile exception under state law, continuing to require a showing of exigent circumstances. In some of these cases, exigent circumstances have been held to mean the vehicle was readily mobile and that "'it was not practicable under the circumstances to obtain a warrant.'"[108] But other jurisdictions have been entirely consistent with the test in *Dyson* and have required only ready mobility and probable cause. There is no additional requirement of the impracticability of obtaining a warrant.[109]

To the extent that Rocha argues that the "exigent circumstance"[110] of a readily mobile vehicle and probable cause are the requirements of the automobile exception, we agree. To the extent that Rocha argues that any *additional* showing of exigent circumstances is required, such as a showing that it was impracticable for the police to obtain a warrant under the circumstances, we disagree.

Rocha's argument seems to be premised on a very narrow application of the ready mobility requirement. He argues that

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[106] *State v. Wallace*, 80 Haw. 382, 910 P.2d 695 (1996); *State v. Conn*, 278 Kan. 387, 99 P.3d 1108 (2004); *State v. Elison*, 302 Mont. 228, 14 P.3d 456 (2000); *State v. Cooke*, 163 N.J. 657, 751 A.2d 92 (2000), *abrogated, State v. Witt*, 223 N.J. 409, 126 A.3d 850 (2015); *State v. Gomez*, 122 N.M. 777, 932 P.2d 1 (1997); *State v. Zwicke*, 767 N.W.2d 869 (N.D. 2009); *State v. Anderson*, 910 P.2d 1229 (Utah 1996); *State v. Bauder*, 181 Vt. 392, 924 A.2d 38 (2007); *State v. Tibbles*, 169 Wash. 2d 364, 236 P.3d 885 (2010).

[107] Brief for appellant at 39.

[108] *State v. Elison, supra* note 106, 302 Mont. at 244, 14 P.3d at 468. See, also, *State v. Bauder, supra* note 106; *State v. Tibbles, supra* note 106.

[109] See, *State v. Conn, supra* note 106; *State v. Howard*, 51 Kan. App. 2d 28, 339 P.3d 809 (2014) (citing *Maryland v. Dyson, supra* note 100); *State v. Zwicke, supra* note 106.

[110] Brief for appellant at 38.

"because [Rocha] was incapable of moving the [vehicle] or destroying evidence, officers should have obtained a warrant before searching the vehicle."[111] This argument focuses on Rocha's practical ability to move the vehicle in light of his arrest rather than on the inherent mobility of the vehicle as a functioning automobile.

Recently in *Alarcon-Chavez*, we analyzed the ready mobility requirement, concluding that "[t]he vehicle was operational and therefore readily movable" even though the defendant had already been arrested and presumably did not have access to the vehicle.[112]

Other state and federal courts have considered the ready mobility requirement and have generally focused the inquiry on the inherent mobility of the vehicle rather than whether the defendant or others actually had the ability to move the vehicle at the time of the search.[113] The 11th Circuit has said, "All that is necessary to satisfy th[e] element [of ready mobility] is that the automobile is operational."[114] In another case, the Second Circuit rejected an argument that the defendant's vehicle was not readily mobile, because the defendant had been taken away from the vehicle to the police station. The court said:

> Whether a vehicle is "readily mobile" within the meaning of the automobile exception has more to do with the inherent mobility of the vehicle than with the potential for the vehicle to be moved from the jurisdiction, thereby precluding a search. . . . The district court's reading of "ready mobility" is in error because the district court appeared to regard the actual ability of a driver or

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[111] *Id.*

[112] *State v. Alarcon-Chavez, supra* note 105, 284 Neb. at 334, 821 N.W.2d at 368.

[113] See, *Warrantless Searches and Seizures*, 45 Geo. L.J. Ann. Rev. Crim. Proc. 49 (2016); 79 C.J.S. *Searches* § 113 (2006).

[114] *U.S. v. Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003).

> passenger to flee immediately in the car, or the likelihood of hi[s] or her doing so, as a requirement for the application of the automobile exception.[115]

Relying on a case involving a warrantless search of a truck that was stuck in a ditch, the 10th Circuit said that the ready mobility inquiry does not focus on "'factual controversies regarding the degree to which a vehicle is or is not readily mobile, or whether its mobility has been or could be obstructed by the police.'"[116] The court noted that in the case cited, the truck was readily mobile because it "had not lost its *inherent* mobility" and because "[t]here was 'no evidence of permanent immobility.'"[117]

[21,22] Similarly, the Eighth Circuit has noted that "[i]t is the characteristic mobility of all automobiles, not the relative mobility of the car in a given case," that justifies the automobile exception.[118] The Eighth Circuit has also said that the test for ready mobility is whether the vehicle is "'readily capable' of 'being used on the highways'" and is "'stationary in a place not regularly used for residential purposes.'"[119]

Like federal courts, state courts have generally adopted a broad reading of the ready mobility requirement. The Supreme Court of Indiana has said:

> In light of the Supreme Court's recent emphatic statement in *Dyson*[120] that the automobile exception "does not have a separate exigency requirement," . . . we conclude that this exception to the warrant requirement under the Fourth Amendment does not require any additional

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[115] *U.S. v. Howard*, 489 F.3d 484, 493 (2d Cir. 2007).

[116] *U.S. v. Mercado*, 307 F.3d 1226, 1229 (10th Cir. 2002).

[117] *Id.* (emphasis in original).

[118] *U.S. v. Perry*, 925 F.2d 1077, 1080 n.4 (8th Cir. 1991). See, also, *United States v. Hepperle*, 810 F.2d 836 (8th Cir. 1987).

[119] *U.S. v. Holleman*, 743 F.3d 1152, 1158 (8th Cir. 2014) (quoting *California v. Carney, supra* note 83).

[120] *Maryland v. Dyson, supra* note 100.

> consideration of the likelihood, under the circumstances, of a vehicle being driven away. Rather, we understand the "ready mobility" requirement of the automobile exception to mean that all operational, or potentially operational, motor vehicles are inherently mobile, and thus a vehicle that is temporarily in police control or otherwise confined is generally considered to be readily mobile and subject to the automobile exception to the warrant requirement if probable cause is present. This broad understanding of "readily mobile" is also consistent with the recognition that, for Fourth Amendment purposes, an individual is deemed to have a reduced expectation of privacy in an automobile.[121]

The Supreme Court of Kentucky rejected the argument that "the ready mobility element is an exigency requirement that cannot be met when a defendant is already arrested."[122] The court instead concluded that "[r]eady mobility refers to the capability of using an automobile on the highways, not the probability that it will be used to do so," and that "a search of an automobile 'is proper even if the occupants or owners are taken into custody.'"[123] The Iowa Supreme Court has held that "sufficient exigency exists to justify a warrantless search of a readily mobile vehicle even after the vehicle has been impounded and removed to another location."[124]

The U.S. Supreme Court has appeared to adopt a broad reading of the ready mobility requirement. In *Thomas*, the Court said the justification for a warrantless search "does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven

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[121] *Myers v. State*, 839 N.E.2d 1146, 1152 (Ind. 2005) (citing *Pennsylvania v. Labron, supra* note 97). Accord *California v. Carney, supra* note 83.

[122] *Chavies v. Com.*, 354 S.W.3d 103, 111 (Ky. 2011).

[123] *Id.*

[124] *State v. Allensworth*, 748 N.W.2d 789, 797 (Iowa 2008).

away . . . during the period required for the police to obtain a warrant."[125] In *Pennsylvania v. Labron*,[126] the Court likewise held that the automobile exception applied even where the defendant had already been arrested when the search occurred and, thus, presumably did not pose any risk of moving his vehicle.

[23] In light of the overwhelming weight of authorities, we hold that the requirement of ready mobility for the automobile exception is met whenever a vehicle that is not located on private property is capable or apparently capable of being driven on the roads or highways. This inquiry does not focus on the likelihood of the vehicle's being moved under the particular circumstances and is generally satisfied by the inherent mobility of all operational vehicles. It does not depend on whether the defendant has access to the vehicle at the time of the search or is in custody, nor on whether the vehicle has been impounded. The purpose of the ready mobility requirement is to distinguish vehicles on public property from fixed, permanent structures, in which there is a greater reasonable expectation of privacy.

(d) Application

[24,25] In this case, the automobile exception clearly justifies the search of the vehicle which Rocha was driving. As the district court correctly concluded, Howton had probable cause to search the vehicle. Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[127] Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[128] The totality of the facts,

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[125] *Michigan v. Thomas, supra* note 99, 458 U.S. at 261.

[126] *Pennsylvania v. Labron, supra* note 97.

[127] *State v. Dalland, supra* note 78.

[128] *Id.*

including Rocha's "nervous" behavior, the residue found in Rocha's sweatshirt that appeared to be marijuana, and the suspected marijuana, drug paraphernalia, and digital scale found in Trejo's purse, provided the necessary probable cause for Howton to search the vehicle.

Additionally, the vehicle unquestionably was readily mobile, because Rocha had just driven it and it was not located on private property. Because the vehicle was readily mobile and because there was probable cause to search the vehicle, the search was permissible under the automobile exception and did not violate the U.S. and Nebraska Constitutions' prohibitions against unreasonable searches and seizures.

4. Overruling of Objection and Motion for Mistrial: Questioning by Prosecution Regarding Lack of DNA and Fingerprint Testing of Evidence by Defense

Rocha argues that the district court erred in overruling his objection to questioning of Howton by the prosecution during the trial as to whether anyone besides the Scottsbluff Police Department had done any DNA and fingerprint testing of the evidence. The question and answer occurred on redirect examination after the defense elicited on cross-examination that Howton had not requested DNA and fingerprint testing on the evidence found in the vehicle. The question and answer appear to allude to the fact that Rocha had not done his own independent testing of the evidence to show that his fingerprints and DNA were not on the items containing methamphetamine. After Rocha's objection was overruled, he made a motion for mistrial, which the court denied. He argues that the questioning impermissibly switched the burden of proof.

(a) Standard of Review

[26,27] Whether to grant a motion for mistrial is within the trial court's discretion, and this court will not disturb its

ruling unless the court abused its discretion.[129] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[130]

(b) Burden of Proof in Criminal Cases

[28] Under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the Nebraska Constitution, in a criminal prosecution, the State must prove every ingredient of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming an ingredient upon proof of the other elements of the offense.[131]

Because the burden of proof always remains with the State, it cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence.[132] The exception to this rule is when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, of self-defense, and of others, relying on facts that could be elicited only from a witness who is not equally available to the State.[133]

The Supreme Court of Florida faced a similar situation in *Hayes v. State*.[134] In that case, the defense brought out on direct examination that the State had never requested testing of certain bloodstains.[135] On redirect examination, the trial judge

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[129] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[130] *Id.*

[131] *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). See *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

[132] See *Jackson v. State*, 575 So. 2d 181 (Fla. 1991).

[133] *Id.*

[134] *Hayes v. State*, 660 So. 2d 257 (Fla. 1995).

[135] *Id.*

allowed the State, over an objection, to inquire as to whether the defense had requested its own testing of the bloodstains, which it had not.[136] The court found that the question and answer were improper and prejudicial because they may have led the jury to believe the defendant had an obligation to test the evidence in order to prove his innocence.[137]

We reject the State's argument that Rocha "opened the door" to the questioning of Howton about Rocha's failure to conduct his own DNA and fingerprint testing. While a defendant may invite the State to explain why it chose not to submit certain items for testing, "a defendant in a criminal case can never 'open the door' to shift the burden of proof."[138] A defendant is entitled to inquire about weaknesses in the State's case, but this does not open the door for the State to point out that the defendant has not proved his or her innocence.

This case is akin to *Hayes*.[139] The prosecution's question and Howton's answer had the risk of misleading the jury into thinking that Rocha had an obligation to prove that his fingerprints and DNA were not on the vials containing methamphetamine. Rocha did not open the door to this questioning by raising the State's failure to conduct such testing. The prosecution properly elicited testimony from Howton why he did not have the evidence tested for DNA and fingerprints, but it went too far when it asked about whether "anyone else" (i.e., Rocha) had it tested.

[29] However, the district court did not abuse its discretion by denying Rocha's motion for a mistrial as a result of the prosecution's questioning. The court instructed the jury to disregard the testimony in its entirety and made clear to the jury that "Rocha has pleaded not guilty and is presumed to

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[136] *Id.*

[137] *Id.*

[138] *People v. Beasley*, 384 Ill. App. 3d 1039, 1048, 893 N.E.2d 1032, 1040, 323 Ill. Dec. 558, 566 (2008).

[139] *Hayes v. State, supra* note 134.

be innocent" and that "[t]he State's burden to prove each element of a crime charged never shifts to a defendant." Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[140] Under our abuse of discretion standard of review, we conclude that the questioning and testimony, in light of the jury instructions, did not deprive Rocha of a fair trial.

5. Denial of Request for Jury Instruction: Lesser-Included Offense

Rocha argues that the district court erred in denying his request to instruct the jury on the lesser-included offense of *attempted* possession of a controlled substance. The district court denied the request, because it "didn't think the evidence warranted a lesser included attempt in this particular case."

(a) Standard of Review

[30] Whether the jury instructions given by a trial court are correct is a question of law.[141] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[142]

(b) Jury Instructions: Lesser-Included Offenses

[31] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[143]

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[140] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

[141] *State v. Rothenberger, supra* note 4.

[142] *Id.*

[143] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[32-34] To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.[144] The test for determining whether a crime is a lesser-included offense is whether the offense in question cannot be committed without committing the lesser offense.[145] Where a crime is capable of being attempted, an attempt to commit such a crime is a lesser-included offense of the crime charged.[146] Every completed crime necessarily includes an attempt to commit it.[147]

> A person shall be guilty of an attempt to commit a crime if he or she:
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> . . . .
>
> (b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.[148]

Conduct is not to be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent.[149] Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.[150]

[35,36] A person 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.[151] Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by

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[144] *Id.*

[145] *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003).

[146] See *id.*

[147] *Id.*

[148] Neb. Rev. Stat. § 28-201(1) (Cum. Supp. 2014).

[149] § 28-201(3); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

[150] *Id.*

[151] *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011); NJI2d Crim. 4.2.

direct or circumstantial evidence.[152] To be guilty, the defendant must possess the controlled substance "knowingly or intentionally."[153]

[37] 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.[154]

The district court did not err by denying Rocha's request for a jury instruction on the lesser-included offense of attempted possession of a controlled substance, because the evidence did not produce a rational basis for acquitting him of the greater offense of possession but convicting him of the lesser offense of attempted possession.

Rocha argues that the facts could support a conviction of attempted possession but not actual possession. He correctly states that "[t]he issue at trial was whether [he] actually knew the [Wyoming canister] contained methamphetamine."[155] He argues that the jury could have found that because he took the Wyoming canister as collateral for a $700 loan, he may not have known, but merely suspected, that it contained methamphetamine and thus was engaging in a substantial step toward possessing a controlled substance.

As the criminal attempt statute makes clear, a person commits an attempted crime when he or she "[i]ntentionally engages in *conduct*" that "constitutes a substantial step" toward the completion of the crime.[156] Rocha's argument that the jury may have found that he suspected, but did not know, that the

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[152] *State v. Howard, supra* note 151.

[153] Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2014).

[154] *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015).

[155] Brief for appellant at 47.

[156] § 28-201(1)(b) (emphasis supplied).

canister contained methamphetamine is an argument that his state of mind constituted a substantial step toward the necessary state of mind for the crime of possession (knowledge or intent). This argument confuses the "mens rea"[157] and "actus reus"[158] components of criminal law.

Rocha's knowledge whether the Wyoming canister contained methamphetamine was the primary issue at trial, because his knowledge was determinative of whether he "knowingly [and] intentionally"[159] possessed the controlled substance, the mens rea component of the crime. Whether he possessed the methamphetamine, the actus reus component, was not the primary issue, because it was undisputedly found in the vehicle over which he had control.

To be guilty of an attempt, a person must *intentionally* engage in conduct constituting a substantial step toward the completion of the underlying crime. An attempted crime involves intent, the mens rea, and conduct that is a substantial step toward the completed crime, the actus reus. But if Rocha had the intent to possess or the intent to attempt to possess the methamphetamine, then he would be guilty of actual possession, not just attempted possession, because the methamphetamine was under his control. The facts in this case do not support the conclusion that Rocha could be guilty of attempted possession but not possession.

Because an instruction as to attempted possession of a controlled substance was not warranted under the facts in

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[157] Black's Law Dictionary 1134 (10th ed. 2014) (defining term as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime").

[158] *Id.* at 44 (defining term as "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability" and "[t]he voluntary act or omission, the attendant circumstances, and the social harm caused by a criminal act, all of which make up the physical components of a crime").

[159] See § 28-416(3).

this case, the district court did not err in denying Rocha's requested instruction.

V. CONCLUSION

Because there was insufficient evidence to show when Rocha's driver's license was suspended, we vacate his conviction for driving under suspension. We reject all of his other assignments of error, or find that they constitute harmless error. We affirm the judgment of the district court in all other respects.

Affirmed in part, and in part vacated.

Heavican, C.J., not participating.

In re Interest of Noah B. et al., children under 18 years of age. State of Nebraska, appellant, v. Griel B. and Michaela B., appellees.

891 N.W.2d 109

Filed February 3, 2017. No. S-16-031.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** The trial court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
3. **Judgments: Res Judicata: Collateral Estoppel: Appeal and Error.** The applicability of claim and issue preclusion is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues preserved for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), there are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which 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.
6. ____: ____. Numerous factors determine when an order affects a substantial right for purposes of appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.

7. **Final Orders.** Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.
8. **Juvenile Courts: Minors.** The State's right in juvenile proceedings is derived from its parens patriae interest, and it is pursuant to that interest that the State has enacted the Nebraska Juvenile Code.
9. ____: ____. The State has a right to protect the welfare of its resident children.
10. **Final Orders: Jurisdiction.** An order dismissing a supplemental petition in its entirety with no leave to amend is a final order when it prevents the State from pursuing adjudication and disposition on additional grounds.
11. **Judgments: Jurisdiction: Res Judicata.** Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
12. **Res Judicata.** The doctrine of claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
13. ____. The doctrine of claim preclusion rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
14. **Judgments: Collateral Estoppel.** Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
15. **Res Judicata: Collateral Estoppel.** Whether the doctrine of either claim preclusion or issue preclusion applies in any given case is necessarily fact dependent.
16. **Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.
17. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

18. **Motions to Dismiss: Summary Judgment: Pleadings.** If, on a motion to dismiss for failure to state a claim, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and the parties must be given reasonable opportunity to present all material made pertinent to such a motion.
19. **Judicial Notice: Motions to Dismiss: Rules of the Supreme Court: Summary Judgment: Pleadings.** A court may take judicial notice of matters of public record without converting a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) into a motion for summary judgment.
20. **Res Judicata: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** As a general proposition, it will be a rare case where the face of a pleading contains the facts necessary to permit a court to determine the applicability of claim preclusion on a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6).
21. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
22. **Juvenile Courts: Res Judicata.** The doctrine of claim preclusion cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time.
23. ____: ____. The policies of finality and judicial efficiency advanced by the doctrine of claim preclusion must, when necessary, give way when strict application of the doctrine would frustrate the central goal of protecting the welfare of children.
24. ____: ____. The doctrine of claim preclusion should not be strictly applied in abuse and neglect cases when doing so would fail to protect children from continuing abuse or neglect.
25. **Juvenile Courts: Jurisdiction: Res Judicata.** The best interests of Nebraska's children cannot be protected by a technical application of claim preclusion that bars the State from filing a supplemental petition seeking to adjudicate continuing allegations of abuse and neglect, simply because the State knew about such allegations previously and did not initially seek adjudication on that basis.
26. ____: ____: ____. The State does not have unfettered authority to adjudicate abuse and neglect allegations in a piecemeal fashion, free from the constraints of claim preclusion. Claim preclusion applies in abuse and neglect cases, but when a supplemental petition seeks adjudication on grounds not alleged in a prior adjudication, claim preclusion will not limit the proof to only facts or evidence that was not considered in, or which came into being after, the prior adjudication proceeding.

27. **Juvenile Courts: Jurisdiction: Res Judicata: Evidence: Proof.** If, in a supplemental petition, the State relies solely on evidence known at the time of a prior adjudication, the doctrine of claim preclusion will apply and bar the State from proceeding. If, however, the State relies on evidence from the time period after the prior adjudication to prove the allegations of the supplemental petition, the doctrine of claim preclusion will not bar the proof, even if the new evidence is used in conjunction with evidence known at the time of the prior adjudication.
28. **Juvenile Courts.** The welfare of Nebraska's children demands that courts place greater emphasis on protecting them from continuing abuse and neglect than on strict application of a judicial policy designed to reduce repeat litigation.

Appeal from the Separate Juvenile Court of Douglas County: Wadie Thomas, Judge. Vacated and remanded for further proceedings.

Donald W. Kleine, Douglas County Attorney, Patrick McGee, Anthony Hernandez, and Megan Furey, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Matthias J. Kraemer for appellee Griel B.

Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellee Michaela B.

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

Stacy, J.

The primary question presented in this appeal is how the doctrines of claim preclusion and issue preclusion apply in an abuse and neglect proceeding when the State seeks to assert supplemental grounds for adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013). On this record, we conclude the juvenile court erred when it dismissed the State's supplemental petition, finding it was barred by claim and issue preclusion. We vacate the order of dismissal and remand the matter for further proceedings.

BACKGROUND

Original Petition Alleging Physical Abuse

Griel B. and Michaela B. are the biological parents of Noah B., Cheyenne B., and Ciara B. Noah was born in 1998, Cheyenne was born in 1999, and Ciara was born in 2001.

On March 17, 2014, the State filed a petition alleging the children came within the meaning of § 43-247(3)(a), in that Griel subjected them to inappropriate physical contact and Michaela failed to protect them from inappropriate physical contact. On the same date, the State filed an ex parte motion for temporary custody of the children. The motion was granted.

On May 30, 2014, the Nebraska Department of Health and Human Services filed an ex parte motion to suspend contact between the parents and children. An affidavit attached to the motion alleged that both Cheyenne and Ciara had made sexual abuse allegations against Griel during forensic interviews. At the hearing on the motion, a caseworker testified that both Cheyenne and Ciara had reported being sexually abused by Griel. In an order entered July 2, the court granted the motion and suspended Griel's contact with all the children.

The matter proceeded to adjudication on the original petition alleging physical abuse; the State did not seek leave to amend the petition to add sexual abuse as a factual basis for adjudication under § 43-247(3)(a). The adjudication hearing took place over a 3-day period. Noah and Cheyenne both testified, but Ciara did not. The record shows Ciara is a child with cognitive disabilities resulting from a stroke or head injury.

Noah testified that he and his sisters had been physically and emotionally abused by Griel. Cheyenne also testified that she and her siblings had been physically abused by Griel, and in addition, she testified that Griel had sexually abused her on multiple occasions before she was removed from the family home. The first day of trial recessed with Cheyenne on the witness stand.

When cross-examination resumed 2 weeks later, Cheyenne recanted her earlier testimony. On redirect, Cheyenne admitted she had talked with her parents the previous evening, and further admitted she wanted to go back home with them. Cheyenne was asked, "Do you think that coming in today and saying these allegations didn't happen will get you to go home?" She replied, "I don't know." The State attempted to show that she had changed her testimony after having unsupervised contact with her parents in violation of a court order. Specifically, the State questioned Michaela regarding contact with Cheyenne the night before trial, but Michaela objected to the questioning on Fifth Amendment grounds. The court sustained the objection, reasoning that "she has a qualified right to remain silent as to anything that might tend to show she committed a crime [and w]itness tampering is a crime."

After the State rested its case, neither Griel nor Michaela presented evidence. The State focused its closing argument on the evidence adduced regarding allegations of physical abuse, and argued it had proved such allegations. The juvenile court found all three children were within the meaning of § 43-247(3)(a) as to both parents due to physical abuse. In its written order, the court made no specific findings regarding sexual abuse, but found Cheyenne was "not a credible witness" and stated it gave "no credence" to her testimony. All three children were placed in the custody of the Department of Health and Human Services and ordered to be placed outside the home. No appeal was taken from this adjudication.

The dispositional order articulated a permanency objective of reunification with a concurrent plan of guardianship. The court also adopted a case plan which included supervised visitation, family therapy, and a requirement that Griel and Michaela complete a parenting assessment. In the months after the adjudication, Cheyenne and Ciara continued to tell providers and others that Griel had sexually abused them before they were removed from the family home.

Supplemental Petition Alleging Sexual Abuse

On November 4, 2015, the State filed a supplemental petition alleging all three children were within the meaning of § 43-247(3)(a), because Griel had subjected one or more of them to inappropriate sexual contact and Michaela had failed to protect them from such contact. The supplemental petition did not allege specific dates or timeframes regarding the alleged sexual abuse.

The State also filed a notice of intent to present hearsay testimony.[1] This notice identified some of the evidence the State intended to offer in support of its supplemental petition. That evidence included recent statements made by Ciara to several persons involved in her care reporting that Griel touched her inappropriately before the children were removed from the home. The evidence also included recent statements made by Cheyenne to her foster parent and her psychiatrist reporting that Griel sexually abused her and Ciara before the girls were removed from the family home. Summarized, the State's notice showed it intended to offer hearsay statements which were made after the original adjudication but which related to incidents of sexual abuse that occurred before the adjudication and before the children were removed from the home.

Motion to Dismiss

Griel moved to dismiss the supplemental petition pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) (rule 12(b)(6)), alleging it failed to state a claim upon which relief could be granted, because the allegations raised therein were, or could have been, litigated in the prior adjudication and were barred by the doctrines of claim preclusion and issue preclusion. Alternatively, Griel moved to strike the supplemental petition. Michaela filed similar motions.

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[1] See Neb. Rev. Stat. § 27-803(7) (Reissue 2016).

At the hearing on the parents' motions, all parties referred extensively to the record and the prior proceedings, but offered no evidence. Griel and Michaela argued the supplemental petition was barred by claim and issue preclusion, because the allegations of sexual abuse were known to all the parties before the initial adjudication hearing and some evidence of sexual abuse was adduced from Cheyenne during the first adjudication hearing.

The State opposed the motions to dismiss on several grounds. First, it argued that even under a traditional application of claim preclusion, the issue of sexual abuse was not alleged or tried on the merits in the first adjudication, particularly as regards Ciara, who did not testify. The State acknowledged testimony of sexual abuse had been elicited from Cheyenne during the first adjudication hearing, but argued that the court made no findings regarding sexual abuse and there were no dispositional orders entered addressing sexual abuse.

The State's primary argument was that the doctrines of claim and issue preclusion apply differently "in matters concerning the best interest of children." The State relied on the cases of *In re Interest of V.B. and Z.B.*[2] and *In re Interest of Marcus W. et al.*[3] for the proposition that claim and issue preclusion cannot settle the question of a child's welfare for all time to come. The State argued that when a supplemental petition is filed, claim preclusion does not limit the proof to only facts or evidence which was not considered in, or which came into being after, the first adjudication. The State argued that after the first adjudication hearing, additional evidence of prior sexual abuse was discovered and prompted the State to conclude it was in the children's best interests to seek additional

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[2] *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 370 N.W.2d 119 (1985).

[3] *In re Interest of Marcus W. et al.*, 11 Neb. App. 313, 649 N.W.2d 899 (2002).

grounds for adjudication. The State advised the court that in addition to the recent disclosures of sexual abuse contained in the State's notice of intent to present hearsay statements, there was evidence that after the initial adjudication, Griel asked Cheyenne during a visit whether she "would still have a desire" to have sexual contact with him and Ciara reported being afraid that once visits were no longer supervised, Griel would subject her to more sexual contact. The State argued that "all of these disclosures, in combination, present sufficient evidence to now move forward with an adjudication as to inappropriate sexual contact." The State concluded by arguing, "There [is] a need for new dispositional orders, as witnesses would testify that the children have been acting out due to sexual abuse and it would be in the best interest of the children not to bar this proceeding."

The trial court took judicial notice of several prior pleadings and orders, and also indicated it "kind of remember[ed]" some of the testimony from the first adjudication and Cheyenne's recanting of her testimony. Briefing was requested, and the matter was taken under advisement.

In an order entered December 10, 2015, the court granted the parents' motions and dismissed the State's supplemental petition in its entirety, finding it was barred by the doctrines of claim and issue preclusion. The State timely appealed, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

ASSIGNMENTS OF ERROR

The State assigns, restated and consolidated, that the juvenile court erred in dismissing the supplemental petition on the bases of claim preclusion and issue preclusion.

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[4] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[5]

[2] The trial court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[6]

[3] The applicability of claim and issue preclusion is a question of law.[7] On a question of law, an appellate court reaches a conclusion independent of the court below.[8]

ANALYSIS

We begin by noting that in the past, claim preclusion and issue preclusion were referred to as res judicata and collateral estoppel, respectively.[9] We have expressed a preference for using the modern terminology,[10] and we therefore use the terms "claim preclusion" and "issue preclusion" in our analysis of the issues presented.

Final Order

[4] In a juvenile case, as in any other appeal, before reaching the legal issues preserved for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter.[11] Griel and Michaela contend we lack jurisdiction to decide this case, because the order dismissing the supplemental petition was not a final, appealable order.

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[5] *In re Interest of Alec S.*, 294 Neb. 784, 884 N.W.2d 701 (2016).

[6] *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[7] *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[8] *Id.*

[9] *Id.*

[10] See *id.*

[11] *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015).

[5] Our jurisdiction to review the juvenile court's December 10, 2015, order depends on whether it is a final order.[12] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), there are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which 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.[13] The first and third categories of final order are not implicated here. But a proceeding before a juvenile court is a special proceeding for appellate purposes,[14] so we must determine whether the order dismissing the State's supplemental petition affected a substantial right.

[6,7] Numerous factors determine when an order affects a substantial right for purposes of appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[15] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[16] Whether the effect of an order is substantial depends on "'"whether it affects with finality the rights of the parties in the subject matter."'"[17]

[8,9] The State's right in juvenile proceedings is derived from its parens patriae interest,[18] and it is pursuant to that interest that the State has enacted the Nebraska Juvenile Code.[19] The State has a right to protect the welfare of its resident

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[12] See Neb. Rev. Stat. § 43-2,106.01 (Reissue 2016).

[13] *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012); *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[14] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[15] *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

[16] *Id.*

[17] *Id.* at 581, 879 N.W.2d at 33.

[18] *In re Interest of Karlie D., supra* note 13.

[19] *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

children,[20] and we have observed that "[o]ne would be hard pressed to cite a governmental interest of greater import."[21] This right is especially prominent in juvenile adjudications, because the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child.[22]

[10] The December 10, 2015, order dismissed the supplemental petition in its entirety with no leave to amend, thus foreclosing the State from pursuing adjudication and disposition on grounds of sexual abuse, and preventing the State from seeking to protect the children from such abuse. We conclude, on these facts, that the order of dismissal affected a substantial right of the State and is a final, appealable order. We proceed to consideration of the merits.

Dismissal of Supplemental Petition

[11-13] The juvenile court dismissed the supplemental petition, finding it was barred by the doctrines of claim preclusion and issue preclusion. Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[23] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[24] The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.[25]

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[20] *In re Interest of Karlie D., supra* note 13.

[21] *In re Interest of R.G., supra* note 19, 238 Neb. at 418, 470 N.W.2d at 790.

[22] *In re Interest of Karlie D., supra* note 13.

[23] *In re Interest of Alan L.*, 294 Neb. 261, 882 N.W.2d 682 (2016).

[24] *Id.*

[25] *Id.*

[14] Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[26]

[15-19] Whether either preclusion doctrine applies in any given case is necessarily fact dependent. In this case, Griel and Michaela raised the applicability of claim and issue preclusion via motions to dismiss under rule 12(b)(6). Because a rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.[27] Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[28] If, on a motion to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court,"[29] the motion shall be treated as one for summary judgment and the parties must be given reasonable opportunity to present all material made pertinent to such a motion.[30] However, a court may take judicial notice of matters of public record without converting a rule 12(b)(6) motion to dismiss into a motion for summary judgment.[31]

[20] As a general proposition, it will be a rare case where the face of a pleading contains the facts necessary to permit a court to determine the applicability of claim preclusion on a

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[26] *Hara v. Reichert, supra* note 7.

[27] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

[28] *Id.*

[29] Neb. Ct. R. Pldg. § 6-1112(b).

[30] See *DMK Biodiesel v. McCoy, supra* note 27. See, also, *In re Adoption of Kenten H., supra* note 6.

[31] *Id.*

motion to dismiss under rule 12(b)(6).[32] This is not that case. The supplemental petition did not allege specific dates or timeframes regarding the alleged sexual abuse, and made no reference to the earlier adjudication proceedings. On its face, it contained no facts relevant to the preclusion analysis.

The juvenile court took judicial notice of certain prior filings in the case, and we have said that when such filings are matters of public record, they can be judicially noticed without converting a motion to dismiss into a motion for summary judgment.[33] However, our review of the record shows that the court considered facts and evidence beyond any matters of public record which it judicially noticed.

As noted, the State presented to the court a notice of intent to offer hearsay evidence and, in doing so, argued as a matter of fact that both Cheyenne and Ciara had made disclosures of sexual abuse after the original adjudication. The State also informed the court it had additional evidence related to statements made by Griel to Cheyenne during visitations and by Ciara after the original adjudication. None of these "facts" could properly be considered by the court in the context of deciding a motion to dismiss.

In its written order dismissing the supplemental petition, the court found that "the State as well as all other parties to this case were aware of the sexual abuse allegations involving the minor children . . . prior to the [first] adjudication in this matter." The court further found that in the first adjudication, "the State called the minor child, Cheyenne as a witness and after she extensively testified to the alleged sexual abuse by her father, Cheyenne inexplicably recanted and admitted that she had lied about the allegations of abuse including sexual abuse." And the court also made a finding that "the State certainly could have called the minor child, Ciara as a witness,

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[32] See John P. Lenich, Nebraska Civil Procedure § 8:16 (2008) (applicability of claim preclusion can be raised in motion for summary judgment, and evidence should be offered to establish defense).

[33] *In re Adoption of Kenten H., supra* note 6.

but it made a tactical decision not to call her." It is not clear from the record what the court relied upon in making these findings. It is clear from our review of the record, however, that the court could not have found the parties were aware of the specific sexual abuse allegations the State sought to raise in the supplemental petition without looking at matters outside the pleadings and prior court records.

On the record before us, we conclude the juvenile court erred by not converting the motions to dismiss into motions for summary judgment and allowing both parties an opportunity to produce evidence supporting their arguments. We do not comment on whether the applicability of claim and issue preclusion could be determined under a summary judgment standard, but hold only that it was error here to consider matters beyond the pleading and matters of public record when ruling on the motion to dismiss. We therefore vacate the order of dismissal and remand the matter for further proceedings consistent with this opinion.

Claim Preclusion in Child Welfare Cases

[21] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[34] Because the issues raised in this appeal regarding the applicability of claim preclusion are likely to recur on remand, we take this opportunity to more fully explain how that doctrine applies in abuse and neglect cases such as this.

[22] We have considered claim preclusion in the context of successive child custody hearings,[35] successive commitment hearings in juvenile delinquency proceedings,[36] and successive parental termination proceedings.[37] In all such contexts, we

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[34] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

[35] *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984).

[36] *In re Interest of Alan L., supra* note 23.

[37] *In re Interest of V.B. and Z.B., supra* note 2.

have cautioned that "'the doctrine of [claim preclusion] cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time.'"[38] This same caution applies in the context of successive adjudications in abuse and neglect cases.

Several other jurisdictions have examined how the doctrine of claim preclusion should be applied in child welfare cases.[39] In *People ex rel. L.S.*,[40] the South Dakota Supreme Court recognized the doctrine is premised on two maxims: (1) A person should not be twice vexed for the same cause, and (2) it is for the public good that there be an end to litigation. It also noted that claim preclusion seeks to promote judicial efficiency by preventing repetitive litigation over the same dispute.[41] The South Dakota court reasoned, however, that "it is important to consider the nature of abuse and neglect proceedings. The protection of children from continuing abuse and neglect is not the type of needless litigation contemplated by the doctrine."[42] It thus articulated that "when it comes to protecting children [claim preclusion] should be cautiously applied."[43] According to the South Dakota Supreme Court, a "hyper-technical application of [claim preclusion] is simply not appropriate" in child welfare cases.[44] This is so, because concern for children's

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[38] *In re Interest of Alan L., supra* note 23, 294 Neb. at 279, 882 N.W.2d at 694. Accord *In re Interest of V.B. and Z.B., supra* note 2.

[39] See, e.g., *L.M. v. Shelby County Dept. of Human Res.*, 86 So. 3d 377 (Ala. Civ. App. 2011); *Kent v. Dept. of Health & Soc. Services*, 233 P.3d 597 (Alaska 2010); *In re Juvenile Appeal (83-DE)*, 190 Conn. 310, 460 A.2d 1277 (1983); *In re J'America B.*, 346 Ill. App. 3d 1034, 806 N.E.2d 292, 282 Ill. Dec. 317 (2004); *People ex rel. L.S.*, 721 N.W.2d 83 (S.D. 2006); *State in Interest of J.J.T.*, 877 P.2d 161 (Utah App. 1994).

[40] *People ex rel. L.S., supra* note 39.

[41] *Id.*

[42] *Id.* at 90.

[43] *Id.*

[44] *Id.* at 92.

welfare "demands that we place greater emphasis on their protection than on a judicial policy against repeat litigation. To hold otherwise is to turn our legal process for protecting abused and neglected children into a hollow ritual."[45]

Other courts have expressed similar caution about mechanically applying claim preclusion in child welfare cases. According to the Connecticut Supreme Court,

> [t]he judicial doctrines of [claim preclusion and issue preclusion] are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. The doctrines of preclusion, however, should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.[46]

The Utah Court of Appeals has also expressed reluctance to apply claim preclusion in child welfare cases, stating:

> A . . . fundamental question . . . is whether the judicial doctrine of [claim preclusion] has any application in proceedings involving the welfare of children. Mindful of the unique nature of child custody and related proceedings, we share the concerns expressed by the courts which have recognized that a hyper-technical application of [claim preclusion] is improper in adjudications where the welfare of children is at stake. Considerations regarding a child's welfare are rarely, if ever, static. . . .
>
> . . . In one sense, each day a child is left in an unsafe or unhealthy environment represents a "new" basis for

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[45] *Id.*

[46] *In re Juvenile Appeal (83-DE), supra* note 39, 190 Conn. at 318, 460 A.2d at 1282.

> judicial concern, and it is this continued threat to a child's welfare that merits the court's continuing jurisdiction and periodic review. The best interests of a child usually cannot be determined from a single incident, or even a series of incidents considered in isolation. Rather, to effectively determine the best interests of a child, a court must be free from the imposition of artificial constraints that serve merely to advance the cause of judicial economy.[47]

We find the concerns expressed by these courts to be compelling. And we note that Nebraska appellate courts have also limited the application of claim and issue preclusion in child welfare cases.

In *In re Interest of V.B. and Z.B.*,[48] the State attempted to terminate a couple's parental rights. After conducting an evidentiary hearing, the court found there was not sufficient evidence to terminate. About 1 year later, the State filed a supplemental petition and again sought to terminate the couple's parental rights. The couple argued the doctrine of claim preclusion barred the court from considering any evidence in support of the second petition that was adduced at the hearing on the first petition for termination. We noted that we had addressed a similar issue in a child custody case, and there reasoned:

> "A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of [claim preclusion] cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say that 'circumstances have changed' when the order is no longer in the children's interest."[49]

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[47] *State in Interest of J.J.T., supra* note 39, 877 P.2d at 163-64.

[48] *In re Interest of V.B. and Z.B., supra* note 2.

[49] *Id.* at 372, 370 N.W.2d at 121, quoting *Marez v. Marez, supra* note 35.

In *In re Interest of V.B. and Z.B.*, we found this rationale applied to parental termination cases as well. We held that "[w]hen a second termination proceeding is not itself barred, the proof is not limited by [claim preclusion or issue preclusion] principles to facts or evidence which was not considered in, or which came into being after, the first proceeding."[50] We explained that in juvenile proceedings claim preclusion prevented a party in a second proceeding from relying solely on evidence it knew of at the time of the prior proceeding, but that it was proper to use the prior evidence in a second proceeding in conjunction with new evidence.[51] We recently held this same principle applies when the State files successive motions to change a juvenile's disposition in delinquency proceedings.[52]

The Nebraska Court of Appeals has also limited the application of claim preclusion in the context of a juvenile dependency proceeding that involved a successive motion to terminate parental rights.[53] In *In re Interest of Marcus W. et al.*,[54] the State unsuccessfully sought to terminate a mother's parental rights based on allegations that she substantially and continuously or repeatedly neglected her children and refused to provide them necessary care. Later, the State sought to terminate the mother's parental rights based on an allegation that she had a mental illness or deficiency that was expected to continue for a prolonged period of time. In finding the second action was not barred by the doctrine of claim preclusion, the court reasoned that even though evidence of the mother's mental capacity could have been presented in the first termination proceeding, the second termination petition alleged different operative facts, and thus, different proof was required. The

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[50] *Id.* at 372, 370 N.W.2d at 122.

[51] *Id.*

[52] See *In re Interest of Alan L., supra* note 23.

[53] See *In re Interest of Marcus W. et al., supra* note 3.

[54] *Id.*

court reasoned that because different grounds for termination were asserted in the second motion, claim preclusion could not bar the successive proceeding.

[23] These cases illustrate that in child welfare cases, Nebraska appellate courts have not strictly applied claim preclusion. Instead, both this court and the Court of Appeals have implicitly recognized that the policies of finality and judicial efficiency advanced by the doctrine of claim preclusion must, when necessary, give way when strict application of the doctrine would frustrate the central goal of protecting the welfare of children. Supplemental petitions seeking adjudication and disposition on additional grounds present such a circumstance.

[24,25] We now expressly hold that the doctrine of claim preclusion should not be strictly applied in abuse and neglect cases when doing so would fail to protect children from continuing abuse or neglect. The best interests of Nebraska's children cannot be protected by a technical application of claim preclusion that bars the State from filing a supplemental petition seeking to adjudicate continuing allegations of abuse and neglect, simply because the State knew about such allegations previously and did not initially seek adjudication on that basis.

[26-28] In so holding, we caution that the State does not have unfettered authority to adjudicate abuse and neglect allegations in a piecemeal fashion, free from the constraints of claim preclusion. Claim preclusion applies in abuse and neglect cases, but when a supplemental petition seeks adjudication on grounds not alleged in a prior adjudication, claim preclusion will not limit the proof to only facts or evidence that was not considered in, or which came into being after, the prior adjudication proceeding.[55] Rather, the applicability of claim preclusion will turn on the nature of the proof being offered. If the State relies solely on evidence known at the time of the prior

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[55] See, generally, *In re Interest of V.B. and Z.B., supra* note 2.

adjudication, the doctrine of claim preclusion will apply and bar the State from proceeding.[56] If, however, the State relies on evidence from the time period after the prior adjudication to prove the allegations of the supplemental petition, the doctrine of claim preclusion will not bar the proof, even if the new evidence is used in conjunction with evidence known at the time of the prior adjudication.[57] Simply put, the welfare of Nebraska's children demands that we place greater emphasis on protecting them from continuing abuse and neglect than on strict application of a judicial policy designed to reduce repeat litigation.

This modified application of claim preclusion is consistent with how we have applied the doctrine in successive child custody hearings,[58] successive commitment hearings in juvenile delinquency proceedings,[59] and successive parental termination proceedings.[60] And modifying application of the doctrine in this fashion is appropriate abuse and neglect cases, because "'the doctrine of [claim preclusion] cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time.'"[61]

CONCLUSION

For the foregoing reasons, we vacate the order of dismissal and remand the matter for further proceedings on the supplemental petition.

Vacated and remanded for
further proceedings.

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[56] *Id.*

[57] *Id.*

[58] *Marez v. Marez, supra* note 35.

[59] *In re Interest of Alan L., supra* note 23.

[60] *In re Interest of V.B. and Z.B., supra* note 2.

[61] *In re Interest of Alan L., supra* note 23, 294 Neb. at 279, 882 N.W.2d at 694. Accord *In re Interest of V.B. and Z.B., supra* note 2.

Dan Anderson, appellee, v. Union Pacific Railroad Company, a Delaware corporation, appellant.

890 N.W.2d 791

Filed February 10, 2017. No. S-15-1224.

1. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretive decisions of the federal courts construing the act.
2. **Negligence: Proof.** The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof.
3. **Negligence: Presumptions.** The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed. Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.
4. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
5. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
6. **Negligence.** If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
7. ____. The doctrine of res ipsa loquitur is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury.
8. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Reversed and vacated, and cause remanded for a new trial.

William M. Lamson, Jr., and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., and Torry N. Garland, of Union Pacific Railroad Company, for appellant.

Kyle J. Long, Robert G. Pahlke, and Robert O. Hippe, of Robert Pahlke Law Group, for appellee.

Nichole S. Bogen, of Sattler & Bogen, L.L.P., and Kathryn D. Kirmayer and Daniel Saphire, of Association of American Railroads, for amicus curiae Association of American Railroads.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

This appeal arises from Dan Anderson's suit against Union Pacific Railroad Company (Union Pacific) pursuant to the Federal Employers' Liability Act (FELA) for personal injury arising from his employment. A jury awarded Anderson damages, including past medical expenses. On appeal, Union Pacific challenges, among other things, the jury instructions on res ipsa loquitur. We conclude that the district court committed reversible error in instructing the jury and in overruling Union Pacific's resulting motion for new trial. Therefore, we vacate the jury's verdict and the judgment entered against Union Pacific. We reverse the order overruling Union Pacific's motion for new trial and remand the cause to the district court for a new trial consistent with this opinion.

BACKGROUND

On October 2, 2007, Anderson fell to the floor while on duty as a control operator for Union Pacific when the chair

in which he sat collapsed. In March 2010, Anderson brought an action against Union Pacific under FELA, asserting that permanent back injuries resulted from the fall and seeking damages. He alleged that Union Pacific was negligent in that it failed to (l) provide a safe workplace, (2) properly maintain and inspect the chair, (3) have a reasonable replacement process in place for office equipment, and (4) properly instruct its employees on how to inspect their office chairs. Union Pacific generally denied Anderson's allegations.

On October 6, 2014, Union Pacific moved in limine to exclude evidence of Anderson's medical expenses altogether, while on October 13, Anderson moved in limine to preclude Union Pacific from offering evidence at trial of the amounts it had paid to satisfy the expenses.

In January 2015, the district court sustained Anderson's motion to preclude evidence of amounts paid by Union Pacific and stated that claims for credits or offsets could be addressed by posttrial motions. The district court overruled Union Pacific's motion in limine.

In June 2015, approximately 3 months before trial, the district court granted Anderson leave to amend his complaint to allege res ipsa loquitur. The amended complaint included the original theories of negligence and added that Union Pacific had failed to provide Anderson with a chair that was safe for the purpose for which it was used, along with a claim for res ipsa loquitur.

At trial, the jury heard undisputed evidence that the cause of the chair's collapse was immediately apparent after Anderson's fall: a bolt had failed. Anderson elicited expert opinion testimony that the bolt failed because the chair was routinely used outside its load limit. However, Union Pacific's expert opined that the bolt failed because it had been overtightened by the manufacturer. Both parties presented evidence that the defect in the bolt could not be seen with the naked eye and likely could not have been discovered upon an inspection by Anderson.

The jury heard evidence that before the collapse, the chair never wobbled or required repair. Anderson testified that on the day of the accident, he observed no apparent defects and believed the chair was safe to use.

The manager of terminal operations for Anderson's terminal testified that Union Pacific did not designate employees to inspect, maintain, or repair defects in the office equipment at Anderson's terminal. Instead, Union Pacific required its employees to inspect their tools and equipment, but it did not provide them with training or instruction on how to inspect office chairs. Employees reported any defects in office equipment to their manager for replacement or repair.

According to the evidence at trial, Union Pacific had "Herman Miller Aeron B" chairs, like the chair that collapsed, in several of its terminals. Union Pacific generally documented complaints about its equipment, and it received no complaints about bolt fractures occurring with that brand of chair before or after Anderson's fall, nor did Anderson himself make any kind of complaint about his chair in particular before the fall.

Union Pacific's manager of safety testified that Union Pacific had selected the "Herman Miller Aeron B" chair in 2002 based on a specific list of criteria, including a 300-pound working load limit. The manufacturer's literature limited the weight of the chair's occupants to either 270 or 300 pounds, depending on the occupant's height. Union Pacific's manager of safety also testified that regular use of the chair by individuals who exceeded its working load limit would create excess stress that could cause the chair to break before the 12-year warranty period expired. He further stated that the chair would not be appropriate for individuals who weighed more than 300 pounds and that continual use by such individuals would constitute abuse of the chair's intended use.

The manager of terminal operations, tasked with training employees to follow safety rules in Anderson's terminal,

testified that at the time of Anderson's accident, he was not aware of any load limit for the chair that collapsed.

Ronald Wilkinson, who had worked as a control operator in Anderson's office around the time of the accident, testified that he was warned that individuals over 300 pounds should not sit in the chair that ultimately failed. Wilkinson testified that the chair was used by two Union Pacific control operators whose weight likely exceeded the 300-pound load limit. However, one of those individuals testified that he never sat in the chair, in accordance with Wilkinson's instructions not to use it because he was "too big for it." Wilkinson did not recall giving such an instruction.

Anderson testified that Union Pacific did not inform him of a 270-pound load limit for the chair, nor was he aware of Union Pacific's informing anyone else. Anderson testified that at the time of the accident, he did not exceed the chair's load limit. Anderson estimated that three control operators probably weighed more than 300 pounds, and certainly more than 270 pounds, but he did not specifically testify that these control operators used the chair.

Anderson sought a variety of nonsurgical treatments for his injuries and eventually underwent surgery to fuse his lumbar spine. Over objections by Union Pacific, the district court received evidence of Anderson's medical expenses. Union Pacific made an offer of proof to preserve the issue of its payment of Anderson's medical expenses. Union Pacific moved for a directed verdict at the close of Anderson's evidence and again at the close of Union Pacific's evidence. The district court denied the motions.

The district court instructed the jury on res ipsa loquitur and on two theories of negligence: that Union Pacific failed to provide reasonably safe equipment and that it failed to provide a safe place to work. The district court's instructions allowed for separate findings of ordinary negligence, negligence based upon res ipsa loquitur, or both. Union Pacific objected to the court's res ipsa loquitur instruction in its entirety.

The jury returned a special verdict for Anderson, finding that he had proved both specific acts of negligence causing injury and res ipsa loquitur. The jury awarded Anderson damages of $920,007, which included $266,925 for past medical expenses.

Following the verdict, Union Pacific filed a motion for judgment notwithstanding the verdict. Alternatively, it sought a setoff against the judgment and a new trial, arguing, among other things, that the district court erred in its treatment of medical expenses and in instructing the jury on res ipsa loquitur.

The district court overruled the motion for judgment notwithstanding the verdict and the motion for new trial. However, it granted the motion for setoff in the amount of $162,964.25, representing medical expenses paid by Union Pacific. This setoff did not include medical expenses written off by providers as a result of negotiations with Union Pacific, and the district court noted that Union Pacific had not paid or contributed to the writeoff.

Union Pacific now appeals. Through no fault of either party, the record does not contain a pretrial conference or closing arguments.

ASSIGNMENTS OF ERROR

Union Pacific assigns, condensed and restated, that (1) the district court erred in overruling Union Pacific's motions for directed verdict and judgment notwithstanding the verdict; (2) Union Pacific is entitled to a new trial because portions of the record were not preserved, as requested by Union Pacific; (3) the district court erred in instructing the jury on res ipsa loquitur; (4) the district court erred in allowing Anderson to introduce irrelevant evidence of his medical expenses and refusing to allow Union Pacific to offer evidence that it paid the medical expenses; and (5) the district court erred in calculating the posttrial setoff.

ANALYSIS

As noted above, the jury instructions allowed the jury to return a verdict making separate findings of ordinary negligence, negligence based upon res ipsa loquitur, or both. Union Pacific principally contends that the jury instructions were incorrect, because Anderson should not have been permitted to pursue a negligence claim simultaneously based on both specific acts of negligence and res ipsa loquitur. Alternatively, Union Pacific contends that the jury instructions were prejudicial, because the special verdict form confused the jury by allowing the following inconsistent findings: (1) that Anderson proved specific acts of negligence and (2) that specific acts of negligence could not be proved. We agree with Union Pacific.

[1] We begin our analysis by acknowledging that in disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretive decisions of the federal courts construing FELA. *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014). Thus, initially we must determine whether the doctrine of res ipsa loquitur is a procedural matter or substantive law.

[2,3] "'The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof.'" *Swierczek v. Lynch*, 237 Neb. 469, 477, 466 N.W.2d 512, 517 (1991), quoting *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969). The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed. *McLaughlin Freight Lines v. Gentrup*, 281 Neb. 725, 798 N.W.2d 386 (2011). Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected. *Id.* See, also, *Swierczek v. Lynch,*

supra (res ipsa loquitur is procedural doctrine and not part of substantive law). On this point, the federal courts are in agreement that res ipsa loquitur is "not a rule of pleading, not a substantive rule of law, but a rule of evidence." *Ramsouer v. Midland Valley R. Co.*, 135 F.2d 101, 106 (8th Cir. 1943). See, also, *Weigand v. Pennsylvania Railroad Company*, 267 F.2d 281 (3d Cir. 1959). Accordingly, we shall apply Nebraska law in analyzing whether the district court erred in instructing the jury on res ipsa loquitur.

[4-7] Whether the jury instructions given by a trial court are correct is a question of law. *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 1018, 858 N.W.2d 196, 210 (2015). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id*. We have held that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur does not apply. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003). See, also, *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998) (simply pleading specific acts of negligence in complaint will render doctrine of res ipsa loquitur inapplicable); *Finley v. Brickman*, 186 Neb. 747, 186 N.W.2d 111 (1971) (if petition alleges particular acts of negligence, then plaintiff must establish specific negligence alleged, and doctrine of res ipsa loquitur cannot be applied). The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

Here, Anderson pled specific acts of negligence in the operative amended complaint. Further, at trial, Anderson presented direct evidence of the cause of the chair's collapse through expert testimony that the chair collapsed because a bolt failed. Further, the expert opined that the bolt failed because users exceeded the chair's load limit over a period

of time. Accordingly, the doctrine of res ipsa did not apply to this case.

Furthermore, the district court erred in instructing the jury on res ipsa loquitur in this instance. As Union Pacific notes, the jury instructions first stated that to find ordinary negligence, Anderson must prove specific acts of negligence by Union Pacific. Then, the jury was instructed that to find negligence via res ispa loquitur, it had to find that Union Pacific's specific acts of negligence could not be proved. The instructions then allowed the jury to determine whether Anderson could recover under (1) ordinary negligence, (2) negligence based on res ipsa loquitur, or (3) *both*. Notably, within the same instruction, the jury was advised that they could return a verdict finding both (1) *that specific acts of negligence by Union Pacific had been proved* and (2) *that specific acts of negligence could not be proved.* And the jury found that both were true. This is clearly a contradiction, and we cannot find that this did not cause confusion for the jury.

[8] A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Long v. Hacker, supra*. If an erroneous jury instruction was prejudicial, or otherwise adversely affected a substantial right of the movant, a motion for new trial must be granted. See *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015). In this case, it is apparent that the res ipsa loquitur instructions' internal inconsistencies distracted the jury, which, in turn, led to the jury's inconsistent and irreconcilable verdict. Thus, the erroneous jury instructions prejudiced Union Pacific.

We conclude that the district court erred in submitting to the jury the issue of negligence based upon res ipsa loquitur and that such error prejudiced Union Pacific. We therefore vacate the verdict of the jury and remand the cause for a new trial.

Our determination that the district court committed reversible error by instructing the jury on res ipsa loquitur resolves

this appeal, and we shall not consider Union Pacific's additional assignments of error. See *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

CONCLUSION

We conclude that the district court committed reversible error in instructing the jury on res ipsa loquitur. Accordingly, we vacate the jury's verdict and the judgment entered against Union Pacific. We reverse the order overruling Union Pacific's motion for new trial and remand the cause to the district court for a new trial consistent with this opinion.

Reversed and vacated, and cause remanded for a new trial.

Miller-Lerman, J., not participating.

David Leon Frederick, appellant, v. City of Falls City, a city and political subdivision of the State of Nebraska, and Falls City Economic Development and Growth Enterprise, Inc., appellees.

890 N.W.2d 498

Filed February 10, 2017. No. S-16-236.

1. **Pleadings: Judgments: Appeal and Error.** An appellate court reviews the denial of a motion to reopen a case for an abuse of discretion.
2. **Trial: Evidence.** Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge. Affirmed.

Stephen D. Mossman, J.L. Spray, and Ryan K. McIntosh, of Mattson Ricketts Law Firm, for appellant.

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

Bonnie M. Boryca, of Erickson & Sederstrom, P.C., for appellee Falls City Economic Development and Growth Enterprise, Inc.

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

Kelch, J.

NATURE OF CASE

After David Leon Frederick learned that the City of Falls City, Nebraska, did not produce all requested records in its possession pursuant to his public records request, Frederick filed a motion to reopen his case against Falls City and the Falls City Economic Development and Growth Enterprise, Inc. (EDGE). In that case, Frederick unsuccessfully sought a writ of mandamus compelling the parties to produce documents in EDGE's possession. Frederick's motion to reopen the case was overruled, and Frederick appeals.

FACTS

Background

Frederick is a Nebraska citizen and a resident of Richardson County, Nebraska. EDGE is a Nebraska nonprofit corporation. EDGE's articles of incorporation state that its goal is to "encourag[e] economic development and growth and improv[e] business conditions" in Falls City and surrounding areas. EDGE performs services for Falls City and Richardson County including, among other things, hosting, communicating with, and negotiating with business development prospects.

In April 2012, a national grain processing and transportation company contacted EDGE about the proposed development of a large grain terminal and transportation facility on a site in Richardson County. This site is located near an existing grain elevator co-owned by Frederick.

On August 29, 2012, pursuant to Neb. Rev. Stat. § 84-712 (Cum. Supp. 2012), Frederick sent a public records request to the Falls City administrator. Frederick requested all records in the physical custody of Falls City and EDGE relating to the processing and transportation company. The administrator provided records in the physical custody of Falls City and sent Frederick a letter stating, among other things, that Frederick was welcome to review the records at the city hall. The administrator also sent a copy of Frederick's request to EDGE's executive director. The director refused to provide the requested records to Frederick or Falls City, alleging that EDGE was not a public entity and that its records were not public records.

In January 2015, this court agreed with EDGE, finding that EDGE was not the "functional equivalent of a city agency, branch, or department" and that thus, the requested records were not "'public records'" within the meaning of Neb. Rev. Stat. § 84-712.01(1) (Reissue 2014).[1] We therefore reversed the district court's order, which had compelled EDGE to produce the requested records. Additional facts relevant to that appeal can be found in our opinion in *Frederick v. City of Falls City*.[2]

Facts Relevant to Current Appeal

On December 23, 2015, Frederick filed a motion pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 2016), which permits a party to vacate or modify a judgment of the district court or, in the alternative, under the court's equity powers, request to reopen the case against Falls City and EDGE. In his motion, Frederick asserted that Falls City did not produce all the documents in its possession and that if all requested documents

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[1] *Frederick v. City of Falls City*, 289 Neb. 864, 878, 857 N.W.2d 569, 579 (2015).

[2] *Federick v. City of Falls City, supra* note 1.

had been produced, Frederick could have taken certain actions to protect his interests.

One of the documents not produced was the document that was posted to give notice of a meeting of a Falls City community redevelopment authority committee. Pursuant to Frederick's records request, Falls City had supplied the meeting's minutes. The minutes indicated that a copy of the notice was attached. However, Frederick did not receive the notice pursuant to the August 2012 records request. It was not until Frederick was involved in another Richardson County District Court case against Falls City, No. CI12-206, that he received a copy of the notice. According to the notice, the meeting was to occur at 12 p.m. But, according to the minutes, the meeting occurred at 4 p.m. In Frederick's motion to reopen, he asserted that the meeting was not a properly noticed meeting under Neb. Rev. Stat. § 84-1411 (Cum. Supp. 2010) and that if the notice had been produced as requested, Frederick could have acted on Open Meetings Act violations.

Falls City and EDGE filed objections to Frederick's motion to reopen. The matter came on for hearing on January 26, 2016, and the district court denied Frederick's motion. Frederick timely appeals.

ASSIGNMENTS OF ERROR

Frederick assigns, combined and restated, that the district court erred in dismissing EDGE from the proceedings and that the district court abused its discretion in overruling Frederick's motion to reopen.

STANDARD OF REVIEW

[1] An appellate court reviews the denial of a motion to reopen a case for an abuse of discretion.[3]

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[3] See, *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989); *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008); *Jessen v. DeFord*, 3 Neb. App. 940, 536 N.W.2d 68 (1995).

ANALYSIS

[2] The primary issue in this case is whether the district court abused its discretion in overruling Frederick's motion to reopen his case against Falls City and EDGE. Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.[4]

As for Frederick's failure to introduce evidence, Frederick claims he "had no way of knowing that documents were withheld, or otherwise not produced."[5] However, as noted above, the meeting minutes that Frederick received from his original records request indicated that certain documents were to be attached. So, the fact that certain documents were not attached or produced was apparent in September 2012, when the case was still open. Moreover, the Falls City administrator, in his letter to Frederick, invited Frederick to review Falls City's records at the city hall; however, Frederick chose not to do so. Accordingly, the first and third factors do not weigh in Frederick's favor.

Perhaps the most dispositive factor in this case, though, is the second factor—the admissibility and materiality of the new evidence to the proponent's case. With respect to materiality, "[t]he evidence must substantially affect the outcome

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[4] *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015); *Jessen v. DeFord, supra* note 3 (citing 75 Am. Jur. 2d *Trial* § 298 (1991)).

[5] Brief for appellant at 7.

of the case, not only the merits of the action, but the trial court's decision as well."[6] Here, Frederick seeks to reopen a case in which he sought a writ of mandamus requiring Falls City and EDGE to "[p]rovide to Frederick the requested documents *in the physical custody of EDGE* . . . ." Upon reopening the case, Frederick seeks to introduce documents that were in Falls City's possession and that Falls City failed to produce. However, Frederick has failed to establish how these recently discovered documents would have any bearing on the issue of whether records within EDGE's possession should be produced.

In *Frederick*, we concluded that the records in EDGE's possession were not required to be produced because the records were not "'public records'" within the meaning of § 84-712.01.[7] We reached that conclusion by examining the relationship between Falls City and EDGE and determining that EDGE is "not the functional equivalent of an agency, branch, or department of Falls City."[8] The documents produced by an unrelated organization, which Frederick seeks to admit, do not relate to Falls City's relationship with EDGE and do not affect EDGE's status as a private entity. Therefore, the new evidence is not material to the case that Frederick seeks to reopen. Frederick claims, "Failure to reopen the case leaves Frederick without any remedy. The statute of limitations has passed on criminal prosecution of the violations."[9] However, the only specific relief requested in the operative complaint (other than a request for attorney fees) was for a writ of mandamus requiring Falls City and EDGE to provide requested documents in the physical custody of EDGE. And,

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[6] 75 Am. Jur. 2d *Trial* § 299 at 534 (2007).

[7] *Frederick v. City of Falls City, supra* note 1, 289 Neb. at 878, 857 N.W.2d at 579.

[8] *Id.*

[9] Brief for appellant at 9.

as discussed above, those documents are not required to be released. Therefore, reopening the case would not lead to any remedy for Frederick.

Based on our review of the factors above, we conclude that the district court did not abuse its discretion in overruling Frederick's motion to reopen the case. Accordingly, we do not reach Frederick's remaining assignment of error, which was that the district court erred in dismissing EDGE from further proceedings.

CONCLUSION

We determine that the district court did not abuse its discretion in overruling Frederick's motion to reopen his case against Falls City and EDGE. We therefore affirm.

Affirmed.

State of Nebraska, appellee, v. Jerry Watson, appellant.

891 N.W.2d 322

Filed February 10, 2017. No. S-16-335.

1. **Postconviction: Constitutional Law: Judgments.** 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.
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: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate

a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.

7. **Homicide.** Malice is not an element of second degree murder.
8. **Homicide: Jury Instructions.** 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.
9. **Constitutional Law: Motions to Suppress: Search and Seizure.** Motions to suppress are designed to remedy unlawful acts, such as an unconstitutional search and seizure.
10. **Evidence.** Once the threshold for admissibility is met, assertions concerning the chain of custody go to the weight to be given to the evidence presented rather than to the admissibility of that evidence.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Matthew Richard Kahler, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Heavican, C.J.

INTRODUCTION

Jerry Watson was convicted of first degree murder and use of a weapon to commit a felony. Watson was sentenced to life imprisonment for the murder conviction and an additional 10 to 20 years' imprisonment on the use conviction. This court affirmed Watson's convictions and sentences.[1] Watson later

[1] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

sought postconviction relief. His motion was denied without an evidentiary hearing. He appeals. We affirm.

FACTUAL BACKGROUND

In 2011, Watson was convicted of the murder of Carroll Bonnet. Bonnet was killed in October 1978. The Omaha Police Department's cold case homicide unit began further investigation into Bonnet's murder in 2009. In connection with that investigation, certain evidence was subjected to new scientific testing, and from that testing, Watson became a suspect in Bonnet's murder.

Bonnet was a 61-year-old man living in Omaha, Nebraska. Bonnet was found in his apartment by the manager of Bonnet's apartment complex, lying naked and face down with a stab wound to his abdomen. Bonnet's telephone cord had been severed, his wallet was missing, and three towels containing fecal matter and hair were found near Bonnet's body. Beer cans were found in the kitchen sink and in the trash can. According to the record, a note believed to be written by the killer was also found in Bonnet's apartment. Bonnet's car was located shortly thereafter in Cicero, Illinois. Stolen Illinois license plates were on the car.

Scientific testing was conducted on a beer can, cigarette butts found in Bonnet's apartment and car, the contents of the living room and kitchen wastebaskets, the severed telephone cord, and fingerprints found in the apartment and car. Prints belonging to Bonnet and Watson, as well as to other unidentified individuals, were found in Bonnet's apartment. Prints belonging to Bonnet and another unidentified individual were found in Bonnet's car. DNA on cigarette butts found both in the apartment and in the car were a match to Watson. A hair found on one of the towels located near Bonnet's body was from Watson; the other hair and the fecal matter were a match to Bonnet.

In addition, further investigation showed that Watson was originally from Cicero. The investigation revealed that Watson

had a relative that lived in Omaha "at some point" and that Watson had visited Omaha in the fall of 1978.

Watson was charged in November 2010. Following a jury trial, he was found guilty of first degree murder and use of a weapon to commit a felony. Watson was sentenced to life imprisonment plus 10 to 20 years' imprisonment. He appealed. This court affirmed, holding that (1) the preindictment delay of 33 years did not violate Watson's confrontation or due process rights, (2) the evidence was sufficient to support the first degree murder conviction, and (3) the prosecutor's comment made during defense counsel's examination of a witness did not necessitate a mistrial. A more complete recitation of the facts surrounding Watson's conviction can be found in our prior opinion.[2]

In March 2014, Watson filed a motion seeking postconviction relief. He alleged that his trial counsel was ineffective in failing (1) to obtain a DNA expert, (2) to investigate another suspect, (3) to file a motion to quash, (4) to object to the second degree murder instruction, (5) to object to testimony by a member of law enforcement, (6) to investigate a handwritten note left at the scene, (7) to file a motion to suppress DNA evidence, (8) to properly advise him during plea negotiations, and (9) to obtain a fingerprint expert.

The district court dismissed Watson's motion without an evidentiary hearing. Watson appeals.

ASSIGNMENT OF ERROR

On appeal, Watson assigns that the district court erred in denying his motion for postconviction relief without a hearing.

STANDARD OF REVIEW

In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant

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[2] *Id.*

failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[3]

ANALYSIS

[1,2] On appeal, Watson argues that the district court erred in denying his motion for postconviction relief without a hearing. 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.[4] 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.[5]

[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.[6] 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.[7]

Watson's postconviction claims center on the alleged ineffective assistance provided by his trial counsel. That counsel represented Watson at trial and again on direct appeal; as such, Watson's claims in this postconviction proceeding are not procedurally barred.

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[3] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[4] Neb. Rev. Stat. § 29-3001 (Reissue 2016).

[5] *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

[6] *Id.*

[7] *Id.*

[5,6] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[8] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[9] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[10] 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.[11] 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.[12]

DNA Expert.

In Watson's motion for postconviction relief, he first alleged that his counsel was ineffective for failing to obtain a DNA expert to conduct independent DNA testing and analyze the State's results.

Watson identified a specific witness whom he alleged would have testified to the flaws in the State's evidence. And Watson identifies those flaws and how his expert would testify generally. But Watson does not allege how his expert would specifically testify with regard to the DNA profiles generated in this case or to the statistics generated for the profiles for which Watson could not be excluded as a contributor.

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[8] *Id.*

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

[10] *State v. Starks, supra* note 5.

[11] *Id.*

[12] *Id.*

The State directs us to *State v. Edwards*.[13] In *Edwards*, we found that the trial record affirmatively showed that defense counsel's strategies were reasonable in not retaining a DNA expert. We concluded that counsel in *Edwards* was reasonable in effectively cross-examining the State's witnesses to plant the seed of doubt in jurors' minds as to that evidence rather than call an expert to propose an "improbable theory."[14]

Counsel in this case extensively and thoroughly cross-examined the DNA experts who testified for the State. Given that Watson's allegations attack that testimony, but fail to allege his expert's own opinions on those same matters, we must conclude that Watson's allegations are insufficient to support the granting of postconviction relief.

There is no merit to Watson's first alleged basis for postconviction relief.

Investigate Other Suspects.

In his second allegation, Watson argued that his trial counsel was ineffective for failing to investigate other suspects, specifically George Kirby, primarily so that a DNA sample could be obtained from Kirby to compare to the results of the testing that was performed.

The district court noted that the record shows counsel attempted to locate these suspects, including Kirby, and was unable to do so such that these individuals were found to be unavailable. Evidence at trial showed that Kirby, at least, was deceased. And evidence at trial also showed that a DNA sample from Kirby had been obtained at the time of the original investigation.

We cannot conclude that counsel was deficient for failing to obtain something that had already been obtained—in this case, a DNA sample—or in failing to find witnesses who were later found to be unavailable.

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[13] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[14] *Id.* at 412, 821 N.W.2d at 705.

The district court was correct in concluding that Watson's second allegation was without merit.

Motion to Quash.

In his third allegation, Watson contended that his trial counsel was ineffective in failing to file a motion to quash. Watson contended that the information filed against him charged a violation of first degree murder under Neb. Rev. Stat. § 28-303 (Reissue 1979), when he should have been charged under Neb. Rev. Stat. § 28-401 (Reissue 1975).

In rejecting this allegation, the district court noted that the language setting forth the elements of first degree murder was identical in both § 28-303 and § 28-401 and that this language was used in the information charging Watson with first degree murder. As such, the district court concluded that Watson suffered no prejudice.

The district court did not err in finding this allegation to be without merit. For the reasons the court noted, Watson was given notice of the elements of the charged crime and could not have been prejudiced by an error in the statutory citation.

More importantly, however, the information's statutory citation was not erroneous. Bonnet was killed in October 1978. Nebraska's criminal code was revamped in 1977, with an operative date of July 1, 1978.[15] As of the date this crime was committed, the relevant citation was, as it is today, § 28-303. Because any motion to quash would have been denied, we cannot find that counsel was deficient for failing to file one.

Second Degree Murder Instructions.

In his fourth allegation, Watson contended that the instructions at his trial defining second degree murder were incorrect. Specifically, Watson contended that counsel was ineffective for failing to object to the omission of the term "malice."

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[15] See 1977 Neb. Laws, L.B. 38, § 325.

[7,8] As we have found previously, malice is not an element of second degree murder.[16] Moreover, any error in his second degree murder instructions would not have prejudiced Watson, because he was convicted of first degree murder pursuant to a step instruction. We noted in *State v. Alarcon-Chavez*,[17] 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."

Accordingly, the district court did not err in finding Watson's fourth allegation in his postconviction motion to be without merit.

Law Enforcement Testimony.

In his fifth allegation, Watson argued that his counsel was ineffective for failing to object to law enforcement testimony regarding a description given to police of a person seen with Bonnet in the days prior to his death and to that officer's testimony that this description matched a photograph of Watson.

But Watson failed to allege how he was prejudiced by this testimony. Given that Watson's fingerprint and DNA were found in Bonnet's apartment and car, the jury was aware that Bonnet and Watson were acquainted. Thus, no prejudice could have resulted from testimony placing Bonnet and Watson together in the days prior to Bonnet's death.

There is no merit to Watson's fifth allegation.

Investigate Handwritten Note Left in Bonnet's Apartment.

In his sixth allegation, Watson argued that counsel was ineffective in various particulars with respect to a note, apparently

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[16] See *State v. Smith*, 294 Neb. 311, 883 N.W.2d 299 (2016).

[17] *State v. Alarcon-Chavez*, 284 Neb. 322, 335, 821 N.W.2d 359, 368 (2012).

left by Bonnet's killer, found in Bonnet's apartment. Watson contended that counsel failed to obtain a copy of the report prepared by the U.S. Secret Service regarding handwriting analysis on the note, because those test results would show either that Watson wrote the note or that he did not. Watson stated that this was particularly important because the note had been lost.

The district court rejected this allegation, contending that Watson was not a suspect at the time the note was originally tested and that thus, the handwriting analysis would be irrelevant as to him. The district court also observed that because the original note no longer existed, it would not be possible to conduct further testing on it.

The district court did not err. It was correct in holding that since the note is now missing, further testing would not be possible, and also that the results are not relevant to Watson, because his handwriting was not a subject of the report. Moreover, there is at least some evidence in the record to suggest that counsel did, in fact, have a copy of the report in question, because counsel referred to it and had a law enforcement witness read from it during cross-examination. For these reasons, we cannot conclude that counsel was deficient. There was no merit to Watson's sixth allegation.

Motion to Suppress DNA Evidence.

In his seventh allegation, Watson contended that his counsel was ineffective in failing to file a motion to suppress DNA evidence due to the lack of a chain of custody and the storage of physical evidence.

[9,10] Watson's concern is with the chain of custody and the storage of some of the physical evidence offered against him. But motions to suppress are designed to remedy unlawful acts, such as an unconstitutional search and seizure.[18]

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[18] Neb. Rev. Stat. § 29-822 (Reissue 2016).

We held in *State v. Bradley*[19] that once the threshold for admissibility is met, assertions concerning the chain of custody go to the weight to be given to the evidence presented rather than to the admissibility of that evidence. A review of the record shows that counsel consistently challenged the physical evidence collected at the time of the murder on the basis of the storage of such items.

Counsel was not deficient in failing to file a motion to suppress, because the filing of a motion to suppress would have been inappropriate in this case. The district court did not err in concluding that Watson's seventh allegation was without merit.

Attorney's Advisement Regarding Plea Agreement.

In his eighth allegation, Watson argued that his counsel provided ineffective assistance in his advisement regarding the State's plea offer. According to Watson, the State offered to let him plead guilty to manslaughter. Counsel informed Watson that the maximum sentence for manslaughter was 20 years' imprisonment; Watson now claims that counsel was ineffective, because the maximum sentence was actually 10 years' imprisonment.

For the same reasons there was no error with respect to Watson's allegations regarding the motion to quash, there was no merit to this allegation. Prior to July 1, 1978, the maximum punishment for manslaughter was 10 years.[20] At the time of Bonnet's death in October 1978, manslaughter was a Class III felony[21] with a maximum punishment of 20 years' imprisonment.[22] Counsel's advisement of 20 years' imprisonment was therefore correct and not deficient.

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[19] See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

[20] Neb. Rev. Stat. § 28-403 (Reissue 1975).

[21] Neb. Rev. Stat. § 28-305 (Reissue 1979).

[22] Neb. Rev. Stat. § 28-105 (Reissue 1979).

Fingerprint Expert.

In his ninth allegation, Watson contended that his counsel was ineffective in failing to call a fingerprint expert to refute the evidence presented by the State.

In his motion and supplemental facts, Watson directed the district court to what he perceived to be weaknesses in the fingerprint evidence presented by the State and argued that his counsel should have retained a separate expert. But Watson did not allege who that expert would be or, more importantly, what that expert's testimony would be. As such, Watson's allegations are insufficient to support the granting of postconviction relief. Moreover, defense counsel did cross-examine the State's witnesses with respect to weaknesses in their testimonies, thus revealing such potential weaknesses to the jury.

The district court was correct in finding that Watson's ninth and final allegation was without merit.

CONCLUSION

The decision of the district court denying postconviction relief is affirmed.

Affirmed.

In re Interest of Luz P. et al., children under 18 years of age.
State of Nebraska, appellee, v. Lucia V., appellant.

891 N.W.2d 651

Filed February 10, 2017. Nos. S-16-534 through S-16-538.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, even where no party has raised the issue.
3. ____: ____. Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto, and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation.
4. ____: ____. An appellate court does not acquire jurisdiction over an appeal if a party fails to properly perfect it.
5. **Constitutional Law: Statutes: Jurisdiction: Time: Appeal and Error.** The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.
6. **Courts: Jurisdiction.** Both juvenile courts and county courts have the power to vacate or modify their own judgments and orders during or after the term in which they were made in the same manner as provided for district courts.
7. **Judgments.** The purpose of an order nunc pro tunc is to correct clerical or formal errors in order to make the record correctly reflect the judgment actually rendered by the court.
8. ____. A nunc pro tunc order reflects now what was actually done before, but was not accurately recorded.
9. ____. The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded.

10. ____. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
11. ____. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it.
12. ____. The proper function of a nunc pro tunc order is not to correct, change, or modify some affirmative action previously taken. Rather, its purpose is to correct the record which has been made so that it will truly record the action taken, which, through inadvertence or mistake, has not been truly recorded.
13. **Judgments: Time: Appeal and Error.** An order nunc pro tunc does not change the time to appeal the order or judgment that it amends, because it only corrects clerical or formal errors. But where an order or judgment is amended in a material and substantial respect, the time for appeal runs from the date of the amendment.
14. ____: ____: ____. A nunc pro tunc order cannot extend the time for a party to appeal the order or judgment which the nunc pro tunc order corrects.
15. **Courts: Judgments: Legislature: Time: Appeal and Error.** Courts have the power to vacate or modify their own judgments and orders at any time during the term at which they were pronounced. But this power may not be used to circumvent the Legislature's power to fix the time limit to take an appeal.
16. **Courts: Judgments: Time: Appeal and Error.** A court may not vacate an order or judgment and reinstate it at a later date just for the purpose of extending the time for appeal.

Appeals from the County Court for Buffalo County: John P. Rademacher, Judge. Appeals dismissed.

D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellant.

Mandi J. Amy, Deputy Buffalo County Attorney, for appellee.

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

Wright, J.

NATURE OF CASE

To perfect an appeal, a party must file a notice of appeal within 30 days from the final order or judgment. Without timely filed notices of appeal, this court is without appellate jurisdiction and must dismiss these consolidated appeals.

In the case at bar, the trial court issued an order nunc pro tunc purporting to vacate its prior order, which had terminated the appellant's parental rights to her five children. The intent of the court's nunc pro tunc order was to vacate the prior order and then reinstate the order in its entirety for the express purpose of extending the appellant's time to appeal. The appellant filed notices of appeal within 30 days of the order nunc pro tunc but more than 30 days after the original order. Without evidence in the record that a party did not receive notice of the prior order, an order vacating and reinstating a prior order cannot be used to extend the time for appeal. In the absence of timely filed notices of appeal, this court is without jurisdiction. We dismiss the appeals for lack of jurisdiction.

BACKGROUND

The appellant, Lucia V., lived in Kearney, Nebraska, with her children Luz P., Jonathan V., Esvin C., and Lindsey C., and her boyfriend, Enrique C. Enrique is the father of Esvin, Lindsey, and Eva D. (who was born after Lucia was incarcerated). Jonathan's father lives near Kearney; Luz' father is deceased.

Lucia came to the United States when Luz was 2 years old. Lucia left Luz and Luz' older brother behind in Guatemala with relatives who raised them. Luz was 14 when she moved to Nebraska from Guatemala to live with Lucia, Enrique, and her younger siblings. Jonathan, Esvin, and Lindsey were born in the United States after Lucia moved from Guatemala.

A few months after Luz arrived from Guatemala, Enrique began making sexual advances toward her. He would do this on Saturdays while Lucia was at work. In the first three

instances, Luz was able to get away from Enrique and avoid his advances. Eventually, Enrique raped her on several different occasions.

At some point in October 2014, Lucia became suspicious when she noticed how Enrique was looking at Luz. Lucia eventually convinced Luz to tell her of the sexual assaults. Lucia told Luz that she did not believe her. Later, Lucia made Luz sit down with her and Enrique and repeat the allegations. Enrique denied sexually assaulting Luz. Lucia became angry and hit Luz with a mop handle. She called Luz a liar, called her other names, and continued to hit her with the mop. According to Luz, "[Lucia] said I was a dog, a bitch, and she said that she cursed the day that I was born." Lucia also pulled Luz to the ground by her hair, which pulled out some of her hair. The next day, Lucia slapped and beat Luz with a bent wire clothes hanger.

The day after this assault, Lucia threw Luz down to the floor, forcibly pulled off Luz' pants and underwear, and sat on her. She then forcibly spread Luz' legs and put her fingers into Luz' vagina. According to Luz, Lucia was calling her a bitch and Enrique was watching and laughing. Lucia stated that she put her fingers in Luz' vagina "only to find out if indeed she had been having sexual relations with him." She stated she did this "[b]ecause that is the custom . . . in Guatemala, for what we do with girls who are out of control."

After this assault, Luz stayed at home that night. Luz said the next morning, Lucia woke her up and "threw [her] out of the house." Lucia stated that Luz left on her own after Lucia went to work that morning. Lucia did not call the police when Luz left home and did not return.

Shortly afterward, Lucia went to Luz' high school in order to "unenroll" her. The school officials had a difficult time understanding what she wanted and convinced her to come back the following week when an interpreter could be present. When Lucia came back, she spoke to Pat McLaughlin, the resource police officer. Lucia told McLaughlin that "[her] daughter had

run away, did not want to come to school, [and] was being uncooperative at home." She told McLaughlin that Luz had "tried to have sex with" her husband, Enrique. McLaughlin completed a runaway report and communicated with other officers about the search for Luz. Lucia did not disclose that she had a brother who lived in Kearney, but instead said that Luz did not have any family and that she did not know where Luz would go. Lucia did not contact the police department to check on the status of its search for Luz, nor did she provide any additional information.

McLaughlin and another officer attempted to follow up with Lucia to gain more information to aid their search for Luz. McLaughlin contacted Kearney Public Schools and learned that Luz had a sibling, Jonathan, who was enrolled in the school system. McLaughlin spoke to a school guidance counselor at Jonathan's elementary school. The counselor spoke with Jonathan and learned that he had an uncle that lived in Kearney. Lucia subsequently disclosed to the police that she had a brother in Kearney and led police to his residence.

Upon arriving at Lucia's brother's residence, the officers learned that Luz had been staying there for 2 weeks. During this time, she did not attend school. Lucia had never checked if Luz was staying there.

Luz was interviewed at a child advocacy center in Kearney. Lucia was also interviewed by a police officer. Lucia told the officer that "she believed her daughter was addicted to sex." After the interview, while she was still in the interview room, Lucia was overheard speaking on her cell phone, "'if the police talk to you, tell them that you went to Guatemala to see your mother for heart surgery.'" Lucia had previously told the police that Enrique had gone to Guatemala to see his mother. She later admitted that she had called Enrique while at the advocacy center.

After Luz and Lucia had been separately interviewed, they were allowed to sit together in the interview room. Luz told Lucia that the only thing that she told law enforcement was

that Enrique had put his arm around her. Lucia was unhappy and told Luz that she should have never said that Enrique put his arm around her but should have said that he never touched her. Lucia told Luz that she should take the blame for what happened with Enrique, saying, "'You need to take responsibility because they won't do anything to you. You're a minor. He is an adult. He will get in trouble.'" Lucia later admitted that she instructed Luz to lie and that she was trying to protect Enrique. Lucia also said that she had Jonathan trained not to talk to law enforcement.

Lucia told Luz that if she had to undergo a physical examination and was asked why she was so big "down there," that she should say that she uses a sexual "apparatus" and that Lucia got it for her.

After the police heard Lucia coaching Luz on what to say to police and talking on a cell phone with whom they believed to be Enrique, they seized her cell phone and obtained arrest and search warrants for Lucia and her home. A search of the residence disclosed a bent wire hanger and a "Swiffer [broom]" that police believed were used to beat Luz. They found hair in the trash can which was believed to have been pulled from Luz' head by Lucia. Lucia admitted that the broom was used to beat Luz.

Enrique was believed to have fled the country. Lucia testified that she last saw Enrique the day she beat Luz. Police discovered that he had bought an airplane ticket and left Kearney on October 24, 2014.

Luz, Jonathan, Esvin, and Lindsey were taken by the Department of Health and Human Services (DHHS) and placed with a foster parent who had been providing childcare for the children.

Lucia was charged with tampering with a witness, a Class IV felony; felony child abuse, a Class IIIA felony; and first degree sexual assault of a child, a Class IB felony. Lucia pled no contest to tampering with a witness and felony child abuse. The sexual assault charge was dismissed. She was

sentenced to 4 months' imprisonment on the witness tampering conviction and 1 year's imprisonment on the felony child abuse conviction. She was released in August 2015 and subsequently deported to Guatemala.

The State filed petitions seeking to adjudicate the children under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013). In exchange for amending the petitions to state the children "lack[ed] proper parental care *through no fault* or habits of his or her parent," Lucia did not contest the petitions. The court heard testimony and determined that Luz, Jonathan, Esvin, and Lindsey lacked proper parental care under § 43-247(3)(a).

In April 2015, while Lucia was incarcerated, she gave birth to a daughter, Eva. After she was born, Eva was placed in the same foster home as her siblings. The State filed a petition alleging that Eva was under § 43-247(3)(a) as a juvenile "who lacks proper parental care by reason of the fault or habits of his or her parent," based on Lucia's abuse and obstruction of the sexual abuse investigation, leading to her incarceration. Lucia pled no contest to this allegation.

In August 2015, the State filed motions for termination of Lucia's parental rights to all five children. The statutory basis for the termination under Neb. Rev. Stat. § 43-292 (Reissue 2016) were subsections (1), (2), and (9)—abandonment, neglect, and aggravated circumstances, respectively. The petitions also alleged that termination of Lucia's parental rights was in the best interests of the children.

In December 2015, the court held a hearing on the State's motions to terminate Lucia's parental rights. The witnesses at the hearing were two police officers who worked on the case, two DHHS children and family service specialists who worked on the case, a therapist that worked with Luz and Jonathan, the children's foster mother, Luz, and Lucia.

One of the DHHS specialists testified that termination would be in the children's best interests because of the effect of the abuse on the children. The specialist was concerned with the physical, sexual, and mental abuse as well as Lucia's blaming

Luz for the abuse by Enrique. She did not believe that Lucia had taken any accountability for her own actions. The specialist testified that the children were bonded together and were very close. She stated that Jonathan had made some further disclosures of physical abuse in therapy.

The therapist testified that he believed it was "definitely" in Luz' best interests to terminate Lucia's parental rights because of all of the trauma from Lucia's abuse and because there was not a bond between the two since Luz was raised by relatives in Guatemala, not by Lucia. As for Jonathan, the therapist was concerned about what he saw as manipulative behavior by Lucia. He said that Lucia focused a lot on herself in her letters to Jonathan. He opined that because Lucia was manipulative and Jonathan was so submissive, it would not be good for Jonathan to continue the relationship. He also testified that he believed if the younger children were to be with Lucia, her manipulative behavior would continue toward them in the future. The therapist also testified that Jonathan disclosed in therapy "how his mom was abusive with him in the past, how she would hit him, pull his ear, scream at him," and would take out her stress on him.

The children's foster mother testified that the children were very scared when they first came to her, but that they were doing much better now. She stated she would be willing to provide permanency for the children, including adoption.

Luz testified that she wanted to stay with her foster mother and did not want to go back with Lucia. She stated that if she went back to Guatemala, she would be afraid that she would see Enrique and would be afraid that "they would kill me."

Lucia testified by telephone from Guatemala. She testified that she was living with her oldest son in Guatemala and that she was seeing a counselor on a weekly basis for post-traumatic stress disorder. She had a job doing cleaning and maintenance at a school and had started a small computer business.

When asked whether she believed it would be in her children's best interests for her parental rights to remain intact and

for them to be reunited with her, Lucia said, "Yes, that's right. I am the mother, and I really need them to be here. I don't have anybody else in the world. They are my children, and I need us to be together."

The county court granted the State's motions to terminate Lucia's parental rights. The court agreed that Lucia had subjected each of the children or a sibling of the children to "aggravated circumstances" under § 43-292(9) and substantial and repeated neglect under § 43-292(2). It found that Lucia had abandoned Luz under § 43-292(1). The court concluded that termination of Lucia's parental rights was in the children's best interests and found that Lucia "is unfit based upon her abusive treatment of Luz and Jonathan and that such a personal deficiency and incapacity has prevented and will probably prevent, performance of reasonable parental obligations in child rearing in the future."

The court's consolidated order was issued on April 4, 2016. The order notes that a copy should be sent to the State's attorney, Lucia's attorney, Jonathan's father's attorney, the court-appointed special advocate, and DHHS. The certificate of service for the order indicates that the clerk sent notice of the order to the court-appointed special advocate; the Guatemalan consulate in Denver, Colorado; the guardian ad litem; and the State's attorney. The certificate of service does not indicate whether notice was sent to Lucia or her attorney.

On April 28, 2016, the court issued a consolidated order nunc pro tunc, which stated, in relevant part:

> The Court has been informed by the staff and has confirmed with the various attorneys that due to a design flaw in the "E-Filing" system of the Courts, that neither the mother's attorney nor father, Enrique, received notice of the Court's decision. Due to the failure of the attorney and father to receive notice, their right to possibly appeal the Court's decision has been severely compromised in that the time for the same has almost expired as they are now just finding out about the Court's decision.

> Therefore, in an effort to correct that problem, the Court hereby vacates its previous Order filed on April 4th, 2016, and now reissues that Order in all respects under today's date, so that those parties will have an appropriate amount of time to contemplate and perhaps file an appeal of the Court's decision.

It does not appear from our record that any party moved to vacate the April 4 order. It also does not appear that any evidence was admitted, by affidavit, testimony, or otherwise, to show that Lucia and her attorney did not receive notice of the court's April 4 order. On May 23, Lucia filed notices of appeal from the court's April 28 order nunc pro tunc.

The Nebraska Court of Appeals directed the parties "to include in their briefing the potential jurisdictional problem caused by the juvenile court's vacating its prior order nunc pro tunc and reissuing the same order for the purpose of extending a party's time to appeal." Thereafter, we moved the cases to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state pursuant to Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

ASSIGNMENT OF ERROR

Lucia's sole assignment of error is that the county court erred in finding by clear and convincing evidence that it was in her children's best interests to terminate her parental rights.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[1]

ANALYSIS

[2,3] 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, even where no party has

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[1] *In re Interest of LeVanta S., ante* p. 151, 887 N.W.2d 502 (2016).

raised the issue.[2] Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto, and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation.[3]

[4,5] An appellate court does not acquire jurisdiction over an appeal if a party fails to properly perfect it.[4] The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.[5]

To perfect an appeal, Neb. Rev. Stat. § 25-1912(1) (Reissue 2016) requires that a notice of appeal be filed "within thirty days after the entry of such judgment, decree, or final order" appealed from. We have held that the timely filing of a notice of appeal is a jurisdictional requirement.[6]

The order terminating Lucia's parental rights was entered on April 4, 2016. On April 28, the court entered an order nunc pro tunc purporting to vacate the April 4 order and to reinstate it in all respects as of that date in order to preserve Lucia's opportunity to appeal the order. Lucia filed her notices of appeal on May 23. Lucia's notices of appeal were therefore filed within 30 days of the April 28 order nunc pro tunc and not within 30 days of the April 4 order terminating her parental rights.

Whether we have jurisdiction in this case depends on whether Lucia satisfied the requirement of § 25-1912(1) that her notices of appeal be filed within 30 days. This, in turn, depends on whether the April 28, 2016, order nunc pro tunc was a valid order by the court which extended the time for Lucia to appeal.

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[2] See, *In re Interest of L.T., ante* p. 105, 886 N.W.2d 525 (2016); *Schlake v. Schlake*, 294 Neb. 755, 885 N.W.2d 15 (2016).

[3] *Harms v. County Board of Supervisors*, 173 Neb. 687, 114 N.W.2d 713 (1962).

[4] *In re Interest of L.T., supra* note 2.

[5] *Id.*

[6] *Id.*

[6] Both juvenile courts and county courts have the power to vacate or modify their own judgments and orders during or after the term in which they were made in the same manner as provided for district courts.[7] District courts have the power to vacate and modify their judgments and orders under Neb. Rev. Stat. § 25-2001 (Reissue 2016). Section 25-2001(3) allows courts to issue nunc pro tunc orders:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders.

[7,8] The purpose of an order nunc pro tunc is to correct clerical or formal errors in order to make the record correctly reflect the judgment actually rendered by the court.[8] The term "'[n]unc pro tunc'" is a Latin phrase that means "'now for then.'"[9] A nunc pro tunc order reflects now what was actually done before, but was not accurately recorded.[10] The power to issue nunc pro tunc orders is not only conveyed by statute, but is inherent in the power of the courts.[11]

[9-12] An order nunc pro tunc differs from an order substantively amending or vacating a court's prior order.[12] In *Continental Oil Co. v. Harris*,[13] we explained:

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[7] See Neb. Rev. Stat. §§ 25-2720.01 and 43-2,106.02 (Reissue 2016). See, also, Neb. Rev. Stat. § 43-245(12) (Reissue 2016).

[8] See, *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *Calloway v. Doty*, 108 Neb. 319, 188 N.W. 104 (1922); *Van Etten v. Test*, 49 Neb. 725, 68 N.W. 1023 (1896).

[9] 46 Am. Jur. 2d *Judgments* § 130 at 487 (2006). See, also, 49 C.J.S. *Judgments* § 155 (2009).

[10] See *id*.

[11] *Van Etten v. Test, supra* note 8.

[12] See *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983).

[13] *Id.* at 424, 333 N.W.2d at 923.

> [T]he office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it. Neither can it be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do.

In *Ferry v. Ferry*,[14] we said:

> The proper function of a nunc pro tunc order is not to correct, change, or modify some affirmative action previously taken. Rather, its purpose is to correct the record which has been made so that it will truly record the action taken, which, through inadvertence or mistake, has not been truly recorded.

[13,14] An order nunc pro tunc does not change the time to appeal the order or judgment that it amends, because it only corrects clerical or formal errors.[15] But where an order or judgment is amended in a material and substantial respect, the time for appeal runs from the date of the amendment.[16] Because an order nunc pro tunc merely makes the record reflect what the court actually decided in the original order or judgment and does not make any substantive or material change to the order or judgment, the order relates back to the

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[14] *Ferry v. Ferry*, 201 Neb. 595, 600-01, 271 N.W.2d 450, 454 (1978).

[15] See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990).

[16] See *id.*

date of the original order or judgment.[17] Thus, a nunc pro tunc order cannot extend the time for a party to appeal the order or judgment which the nunc pro tunc order corrects.[18]

The court's April 28, 2016, order did not extend Lucia's time to appeal the termination of her parental rights, because a nunc pro tunc order exists for the purpose of correcting clerical errors in the court records and its effect relates back to the time of the original order.

While the court's April 28, 2016, order is labeled "Order Nunc Pro Tunc," it also expressly states that it vacates the original order and reinstates it in whole as of that date. The stated intent of this was to extend the time to appeal, a substantive change in the rights of a party. By definition, this is something that an order nunc pro tunc cannot do. The order's stated intent makes clear that the label "Order Nunc Pro Tunc" is a misnomer. Rather, the order is one substantively amending, by vacating and reinstating, the earlier order.

[15,16] Courts have the power to vacate or modify their own judgments and orders at any time during the term at which they were pronounced.[19] But this power may not be used to circumvent the Legislature's power to fix the time limit to take an appeal.[20] A court may not vacate an order or judgment and reinstate it at a later date just for the purpose of extending the time for appeal.[21] Where a later order or judgment modifies, vacates, amends, or contradicts a prior order or judgment, the time for appeal from that portion of the later order which

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[17] See *id.*

[18] See *id.*

[19] *Moackler v. Finley*, 207 Neb. 353, 299 N.W.2d 166 (1980). See, also, § 25-2001(1).

[20] *Morrill County v. Bliss*, 125 Neb. 97, 249 N.W. 98 (1933). See, also, *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *Ricketts v. Continental Nat. Bank*, 169 Neb. 809, 101 N.W.2d 153 (1960).

[21] *Morrill County v. Bliss, supra* note 20.

contradicts the earlier order—*and that portion only*—runs from the issuance of the later order.[22]

One exception to this rule against using a court's power to vacate as a tool to extend the time for appeal is where a clerk fails to provide notice of a judgment to a party, thereby impairing the party's ability to appeal.[23] As we said in *Nye v. Fire Group Partnership*,[24] "the right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment." As the Court of Appeals has noted, "the proper method of addressing the situation would have been by a motion to vacate" the original order.[25]

But a motion to vacate an order or judgment on the basis that the clerk failed to provide a party with notice, thereby impairing the party's ability to appeal, must be supported by some evidence. Here, the court based its decision because it "ha[d] been informed by the staff and ha[d] confirmed with the various attorneys that due to a design flaw in the 'E-Filing' system of the Courts, . . . the mother's attorney [did not] receive[] notice of the Court's decision." The problem is there was no record made by any of the parties that would support the court's finding. The court's statement is not evidence. There is simply no evidence in the record from the court staff, the attorneys, or anyone else to establish that Lucia and her attorney did not receive notice of the court's order. No affidavits were submitted to this effect, nor was there any testimony offered. The court is not permitted to make this determination without some type of evidence to support the finding by the court.

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[22] See *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

[23] See *Nye v. Fire Group Partnership*, 263 Neb. 735, 642 N.W.2d 149 (2002).

[24] *Id.* at 740, 642 N.W.2d at 153.

[25] *TierOne Bank v. Cup-O-Coa, Inc.*, 15 Neb. App. 648, 652, 734 N.W.2d 763, 767 (2007).

While the certificate of service for the April 4, 2016, order states that other parties were served with a copy of the order, it does not state whether Lucia and her attorney were provided notice. Nor is there any direct evidence in the record that they were not provided notice of the order. Absent a record, we cannot assume that the clerk failed to notify an attorney of record of the court's order. Moreover, it does appear that Lucia's attorney was notified of the April 4 order at some point prior to the April 28 order and within the 30-day window to file notices of appeal.

Because there is no evidence in the record to establish that Lucia and her attorney did not receive notice of the court's order, the court's April 28, 2016, order purporting to vacate and reinstate the April 4 order for the purpose of extending Lucia's time to appeal was invalid and, as such, could not extend the time to appeal established by the Legislature. To timely perfect her appeals, Lucia was required to file notices of appeal within 30 days of the April 4 order. Absent a record that she did not timely receive notice of the April 4 order, the district court had no authority to issue its April 28 order, which attempted to extend Lucia's time to appeal.

CONCLUSION

Because Lucia failed to file notices of appeal within 30 days of the April 4, 2016, order terminating her parental rights and because there is no evidence in the record to show that she and her attorney did not receive notice of the order before the time to appeal had expired, this court is without jurisdiction and must dismiss these appeals.

Appeals dismissed.

State of Nebraska, appellee, v. Marco E. Torres, Jr., appellant.

894 N.W.2d 191

Filed February 17, 2017. No. S-16-269.

1. **Postconviction: Evidence: Appeal and Error.** 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. An appellate court upholds the trial court's findings unless they are clearly erroneous. An appellate court independently resolves questions of law.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
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. **Right to Counsel: Effectiveness of Counsel.** The right to counsel has been interpreted to include the right to effective counsel.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** Under the standard established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), claims of ineffective assistance of counsel by criminal defendants are evaluated using a two-prong analysis: first, whether counsel's performance was deficient and, second, whether the deficient performance was of such a serious nature so as to deprive the defendant of a fair trial.
6. **Effectiveness of Counsel: Proof.** To show that the performance of a prisoner's counsel was deficient, it must be shown that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.

7. ____: ____. To establish the prejudice element of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, a defendant must show that the counsel's deficient performance was of such gravity to render the result of the trial unreliable or the proceeding fundamentally unfair.
8. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics.
9. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.
10. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.
11. **Effectiveness of Counsel.** Under the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), framework for ineffective assistance of counsel claims, a court may address the two elements, deficient performance and prejudice, in either order.
12. **Effectiveness of Counsel: Proof.** To prove the prejudice element of an ineffective assistance of counsel claim, a prisoner must prove that his or her counsel's deficient performance was of such gravity to render the result of the trial unreliable or the proceeding fundamentally unfair, by establishing that but for the deficient performance of counsel, there is a "reasonable probability" that the outcome of the case would have been different.
13. **Postconviction: Constitutional Law: Prosecuting Attorneys: Effectiveness of Counsel.** A claim of prosecutorial misconduct may be considered on postconviction only to the extent it constitutes a constitutional violation under the U.S. or Nebraska Constitutions.
14. **Evidence: Prosecuting Attorneys: Due Process.** The nondisclosure by the prosecution of material evidence favorable to the defendant and requested by the defendant violates the Due Process Clause, irrespective of the good faith or bad faith of the prosecution.
15. **Postconviction: Appeal and Error.** A motion for postconviction relief is not a substitute for an appeal.
16. ____: ____. 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; such issues are procedurally barred.
17. **Postconviction: Prosecuting Attorneys: Appeal and Error.** Whether a claim of prosecutorial misconduct could have been litigated on direct

appeal and is thus procedurally barred from being litigated on postconviction depends on the nature of the claim.

18. ____: ____: ____. Where the claim of prosecutorial misconduct is such that a determination of the merits is possible based on the record on direct appeal, such as statements made in a prosecutor's closing argument, it is procedurally barred from being litigated on postconviction.

19. **Postconviction: Appeal and Error.** Where an evidentiary hearing is necessary to decide the merits of the claim, the failure to raise the issue on direct appeal does not preclude it from being litigated on postconviction.

Appeal from the District Court for Hall County: James D. Livingston, Judge, Retired. Affirmed.

Alfred E. Corey III, of Shamberg, Wolf, McDermott & Depue, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

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

Wright, J.

I. NATURE OF CASE

Marco E. Torres, Jr., was convicted by jury of two counts of first degree murder, one count of robbery, three counts of use of a deadly weapon to commit a felony, and one count of unauthorized use of a financial transaction device. Torres was sentenced to death on each murder conviction, 50 to 50 years' imprisonment on each of the robbery and use convictions, and 20 months' to 5 years' imprisonment for the unauthorized use of a financial transaction device conviction. His convictions were affirmed by this court on direct appeal.[1] Torres filed a petition for postconviction relief in the district court for Hall County. After an evidentiary hearing, the district court denied Torres' petition. Torres appeals this denial. We affirm.

[1] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

II. BACKGROUND

1. Torres' Relationship With Other Characters

Torres was involved in drug trafficking in Grand Island, Nebraska. Through his drug activities, Torres knew a man known as Billy Packer, who was also involved in drug trafficking. It was through Packer that Torres met Jose Cross, Gina Padilla, and Timothy Donohue.

Edward Hall allowed Donohue to live in Hall's house in a room on the second floor. Hall also allowed Padilla to live in his house in exchange for cleaning the house and caring for his cats. Padilla was dating Cross, who eventually moved in to Hall's house with Padilla. Cross, who also sold drugs, used Hall's house as a base for his drug trafficking.

2. Kidnapping and Robbery of Packer

In February 2007, Torres and Packer were hanging out with a group of people in a trailer. After Torres got into an argument with someone, he and Packer left in Packer's car. Once inside the car, Torres pulled out a gun, pointed it at Packer, and told him to drive to Cross' house.

Upon arrival, Torres and Packer went inside. Torres was holding the gun inside his coat and pulled it back out once they were inside. Torres, Packer, and Cross went upstairs, where Padilla was present. Torres gave Cross some duct tape and told him to tie up Packer, which he did. Torres said that Packer was supposed to have obtained an ounce of methamphetamine for someone in Texas. Torres said that once Packer got the methamphetamine, Torres would take it to Texas. Torres forced Packer to make a number of cell phone calls in order to obtain the methamphetamine. While he was holding Packer, Torres took approximately $800 from Packer's wallet. He told Cross and Padilla to go purchase food with Packer's bank card, which they did.

Cross and Padilla convinced Torres to let Packer go, because Packer had to travel to Kansas for a court date and could get

the methamphetamine when he returned. Torres kept Packer's cell phone and other items from Packer's wallet.

Torres was charged with kidnapping, robbery, and two counts of use of a weapon to commit a felony for the kidnapping and robbery of Packer. He was convicted by a jury and sentenced by the court to 25 to 40 years' imprisonment on both the kidnapping and associated weapons convictions and 20 to 30 years' imprisonment on both the robbery and associated weapons convictions, all to be served consecutively.

On his direct appeal in 2008, he alleged only that his sentences were excessive. Torres filed a supplemental pro se brief, alleging that his trial counsel was ineffective. On September 17, 2008, in case No. A-08-131, the Nebraska Court of Appeals summarily affirmed his convictions, but concluded that the record was not sufficient to address Torres' claims of ineffective assistance of counsel on direct appeal.

After his kidnapping and robbery convictions were affirmed, Torres petitioned for postconviction relief. He alleged, among other things, that his counsel was ineffective for failing to call certain witnesses that he believed would have refuted the testimony that he kidnapped Packer. The district court held an evidentiary hearing and denied Torres' postconviction petition, which denial the Court of Appeals affirmed.[2]

3. Murders of Hall and Donohue

On March 1, 2007—less than a month after Torres kidnapped Packer—Torres asked Cross if he could stay in Hall's house because he had no other place to stay. Cross was reluctant, but Donohue agreed to let Torres stay in his room. Early the next morning, Cross and Padilla left on a trip to Texas. They did not tell Torres they were going to Texas, because they knew he wanted to go to Texas and also knew that he had a gun. Cross and Padilla's departure left Torres in the house with Hall and Donohue.

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[2] See *State v. Torres*, No. A-11-1051, 2012 WL 5395345 (Neb. App. Nov. 6, 2012) (selected for posting to court website).

On March 5, 2007, the bodies of Hall and Donohue were found in Hall's house by police after Padilla requested that police conduct a welfare check on the two. Hall's body was found on the first floor of the house, bound by an extension cord in an armchair and gagged with a bathrobe belt. He had three contact gunshot wounds to his head from a small-caliber weapon. His cause of death was determined to be asphyxiation by gagging, suffocation, physical restraint, and multiple deeply penetrating gunshot wounds.

Donohue's body was found upstairs. His cause of death was three gunshot wounds to his head and chest. The shots were fired at close range and were contact or near-contact shots.

Torres' DNA was found on the bathrobe belt used to gag Hall, and he could not be excluded from the DNA sample on the cord used to bind Hall. His DNA was also found on cigarette butts in Donohue's room.

Hall's bank card was used by Torres early in the morning on March 3, 2007. Torres left for Texas in Hall's car, arriving in Houston, Texas, on March 8. Hall's car was later found near where Torres was staying in Texas. It had been burned. Houston law enforcement apprehended Torres on March 26. Torres had Packer's cell phone in his possession when he was arrested.

4. Murder Trial

In 2009, Torres was tried and convicted of two counts of first degree murder for the murders of Hall and Donohue, one count of robbery, three counts of use of a deadly weapon to commit a felony, and one count of unauthorized use of a financial transaction device for the use of Hall's bank card. Torres was found guilty by a jury; he waived his right to a jury determination of the aggravating factors at the sentencing phase, choosing to be sentenced by a panel of three judges. The panel found all four of the aggravating factors that were alleged with regard to the murder of Hall and three of the four factors with regard to the murder of Donohue. Torres was sentenced to death on each murder conviction, 50 to 50 years'

imprisonment on each of the robbery and use convictions, and 20 months' to 5 years' imprisonment for the unauthorized use of a financial transaction device conviction.

At Torres' murder trial, the district court admitted evidence about his kidnapping and robbery of Packer, including a part of the bill of exceptions from his kidnapping and robbery trial in which he had been convicted. The district court held that this evidence was admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), "for purposes of motive, intent, plan, knowledge, opportunity, and identity."[3]

5. Direct Appeal

On direct appeal of his murder convictions, Torres argued that the district court improperly admitted the evidence of his kidnapping and robbery of Packer under rule 404(2).[4] This court concluded that the district court erred in admitting this evidence to show Torres' intent or opportunity to commit the murders. But we concluded that it was admissible to show his motive. We concluded that the improper admission of this evidence to show intent or opportunity was harmless error and affirmed his convictions and sentences.[5]

6. Postconviction Petition and Hearing

In 2013, Torres filed a motion for postconviction relief. The court granted his motion to appoint counsel. Torres was allowed to amend his petition and submit a second amended petition for postconviction relief.

His petition alleged that his trial counsel was ineffective by "fail[ing] to . . . adequately address the [rule] 404 evidence regarding the alleged kidnapping and robbery of . . . Packer, including the failure to present evidence regarding testimony of [three potential witnesses] and a failure to adequately raise

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[3] See *State v. Torres, supra* note 1, 283 Neb. at 155, 812 N.W.2d at 230.

[4] *State v. Torres, supra* note 1.

[5] *Id.*

issues regarding phone records of . . . Packer's telephone." Torres claimed that trial counsel was ineffective by "fail[ing] to adequately raise the issues regarding destruction of evidence, contamination of evidence and the State's failure to produce evidence," including the handling of crime scene evidence. He alleged counsel was ineffective in failing to call an expert witness to testify about the possible evidence contamination and DNA testing and the release of the crime scene premises (Hall's house) to Hall's family and its subsequent destruction. He claimed counsel failed to obtain sign-in sheets and surveillance video from the Salvation Army, failed to argue *State v. Glazebrook*[6] to oppose the use of the rule 404 evidence, and failed to hire a mitigation expert for the sentencing phase.

Torres alleged that the State had withheld evidence and had engaged in prosecutorial misconduct by failing to obtain and preserve the surveillance video from the Salvation Army, releasing the crime scene to Hall's family and allowing it to be destroyed, and "[a]ttempt[ing] to extort a guilty plea by threats of charging and prosecuting [Torres'] mother."

The district court held an evidentiary hearing. The evidence presented at the hearing included the depositions of Torres' attorneys, the Hall County Attorney, an expert witness, and others. Also presented were police reports, cell phone records, the bill of exceptions from the murder trial, and various other documents.

The district court denied Torres' petition for postconviction relief. Torres appealed.

III. ASSIGNMENTS OF ERROR

Torres claims that the district court erred by determining that his trial counsel was not ineffective and that the State did not commit prosecutorial misconduct.

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[6] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

IV. STANDARD OF REVIEW

[1] 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. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law.[7]

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[8] 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*,[9] an appellate court reviews such legal determinations independently of the lower court's decision.[10]

V. ANALYSIS

Nebraska's postconviction act allows a prisoner to petition a court to vacate or set aside his or her conviction "on the ground that there was a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States."[11]

1. Ineffective Assistance of Trial Counsel

[4,5] The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall

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[7] *State v. Hessler, ante* p. 70, 886 N.W.2d 280 (2016).

[8] *State v. Harris*, 294 Neb. 766, 884 N.W.2d 710 (2016).

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

[10] *State v. Hessler, supra* note 7; *State v. Harris, supra* note 8.

[11] Neb. Rev. Stat. § 29-3001(1) (Reissue 2016). See, also, *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

enjoy the right . . . to have the Assistance of Counsel for his defen[s]e." The right to counsel has been interpreted to include the right to *effective* counsel.[12] Under the standard established by the U.S. Supreme Court in *Strickland v. Washington*, claims of ineffective assistance of counsel by criminal defendants are evaluated using a two-prong analysis: first, whether counsel's performance was deficient and, second, whether the deficient performance was of such a serious nature so as to deprive the defendant of a fair trial.[13] A court may address the two elements of this test, deficient performance and prejudice, in either order.[14]

[6,7] To show that the performance of a prisoner's counsel was deficient, it must be shown that "'counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law . . . .'"[15] To establish the prejudice element of the *Strickland v. Washington* test, a defendant must show that the counsel's deficient performance was of such gravity to "'render[] the result of the trial unreliable or the proceeding fundamentally unfair.'"[16] This prejudice is shown by establishing that but for the deficient performance of counsel, there is a "'reasonable probability'" that the outcome of the case would have been different.[17]

[8-10] When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics.[18] There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic

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[12] *Strickland v. Washington, supra* note 9. See *State v. Dubray, supra* note 11.

[13] *Id.*

[14] *State v. Dubray, supra* note 11.

[15] *Id.* at 950, 885 N.W.2d at 553.

[16] *Id.*

[17] *Id.*

[18] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

decisions.[19] The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.[20]

(a) Failure to Call Witnesses: Rule 404(2)
Evidence of Torres' Kidnapping
and Robbery of Packer

Torres claims that his counsel was ineffective by not presenting the testimony of three potential witnesses to refute the evidence of his kidnapping and robbery of Packer, which was admitted under rule 404(2).

Torres' trial counsel explained that the decision not to focus on the kidnapping of Packer was a matter of trial strategy. He explained that "the less talked about the . . . Packer episode, the better. Because my opinion was that the evidence was clear-cut [that] the kidnapping occurred from just too many witnesses." The trial strategy was to focus on the crimes that Torres was charged with, rather than the kidnapping, which was admissible only as rule 404 evidence. Torres' trial counsel explained that he did not want to shift the focus onto the timeline of who had Packer's cell phone at what time. Torres' counsel was also concerned about what testimony might come out on the witness stand if these witnesses were to testify. He did not believe that it was a good trial strategy to call witnesses that may end up bolstering the testimony about the kidnapping and robbery.

The decision not to call these witnesses was a reasonable trial strategy by Torres' trial counsel. As his counsel explained, the evidence for the kidnapping was strong. Calling additional witnesses would have run the risk of bolstering the evidence of the kidnapping and robbery. This

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[19] *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013). See, also, *State v. Parnell, supra* note 18.

[20] *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014).

strategy was not unreasonable. The performance of Torres' trial counsel was not deficient, and therefore, this claim of ineffective assistance of counsel was correctly rejected by the district court.

In Torres' postconviction motion following his kidnapping and robbery convictions, he raised his trial counsel's failure to call those same three witnesses, among several others, to testify. On appeal from the denial of postconviction relief, the Court of Appeals concluded that his trial counsel was not ineffective for not calling these witnesses. If Torres' trial counsel was not ineffective for failing to call these witnesses to refute the kidnapping and robbery allegation in his kidnapping and robbery trial, then it follows a fortiori[21] that his counsel was not ineffective in his murder trial by not presenting these witnesses, because the kidnapping was used only as rule 404 evidence to show motive.

Finally, Torres argues that his counsel should have introduced statements of Hall through the testimony of two individuals who had spoken with Hall. This claim was not raised in Torres' second amended petition. An appellate court will not consider an issue on appeal that was not presented to the trial court in the pleadings.[22] This claim regarding the testimony of those witnesses concerning statements made by Hall was not presented to the district court in his petition for postconviction relief, and we will not consider it here.

(b) Failure to Argue About Withheld or Destroyed Evidence

Torres argues that his trial counsel was ineffective by failing to sufficiently raise the issues of contamination, destruction,

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[21] See Black's Law Dictionary 72 (10th ed. 2014) ("[b]y even greater force of logic; even more so it follows").

[22] *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016); *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007); *Central Nebraska Public Power and Irrigation District v. Walston*, 140 Neb. 190, 299 N.W. 609 (1941).

and failure to produce evidence. He argues that his counsel failed to sufficiently question the handling of the evidence by the police. He concedes that his trial counsel did raise issues relating to the handling of evidence at the crime scene, but "believes that his counsel should have done more."[23] He argues that his counsel should have called Dr. Robert Pyatt as an expert witness to "focus on the contamination of the evidence."[24]

Torres' trial counsel testified that he and cocounsel discussed the pros and cons of having Pyatt testify regarding the collection of DNA evidence. They ultimately decided there was not enough of a difference in opinion between Pyatt and the State's expert witness to justify calling Pyatt to testify.

Torres' trial counsel raised the issues of the collection of crime scene evidence and possible contamination on cross-examination of the State's expert witness. Considering the fact that the problems with the collection of evidence were raised by Torres' counsel on cross-examination, we are unable to conclude that counsel was ineffective in not calling Pyatt to testify. Pyatt's testimony would have been cumulative. The decision not to call Pyatt to testify was a reasonable trial strategy. His counsel's performance was not deficient in this regard.

Torres also claims that his counsel was ineffective by failing to raise the issue of "destruction of evidence." Specifically, he raises the fact that shortly after the murders, the crime scene (Hall's house) was released to Hall's estate, which gave the Grand Island Fire Department permission to burn it for training purposes. Torres says that his counsel's failure to go into the house and investigate the crime scene before it was released and burned constituted ineffective assistance of counsel because it inhibited his ability to prove that methamphetamine was being manufactured in the house.

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[23] Brief for appellant at 14.

[24] *Id.*

Torres' counsel testified that although he was given the opportunity, he chose not to go into the house, because of his concern for his own health and because he believed the photographic and physical evidence taken from the scene was sufficient. This was not an unreasonable decision by Torres' counsel, and it did not constitute deficient performance.

Moreover, it would not have made a difference in the outcome of the case if there were evidence in the residence to show that methamphetamine was being manufactured there. The evidence at trial showed that Cross was using the residence as a base for his drug trafficking. The distinction between whether methamphetamine was being manufactured or merely sold out of the house was immaterial to whether Torres murdered Hall and Donohue.

Torres also claims that his counsel was ineffective in failing to obtain sign-in sheets and surveillance video from the Salvation Army. Torres claims the sign-in sheets and video would have shown that Hall was alive and would have contradicted the State's theory of the time of Hall's death. He claims that not having these sign-in sheets and video rendered him "unable to effectively present a defense."[25]

As to the sign-in sheets, Torres' attorney did obtain the original sheets and sent them to a document examiner to analyze the signatures. The examiner could not determine with certainty whether the signature "Ed" on the relevant date was that of Hall.

As to the surveillance video, Torres states that "[t]he video has been unable to be located and would have been important to compare the time of death with Torres' argument that he did not commit the crime."[26] This claim overlaps with his claim that the State committed prosecutorial misconduct by failing to produce the video. It is not clear whether Torres is blaming his attorneys or the prosecution for the unavailability of the

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[25] *Id.* at 15.

[26] *Id.*

video. He has not articulated exactly what his counsel did that made this video unable to be located or how this constituted deficient performance on counsel's part. Torres has failed to prove this claim of ineffective assistance of counsel.

(c) Failure to Use Mitigation Specialist

Torres claims that his counsel was ineffective for failing to hire a mitigation specialist to present evidence to the three-judge panel. In the district court hearing, Torres offered an excerpt from the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases[27] and also the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.[28] Guideline 4.1 states that in a death penalty case, "[t]he defense team should consist of no fewer than two [qualified] attorneys . . . an investigator, and a mitigation specialist."[29]

[11] Under the *Strickland v. Washington* framework for ineffective assistance of counsel claims, a court may address the two elements, deficient performance and prejudice, in either order.[30] We conclude that Torres failed to prove that he suffered any prejudice as a result of his counsel's failure to hire a mitigation specialist.

[12] To prove the prejudice element of his ineffective assistance of counsel claim, a prisoner must prove that his or her counsel's deficient performance was of such gravity to "'render[] the result of the trial unreliable or the proceeding fundamentally unfair,'" by establishing that but for the deficient

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[27] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003).

[28] *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008).

[29] *ABA Guidelines, supra* note 27 at 952.

[30] See *State v. Dubray, supra* note 11.

performance of counsel, there is a "'reasonable probability'" that the outcome of the case would have been different.[31] Torres has not met this burden.

Torres does not explain just what a mitigation specialist would have discovered that his attorneys did not and how that would have made a difference in his sentencing. He argues that "he was prejudiced in his attorneys' failure to present a complete picture of him to the three judge panel."[32]

We have rejected similar claims of ineffective assistance of counsel where prisoners fail to show how a different or more thorough investigation of mitigating evidence would have made a difference in sentencing. In *State v. Hessler*,[33] we said:

> Other than his alleged mental incompetence, [the defendant] presented no evidence of mitigating circumstances that counsel should have discovered and presented at his sentencing. We therefore conclude that the district court did not err when it rejected [the defendant's] claim that trial counsel was ineffective for failing to discover and present mitigating evidence at sentencing.

In *State v. Palmer*,[34] we said that "[w]hile [the defendant] asserts that the failure of his counsel to undertake these investigations is ineffective assistance of counsel, [the defendant] does not argue how any of these actions by counsel would have made a difference in [his] sentencing."

In this case, the district court concluded that Torres suffered no prejudice, because the mitigating evidence "would barely have altered the sentence profile presented to the decision maker."

We note that Torres did request that the district court appoint a mitigation specialist to assist him in this postconviction

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[31] *Id.* at 950, 885 N.W.2d at 553.

[32] Brief for appellant at 20.

[33] *State v. Hessler, supra* note 7, *ante* at 85, 886 N.W.2d at 292.

[34] *State v. Palmer*, 257 Neb. 702, 721, 600 N.W.2d 756, 772 (1999).

case, which the court denied. But Torres has not raised this denial in his assignments of error.

Because Torres has failed to show a reasonable probability that the result of the sentencing would have been different had his counsel retained a mitigation specialist, he suffered no prejudice and cannot prevail on this claim of ineffective assistance of counsel.

Torres argues, however, that we should presume prejudice in this case. Under *State v. Trotter*,[35] "under certain specified circumstances, prejudice to the accused is to be presumed," namely "(1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial." Torres argues that the third category of presumed prejudice, based on "the surrounding circumstances," applies in this case where his counsel failed to retain a mitigation specialist.[36] We decline to adopt a presumption of prejudice based on counsel's failure to obtain a mitigation specialist in the sentencing phase of this capital case.

2. Prosecutorial Misconduct

Torres alleges that the State engaged in prosecutorial misconduct by failing to obtain and preserve the sign-in sheets and surveillance video from the Salvation Army, by releasing the crime scene to Hall's family and allowing it to be destroyed, by tampering with Packer's cell phone records, and by attempting to "extort" a plea deal from him with threats of prosecuting his mother. We find these allegations to be without merit.

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[35] *State v. Trotter*, 259 Neb. 212, 218, 609 N.W.2d 33, 38 (2000).

[36] Brief for appellant at 19.

[13] Nebraska's postconviction act allows a prisoner to petition for postconviction relief "on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States."[37] Thus, a claim of prosecutorial misconduct may be considered on postconviction only to the extent it constitutes a constitutional violation under the U.S. or Nebraska Constitutions.[38]

[14] Under *Brady v. Maryland*,[39] the nondisclosure by the prosecution of material evidence favorable to the defendant and requested by the defendant violates the Due Process Clause, irrespective of the good faith or bad faith of the prosecution.[40] The Due Process Clause also requires the State to preserve potentially exculpatory evidence on behalf of a defendant in some circumstances.[41] Failure to preserve "'"material exculpatory"'" evidence violates the Due Process Clause, regardless of the good or bad faith of the State, while failure to preserve "'"potentially useful"'" evidence does not violate the Due Process Clause unless done in bad faith.[42]

[15-19] A motion for postconviction relief is not a substitute for an appeal.[43] Therefore, 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; such issues are procedurally barred.[44] Whether a claim

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[37] § 29-3001(1).

[38] See *id.*

[39] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[40] See *State v. Parnell, supra* note 18.

[41] *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011) (citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)).

[42] *Id.* at 785, 807 N.W.2d at 784 (citing *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

[43] *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

[44] See *id.*

of prosecutorial misconduct could have been litigated on direct appeal and is thus procedurally barred from being litigated on postconviction depends on the nature of the claim.[45] Where the claim of prosecutorial misconduct is such that a determination of the merits is possible based on the record on direct appeal, such as statements made in a prosecutor's closing argument,[46] it is procedurally barred from being litigated on postconviction.[47] But where an evidentiary hearing is necessary to decide the merits of the claim, the failure to raise the issue on direct appeal does not preclude it from being litigated on postconviction.[48] Because Torres' claims of prosecutorial misconduct could not have been decided based on the record on direct appeal, they are not procedurally barred, even though they were not raised on direct appeal.

(a) Failure to Produce Evidence: Salvation Army Sign-in Sheets and Surveillance Video

Torres claims that the State committed prosecutorial misconduct by failing to produce a surveillance video from the Salvation Army that he claims would have shown Hall had eaten there, proving that he was alive and contradicting the State's timeline for when the murders occurred.

The county attorney testified in his deposition that he did not personally watch the video. The other attorneys in his office in charge of reviewing the evidence did not report seeing Hall in the video. Torres' first attorney testified that he thought he saw the Salvation Army video, but could not recall for sure. Torres' subsequent counsel did not recall anything about the video.

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[45] See, generally, *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[46] E.g., *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[47] *State v. Harris, supra* note 45.

[48] See *id.*

The district court concluded that "there has been nothing presented to show that evidence existed that was probative concerning a security video from the Salvation Army and review shows Torres'[] counsel explored both of these avenues as possible evidence but it was not present." We conclude that Torres has failed to prove this claim of prosecutorial misconduct. He has not shown that the prosecution failed to turn over the video, nor has he shown that the video would be exculpatory.

Additionally, Torres claims that the State committed prosecutorial misconduct by failing to turn over the original Salvation Army sign-in sheets. This claim is without merit, because Torres' own counsel testified in his deposition that he received copies of the sheets and, when requested, the original sign-in sheets.

(b) Destruction of Evidence: Hall's House and Packer's Cell Phone Records

Torres claims that the State committed prosecutorial misconduct by releasing the crime scene to Hall's family, after which it was burned in a fire department training exercise. He argues that "[b]y failing to allow the evidence to be preserved, Torres was unable to investigate and then argue that methamphetamine was being manufactured at . . . Hall's residence and [that] this evidence was material to his defense."[49]

First, there is no question about a failure to produce evidence: Torres' counsel was given the opportunity to inspect the house. More importantly, the State was not required to preserve Hall's house after it obtained extensive physical and photographic evidence from the scene. Aside from the practical difficulties of preserving Hall's house for an indefinite period of time for Torres' evidentiary use, the State had no responsibility to preserve the house, because it was not

[49] Brief for appellant at 23.

"'"material exculpatory,"'" and was, at most, "'"potentially useful."'"[50] As discussed above, the evidence at trial showed that Cross was using the residence as a base for his drug trafficking. The distinction between whether methamphetamine was being manufactured or merely sold out of the house is immaterial to whether Torres murdered Hall and Donohue. Absent a showing of bad faith—which Torres has not shown—the State has no burden to preserve evidence that is merely potentially useful.[51]

Torres claims the State "committed misconduct in [its] production of . . . Packer's phone records."[52] Specifically, he alleges that "various phone calls were admitted at trial that were supposed to be from . . . Packer's phone but included calls from others as well as included phone records he never received" and that "the State failed to preserve the texts on . . . Packer's phone."[53] He also claims that the State did not disclose all of the cell phone records based on his claim that the records provided to him differed from those provided to his attorney and that those originally provided to him "did not contain any marks at the top of the documents," but those provided later did have a fax header on them.[54]

Torres has failed to prove that the prosecution altered or deleted any calls on Packer's cell phone records. The only evidence that the State's records were incorrect was Torres' own claim that "he had written down a list of . . . Packer's texts from his phone,"[55] which conflicted with the State's records. Nor has Torres proved that the State engaged in prosecutorial misconduct based on the presence or absence of a fax header

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[50] See *State v. Nelson, supra* note 41, 282 Neb. at 785, 807 N.W.2d at 784.

[51] See *id.*

[52] Brief for appellant at 23.

[53] *Id.*

[54] *Id.* at 24.

[55] *Id.* at 23.

on the cell phone records provided to him. Torres has failed to prove this claim.

(c) Attempt to "Extort" Plea

Torres alleges that the State engaged in prosecutorial misconduct by "[a]ttempts to extort a guilty plea by threats of charging and prosecuting [Torres'] mother." The district court correctly concluded that this allegation was frivolous. Torres did not accept any plea offer. This claim is wholly without merit.

VI. CONCLUSION

Torres has failed to show that his trial counsel was ineffective or that the State engaged in prosecutorial misconduct. We affirm the district court's denial of Torres' motion for postconviction relief.

Affirmed.

Marcia M. Harring, appellant, v. Janis J. Gress and Fredrick Gress, Copersonal Representatives of the Estate of Darin J. Gress, deceased, appellees.

890 N.W.2d 502

Filed February 17, 2017. No. S-16-362.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Courts: Justiciable Issues.** Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.
3. **Courts.** The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreement based on contingent future events that may not occur at all or may not occur as anticipated.

Appeal from the District Court for Thayer County: Vicky L. Johnson, Judge. Reversed and remanded for further proceedings.

Daniel L. Werner, P.C., L.L.O., for appellant.

Sheri Burkholder, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellees.

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

Heavican, C.J.

INTRODUCTION

Marcia M. Harring filed suit in the district court seeking the allowance of an unliquidated claim against the decedent's

estate and the imposition of a lien against real property owned by the estate or, in the alternative, a trust, constructive or otherwise, to secure payment of that claim, as well as judgment for attorney fees and costs. The estate's motion to dismiss was granted, and Marcia appeals. We reverse, and remand for further proceedings.

BACKGROUND

Marcia was previously married to the decedent, Darin J. Gress. Justin Gress, son of Marcia and Darin, was born in 2000.

Marcia and Darin were divorced in 2009. That decree provided in part:

> "12. Pursuant to the stipulation of the parties in regard to Justin's funds, the Court approves creation of a joint account requiring the signatures of both parties for disbursement for college expenses. Any savings held in the name of Justin and not used for his education shall be transferred to him when he reaches his age of majority or becomes otherwise emancipated.
>
> "13. Pursuant to the stipulation of the parties, Darin and Marcia are ordered to equally pay for Justin's reasonable secondary educational expenses not otherwise covered by his savings accounts. Such expenses include tuition, books, and housing."

Darin died on May 15, 2015, and his estate is being probated in the Thayer County Court. Janis J. Gress and Fredrick Gress are the copersonal representatives of the estate; Justin is an heir at law.

On August 4, 2015, Marcia filed a claim with Darin's estate on Justin's behalf. The claim sought one-half of Justin's reasonable secondary educational expenses not otherwise covered by his savings accounts, due upon incurring such expenses. The claim indicated that it was contingent and unliquidated. This claim was disallowed by the estate.

Marcia filed suit in the district court against the estate, seeking that the court order the claim filed on August 4, 2015, be

"allowed," and further that the court confirm the lien of the court's judgment against real property owned by the estate. Marcia also filed a second cause of action against Janis and Fredrick, arguing that they owed a fiduciary duty to the estate to pay all lawful claims and that this duty was breached when the claim was disallowed. Marcia sought to impose a constructive trust on the assets of the estate.

The estate filed a motion to dismiss, which was granted. In dismissing the action, the district court found that the issue was not ripe for resolution because it was not possible to know the amount of "'reasonable'" educational expenses. The district court also noted that Justin is a beneficiary of Darin's estate and that if the trustee failed to pay expenses as provided by Darin's instructions, Justin would have a cause of action against the trustee. Thus, "[a]s there is already a trust in existence with the obligation to pay Justin's college expenses, there is no reason to create a constructive trust to do the exact same thing Marcia requests."

Marcia appeals.

ASSIGNMENTS OF ERROR

Marcia assigns that the district court erred in (1) finding that Justin was a beneficiary of Darin's estate and entitled to one-third of Darin's net estate; (2) determining that under the terms of the trust, the trustee is required to pay the educational expenses of the minor children and Justin would have a cause of action against the trustee for the failure to pay such expenses; and (3) determining that the unliquidated and contingent nature of the claim resulted in its being unfit for judicial resolution.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss is reviewed de novo.[1]

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[1] *Litherland v. Jurgens*, 291 Neb. 775, 869 N.W.2d 92 (2015).

ANALYSIS

On appeal, Marcia makes several arguments, but all are in support of her primary contention that the district court erred in dismissing her suit.

Marcia's suit is based upon her claim against Darin's estate. Some background is helpful to understand this process.

Neb. Rev. Stat. § 30-2486 (Reissue 2016) provides for the presentation of claims against an estate:

> (1) The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.
>
> (2) The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his or her death.
>
> (3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or to avoid injustice the court, on

petition, may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

Neb. Rev. Stat. § 30-2485 (Reissue 2016) provides:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) Within two months after the date of the first publication of notice to creditors if notice is given in compliance with sections 25-520.01 and 30-2483 . . . .
>
> (2) Within three years after the decedent's death if notice to creditors has not been given in compliance with sections 25-520.01 and 30-2483.
>
> (b) All claims, other than for costs and expenses of administration as defined in section 30-2487, against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;
>
> (2) Any other claim, within four months after it arises.
>
> (c) Nothing in this section affects or prevents:
>
> (1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

> (2) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he or she is protected by liability insurance.

Neb. Rev. Stat. § 30-2492 (Reissue 2016) sets forth the procedure to follow in the case of unliquidated or contingent claims:

> (a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.
>
> (b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:
>
> (1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;
>
> (2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

[2,3] The basis of the district court's decision was that Marcia's claim was not ripe.

> Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.[2] The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.[3]

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[2] *Shepard v. Houston*, 289 Neb. 399, 407, 855 N.W.2d 559, 566 (2014).

[3] *Id.*

Specifically, the district court noted:

> [I]t would appear that additional factual development is necessary. First, one does not know whether sufficient savings were provided under the Decree's provisions. One does not know the amount of "reasonable" educational expenses. Whether Justin qualifies for student financial aid is unknown. The amount of Justin's share of the estate is unknown. Finally, and most importantly, it appears there are no post-secondary expenses yet incurred. Marcia's claim recognized this by acknowledging that her claim was contingent and unliquidated. Given these unknowns, the issue is not yet fit for judicial resolution.

We agree with the district court that there are a great number of unknowns in this case. Indeed, Marcia acknowledges that her claim was contingent and unliquidated. But the unknowns presented by this case are insufficient, on the facts and situation presented, to make Marcia's suit not ripe.

Sections 30-2485 and 30-2492 plainly allow for such a claim. Sections 30-2485 and 30-2486 require Marcia to make this claim now; given the limitations on the filing of claims, a claim made after resolution of the various unknowns would be untimely and barred. We therefore reverse the district court's dismissal and remand the cause for further proceedings.

Because we are reviewing the grant of a motion to dismiss, for all relevant purposes, our record is limited to the pleadings filed in this case. Having reviewed those pleadings, we note that to the extent the district court and parties focus on an obligation to provide for Justin's college educational expenses, the divorce decree, at least as set forth in the pleadings, does not provide for payment of such expenses.

CONCLUSION

We conclude that Marcia's action was ripe. We accordingly reverse, and remand for further proceedings.

Reversed and remanded for
further proceedings.

Kelch and Funke, JJ., not participating.

Rosemary Henn, individually and on behalf of others similarly situated, plaintiff, v. American Family Mutual Insurance Company, defendant.

894 N.W.2d 179

Filed February 17, 2017. No. S-16-597.

1. **Insurance: Contracts.** A court interpreting an insurance policy must first determine, as a matter of law, whether the contract is ambiguous.
2. **Insurance: Contracts: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
3. ____: ____: ____. When an insurance contract is ambiguous, an appellate court will construe the policy in favor of the insured.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting meanings.
5. **Insurance: Contracts: Words and Phrases.** Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean.
6. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
7. **Insurance: Contracts: Words and Phrases.** There is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous.
8. ____: ____: ____. Actual cash value is not a substantive measure of damages, but, rather, a representation of the depreciated value of the property immediately prior to damages.

9. **Insurance: Contracts.** For purposes of indemnification, actual cash value must not equal the amount required to complete the repairs or replacement of the property. Instead, actual cash value is intended only to provide a depreciated amount of the replacement cost to start the repairs.
10. ____: ____. Under a replacement cost policy, the insured, not the insurer, is responsible for the cash difference necessary to replace the old property with the new property. And upon submitting the required materials for replacement cost value, the insured will receive the difference necessary to replace the old property with the new property.
11. ____: ____. Both materials and labor constitute relevant facts to consider when establishing the value of the property immediately prior to the loss.
12. ____: ____. Absent specific language in an insurance policy, a court may consider any relevant evidence in its calculation of actual cash value, including materials and labor.
13. ____: ____. An insured is properly indemnified when the amount calculated for actual cash value equals the depreciated value of the property just prior to the loss, which includes both materials and labor.

Certified Question from the U.S. District Court for the District of Nebraska. Judgment entered.

Eric R. Chandler, of Law Offices of Eric R. Chandler, P.C., L.L.O., and Erik D. Peterson and M. Austin Mehr, of Mehr, Fairbanks & Peterson Trial Lawyers, P.L.L.C., for plaintiff.

Bartholomew L. McLeay and Brooke H. McCarthy, of Kutak Rock, L.L.P., and Michael S. McCarthy and Marie E. Williams, of Faegre, Baker & Daniels, L.L.P., for defendant.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., for amici curiae American Insurance Association et al.

Mark C. Laughlin and Robert W. Futhey, of Fraser Stryker, P.C., L.L.O., for amicus curiae State Farm Fire and Casualty Company.

Heavican, C.J., Wright, Cassel, Kelch, and Funke, JJ., and Inbody and Bishop, Judges.

Heavican, C.J.

INTRODUCTION

The U.S. District Court for the District of Nebraska has certified the following question to this court: "May an insurer, in determining the 'actual cash value' of a covered loss, depreciate the cost of labor when the terms 'actual cash value' and 'depreciation' are not defined in the policy and the policy does not explicitly state that labor costs will be depreciated?" We answer this question in the affirmative.

The question arises from a putative class action filed in the U.S. District Court, in case No. 8:15CV257, involving a dispute over the interpretation of a homeowner's insurance policy. Rosemary Henn asserts claims for breach of contract, unjust enrichment, violations of Nebraska's Consumer Protection Act, fraudulent concealment, and equitable estoppel. Henn argues American Family Mutual Insurance Company (American Family) wrongfully failed to compensate her and others similarly situated by depreciating labor costs in calculation of actual cash value for loss or damage to a structure or dwelling under its homeowner's insurance policies.

The dispute centers on whether labor costs can be depreciated in determining the actual cash value of covered damaged property under a homeowner's insurance policy. The parties agree that actual cash value is replacement cost minus depreciation, but disagree as to whether the labor component can be depreciated.

No class has yet been certified, and progression of the case has been stayed pending the outcome of this certified question.

BACKGROUND

The following facts were obtained from the briefs submitted by the parties and from the district court's certificate and memorandum order.

In September 2011, Henn submitted a homeowner's claim under her insurance policy issued by American Family. The claim was submitted due to damage that occurred to her home's roof vent caps, gutters, siding, fascia, screens, deck,

and air-conditioning unit during a hailstorm on August 18, 2011. The insurance policy, American Family's "Nebraska Homeowners Policy-Gold Star Special Deluxe Form" No. 26-BE4992-01, is a replacement cost policy. American Family determined that the hail loss was covered by Henn's policy.

The policy provides, in relevant part, that an insured may recover, following a covered loss, "the cost to repair the damaged portion or replace the damaged building, provided repairs to the damaged portion or replacement of the damaged building are completed," or "[i]f at the time of loss, . . . the building is not repaired or replaced, [American Family] will pay the actual cash value at the time of loss of the damaged portion of the building up to the limit applying to the building." Therefore, under the policy, the insured has two options for recovery following a covered loss: (1) receive "the actual cash value at the time of loss of the damaged portion of the building up to the limit applying to the building" or (2) receive the full replacement cost value upon completion of the repair or replacement of the damaged property.

Under both options, the insured will first receive an actual cash value payment. If the insured repairs or replaces the damaged property, the insured can recover the difference between the replacement cost value and actual cost value payments. If the insured does not repair or replace the damaged property, the insured is entitled to receive only the actual cash value. Payment under the replacement cost option is limited to the smallest of the cost to replace the property with like construction for similar use, the actual amount spent to repair or replace the property, or 120 percent of the limit applying to the damaged building.

The policy does not define "actual cash value" or depreciation, or describe the methods employed to calculate "actual cash value." The policy also does not explain how American Family determines the difference between replacement cost value and actual cost value. The policy states under the conditions section for actual cash value that

> [i]f at the time of loss, the Increased Building Limit Coverage as provided under the Supplementary Coverages - Section I applies and the building is not repaired or replaced, [American Family] will pay the actual cash value at the time of loss of the damaged portion of the building up to the limit applying to the building.

After inspecting the storm damage, American Family provided Henn with a written estimate that explained the calculations for replacement cost value, actual cash value, and depreciation for the claim. The written estimate defined actual cash value as being "based on the cost to repair or replace the damaged item with an item of like kind and quality, less depreciation." The estimate further stated that "replacement cost" was the "cost to repair the damaged item with an item of like kind and quality, without deduction for depreciation." In the estimate, American Family's adjuster determined that the cost to repair and replace the damaged portions of Henn's home with new materials would be $3,252.60. From this amount, American Family subtracted $276.67 in depreciation, to arrive at an actual cash value amount of $2,975.93. American Family then subtracted Henn's $1,000 deductible, leaving her with an actual cash value payment of $1,975.93. The depreciated amount includes both material costs and labor costs. The estimate did not show how much it depreciated from building materials as opposed to labor.

American Family sent Henn a letter stating that Henn had 1 year from the date of the loss to complete the repairs and receive any difference between the actual repair costs and the actual cash value payment. Henn failed to make a claim for payment of replacement costs.

Henn filed the current action in the district court for Douglas County, Nebraska. American Family removed the case to the U.S. District Court for the District of Nebraska based on diversity of citizenship under 28 U.S.C. § 1332 (2012). American Family subsequently filed a motion for summary judgment, arguing that the policy was unambiguous

and that the issues could be resolved as a matter of law. Henn contends that summary judgment was not proper, because "the term 'actual cash value' is ambiguous, that actual cash value should not include depreciation of labor, and [that] the policy provision should be construed in her favor."

The U.S. District Court found that "resolution of the motion involves a question of law in Nebraska on which there is no controlling precedent in the decisions of the Nebraska Supreme Court." The U.S. District Court certified the question to the Nebraska Supreme Court. American Family's motion for summary judgment is being held in abeyance until this court responds to the certified question.

Again, the question certified is: "May an insurer, in determining the 'actual cash value' of a covered loss, depreciate the cost of labor when the terms 'actual cash value' and 'depreciation' are not defined in the policy and the policy does not explicitly state that labor costs will be depreciated?"

ANALYSIS

This court must determine whether the term "actual cash value" unambiguously allows for depreciation of labor in the insurance policy. Both parties agree that depreciation is an element of actual cash value. But Henn argues that the language in the policy does not unambiguously allow for labor depreciation and that American Family's depreciation of labor resulted in underindemnification of her loss.

Conversely, American Family argues that "actual cash value" as used in the policy is not ambiguous, because the term incorporates the concept of depreciation from the cost of repairs, which includes both materials and labor. American Family contends that actual cash value is merely an interim payment and that depreciation of both materials and labor properly indemnifies the insured.

[1-7] A court interpreting an insurance policy must first determine, as a matter of law, whether the contract is

ambiguous.[1] In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.[2] But when an insurance contract is ambiguous, we will construe the policy in favor of the insured.[3] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting meanings.[4] Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean.[5] While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.[6] There is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous.[7]

Some background on how this court calculates actual cash value is helpful. This court has set forth three approaches to determining actual cash value: "(1) [W]here market value is easily determined, actual cash value is market value, (2) if there is no market value, replacement or reproduction

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[1] *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002).

[2] *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

[3] *American Fam. Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 842 N.W.2d 100 (2014).

[4] *Van Kleek v. Farmers Ins. Exch.*, 289 Neb. 730, 857 N.W.2d 297 (2014).

[5] *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

[6] *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

[7] *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

cost may be used, (3) failing the other two tests, any evidence tending to formulate a correct estimate of value may be used."[8]

The first approach, market value, has been used by this court in several cases to calculate actual cash value.[9] This court has defined market value as "the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it."[10] And in deciding market value, the jury "should consider the situation and condition of the property as it was at that time and all the other facts and circumstances shown by the evidence that affected or had a tendency to establish its value."[11]

Under the second approach, replacement or reproduction cost, this court has stated that "application of a depreciation factor would serve to indemnify the insured for the value of that which was lost, but no more."[12]

We have also defined the third approach, often referred to as the "broad evidence rule." This court found that it had "no particular quarrel" with calculation of actual cash value according to the following definition of the broad evidence rule:

> "[I]n determining the actual cash value of the property involved they may consider every fact and circumstance which would logically tend to the formation of a correct estimate of the building's value, including the original cost, the economic value of the building, the income derived from the building's use, the age and condition of

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[8] *Olson v. Le Mars Mut. Ins. Co., supra* note 2, 269 Neb. at 806, 696 N.W.2d at 458, citing *Sullivan v. Liberty Mutual Fire Ins. Co.*, 174 Conn. 229, 384 A.2d 384 (1978).

[9] See *id.*

[10] *Borden v. General Insurance Co.*, 157 Neb. 98, 113, 59 N.W.2d 141, 150 (1953).

[11] *Id.* at 114, 59 N.W.2d at 150.

[12] *Olson v. Le Mars Mut. Ins. Co., supra* note 2, 269 Neb. at 808, 696 N.W.2d at 459.

> the building, its obsolescence, both structural and functional, its market value, and the depreciation and deterioration to which it has been subjected."[13]

We discussed actual cash value under the market value test and broad evidence rule in *Erin Rancho Motels v. United States F. & G. Co.*[14] We approved use of both the broad evidence rule and fair market value, noting that "actual cash value must still be measured as an economic unit, i.e., related to what, in terms of value, one could receive for his or her property."[15] We further explained that "[f]air market value is a term which has been used and is generally understood by experts and lay people alike, and which may be found by employing, if you will, the broad evidence rule."[16]

More recently, in *D & S Realty v. Markel Ins. Co.*,[17] this court again defined actual cash value and distinguished it from replacement cost value: "Actual cash value is the value of the property in its depreciated condition. The purpose of actual cash value coverage is indemnification. It is to make the insured whole, but never to benefit the insured because the loss occurred."

This court then stated that under a replacement cost policy, "where the cost to repair or replace is greater than the actual cash value, the insured, not the insurer, is responsible for the cash difference necessary to replace the old property with new property."[18] Further, this court stated that under a replacement cost policy, the actual cash value of the loss "can be used as seed money to start the repairs."[19]

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[13] *Erin Rancho Motels v. United States F. & G. Co.*, 218 Neb. 9, 14, 352 N.W.2d 561, 564-65 (1984).

[14] *Erin Rancho Motels v. United States F. & G. Co., supra* note 13.

[15] *Id.* at 14, 352 N.W.2d at 565.

[16] *Id.*

[17] *D & S Realty v. Markel Ins. Co.*, 284 Neb. 1, 14, 816 N.W.2d 1, 11 (2012).

[18] *Id.*

[19] *Id.* at 15-16, 816 N.W.2d at 12.

Olson v. Le Mars Mut. Ins. Co.

In *Olson v. Le Mars Mut. Ins. Co.*,[20] this court further defined actual cash value under an actual cash value policy. The insurance policy at issue provided that it would pay actual cash value as of the time of loss or damage, and it did not include replacement cost coverage. We stated that "[a]s used in a property insurance policy, the phrase 'actual cash value' is a limitation on the amount of recovery for the protection of the insurer and not a substantive measure of damages."[21] And we further stated that "[a]pplying either a market value test or the broad evidence rule," the value of the insured building was an "economic unit."[22] However, this court ultimately held that

> under an actual cash value policy which does not expressly provide otherwise, an insurer may not deduct depreciation from the cost of repairing partial damage to insured property where the actual cash value of the property, as repaired, does not exceed its actual cash value at the time of the loss.[23]

Therefore, we held that payment of the full repair costs without a depreciation deduction would "restore the value of the insured property that existed immediately prior to the loss, but [would] not enhance that value."[24]

Henn contends that the holding in *Olson* is controlling in the current case. However, we find it largely distinguishable. Our holding in *Olson* applied to the unique set of facts in which the value of the insured property at the time of the loss was equal to the actual cash value of the property as repaired. Under those facts, had the court allowed for depreciation of the actual cash value, it would have been a lower value than

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[20] *Olson v. Le Mars Mut. Ins. Co., supra* note 2.

[21] *Id.* at 806, 696 N.W.2d at 458.

[22] *Id.* at 807, 696 N.W.2d at 459.

[23] *Id.* at 810, 696 N.W.2d at 461.

[24] *Id.*

the value of the property prior to the time of the loss, which would have resulted in underindemnification. This court limited the application of the holding to "under an actual cash value policy" and to situations "where the actual cash value of the property, as repaired, does not exceed its actual cash value at the time of loss." But neither of these situations occurred in the current case; therefore, the holding in *Olson* that the policy must "expressly provide" for depreciation does not apply. We note, however, that this court's discussion of the definition of actual cash value in *Olson* remains applicable to the current case.

Henn argues that the flexible approach to calculating actual cash value employed by this court creates ambiguity in the term. We agree that this court uses three approaches in calculating actual cash value, but under each of the approaches, it is a well-accepted principle that "[a]ctual cash value is the value of the property in its depreciated condition."[25] As the parties concede, Nebraska law makes clear that the definition of "actual cash value" generally allows depreciation. But this court has not explicitly addressed depreciation of labor as opposed to materials, or addressed indemnification in terms of actual cash value.

Other Jurisdictions

Both the market value test set forth in *D & S Realty* and the broad evidence rule first explained in *Erin Rancho Motels* consider all the other "facts and circumstances" shown by the evidence that affected or had a tendency to establish the property's value.[26] To answer whether all the other "facts and circumstances" include labor, we turn to cases from other jurisdictions that have addressed this issue.

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[25] *D & S Realty v. Markel Ins. Co., supra* note 17, 284 Neb. at 14, 816 N.W.2d at 11.

[26] *Borden v. General Insurance Co., supra* note 10, 157 Neb. at 114, 59 N.W.2d at 150.

In *Redcorn v. State Farm Fire & Cas. Co.*,[27] a divided Oklahoma Supreme Court reasoned that depreciation of labor was appropriate under the broad evidence rule and that it did not lead to underindemnification. The court reasoned that labor could not be separated from the total amount that was depreciated, because

> [a] roof does not have a separate market value from the building it covers. The relevant evidence for determining actual cash value for a roof would include cost of reproduction, the age of the roof, and the condition in which it has been maintained. A building is the product of both materials and labor. . . . Likewise, a roof is the product of materials and labor, and its age and condition are also relevant facts in setting the amount of a loss.[28]

Based on this reasoning, the court held that "indemnity is served by considering the age and condition of a roof, both materials and labor, in setting an amount of loss."[29] Furthermore, the court stated that "[t]o meet the goal of indemnity, [the insured] should be placed, as nearly as practicable, in the same condition as he was in just prior to the insured loss."[30]

Applying the broad evidence rule, the court held that "a fact-finder is entitled to consider what the life of the destroyed roof, both materials and labor, would have been, as well as any other relevant evidence presented."[31] The court further explained that the insurance policy "insured a roof surface, not two components, material and labor. [The insured] did not pay for a hybrid policy of actual cash value for roofing materials and replacement costs for labor. To

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[27] *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017 (Okla. 2002).

[28] *Id.* at 1020.

[29] *Id.* at 1021.

[30] *Id.*

[31] *Id.*

construe the policy in such a manner would unjustly enrich the policy holder."[32]

The dissent in *Redcorn* disagreed, arguing instead that a roof "is not an integrated product . . . but a combination of a product (shingles) and a service (labor to install the shingles)" and that "[l]abor . . . is not logically depreciable."[33] Therefore, the dissent opined that "allowing [the insurer] to depreciate the cost of labor would leave [the insured] with a significant out-of-pocket loss, a result that is inconsistent with the principle of indemnity."[34]

In *Adams v. Cameron Mut. Ins. Co.*,[35] the Supreme Court of Arkansas held that the term "actual cash value" was ambiguous in the actual cash value policy, and the court cited the *Redcorn* dissent in finding that labor could not be depreciated. The court stated that like the dissenters in *Redcorn*, it "simply cannot say that labor falls within that which can be depreciable."[36] In addition, the court stated that because it found that the term "actual cash value" was ambiguous, it must construe the policy against the insurer.

Similarly, in *Bailey v. State Farm Fire & Cas. Co.*,[37] the U.S. District Court for the Eastern District of Kentucky found that the *Redcorn* dissent was more persuasive. The court held that in determining actual cash value—which was not defined in the insurance policy—the insurer could not depreciate the labor component of replacement cost. The court stated that actual cash value was defined under Kentucky law as "'replacement cost of the property at the time of loss

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[32] *Id.*

[33] *Id.* at 1022 (Boudreau, J., dissenting; Watt, V.C.J., and Summers, J., join).

[34] *Id.* at 1023.

[35] *Adams v. Cameron Mut. Ins. Co.*, 2013 Ark. 475, 430 S.W.3d 675 (Nov. 21, 2013).

[36] *Id.* at *6, 430 S.W.3d at 679.

[37] *Bailey v. State Farm Fire & Cas. Co.*, No. 14-53-HRW, 2015 WL 1401640 (E.D. Ky. Mar. 25, 2015) (memorandum opinion).

less depreciation.'"[38] And it stated that "[d]enying the distinct nature of labor as a component runs afoul [of] logic."[39] Based on the reasoning in the *Redcorn* dissent, the court held that "[t]o adequately indemnify its insureds, [the insurer] should pay the cost of materials, depreciated for wear and tear, plus the cost of their installation."[40]

Conversely, in *Papurello v. State Farm Fire & Cas. Co.*,[41] the U.S. District Court for the Western District of Pennsylvania held that the policy's plain language permitted the depreciation of labor as part of actual cash value. The court cited the majority's opinion in *Redcorn* that "'[a] building is the product of *both* materials and labor'"[42] and that the term "property" could not reasonably be interpreted as relating only to physical materials. Rather, the court stated that the "[insurer] did not promise at step one of the Policy to pay the present-day 'actual cash value' of whatever labor and taxes [the insureds] require to repair or replace their roof."[43] Instead, the value of the property suffered depreciation, and the insurer appropriately applied that depreciation to materials, taxes, and labor costs.

Similarly, in *Goff v. State Farm Florida Ins. Co.*,[44] the Florida District Court of Appeals held that the insurer could depreciate "overhead and profit" in a policy that did not define actual cash value. The court cited an American Bar Association publication which stated that "'following a loss, both actual cash value and the full replacement cost are determined. The difference between those figures is withheld as

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[38] *Id.* at *5.

[39] *Id.* at *8.

[40] *Id.*

[41] *Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746 (W.D. Pa. 2015).

[42] *Id.* at 770.

[43] *Id.*

[44] *Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684, 690 (Fla. App. 2008).

depreciation until the insured actually repairs or replaces the damaged structure.'"[45]

The *Goff* court also cited an Oklahoma Supreme Court case in which the court found that "'it was proper to depreciate both materials and labor when calculating the loss suffered by the insured.'"[46] The *Goff* court reasoned that "depreciation" included "overhead and profit."

In addition, the Indiana Supreme Court, in *Travelers Indem. Co. v. Armstrong*,[47] stated that the broad evidence rule was a "flexible rule" which "permits an appraiser or a court or a jury to consider any relevant factor." The court stated that "[u]nder the broad evidence rule, the parties were entitled to introduce evidence of 'every fact and circumstance which would logically tend to a formation of a correct estimate of the loss.'"[48] The court further addressed indemnity in terms of actual cash value and stated that "'[i]f the princip[le] of indemnity be adhered to, depreciation must be considered in loss adjustment so that the insured will not receive the equivalent of a new building for a loss of the old one.'"[49]

Labor Can Be Depreciated

[8,9] We cannot agree with the dissent in *Redcorn*, as set forth in Henn's argument, that the depreciation of labor is illogical because labor does not depreciate. Actual cash value, as defined by this court, is "not a substantive measure of damages,"[50] but, rather, a representation of the depreciated value of the property immediately prior to damages. This

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[45] *Id.*, quoting Leo John Jordan, *What Price Rebuilding? A Look at Replacement Cost Policies*, 19 The Brief 17 (Spring 1990).

[46] *Id.*, quoting *Branch v. Farmers Ins. Co.*, 55 P.3d 1023 (Okla. 2002).

[47] *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 356 (Ind. 1982).

[48] *Id.* at 357.

[49] *Id.* at 353.

[50] *Olson v. Le Mars Mut. Ins. Co., supra* note 2, 269 Neb. at 806, 696 N.W.2d at 458.

court's explanation of actual cash value under the replacement cost policy in *D & S Realty*[51] shows that for purposes of indemnification, actual cash value must not equal the amount required to complete the repairs or replacement of the property. Instead, actual cash value is intended only to provide a depreciated amount of the replacement cost to "start the repairs."[52]

[10] As we held in *D & S Realty*, it is "the insured, not the insurer," that "is responsible for the cash difference necessary to replace the old property with new property."[53] By distinguishing between the "lesser of actual cash value or the cost of repairing or replacing the damaged property,"[54] this court clarified that actual cash value must not equal the cost to repair or replace the damaged property. And upon submitting the required materials for replacement cost value, the insured will receive the difference necessary to replace the old property with the new property.

[11] As in *Redcorn*, this court has adopted the broad evidence rule. This court has also employed the market value approach. As established above, both approaches allow all relevant facts and circumstances to be considered when determining the actual cash value. We find that both materials and labor constitute relevant facts to consider when establishing the value of the property immediately prior to the loss.

[12] Therefore, as in the majority opinion in *Redcorn*, this court may consider any relevant evidence in its calculation of actual cash value, including materials and labor. We agree with the majority opinion in *Redcorn*, in that absent specific language in the policy, the insured does "not pay for a hybrid policy of actual cash value for roofing materials and

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[51] *D & S Realty v. Markel Ins. Co., supra* note 17.

[52] *Id.* at 15-16, 816 N.W.2d at 12.

[53] *Id.* at 14, 816 N.W.2d at 11.

[54] *Id.*

replacement costs for labor."[55] The property is a product of both materials and labor.

This finding appears to be consistent with the interpretation of actual cash value set forth in a Nebraska Department of Insurance brochure applying depreciation to both materials and labor. The brochure on hail damage states that under actual cash value, "[i]f your roof was worth 75% of the value of a new roof, you will be entitled to 75% of the estimated cost to repair or replace the damaged area."[56] In other words, the percentage of depreciation is taken from the whole when calculating actual cash value.

[13] Unlike *Adams*,[57] Nebraska has a well-developed case law on the definition of actual cash value. We therefore find that the term is not ambiguous in the policy. The unambiguous definition of actual cash value is a depreciation of the whole. As such, the insured is not underindemnified by receiving the depreciated amount of both materials and labor. We agree with American Family that a payment of actual cash value that included the full cost of labor would amount to a prepayment of unearned benefits. We hold, as in the majority opinion in *Redcorn*, that an insured is properly indemnified when the amount calculated for actual cash value equals the depreciated value of the property just prior to the loss, which includes both materials and labor.

Henn argues that an insured is properly indemnified only when the materials are depreciated according to actual cash value and the labor is not depreciated pursuant to the replacement cost value. As in *Papurello*,[58] we do not see how this distinction can be made under the plain meaning of actual cash value in the policy. The policy does not state that the

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[55] *Redcorn v. State Farm Fire & Cas. Co., supra* note 27, 55 P.3d at 1021.

[56] Neb. Dept. of Ins., *Do I Have Hail Damage on My Roof?* (rev. May 2012), http://www.doi.nebraska.gov/files/doc/out01121.pdf.

[57] *Adams v. Cameron Mut. Ins. Co., supra* note 35.

[58] *Papurello v. State Farm Fire & Cas. Co., supra* note 41.

insured will receive the actual cash value of the materials and the replacement cost value of the labor. As in *Redcorn*, Henn did not purchase a "hybrid policy" that would allow for this distinction. The policy does not distinguish between materials and labor, and we refuse to read that distinction into the policy.

Henn also argues that it is the historical practice of insurance companies to refrain from depreciating labor costs and that the "clear majority of courts to address labor depreciation in this context recognize that the cost of labor cannot be depreciated when calculating [actual cash value]."[59] However, we find that the texts cited by Henn fail to support the premise of any such historical practice.

In addition, while Henn cites to various courts that have found that the cost of labor cannot be depreciated, we do not find that it is a "clear majority," nor do we find that those cases are controlling under the current policy at issue. Instead, the Nebraska Department of Insurance brochure cited by American Family indicates that it is an accepted practice in Nebraska to depreciate from the whole.

We hold that payment of the full amount of labor would amount to a prepayment of benefits to which the insured is not yet entitled. Depreciating the whole is merely one way to arrive at a value that represents the depreciated value of the property to which the insured is entitled. We hold that payment of actual cash value, which depreciates both materials and labor, does not underindemnify the insured.

Therefore, under both the market value test and the broad evidence rule, all relevant evidence is considered in determining the value. Both materials and labor are elements that help establish the value of the property immediately prior to the time of loss. We hold that actual cash value applies to the insured property as a whole. We cannot agree with the distinction in

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[59] Brief for plaintiff at 17.

depreciation that Henn is attempting to read into the policy. As reasoned above, there is no ambiguity in the term "actual cash value."

CONCLUSION

We find that the term "actual cash value" is unambiguous and that depreciation of labor does not lead to underindemnification. Therefore, we answer the certified question in the affirmative.

Judgment entered.

Miller-Lerman and Stacy, JJ., not participating.

State of Nebraska, appellee, v. Adrian Lester, appellant.

898 N.W.2d 299

Filed February 24, 2017. No. S-15-742.

1. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
2. **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.
3. **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.
4. **Motions for New Trial: Appeal and Error.** The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.
5. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

6. **Juries: Equal Protection: Discrimination: Prosecuting Attorneys.** Ordinarily, a prosecutor is entitled to exercise permitted peremptory challenges for any reason related to the prosecutor's view concerning the outcome of the case. But the Equal Protection Clause forbids the use of peremptory challenges on potential jurors solely because of their race.
7. **Juries.** When a timely objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is made, a trial court must inquire into the reasons behind the peremptory strike.
8. **Juries: Prosecuting Attorneys.** Evaluating whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process.
9. **Juries: Discrimination: Prosecuting Attorneys.** Under the first step of an inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. A defendant satisfies the requirements of the first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.
10. ____: ____: ____. Under the second step of an inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. In determining whether the proffered explanation is race neutral, the court does not consider whether the prosecutor's reasons are persuasive, or even plausible. It is sufficient if the stated reasons, on their face, are not inherently discriminatory.
11. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** The question of whether the prosecutor's reasons for using a peremptory challenge are race neutral is a question of law that an appellate court reviews de novo.
12. **Juries: Discrimination: Prosecuting Attorneys: Proof.** The third step of the inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), requires the court to determine, in light of the parties' submissions, whether the defendant has met the burden of proving purposeful discrimination. This step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
13. **Juries: Prosecuting Attorneys: Discrimination: Appeal and Error.** A trial court's ultimate determination of whether purposeful discrimination has been shown frequently involves its evaluation of the prosecutor's credibility and its observations of the juror's demeanor, and

because determinations of credibility and demeanor lie peculiarly within a trial judge's province, an appellate court affords deference to these findings absent exceptional circumstances.

14. **Appeal and Error.** Absent plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted to it for disposition.
15. **Appeal and Error: Words and Phrases.** Plain error 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.
16. **Constitutional Law: Juries: Discrimination: Proof.** While the Constitution forbids striking even a single prospective juror for a discriminatory purpose, the inquiry under the third step of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), does not require considering the wisdom or efficacy of a peremptory strike, but instead requires the court to determine, in light of the parties' submissions, whether the defendant has carried the burden of proving the strike was the result of purposeful discrimination.
17. **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.
18. **Verdicts: Juries: 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 was surely unattributable to the error.
19. **Trial: 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.
20. **Judges: Motions for New Trial: Evidence: Witnesses: Verdicts.** A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.
21. **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 court abused its discretion.
22. **Criminal Law: Motions for Mistrial.** A mistrial is properly granted in a criminal case where an event occurs during the course of trial

which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.

23. **Constitutional Law: Criminal Law: Due Process: Presumptions: Proof.** Under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the Nebraska Constitution, in a criminal prosecution, the State must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming that element upon proof of the other elements of the offense.
24. **Criminal Law: Trial: Witnesses: Evidence: Proof.** Because the burden of proof always remains with the State, it cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. The exception to this rule is when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, of self-defense, and of others, relying on facts that could be elicited only from a witness who is not equally available to the State.
25. **Trial: Evidence.** A defendant is entitled to inquire about weaknesses in the State's case, but this does not open the door for the State to point out that the defendant has not proved his or her innocence.
26. **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.
27. **Motions for New Trial: Evidence.** Newly discovered evidence must actually be newly discovered, and it may not be evidence which could have been discovered and produced at trial with reasonable diligence.
28. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.

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

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ., and Pirtle, Judge.

Stacy, J.

Adrian Lester appeals his convictions for first degree murder, first degree assault, robbery, attempted robbery, and four counts of use of a deadly weapon to commit a felony. We affirm.

I. BACKGROUND

On April 14, 2014, 15-year-old Allee H. sent a text message to her high school classmate Justice Terpstra (Terpstra), asking if he would sell her marijuana. Terpstra refused, after which the text messages between Allee and Terpstra became contentious, culminating in an agreement to meet at a park in Omaha, Nebraska, to fight. Both Allee and Terpstra recruited others to accompany them.

Allee's group was the first to arrive at the park. Accompanying Allee were Marcus Cooper, Joshua Schmitt, Lucio Martinez, and Tielor Williams. Everyone in Allee's group, except Martinez, smoked marijuana before going to the park to fight. Allee's group drove to the park in two vehicles. Schmitt drove one of the vehicles, in which Allee and Williams rode as passengers. Martinez drove the other vehicle with Cooper as a passenger.

When Terpstra arrived at the park, he was accompanied by his sister, Freedom Terpstra; his cousin, Victoria Terpstra; and his friends Dennis Brewer, Lester, and two other males. As soon as Terpstra's group arrived at the park, they got out of their vehicles and approached Schmitt's vehicle. Freedom was the first to reach Schmitt's vehicle, and she began hitting the car and screaming for Allee to get out. Allee stayed inside Schmitt's vehicle, as did Schmitt and Williams. At about the same time, a person from Allee's group, Cooper, walked over and stood near the passenger door of Schmitt's vehicle.

A male from Terpstra's group then approached the passenger side of Schmitt's vehicle, pointed a gun at Cooper, and

told Cooper to empty his pockets. Cooper handed the male a gold Zippo lighter and saw the male put the lighter into his pocket. Cooper testified the male who robbed him never fired his gun. Terpstra identified the male who robbed Cooper as Brewer.

Several witnesses testified they saw Lester approach the passenger side of Schmitt's vehicle and order the front seat passenger, Williams, to empty his pockets. Williams refused. Gunshots erupted, and Williams was shot four to five times in the face and neck. Schmitt was shot in the hand.

After the shooting, everyone in Terpstra's group ran to their vehicles and left. Some members of the group returned to Terpstra's house. Freedom testified that while they were gathered there, Lester said, "That motherfucker shouldn't have told me no" and then made a shooting sign with his hand. Victoria testified that when Lester was asked what happened, he responded, "I didn't like his tone so I shot him."

Before Lester left Terpstra's house, Lester asked Brewer to trade shirts with him. Brewer agreed, and took the orange shirt Lester had been wearing. Later that evening, when Freedom and Brewer were alone, Brewer gave Freedom a gold lighter. Both the orange shirt and gold lighter were later recovered by the police at Terpstra's house. On April 15, 2014, Terpstra and Freedom went to a motel to "hide from everybody" who knew about the shooting. They were later apprehended by U.S. marshals.

After the shooting, Allee's group drove to the hospital to seek medical attention for Williams and Schmitt. Schmitt's injuries required surgery but were not life threatening. Williams was pronounced dead. The cause of death was a gunshot wound to the head. Autopsy reports revealed Williams had been shot at very close range four times.

On the night of the shooting and into the next day, Omaha police detectives interviewed a number of people, including Cooper, Martinez, and Allee. Victoria later provided a written statement about what happened, and the primary suspects

became Brewer and Lester. On May 8, 2014, Lester was arrested and eventually charged with first degree murder, first degree assault, robbery, attempted robbery, and four counts of use of a deadly weapon to commit a felony.

Terpstra, Freedom, Victoria, Cooper, Schmitt, and Martinez all testified at trial. The witnesses provided conflicting accounts of who fired the shots that killed Williams and what the shooter was wearing.

Terpstra, Freedom, and Victoria each identified Lester as the person who shot Williams. Schmitt testified he was not able to see the shooter, because the shots were fired from outside the passenger side of his vehicle and Schmitt was in the driver's seat. Schmitt admitted that 3 days after the shooting, he was shown a photographic lineup and identified someone other than Lester as the shooter, but at trial he "back[ed] off" that identification and testified he never saw the shooter. Martinez testified that it was a man in a black hoodie pointing a gun at Cooper who shot Williams. Cooper testified that a man in a black hoodie was pointing a gun at him when shots were fired, but Cooper testified the man pointing the gun at him did not shoot. Cooper testified he did not see the shooter.

On multiple occasions while testifying, the witnesses contradicted prior statements they had made to the police or statements they had made in depositions. Lester's counsel argued that because of these contradictions, the witnesses were not credible. Defense counsel also questioned the thoroughness of the police investigation, noting that several pieces of evidence, including the orange shirt and gold lighter, were not tested for DNA.

The jury returned a verdict of guilty on all eight counts. After his motion for new trial was denied, Lester was sentenced to life imprisonment on the murder conviction, imprisonment of 15 to 15 years for two convictions involving use of a deadly weapon, and imprisonment of 20 to 20 years for assault in the first degree. The sentences were ordered to

be served consecutively. No sentences were imposed on the remaining convictions pursuant to *State v. McHenry*,[1] a case in which we held the underlying felony offense merges into a felony murder conviction and cannot be punished separately, barring a clear indication by the Legislature that independent punishments were intended.

Lester timely filed this direct appeal.

II. ASSIGNMENTS OF ERROR

Lester assigns, restated and renumbered, that the district court erred by (1) overruling his *Batson* challenge to the State's peremptory strike of a prospective juror, (2) excluding testimony that was offered to impeach a witness, and (3) denying his motion for new trial. In addition, Lester asserts (4) the evidence presented at trial was insufficient to support his convictions.

III. STANDARD OF REVIEW

[1] An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.[2]

[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.[3]

[3] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court,

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[1] *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

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

[3] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

an appellate court reviews the admissibility of evidence for an abuse of discretion.[4]

[4] The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.[5]

[5] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6]

IV. ANALYSIS

1. *Batson* Challenge

After the jurors were seated but before they had been sworn, Lester's counsel stated:

> At this time I would raise a Batson challenge based upon the fact that none of the primary jurors in this matter are African-American or black. There were two on the panel; they were both stricken by the State. I do recognize there is an alternate juror that is black but, for the reasons stated, I would raise a Batson challenge at this time.

Lester directed his challenge under *Batson v. Kentucky*[7] to prospective jurors S.M. and P.S., both of whom had been removed by the State using peremptory strikes. The court denied the challenge as to both. Lester does not assign error to

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[4] *Id.*

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

[6] *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015).

[7] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

the court's ruling with respect to S.M., and we therefore focus our analysis on P.S.

[6,7] In *Batson*, the U.S. Supreme Court held that a prosecutor's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.[8] Ordinarily, a prosecutor is entitled to exercise permitted peremptory challenges for any reason related to the prosecutor's view concerning the outcome of the case.[9] But the Equal Protection Clause forbids the use of peremptory challenges on potential jurors solely because of their race.[10] When a timely objection under *Batson* is made, a trial court must inquire into the reasons behind the peremptory strike.[11]

[8,9] Evaluating whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process.[12] First, the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race.[13] A defendant satisfies the requirements of the first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.[14]

[10,11] Second, if the requisite showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question.[15] In determining whether the proffered explanation is race neutral, the court does not consider whether the prosecutor's reasons are persuasive, or even plausible.[16] It is sufficient if the stated reasons,

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[8] See *State v. Oliveira-Coutinho, supra* note 2.

[9] See, *id.*; *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

[10] See *id.*

[11] *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002).

[12] See *State v. Oliveira-Coutinho, supra* note 2.

[13] See *id.*

[14] See *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727.

[15] See *State v. Oliveira-Coutinho, supra* note 2.

[16] *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

on their face, are not inherently discriminatory.[17] The question of whether the prosecutor's reasons are race neutral is a question of law that we review de novo.[18]

[12,13] The third step of the *Batson* inquiry requires the court to determine, "'in light of the parties' submissions,'"[19] whether the defendant has met the burden of proving purposeful discrimination.[20] This step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[21] A trial court's ultimate determination of whether purposeful discrimination has been shown frequently involves its evaluation of the prosecutor's credibility and its observations of the juror's demeanor, and because determinations of credibility and demeanor lie "'"peculiarly within a trial judge's province,"'"[22] we afford deference to these findings absent exceptional circumstances.[23]

Here, the State asserted prospective juror P.S. "had some difficulty with speech and understanding" but suggested the "bigger concern" was his employment working with "computer software passcodes," which the State thought demonstrated "a heightened mindset that is looking very technically at this type of case." The State also noted that during voir dire, P.S. was the only prospective juror who mentioned that a witness' memory could be affected by drugs and alcohol. This concerned the

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[17] *Id.*; *State v. Nave, supra* note 9.

[18] See *State v. Nave, supra* note 9.

[19] *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 175 (2008).

[20] See *State v. Johnson, supra* note 16.

[21] See *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[22] *Snyder v. Louisiana, supra* note 19, 552 U.S. at 477.

[23] *State v. Johnson, supra* note 16.

State because several of its eyewitnesses had used marijuana immediately before the shooting.

After the State articulated its rationale for striking P.S., the court asked Lester's counsel, "Anything else?" Counsel answered, "No, Your Honor." The court then found that "the Batson challenges have been overcome by virtue of the statements of the prosecutor. There [are] race-neutral reasons for [the State's] decisions." The jury was sworn, and the trial commenced.

Lester argues the district court erred by accepting the State's race-neutral reason for exercising a peremptory strike to remove prospective juror P.S. After careful consideration of the principles announced in *Batson*, including the recent decision of the U.S. Supreme Court in *Foster v. Chatman*,[24] we find no clear error in the district court's ruling.

Here, Lester timely objected to the State's use of a peremptory strike to remove P.S., one of only two black prospective primary jurors. The district court implicitly concluded Lester had made a prima facie showing under *Batson* sufficient to permit the inference that discrimination had occurred, because it proceeded directly to the second step of the analysis and asked the State to explain its reasons for striking P.S.

As noted, the State gave three reasons for striking P.S. Upon our de novo review of the State's proffered explanations,[25] we conclude the reasons were not, on their face, inherently discriminatory. We thus proceed to the third step in the *Batson* analysis.

The district court made a factual finding that the *Batson* challenge had "been overcome by virtue of the statements of the prosecutor" and that there were "race-neutral reasons" for

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[24] *Foster v. Chatman*, 578 U.S. 488, 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016).

[25] See *State v. Oliveira-Coutinho, supra* note 2.

the State's decisions. We review the court's factual finding in this regard for clear error.[26]

(a) Difficulty With Speech and Understanding

Lester asserts there is nothing in the record to support the State's contention that prospective juror P.S. had difficulty with speech and understanding. The record does indicate that during voir dire, both the court and the State asked P.S. to repeat himself, but also shows that other prospective jurors, including some who served, were also asked to repeat responses or speak louder. Whether P.S. exhibited difficulty with speech or understanding during voir dire is difficult to discern from the written record, but our deferential standard of review recognizes that the district court had the benefit of observing the exchanges involving P.S. and was in the best position to judge whether the prosecutor's assessment of P.S.' speech and understanding was credible. And at the time the State offered this as an explanation for its strike of P.S., Lester did not challenge the accuracy of the State's characterization. Lester, as the appellant, has the responsibility to present a record that permits appellate review of the issue assigned as error[27] and bears the ultimate burden under *Batson* to show a discriminatory purpose.[28] On this record, we find no clear error in the district court's decision to accept the State's first reason for striking P.S.

(b) Heightened Technical Mindset

P.S. worked as a software security coordinator for the University of Nebraska Medical Center. The State perceived this work as highly technical and was concerned that a heightened

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[26] See *id.*

[27] See *State v. Lewis*, 240 Neb. 642, 483 N.W.2d 742 (1992) (Grant, J., concurring; Boslaugh, J., joins).

[28] See *State v. Thorpe, supra* note 21.

technical mindset would not be ideal for its case, particularly as the police had ordered fingerprint, DNA, and ballistic testing on some items of evidence, but not others.

On appeal, Lester argues the State's "'heightened mindset'" rationale was pretextual.[29] He argues that other, nonblack, jurors who were permitted to serve on the jury also had technical jobs. The U.S. Supreme Court explained recently in *Foster v. Chatman* that "'[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.'"[30]

[14,15] We note that Lester's argument about the occupations of other jurors was never articulated to the district court for its consideration and evaluation. Absent plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted to it for disposition.[31] Plain error 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.[32] Assisted by the postargument supplemental briefing of the parties, we have carefully reviewed the record for plain error on this issue and find none.

Among the 12 jurors and two alternates were a camera company employee, a director of international service and new product development, a dog walker, a natural habitat manager, a credit union employee, a furniture rental employee, a retired postal worker, a family physician, an operation and communications coordinator for a natural gas company, an employee

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[29] Supplemental brief for appellant at 7.

[30] *Foster v. Chatman, supra* note 24, 136 S. Ct. at 1754.

[31] *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

[32] *State v. Nadeem, supra* note 31.

at a dance studio, a nursing student, and a physical therapist. Several impaneled jurors were unemployed. While each impaneled juror had some form of expertise and several had occupations which required advanced degrees and attention to detail, none had employment similar to P.S. On this record, we find no plain error in the district court's acceptance of this rationale as credible and race neutral.

(c) Witness' Memory Affected by Drugs and Alcohol

During voir dire, P.S. was asked, "How do you judge the credibility of a witness [who is] on the stand?" P.S. replied, "I'm going to look at . . . listen to what they have to say, but at the same time memory could be affected by a lot of other things." When counsel asked, "Like what?" P.S. answered, "Alcohol, could be drugs, also could be vision. Those things have an impact on it."

P.S. was the only prospective juror to specify that when judging witness credibility, he would look at alcohol and drug use. The State argues it found this troubling, because several eyewitnesses had smoked marijuana just before the shooting and the credibility of those witnesses was a significant component of the State's case.

[16] On appeal, Lester points to nothing in the record suggesting the State's third rationale for striking P.S. was pretextual. Instead, he argues that a witness' alcohol and drug use is an entirely appropriate consideration when judging credibility. This argument, while correct, misses the point. While alcohol and drug use are indeed appropriate considerations when weighing witness credibility, prosecutors are free to exercise peremptory strikes for any reason related to their views concerning the outcome of the case,[33] including the possibility that a particular juror may be likely to weigh credibility in a way the prosecutor deems unfavorable, so long as

[33] See, *State v. Oliveira-Coutinho, supra* note 2; *State v. Nave, supra* note 9.

the peremptory strike is not used to remove a juror based on race.[34] While the Constitution forbids striking even a single prospective juror for a discriminatory purpose,[35] the inquiry under the third step of *Batson* does not require considering the wisdom or efficacy of a peremptory strike, but instead requires the court to determine, in light of the parties' submissions, whether the defendant has carried the burden of proving the strike was the result of purposeful discrimination.[36]

On this record, we find no clear error in the district court's acceptance of the State's race-neutral reasons for striking P.S. We reject Lester's first assignment of error.

2. Impeachment Evidence

Lester assigns that the district court erred in sustaining the State's objection to evidence he wanted to offer to impeach one of the State's witnesses. Some additional factual background is necessary to understand this assignment.

Terpstra was one of the witnesses who identified Lester as the shooter. During Terpstra's testimony, he acknowledged that shortly before the fight at the park, he sent Jasyln C. a Facebook message that said, "I wouldn't fight a bitch but I'd shoot a bitch." Terpstra admitted this message was a reference to Allee, and he admitted deleting this message after the shooting of Williams. Terpstra testified he sent this message to portray himself as a "bad-ass," but he denied having a gun with him the night of the fight. He further testified that he had never possessed a gun before the date of the shooting.

Lester called Jaslyn as a witness. Jaslyn testified she was not present during the fight at the park, but she had communicated with Terpstra via Facebook messenger both before and after the fight. She testified she was worried, based on those messages, that Terpstra would bring a gun to the park. She

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[34] See *id.*

[35] *Foster v. Chatman, supra* note 24.

[36] See *State v. Johnson, supra* note 16.

tried to convince Terpstra not to do so, asking him several times "not to bring a gun up to [the] [p]ark" on the day of the shooting.

In addition to this testimony, Lester wanted to elicit testimony from Jaslyn that while at school 2 months before the shooting, she overheard Terpstra telling a classmate that he "had a gun." Lester claimed he wanted to offer this evidence both to impeach Terpstra's testimony that he had never possessed a gun and to give weight to Lester's theory that someone else fired the shots that killed Williams. The State objected to this testimony. The district court sustained the objection, ruling that Jaslyn's testimony was (1) hearsay, (2) improper impeachment, and (3) related to an event too remote in time to be admissible, as the alleged statement occurred 2 months before the shooting.

On appeal, Lester argues that Jaslyn's testimony was not hearsay and was admissible as a specific instance of prior conduct under Neb. Rev. Stat. § 27-608(2) (Reissue 2016) for the purpose of attacking Lester's credibility. The State argues that § 27-608 is the wrong framework and suggests that because Jaslyn's testimony refers to Terpstra's prior statement rather than his prior conduct, its admissibility is governed by Neb. Rev. Stat. § 27-613(2) (Reissue 2016), which excludes extrinsic evidence of prior inconsistent statements unless the witness is given an opportunity to "explain or deny" the statement.

[17-19] It is unnecessary to analyze the parties' evidentiary arguments, because the exclusion of Jaslyn's testimony, even if found to be erroneous, was undoubtedly 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.[37] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that

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[37] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

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.[38] 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.[39]

The record shows that Terpstra's testimony denying he possessed a gun was impeached by other evidence, such that Jaslyn's testimony about overhearing Terpstra claim to have a gun 2 months before the shooting would have been merely cumulative. Terpstra admitted that Jaslyn asked him not to bring a gun to the fight at the park and admitted that he sent Jaslyn a Facebook message stating, "I wouldn't fight a bitch but I'd shoot a bitch." He admitted this message referred to Allee, and he admitted to deleting this message after the shooting of Williams. Jaslyn testified she was worried Terpstra would bring a gun to the fight at the park, and she tried to convince him not to. She also testified that before the fight, she told Allee of her concern that Terpstra would bring a gun to the fight. All of this evidence was heard by the jury and tended to undermine the credibility of Terpstra's testimony that he did not possess a gun before the fight. We conclude that Jaslyn's omitted testimony—that she overheard Terpstra say he had a gun 2 months before the shooting—was merely cumulative of this other evidence. As such, the exclusion of that testimony, if error at all, was harmless. We reject Lester's second assignment of error.

3. Motion for New Trial

[20] After the jury returned its verdict, Lester filed a motion for new trial, which the district court denied. Lester now contends the motion should have been granted based on two

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[38] *Id.*

[39] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Kinser*, 259 Neb. 251, 609 N.W.2d 322 (2000).

grounds: prosecutorial misconduct and newly discovered evidence. In addressing his argument, we are mindful that a trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.[40]

(a) Prosecutorial Misconduct and Improper Burden Shifting

During cross-examination, Lester asked a detective whether DNA was collected on certain items of evidence acquired during the investigation and the detective admitted it was not. The questions generally attempted to discredit the police investigation. On redirect examination, the State asked the detective to explain who decides to test certain items for DNA and why some items are not tested. In this context, the State asked the detective whether "[d]efense attorneys have the right to make the request to have [an item of evidence] tested?" The detective answered that defense attorneys can request testing, and the redirect proceeded without objection.

During closing arguments, the State discussed how challenging it can be to get usable fingerprints from various items of evidence. The prosecutor referenced the testimony of the detective, stating:

> And why didn't we do DNA [analysis on certain items of evidence]? Why didn't we do fingerprints? . . .
>
> . . . It isn't the police that has the DNA lab. It's a separate entity at the University of Nebraska Medical Center. [The defense] ha[s] just as much right to get that property and have it tested as everybody else in this case.

Lester did not object when this statement was made. But at the conclusion of the State's closing argument, Lester moved for a mistrial. He argued this statement was prosecutorial misconduct, because it implied Lester had a duty to order

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[40] *State v. Oldson, supra* note 5.

testing and thus improperly shifted the burden of proof to the defense. The trial court denied the motion, noting Lester failed to object during the detective's testimony at trial and finding the statement did not suggest Lester had the burden of proof to elicit exculpatory evidence.

[21,22] Even if the prosecutor's statement during closing constituted prosecutorial misconduct, an issue we need not decide, we conclude the trial court did not err in refusing to grant a mistrial. Whether to grant a motion for mistrial is within the trial court's discretion, and this court will not disturb its ruling unless the court abused its discretion.[41] A mistrial is properly granted in a criminal case where an event occurs during the course of trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[42]

[23,24] Under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the Nebraska Constitution, in a criminal prosecution, the State must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming that element upon proof of the other elements of the offense.[43] Because the burden of proof always remains with the State, it cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence.[44] The exception to this rule is when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, of self-defense, and of others, relying on facts that could

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[41] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[42] *Id.*

[43] *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

[44] See *State v. Rocha, ante* p. 716, 890 N.W.2d 178 (2017).

be elicited only from a witness who is not equally available to the State.[45]

We recently decided *State v. Rocha*,[46] a case in which the State sought to elicit testimony that the defendant had not requested DNA testing on certain evidence. Rocha was arrested during a police stop after the police found a marijuana-like residue in his pocket and a methamphetamine-like substance and drug paraphernalia in his vehicle. At trial, the arresting police officer conceded he did not request any fingerprint or DNA testing of the items found in the vehicle. During redirect, the State noted the defendant had not independently tested the evidence to show his fingerprints and DNA were not present. The defendant immediately objected that the State was improperly shifting the burden of proof to him and moved for a mistrial. The motion for mistrial was denied, but the court included the following jury instruction with regard to the burden of proof:

> "There was testimony at trial that [the defendant] never requested any scientific testing of evidence. You must disregard that testimony in its entirety. [The defendant] has pleaded not guilty and is presumed to be innocent. The State's burden to prove each element of a crime charged never shifts to a defendant."[47]

[25] On appeal, we rejected the State's argument that the defendant "opened the door" to its questions about Rocha's failure to conduct his own DNA and fingerprint testing. We explained that while a defendant may invite the State to explain why it chose not to submit certain items for testing, a defendant in a criminal case can never "open the door" to shift the burden of proof.[48] In other words, a defendant is entitled to inquire about weaknesses in the State's case, but this does

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 727, 890 N.W.2d at 191.

[48] *State v. Rocha, supra* note 44.

not open the door for the State to point out that the defendant has not proved his or her innocence.[49]

[26] We held in *Rocha* that the district court did not abuse its discretion in denying the motion for mistrial. We reasoned the court instructed the jury to disregard the testimony in its entirety and made clear to the jury that the defendant "'has pleaded not guilty and is presumed to be innocent'" and that "'[t]he State's burden to prove each element of a crime charged never shifts to a defendant.'"[50] Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[51] Thus, under our abuse of discretion standard of review, we concluded that the questioning and testimony, in light of the jury instructions, did not deprive the defendant of a fair trial.[52]

There are factual and procedural differences between the present case and *Rocha*. In this case, Lester did not object to the detective's testimony during trial nor did he object during the State's closing argument when reference was made to Lester's ability to independently test the evidence. Instead, as we discuss later, Lester's counsel addressed the State's remarks in his own closing argument, then moved for a mistrial after closing arguments were concluded. Lester did not request a curative instruction, and the court did not give one.

However, here, as in *Rocha*, the jury was properly instructed: "The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged and this burden never shifts." The jury was also instructed: "Statements, arguments, and questions of the lawyers for the State and [Lester]" are not evidence. The jury was repeatedly reminded of these standards during trial by the

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[49] *Id.*

[50] *Id.* at 758-59, 890 N.W.2d at 209.

[51] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

[52] *State v. Rocha, supra* note 44.

State, the defense, and the court. Furthermore, during his closing argument, Lester's counsel stated:

> It is not [Lester's] job to test evidence that is booked into state property or to do something with a piece of evidence that's regularly being used by law enforcement and sent over to a DNA laboratory. . . . Do not think that in any way it is our burden to do that. It is the State's.

In this case, the jury was instructed multiple times by the court, and reminded by counsel, that the State had the burden to prove every element of the crime charged. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[53] Under our abuse of discretion standard of review, we conclude on this record that the State's brief comment during closing argument did not deprive Lester of a fair trial.

(b) Newly Discovered Evidence

Lester claims that 2 days after the jury returned its verdict in this case, Brewer posted a comment on Facebook. The post, without edits, reads as follows: "If they identified me as the shooter then why tf ain't ma brother sittin here next to me? The system corrupt, send ma fucn brother home man . . . #ReadyDaTruth."

Lester contends that in this posting, "Brewer is acknowledging his potential involvement as the shooter . . . and exculpating [Lester]." Lester characterizes the Facebook post as newly discovered evidence.

The district court found Brewer's Facebook post was "ambiguous at best" and did not constitute newly discovered evidence for purposes of a new trial. We agree.

[27,28] Newly discovered evidence must actually be newly discovered, and it may not be evidence which could have been discovered and produced at trial with reasonable diligence.[54]

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[53] *State v. McSwine, supra* note 51.

[54] *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994), *disapproved on other grounds, State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006).

A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.[55]

The Facebook post was not newly discovered evidence for at least two reasons. First, it was not evidence that could not have been discovered and produced at trial. Rather, it was a public comment made in response to the jury's verdict. Brewer's post merely expresses a belief that at some point during the investigation, somebody identified Brewer as the shooter. Second, the comment is ambiguous at best as to Lester's guilt or innocence and does not amount to exculpatory evidence. The post does not contain any admission or suggestion of Brewer's guilt, but merely expresses dissatisfaction with the jury's verdict of guilt.

We find no abuse of discretion in denying the motion for new trial. Lester's third assignment of error lacks merit.

4. Sufficiency of Evidence

Finally, Lester claims the evidence at trial was insufficient to support his convictions. Lester does not point to a specific element of an offense that was lacking in evidentiary support; rather, he argues there was insufficient evidence to convict him, because the State's witnesses contradicted one another and were biased. Further, Lester claims the State's investigation was inadequate. Lester made these same arguments to the jury.

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.[56] The relevant question for an appellate court

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[55] *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[56] *State v. Newman, supra* note 6; *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

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.[57]

After carefully reviewing the record, we find there was sufficient evidence to support Lester's convictions. We acknowledge that there were some inconsistencies in witness testimony; however, an appellate court does not resolve conflicts in the evidence or pass on the credibility of witnesses. Viewed in the light most favorable to the State, the record contains sufficient evidence, if believed, to support every element of the crimes charged. Lester's fourth assignment is meritless.

V. CONCLUSION

For the foregoing reasons, we affirm Lester's convictions and sentences.

Affirmed.

Connolly, J., not participating.

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[57] *Id.*

D.I., appellee, v. William R. Gibson and Tylynne Bauer, in their official capacities as employees of the State of Nebraska, et al., appellants.

890 N.W.2d 506

Filed February 24, 2017. No. S-15-1166.

1. **Attorney Fees.** Whether attorney fees are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Attorney Fees.** Attorney fees and expenses are recoverable only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.
4. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
5. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
6. **Convicted Sex Offender.** The Sex Offender Commitment Act specifies that a subject is entitled to the rights provided in Neb. Rev. Stat. §§ 71-943 to 71-960 (Reissue 2009) during proceedings concerning the subject under the Sex Offender Commitment Act.
7. **Convicted Sex Offender: Right to Counsel.** Neb. Rev. Stat. § 71-945 (Reissue 2009) authorizes the appointment of counsel for subjects involved in proceedings under the Sex Offender Commitment Act.
8. **Convicted Sex Offender: Right to Counsel: Attorney Fees.** Neb. Rev. Stat. § 71-947 (Reissue 2009) expressly provides for the payment of fees for appointed counsel under the Sex Offender Commitment Act.
9. **Habeas Corpus: Convicted Sex Offender.** Neb. Rev. Stat. § 71-959(9) (Reissue 2009) contemplates the filing of a petition for a writ of habeas corpus by a subject in custody or receiving treatment under the Sex

Offender Commitment Act for the purpose of challenging the legality of his or her custody or treatment.

10. **Statutes.** Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
11. **Convicted Sex Offender: Right to Counsel: Attorney Fees.** An attorney validly appointed by a court to assist an indigent subject in a habeas corpus proceeding challenging the subject's custody or treatment under the Sex Offender Commitment Act is entitled to attorney fees under Neb. Rev. Stat. § 71-947 (Reissue 2009).

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Douglas J. Peterson, Attorney General, James D. Smith, and Joseph M. Smith, Madison County Attorney, for appellants.

Ryan J. Stover, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellee.

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

Cassel, J.

INTRODUCTION

The district court ordered a county to pay the fees and expenses of a court-appointed attorney who represented an indigent subject challenging his custody under the Sex Offender Commitment Act (SOCA)[1] through a petition for a writ of habeas corpus. Because we find statutory authorization for appointment and payment of counsel to represent an indigent subject under the SOCA and for a subject to challenge his or her custody or treatment under the SOCA by filing a petition for a writ of habeas corpus, we affirm the court's order.

BACKGROUND

In 2006, the mental health board for Douglas County committed D.I. to the Norfolk Regional Center in Madison County for treatment as a dangerous sex offender under the SOCA. On

[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009).

appeal, this court upheld the commitment.[2] During the SOCA proceedings, the Douglas County public defender's office represented D.I.

Subsequently, D.I. filed with the district court for Madison County a pro se petition for a writ of habeas corpus. He sought immediate release from the Norfolk Regional Center. The court allowed D.I. to proceed in forma pauperis. At some point, attorney Ryan Stover began to represent him. The record does not contain any certificate or motion for appointment of counsel. Likewise, the record does not show any objection to the appointment. There is no bill of exceptions from the habeas proceeding, as it was submitted upon stipulated facts. The written stipulated facts were settled as a "statement of evidence on which the Court relied" in denying habeas relief. Stover represented D.I. for the remainder of the proceeding in the district court, which ultimately dismissed D.I.'s petition, and in an unsuccessful appeal to this court.[3]

After the district court spread our mandate, Stover filed an application for an order fixing attorney fees and expenses and attached a copy of an official county claim form showing attorney fees of $6,067.50 and expenses of $192.37. Stover's application recited that he was "attorney by Court appointment for [D.I.]," but otherwise the record in the instant appeal is silent regarding Stover's appointment. The respondents objected in writing to Stover's application, "because there [was] no authority for [the district court] to order payment of attorneys' fees or costs by any governmental entity in the [habeas corpus proceeding]." The respondents cited two cases, which we discuss later in this opinion. The respondents' written objection did not refer to Stover's appointment. Nor did the objection take any issue with the amount that Stover sought. The court ordered Madison County to pay Stover's fees and expenses in the amount of $6,259.87.

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[2] See *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

[3] See *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015).

The respondents, in their official capacities as employees of the State of Nebraska; Madison County; the State on behalf of its political subdivision, Madison County; and the Attorney General, on behalf of the State (collectively the State) filed a timely appeal. We moved the case to our docket.[4] Shortly before oral arguments, we directed the parties to submit supplemental briefs. They have done so, and we have considered their submissions.

ASSIGNMENT OF ERROR

The State assigns that the district court erred by "fixing and ordering the payment of attorney fees and expenses" for Stover.

STANDARD OF REVIEW

[1,2] Whether attorney fees are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law.[5] We independently review questions of law decided by a lower court.[6]

ANALYSIS

[3] We have long held that attorney fees and expenses are recoverable only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.[7] On appeal, the State initially argued that the district court had no authority to order the payment of fees for court-appointed counsel in a habeas corpus proceeding. The State relied upon our precedent disallowing attorney fees in a habeas corpus proceeding. In *In re Application of Ghowrwal*,[8]

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[5] *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

[6] *Id.*

[7] See, e.g., *State ex rel. Ebke v. Board of Educational Lands & Funds*, 159 Neb. 79, 65 N.W.2d 392 (1954); *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N.W. 1037 (1914).

[8] *In re Application of Ghowrwal*, 207 Neb. 831, 301 N.W.2d 349 (1981).

a case involving custody of a child, the district court ordered the respondent to pay $1,000 to be applied to the relator's attorney fees. We reversed that portion of the judgment, stating "[t]here is no statutory authority for awarding attorney fees in a habeas corpus proceeding in this state."[9] In *Anderson v. Houston*,[10] an inmate who sought credit on his sentence was awarded attorney fees and costs. We observed that Neb. Rev. Stat. § 29-2819 (Reissue 2016) "authorizes a court in a habeas corpus action to 'make such order as to costs as the case may require'"[11] and that Neb. Rev. Stat. § 29-2824 (Reissue 2016), which specifies fees taxable as costs in a habeas corpus proceeding, did not provide for an award of attorney fees. We stated, "No other statute specifically provides for the recovery of attorney fees in a habeas action, nor is there any recognized and accepted uniform course of procedure that allows the recovery of attorney fees in a habeas action."[12] Thus, we concluded that the district court erred in taxing the attorney fees as costs. And these were the two cases cited by the State in the written objection filed in the district court.

In re Application of Ghowrwal and *Anderson* correctly applied the law applicable in those cases. But neither case involved an attorney appointed by the court to represent an indigent subject seeking to use a habeas corpus proceeding to challenge the legality of his commitment under the SOCA.

[4] At this point, it is important to emphasize that the State explicitly declared in its initial brief that it does not "challenge [Stover's] appointment."[13] Neither the record presented to us in this appeal nor our record in the appeal of the denial of the writ contain any order appointing Stover as counsel or any objection to the appointment. Neither party requested

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[9] *Id.* at 835, 301 N.W.2d at 352.

[10] *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

[11] *Id.* at 917, 766 N.W.2d at 102.

[12] *Id.*

[13] Brief for appellants at 5.

the preparation of a bill of exceptions in the habeas corpus appeal. And according to an affidavit of the official court reporter in the instant appeal, there were no proceedings on the record regarding the signing of the "Order Fixing Fee." To the extent that the State now asserts in its supplemental brief that the court's appointment of Stover was contrary to statute, there is no record to corroborate this argument. As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[14] Without a record, we decline to engage in speculation regarding the process that resulted in Stover's appointment.

[5] Moreover, there is nothing in our record to suggest that any error in the process followed to appoint Stover was ever presented to the district court. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[15] It seems to us that if the State wished to object to that procedure (whatever it was), the State should have done so promptly in the initial habeas proceeding. But, as the State never did so, we decline to address that issue and turn to the issue that the State actually raised—the statutory authority for Stover's fees.

Statutory authorization for Stover's fees is more complicated than some other situations. As we recently explained in *State v. Rice*,[16] a statute[17] applies to fees for appointed counsel for indigent felony defendants in criminal cases and a different statute[18] governs the appointment of counsel and payment of fees to appointed counsel in postconviction proceedings. We agree with the State that neither of these statutes

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[14] *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016).

[15] *Aldrich v. Nelson*, 290 Neb. 167, 859 N.W.2d 537 (2015).

[16] *State v. Rice, ante* p. 241, 888 N.W.2d 159 (2016).

[17] Neb. Rev. Stat. § 29-3905 (Reissue 2016).

[18] Neb. Rev. Stat. § 29-3004 (Reissue 2016).

authorizes the fees at issue here. But a statutory path exists nonetheless, and the State's supplemental brief follows it up to a point.

[6] The first step is the SOCA's incorporation of specific rights enumerated in the Nebraska Mental Health Commitment Act.[19] The SOCA specifies that a subject is entitled to the rights provided in §§ 71-943 to 71-960 during proceedings concerning the subject under the SOCA.[20]

[7] Second, the incorporated statutes authorize the appointment of counsel for subjects involved in proceedings under the SOCA. Section 71-945 states that "[a] subject shall have the right to be represented by counsel *in all proceedings under the* [*SOCA*]" and provides for the appointment of counsel by a court if the subject is found to be indigent. (Emphasis supplied.) The appointment of counsel under § 71-945 is to be in accordance with the procedures set forth in § 71-946. But as we have already noted, the record does not show that the State ever presented the district court with a challenge to the validity of Stover's appointment.

[8] Third, another incorporated statute expressly provides for the payment of fees for appointed counsel. The appointed attorney "shall apply to the court in which his or her appointment is recorded for fees for services performed" and after a hearing on the application, the court "shall fix reasonable fees" to be paid by the county "in which the application was filed."[21] This statute provides the clear statutory basis for payment of attorney fees for court-appointed counsel under the SOCA.

[9] Finally, another of these incorporated rights under the SOCA contemplates the filing of a petition for a writ of habeas corpus. Section 71-959(9) empowers a subject in custody or receiving treatment under the SOCA "[t]o file, either personally or by counsel, petitions or applications for writs of

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[19] Neb. Rev. Stat. §§ 71-901 to 71-963 (Reissue 2009 & Cum. Supp. 2016).

[20] § 71-1224.

[21] See § 71-947.

habeas corpus for the purpose of challenging the legality of his or her custody or treatment."

D.I. was such a subject, and he sought a writ of habeas corpus to challenge the legality of his custody. And it was during the course of those proceedings that the district court for Madison County apparently appointed Stover to represent D.I. Stover thereafter applied to the district court for Madison County for fees, as permitted by § 71-947.

[10,11] Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.[22] Reading these statutes together, the Legislature has clearly authorized use of a habeas corpus proceeding to challenge a SOCA commitment, recognized a subject's right to appointed counsel in "all proceedings under the [SOCA],"[23] and provided a statutory basis for payment of attorney fees. We believe that this chain of statutes leads inescapably to one conclusion. We hold that an attorney validly appointed by a court to assist an indigent subject in a habeas corpus proceeding challenging the subject's custody or treatment under the SOCA is entitled to attorney fees under § 71-947.

We emphasize that the Legislature has created only a narrow exception to the general rule. For the most part, it remains true that there is no statutory authority for awarding attorney fees in a habeas corpus proceeding in this state. But Stover's claim for attorney fees falls within the exception. In *State v. Rice*,[24] we disapproved case law suggesting that a trial court must award fees in the amount requested if the State does not object. Although the State did not dispute the reasonableness of the fee, we see nothing in the record to show that the district court failed in its duty to allow only a reasonable fee.

The record does not permit us to go beyond this point. We express no opinion regarding the process followed by

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[22] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[23] § 71-945.

[24] *State v. Rice, supra* note 16.

the district court in appointing Stover. It may well be that in another case with a proper record, error in not following statutory procedures for appointment of counsel in SOCA proceedings might preclude a court-appointed counsel in a habeas proceeding from obtaining a fee. Thus, we urge bench and bar to exercise caution. We also express no opinion regarding whether a statute[25] providing for adjustment between counties of expenses incurred on account of a dangerous sex offender has any application to the fees awarded to Stover.

CONCLUSION

We conclude that statutes authorize the payment of attorney fees incurred by court-appointed counsel representing an indigent subject challenging his or her custody or treatment under the SOCA via a petition for a writ of habeas corpus. Because Stover's fees were for services apparently performed in that capacity, we affirm the order of the district court.

Affirmed.

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[25] See Neb. Rev. Stat. § 83-351 (Reissue 2014).

deNourie & Yost Homes, LLC, a Nebraska limited liability company, appellant, v. Joe Frost and Amy Frost, husband and wife, and Security State Bank, doing business as Dundee Bank, a Nebraska corporation, appellees.

893 N.W.2d 669

Filed February 24, 2017. No. S-16-014.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law.
3. **Election of Remedies.** Whether the election of remedies doctrine applies is a question of law.
4. **Judgments: Estoppel: Appeal and Error.** An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.
5. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage.
6. **Appeal and Error.** Under the law-of-the-case doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication.
7. ____. The law-of-the-case doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal.
8. **Judgments: Appeal and Error.** Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.
9. ____: ____. The general rule is that a reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is

a general remand and the parties stand in the same position as if the case had never been tried.

10. ____: ____. Under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.
11. **Waiver: Appeal and Error.** An issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal.
12. **Election of Remedies.** The election of remedies doctrine is an affirmative defense.
13. **Pleadings.** A party must specifically plead an affirmative defense for the court to consider it.
14. **Contracts: Fraud.** A contract is voidable by a party if his or her manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which he or she is justified in relying.
15. **Contracts.** A voidable contract can be affirmed by the injured party.
16. **Election of Remedies.** The election of remedies doctrine generally applies in two instances: when a party seeks inconsistent remedies against another party or persons in privity with the other party or when a party asserts several claims against several parties for redress of the same injury.
17. **Damages.** A party may not have double recovery for a single injury, or be made more than whole by compensation which exceeds the actual damages sustained.
18. **Actions.** Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had.
19. **Contracts: Fraud: Election of Remedies.** A party fraudulently induced to enter into a contract has an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract.
20. **Election of Remedies.** The election of remedies doctrine does not preclude a plaintiff from pursuing two causes of action, such as breach of contract and fraud, where each action arose out of different obligations and different operative facts.
21. **Contracts: Fraud: Election of Remedies.** A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively.

22. **Equity: Estoppel.** Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.
23. **Estoppel.** The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
24. **Estoppel: Intent.** Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Reversed and remanded for further proceedings.

Jerrold L. Strasheim for appellant.

Christopher J. Tjaden, Michael J. Whaley, and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellee Security State Bank.

Kristopher J. Covi and Jay D. Koehn, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees Joe Frost and Amy Frost.

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

Cassel, J.

INTRODUCTION

We address a second appeal from an action by a contractor seeking damages arising out of its construction of a house. Following our remand, the district court determined that the election of remedies doctrine and judicial estoppel required a dismissal of the contractor's claims. Because the claims were consistently premised on the existence of a contract, no election was required. And because the claims were based on different facts and obligations, both could be pursued. We therefore reverse, and remand for further proceedings.

BACKGROUND

New Home Construction

In 2004, Joe Frost and Amy Frost obtained two loans for the construction of a new home. Security State Bank, doing business as Dundee Bank (the bank), was not the lender on either loan. In 2005, construction on the new home stopped. In 2007, the Frosts entered into a "Project Completion Agreement" with deNourie & Yost Homes, LLC (D&Y), under which they agreed to pay D&Y $325,630 in return for completion of the new home construction. At that time, Joe had a business relationship with the bank, in which the bank loaned Joe money. The Frosts defaulted on payments owed to D&Y and on both loans. Ultimately, the house was sold at foreclosure, and the Frosts filed for bankruptcy with no assets.

Proceedings on Fourth Amended Complaint

D&Y filed a fourth amended complaint against the Frosts and the bank. It alleged five causes of action: breach of contract against the Frosts; fraud, concealment, and nondisclosure against the Frosts; civil conspiracy against the Frosts and the bank; equitable estoppel against the bank; and promissory estoppel against the bank.

The bank moved for summary judgment, and the Frosts moved for partial summary judgment on the fraud and civil conspiracy causes of action. The district court sustained the motions as to D&Y's claims of fraudulent concealment and conspiracy. Because the court found that the fraudulent concealment claim against the Frosts failed as a matter of law, the court determined that there could be no conspiracy claim against the Frosts. With regard to the civil conspiracy claim against the bank, the court stated that "D&Y did not assert a cause of action for the underlying tort of fraudulent concealment against [the bank], and therefore, it cannot sustain a cause of action for conspiracy." This left remaining the claim against the Frosts for breach of contract and the

claims against the bank for equitable estoppel and promissory estoppel.

At the commencement of a bench trial on the remaining issues, the Frosts made an oral motion to confess judgment on D&Y's breach of contract claim in the amount of $245,000. The district court entered an order granting a judgment in favor of D&Y and against the Frosts in the amount of $245,000 and dismissing the Frosts as parties. Following the trial, the court found in favor of the bank and dismissed the fourth amended complaint with prejudice.

First Appeal

D&Y appealed. In *deNourie & Yost Homes v. Frost* (*Frost I*),[1] we determined that the district court erred in granting summary judgment on D&Y's fraud and conspiracy claims. In the background section of the opinion, we stated that "[i]n April 2013, at the start of the bench trial, the Frosts confessed judgment for $245,000 on D&Y's breach of contract claim."[2] We held as follows:

- The court erred in granting summary judgment to the Frosts on D&Y's fraud claim because genuine issues of material fact existed whether the Frosts had intentionally made false or misleading representations that they could pay for D&Y's work.
- The court erred in granting summary judgment to the bank on D&Y's civil conspiracy claim because the complaint was sufficient to put the bank on notice that the claim rested on the bank's alleged conspiracy to commit fraud.
- The court erred in granting summary judgment to the Frosts on D&Y's civil conspiracy claim because its ruling rested on its incorrect judgment that D&Y's fraud claim failed as a matter of law and because it failed to

[1] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[2] *Id.* at 146, 854 N.W.2d at 309.

consider that D&Y alleged two separate instances of fraudulent conduct.

- In the bench trial, the court did not err in finding that D&Y had failed to prove by clear and convincing evidence that the bank promised to finance D&Y's construction contract and to pay these funds directly to D&Y.[3]

With regard to the civil conspiracy claim against the bank, we "conclude[d] only that the court erred in granting summary judgment for its stated reason."[4] We reversed the summary judgment orders and "remand[ed] the cause to the court to conduct further proceedings on D&Y's claims of fraud and civil conspiracy."[5]

Proceedings After Remand

After remand, D&Y filed a fifth amended complaint, which differed from the fourth amended complaint in several respects. The second cause of action, for "Fraud/Concealment/Nondisclosure," incorporated by reference all allegations of the third cause of action and contained numerous additional factual allegations. The new complaint set forth five representations that D&Y claimed were false and alleged that D&Y finished construction after it received assurance of payment from Joe and the president of the bank. The fifth amended complaint alleged that the failure of the Frosts to pay the $245,000 owed for completion of the construction "destroyed D&Y's business which is no longer functioning." It claimed that D&Y "suffered damages consisting of the unpaid $245,000 plus approximately $2,400,000 for the destruction of D&Y's business or the total of $2,645,000." In contrast, the fourth amended complaint sought damages of $242,500, "plus

[3] *Id.* at 139-40, 854 N.W.2d at 305.

[4] *Id.* at 157, 854 N.W.2d at 316.

[5] *Id.* at 163, 854 N.W.2d at 320.

damages in an undetermined amount for the destruction of D&Y's construction business."

D&Y also modified the third cause of action of the fifth amended complaint. D&Y alleged that there was a civil conspiracy between Joe and the bank to defraud D&Y, that the bank aided and abetted the Frosts' actions to defraud D&Y, and that Joe aided and abetted the acts of the bank to defraud D&Y. The third cause of action also included a number of new factual allegations, including specific acts and omissions demonstrating the alleged conspiracy.

The Frosts moved to dismiss the fifth amended complaint or, alternatively, moved for summary judgment. During a hearing on the motion, the bank stated that it would join in the Frosts' motion for summary judgment. The bank believed that if the Frosts were granted summary judgment, there would be no underlying action upon which the conspiracy action against the bank could be based. D&Y's counsel responded that the bank could support the Frosts' motion for summary judgment, but that it could not join it without filing and serving a motion. The district court agreed, stating, "I think he probably has to plead it, too, and have a separate hearing, if that's, in fact, what happens." No party adduced evidence during the hearing, but the Frosts requested that the court take judicial notice of the court's file. After the hearing, the bank filed an answer to the fifth amended complaint.

On November 25, 2015, the district court entered an order on the Frosts' alternative motions. First, the court denied the motion to dismiss, noting that the fifth amended complaint was filed before the deadline contained in the scheduling order. With regard to the motion for summary judgment, the court determined that the fraud claim was barred by the election of remedies. The court explained:

> In its Fifth Amended Complaint, D&Y claims that the Frosts breached the agreement or, in the alternative, they committed fraud in inducing [D&Y] to enter into and/or continue work under the contract. The Court finds that

> either a contract exists and is enforceable, or there was fraud and the contract is void. Here, D&Y chose to take a judgment on the breach of contract claim. In doing so, D&Y elected breach of contract as a remedy which now forecloses D&Y from proceeding on any fraud claims.
>
> The breach of contract claim is predicated on the existence of the contract. The fraud claim is based on allegations that D&Y would not have entered into the cont[r]act but for the alleged fraud and therefore the contract is void. Essentially, the damages D&Y sought (and obtained a judgment for) with respect to its breach of contract claim are to put [D&Y] in the position had the contract been fulfilled as agreed. Conversely, the damages D&Y seeks with respect to its fraud claim are to put D&Y in the position had the contract never occurred. It is clear that these remedies may not co-exist.

The district court also found that the doctrine of judicial estoppel "prevented" D&Y's fraud claim. The court stated that because D&Y had already reduced its breach of contract claim to judgment which was premised on the existence of a valid contract, judicial estoppel barred D&Y from now proceeding on a fraud claim based on a theory that the contract was not valid. The court therefore granted the Frosts' motion for summary judgment with respect to D&Y's fraud claim.

The district court also granted the Frosts' motion for summary judgment as to the civil conspiracy claim. The court stated:

> [A]ny claims for fraudulent misrepresentations or concealment . . . would be premised on the lack of a contract. Once again, the damages D&Y sought (and obtained a judgment for) with respect to its breach of contract claim are to put D&Y in the position had the contract been fulfilled as agreed. Conversely, the damages D&Y seeks with respect to its conspiracy claim are to put D&Y in the position had the contract never occurred. It is clear that these remedies may not co-exist. Consequently, the Court finds that the doctrine of election of remedies and

doctrine of judicial estoppel bar[] D&Y's civil conspiracy claim for the same reasons that the doctrines bar D&Y's fraud claim.

On December 10, 2015, the district court entered an "order nunc pro tunc." The order stated that the November 25 order was intended to be a final order dismissing all claims against all defendants.

On December 23, 2015, D&Y filed a notice of appeal. The bank subsequently moved for summary dismissal of the civil conspiracy claim, asserting that we lacked jurisdiction over the claim. We overruled the motion, but reserved the issue until plenary submission of the appeal.

ASSIGNMENTS OF ERROR

D&Y assigns that the district court erred in (1) failing to apply the law-of-the-case doctrine in accordance with our mandate, (2) failing to find that the Frosts and the bank waived the defense of election of remedies by not raising it in the earlier appeal, (3) granting summary judgment to the Frosts and the bank on the theory of election of remedies when that defense was never pled, (4) failing to hold that election of remedies "comes into play" after trial, (5) failing to hold that the purported confession of judgment was not an election of remedies, (6) failing to recognize that the purported confession of judgment was not entitled to be treated as a judgment with respect to merger and bar, (7) granting the Frosts and the bank summary judgment and dismissing D&Y's fraud and civil conspiracy claims without any evidence or any new evidence, (8) granting the bank summary judgment even though it had not filed a motion for summary judgment or followed the statutes providing for summary judgment, and (9) denying D&Y its right to trial and due process with respect to its fraud and civil conspiracy claims.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an

appellate court to reach its conclusions independent from a trial court.[6]

[2] The construction of a mandate issued by an appellate court presents a question of law.[7]

[3] Whether the election of remedies doctrine applies is a question of law.[8]

[4] An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.[9]

ANALYSIS

Jurisdiction

The bank challenges our jurisdiction in this matter. It asserts that D&Y voluntarily dismissed its conspiracy claim against the bank in order to convert a nonfinal order of summary judgment in favor of the Frosts into a final, appealable order.

We have stated that a party may not dismiss without prejudice a cause of action in order to create finality and confer appellate jurisdiction where there would normally be none.[10] This is because one who has been granted that which he or she sought has not been aggrieved, and only a party aggrieved by an order or judgment can appeal.[11]

Lack of clarity in the record complicates resolution of what should be a simple question. The bank asserts that D&Y orally

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[6] *City of Springfield v. City of Papillion*, 294 Neb. 604, 883 N.W.2d 647 (2016).

[7] *Liljestrand v. Dell Enters.*, 287 Neb. 242, 842 N.W.2d 575 (2014).

[8] See, *American Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321 (5th Cir. 2008); *In re Estate of Koellen*, 167 Kan. 676, 208 P.2d 595 (1949); *Wickenhauser v. Lehtinen*, 302 Wis. 2d 41, 734 N.W.2d 855 (2007).

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

[10] See *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

[11] See *id.*

moved to voluntarily dismiss its conspiracy claim against the bank. D&Y, on the other hand, contends that the district court granted the bank summary judgment on that claim. The bill of exceptions does not contain any proceedings on the oral motion. Both parties rely on the court's purported order nunc pro tunc, which, as it appears in our transcript, stated:

> On the oral motion of [D&Y] through its counsel to clarify the finality of this court's November 25, 2015 Order on Defendants' Motion to Dismiss Fifth Amended Complaint or in the alternative Motion For Summary Judgment ("November 25 Order"), it is hereby ordered nunc pro tunc that the November 25 Order is intended to be and is a final order dismissing all claims of [D&Y] against all Defendants, and to the extent necessary, if any, decides against [D&Y] on all of [D&Y's] claims for relief against all Defendants, and dismisses this action in its entirety.

The bank claims that the order nunc pro tunc documents D&Y's oral motion to dismiss. But D&Y denies voluntarily dismissing the claim, and such dismissal is not plainly contained in the record. The order's reference to D&Y's "oral motion" does not compel an inference that D&Y orally moved to dismiss its claim against the bank.

Even if the district court intended the order as something else, it appears on its face to have been an order modifying a previous order made within the same term.[12] The order clearly dismissed all claims against both the Frosts and the bank. Thus, there is a final, appealable order. We conclude that we have jurisdiction over all of the parties.

Law-of-the-Case Doctrine

[5-8] The law-of-the-case doctrine is occasionally invoked in cases following a remand by an appellate court. The law-of-the-case doctrine reflects the principle that an issue

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[12] See Neb. Rev. Stat. § 25-2001(1) (Reissue 2016).

litigated and decided in one stage of a case should not be relitigated at a later stage.[13] Under this doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication.[14] The doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal.[15] Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.[16]

D&Y advances three reasons why it believes the law-of-the-case doctrine precluded the district court from entering summary judgment. We find no merit to any of them.

First, D&Y asserts that "[s]ummary [j]udgment is barred under the law-of-the-case doctrine."[17] D&Y's argument is based upon our reversal of summary judgment on the fraud and civil conspiracy claims in *Frost I*. According to D&Y, we "implicitly" held that D&Y was entitled to a trial on those claims.[18] It draws this conclusion from our statements that preponderance of evidence standards would apply, that a fact finder could determine Joe colluded with a banker in December 2007 to make fraudulent misrepresentations about the availability of funding, and that a fact finder could reasonably believe D&Y's evidence. D&Y reads too much into our mandate.

[9] Our opinion and mandate did not specify any particular action to be taken by the district court. The general rule is that a reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is a

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[13] *Bauermeister Deaver Ecol. v. Waste Mgmt. Co.*, 290 Neb. 899, 863 N.W.2d 131 (2015).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Brief for appellant at 13.

[18] *Id.* at 14.

general remand and the parties stand in the same position as if the case had never been tried.[19] But there is an exception—if the undisputed facts are such that but one judgment could be rendered, the trial court should enter such judgment, notwithstanding the mandate did not so direct.[20] The exception does not apply here. Our opinion in *Frost I* left open a number of possible actions upon remand. A trial on the claims for fraud and civil conspiracy was one possibility. But other possible actions include opening the case for the reception of additional evidence or deciding the case without receiving additional evidence.[21] We conclude that the law-of-the-case doctrine did not require a trial on D&Y's fraud and civil conspiracy claims. Instead, our general remand returned the parties to the same position as though summary judgment had not been entered against D&Y on those claims. Proceedings on whether the doctrines of election of remedies or judicial estoppel apply were within the scope of our broad mandate.

[10,11] Second, D&Y contends that the Frosts waived the right to raise election of remedies or judicial estoppel by not raising them in the first appeal. We disagree. Under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.[22] But an issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal.[23] The Frosts had no incentive to raise those potential defenses in *Frost I*, because the trial court had entered summary judgment in their favor

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[19] *Master Laboratories, Inc. v. Chesnut*, 157 Neb. 317, 59 N.W.2d 571 (1953).

[20] See *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942).

[21] See 5 C.J.S. *Appeal and Error* § 1139 (2007).

[22] *Bauermeister Deaver Ecol. v. Waste Mgmt. Co., supra* note 13.

[23] *Id.*

and the Frosts did not challenge any action taken by the court. Further, it would not have been proper to raise election of remedies in *Frost I* when it had not been raised at the trial court level. This follows from the rule that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[24]

Third, D&Y claims that an exception to application of the law-of-the-case doctrine does not apply. The doctrine does not apply in subsequent proceedings when the petitioner presents materially and substantially different facts.[25] D&Y points out that the Frosts offered no new evidence at the summary judgment hearing following remand. Thus, it argues, the exception does not apply. This argument compares apples and oranges. The Frosts asserted the new defenses of election of remedies and judicial estoppel. And, if applicable, those defenses would have the effect of barring further proceedings on the fraud and conspiracy claims.

Election of Remedies

The heart of D&Y's appeal is that the district court erred in granting summary judgment to the Frosts on the basis that D&Y's claims were barred by the election of remedies doctrine. We agree that the court erred in granting summary judgment on this basis. Before reaching the merits of this matter, we address two preliminary matters.

[12,13] We first address D&Y's assignment that the district court erred in granting summary judgment on the election of remedies defense where it was never pled. The election of remedies doctrine is an affirmative defense.[26] A party must specifically plead an affirmative defense for the court to consider it.[27]

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[24] See *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

[25] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[26] *Weitz Co. v. Hands, Inc.*, 294 Neb. 215, 882 N.W.2d 659 (2016).

[27] *Id.*

The Frosts asserted the defense in a motion directed to a pleading that ceased to serve as the operative pleading. In a motion for summary judgment responsive to the fourth amended complaint, the Frosts asserted they were entitled to judgment on the basis of election of remedies. But nearly 1 month later, D&Y filed its fifth amended complaint. At that point, the fourth amended complaint no longer operated as a pleading. An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.[28]

The Frosts did not reassert the defense of election of remedies in their motions responsive to the fifth amended complaint. The Frosts filed a motion to dismiss the fifth amended complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief can be granted. An affirmative defense may be asserted in a motion filed pursuant to § 6-1112(b)(6) when the defense appears on the face of the complaint.[29] But the operative complaint made no mention of the confession of judgment or otherwise showed that an election of remedies had allegedly been made. The Frosts alternatively moved for summary judgment, but they did not refer to the election of remedies doctrine.

However, in an objection to the Frosts' motions, D&Y responded to the Frosts' "defense that the . . . [c]onfession of [j]udgment [f]or [b]reach of [c]ontract is a bar to [D&Y's] causes of action." Based upon D&Y's response, we assume, without deciding, that the defense was properly before the district court.

[14,15] We next address an erroneous statement by the district court. The court stated that "either a contract exists and is enforceable, or there was fraud and the contract is void." A contract is voidable by a party if his or her manifestation of

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[28] *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

[29] *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

assent is induced by either a fraudulent or a material misrepresentation by the other party upon which he or she is justified in relying.[30] And a voidable contract can be affirmed by the injured party.[31] Thus, when a party has been fraudulently induced to enter a contract, the contract is not void but voidable. Having disposed of the preliminary matters, we turn our focus to the election of remedies doctrine.

[16-18] We first recall general principles concerning the doctrine. The election of remedies doctrine generally applies in two instances: when a party seeks inconsistent remedies against another party or persons in privity with the other party or when a party asserts several claims against several parties for redress of the same injury.[32] A party may not have double recovery for a single injury, or be made more than whole by compensation which exceeds the actual damages sustained.[33] Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had.[34]

[19] D&Y did not assert inconsistent theories of recovery or seek inconsistent remedies. Certainly, a party cannot proceed on a theory of recovery which is premised upon the existence of a contract and at the same time proceed alternatively on a theory which is premised on the lack of a contract.[35] But contrary to the district court's determination, D&Y did not do so. A party fraudulently induced to enter into a contract has an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated

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[30] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[31] See *First Nat. Bank v. Guenther*, 125 Neb. 807, 252 N.W. 395 (1934).

[32] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[33] *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

[34] *Id.*

[35] *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

to the induced party's position which existed before entry into the contract.[36] Thus, rescission is not the only remedy available. A defrauded party may affirm the contract and seek damages. And doing so is entirely consistent with a breach of contract action, which necessarily affirms the existence of the contract.

D&Y did not seek to rescind the contract. Indeed, rescission would not have been proper. The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract.[37] But here, the parties could not be placed in a status quo. D&Y completed construction on the Frosts' home, and in doing so without payment from the Frosts, it allegedly suffered a destruction of its business. Since that time, the Frosts' home was sold at foreclosure and the Frosts filed for bankruptcy without assets.

Instead, D&Y sought damages for both its breach of contract claim and its fraud claims. The proper measure of damages in a contract action is the losses sustained by reason of a breach.[38] In an action for fraud, a party may recover such damages as will compensate him or her for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he or she would have been in had the fraud not occurred.[39] We invoked this precise rule in a case where the plaintiff chose to affirm the contract and sue for damages.[40] We have stated that "there is nothing inconsistent

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[36] See *InterCall, Inc. v. Egenera, Inc., supra* note 30.

[37] *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[38] *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997).

[39] *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[40] See *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

in seeking to recover damages arising by virtue of having been induced to enter into a contract by fraud and seeking to recover damages because express and implied warranties were allegedly breached," because "[a]ll three theories rest upon the premise that a contract came into being which resulted in damages."[41] Similarly, where a plaintiff affirmed the contract on his fraud-based theories rather than requesting rescission, we stated that "it is entirely consistent for him to also assert a claim based on breach of its terms."[42] Because D&Y affirmed the contract and sought damages for both the breach of contract and fraud claims, the election of remedies doctrine is not applicable.

[20,21] Nor does the election of remedies doctrine preclude a plaintiff from pursuing two causes of action, such as breach of contract and fraud, where each action arose out of different obligations and different operative facts.[43] "'A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively.'"[44]

D&Y's causes of action were based on different facts and obligations. D&Y based its breach of contract action on the Frosts' failure to pay amounts due under the contract. It alleged that "[a]s a proximate result of the Frosts' failures to perform their payment obligations, D&Y and its principals were denied $250,000 necessary for business operating capital

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[41] *Tobin v. Flynn & Larsen Implement Co., supra* note 35, 220 Neb. at 261, 369 N.W.2d at 98-99.

[42] *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 374, 518 N.W.2d 910, 923 (1994).

[43] See *General Ins. v. Mammoth Vista Owners Ass'n*, 174 Cal. App. 3d 810, 220 Cal. Rptr. 291 (1985).

[44] *Davis v. Cleary Building Corp.*, 143 S.W.3d 659, 669 (Mo. App. 2004). See, also, *Acadia Partners, L.P. v. Tompkins*, 673 So. 2d 487 (Fla. App. 1996).

essential for D&Y to perform its business function and to pursue any future business opportunity." On the other hand, D&Y premised its fraudulent concealment cause of action on the Frosts' false representations upon which D&Y relied in entering into the contract and in subsequently completing the construction of the home. Its fraud action alleged that "[t]he Frosts induced D&Y to enter into the [contract] by concealing from D&Y and not disclosing that the Frosts were insolvent and that more likely than not the Frosts could not pay and would not be able to pay . . . ." The causes of action arose at different points of time from the violation of separate obligations. Because the causes of action were based on different obligations and were not repugnant to one another, D&Y could pursue both. Thus, the purported confession of judgment on the breach of contract claim did not bar D&Y from pursuing its fraud claims.

In summary, the district court erred in granting summary judgment to the Frosts on the basis of election of remedies. D&Y did not assert inconsistent claims or inconsistent remedies. Both its breach of contract and its fraud claims were based on the existence of a contract, and both sought damages. Further, the claims were based on different facts and different obligations, such that recovery could potentially be had on both. And because the court's entry of summary judgment on the civil conspiracy claim was premised on the same erroneous belief that the remedies sought may not coexist, it, too, must be reversed.

Judicial Estoppel

The district court also found that "D&Y's fraud claim is prevented by the doctrine of judicial estoppel." We disagree, for reasons similar to those discussed with respect to election of remedies.

[22-24] Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial

process.[45] The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[46] Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.[47]

Judicial estoppel does not apply, because D&Y has not asserted an inconsistent position. The district court found that judicial estoppel barred D&Y from proceeding on a fraud claim based on a theory that the contract was not valid. But as discussed above, D&Y's fraud claim was premised on the existence of a contract, which is not inconsistent with a claim for breach of contract. Accordingly, the court abused its discretion in finding that the doctrine of judicial estoppel applied.

Judgment in Favor of the Bank

D&Y assigns that the district court erred in granting the bank summary judgment. It points out that the bank did not file a motion for summary judgment or follow the statutes providing for summary judgment. However, the record does not demonstrate that the court granted summary judgment to the bank. The November 2015 order clearly granted summary judgment to the Frosts only. And the purported order nunc pro tunc merely stated that the court "to the extent necessary, if any, decides against [D&Y] on all of [D&Y's] claims for relief against" the Frosts and the bank. But because judgment may have been entered in the bank's favor based on the erroneous entry of summary judgment in the Frosts' favor on the

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[45] *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co., supra* note 9.

[46] *Id.*

[47] *Id.*

civil conspiracy claim, we must reverse, and remand for further proceedings.

CONCLUSION

We conclude that under the law-of-the-case doctrine, our general remand for further proceedings in *Frost I* did not preclude the district court from entering summary judgment. However, because an election of remedies was not required, the court erred in granting summary judgment to the Frosts on that basis. And because D&Y did not assert inconsistent positions, the court abused its discretion in finding that the doctrine of judicial estoppel barred D&Y's fraud and conspiracy claims. The court further erred in entering judgment in favor of the bank. We reverse the order granting summary judgment to the Frosts and the purported "order tunc pro tunc," and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

Merie B. on behalf of Brayden O., appellee, v. State of Nebraska Department of Health and Human Services and Vivianne M. Chaumont, director of Division of Medicaid and Long Term Care, Department of Health and Human Services, appellants.

890 N.W.2d 513

Filed February 24, 2017. No. S-16-437.

1. **Judgments: Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law reviewed independently of the lower court's conclusion.
2. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
5. ____: ____. A party may not extend his or her request for relief beyond that which was initially determined by an appellate court.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded with directions.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellants.

Terrance A. Poppe, Andrew K. Joyce, and Annie E. Brown, Senior Certified Law Student, for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Kelch, J.

NATURE OF CASE

Merie B. initiated this action on behalf of her disabled daughter, Brayden O., after the Nebraska Department of Health and Human Services (DHHS) determined that Brayden was no longer eligible for home and community-based waiver services. Merie appealed to the district court for Lancaster County, which affirmed the determination made by DHHS. In a prior appeal to this court, we reversed the district court's judgment and remanded the cause with directions that the district court order DHHS to reinstate waiver services to Brayden, effective as of the date services were originally terminated.

Upon remand, Merie requested reimbursement for expenses she incurred due to the wrongful termination of Brayden's services, as well as attorney fees. The district court granted Merie's request and entered judgment against DHHS in the amount of $76,260.48. DHHS and the director of its Medicaid and long-term-care division now appeal from the district court's judgment.

BACKGROUND

Merie is the mother of Brayden, who suffers from Coffin-Lowry Syndrome. Brayden, who was 17 years old at the time of the court's hearing in this case, has the cognitive awareness of a 4- or 5-year-old child and requires constant supervision. In addition, Brayden has a seizure disorder, a heart disorder, and a myriad of neurological deficiencies, as well as vision and hearing deficits. Due to her disabilities, Brayden had been receiving home and community-based waiver services

through the Medicaid division of DHHS since approximately 2001. However, on November 11, 2012, Brayden's services were terminated after DHHS reassessed her condition and determined that she no longer met the necessary qualifications for such services. Merie appealed DHHS' determination, which was affirmed following an administrative appeal hearing.

Merie then filed a petition for review under Nebraska's Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 2008 & Cum. Supp. 2012), in the district court for Lancaster County. The district court affirmed DHHS' determination that Brayden no longer qualified for waiver services. On appeal to this court, in *Merie B. on behalf of Brayden O. v. State* (*Merie B. I*),[1] we reversed the district court's judgment and remanded the cause with directions that the district court order DHHS to reinstate waiver services to Brayden, effective November 11, 2012.

Upon remand, Merie filed a "Motion to Determine Expenses" in the district court. She requested an award in the amount of $65,394.28 for reasonable and necessary childcare expenses that were incurred due to the wrongful termination of Brayden's services by DHHS. A hearing was held on the motion, during which Merie testified regarding the expenses she incurred while Brayden's services were terminated, including daycare expenses of $45,349.26, health insurance premiums totaling $15,477.01, and out-of-pocket medical expenses of $2,233.96. DHHS objected to the presentation of any evidence regarding Merie's request for payment of health insurance premiums on the bases that it was not contested at the agency level and was outside the scope of the initial petition for review. The district court overruled DHHS' objections and allowed the testimony.

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[1] See *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015).

Merie testified that Brayden's health insurance premiums had previously been paid by DHHS through the "Health Insurance Premium Payment" (HIPP) program. After Merie received notice from DHHS that Brayden's waiver services were being terminated, she received a separate notice that Brayden was being terminated from the HIPP program as well. Merie acknowledged that she did not appeal Brayden's termination from the HIPP program, because her understanding was that Brayden's termination from waiver services rendered her ineligible for HIPP.

Merie further testified that she had not yet been reimbursed for any expenses since our mandate was issued in August 2015. DHHS acknowledged that it owed Merie for childcare expenses and out-of-pocket medical expenses, but objected to paying for the health insurance premiums because Merie did not appeal Brayden's termination from the HIPP program. As for the childcare expenses, DHHS indicated that it would take time to arrange those payments due to the administrative process required by Medicaid. It explained that federal Medicaid regulations did not allow DHHS to issue payments to recipients. Instead, each daycare provider must apply to be approved through the Medicaid system and then submit billing statements to DHHS, after which submission DHHS would remit payment directly to the providers. At that point, Merie would have to seek reimbursement from the providers for the amounts she had previously paid.

The district court agreed with DHHS that the HIPP expenses were not part of the underlying administrative action or the petition for review before the district court, nor was it addressed on appeal to this court. Nonetheless, it found that the health insurance premiums paid by Merie should be reimbursed by DHHS, because the denial of HIPP benefits would not have occurred but for DHHS' improper termination of Brayden's waiver services. It found that our opinion required Brayden to be placed in the same position she would have been had the waiver services not been improperly terminated,

which included eligibility for the HIPP program. Thus, the district court ordered DHHS to reimburse Merie for health insurance premiums in the amount of $15,477.01, in addition to the $45,349.26 it had agreed to pay for daycare services due under the waiver program. Finally, the district court found that DHHS had "improperly placed barriers preventing Merie from receiving the amounts due to her" and therefore ordered DHHS to pay attorney fees incurred by Merie since the issuance of our mandate, in the amount of $4,506. It entered judgment against DHHS in the total amount of $76,260.48, which included additional attorney fees that had previously been awarded in our mandate. DHHS and the director appeal from that judgment.

ASSIGNMENTS OF ERROR

DHHS and the director assign that the district court erred by (1) issuing an order outside the scope of the directions on remand, (2) receiving additional evidence at the hearing on Merie's motion to determine expenses, (3) considering an issue not presented as part of the petition for review, (4) ordering DHHS to pay Merie directly instead of following federal Medicaid requirements, and (5) awarding additional attorney fees to Merie.

STANDARD OF REVIEW

[1] The construction of a mandate issued by an appellate court presents a question of law reviewed independently of the lower court's conclusion.[2]

[2,3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[3] When reviewing an order of a district court under the Administrative

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[2] See *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

[3] *Merie B. I, supra* note 1.

Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

ANALYSIS

This matter initially came before this court upon an appeal by Merie after the district court, pursuant to the Administrative Procedure Act, affirmed DHHS' determination that Brayden no longer qualified for waiver services. We reversed the district court's judgment and remanded the cause to the district court with directions to order DHHS to reinstate waiver services to Brayden effective November 11, 2012.[5]

After remand, the district court correctly entered an order spreading the mandate and ordering DHHS to reinstate waiver services to Brayden effective November 11, 2012. Rather than seeking enforcement of that order by instituting a new proceeding pursuant to the Administrative Procedure Act, Merie filed a motion in district court. Said motion requested that the district court award her an additional $65,394.28 for reasonable and necessary childcare expenses incurred as a result of the wrongful termination of Brayden's services by DHHS. Although the district court was to function not as a trial court but as an intermediate court of appeals,[6] it held a hearing, over DHHS' objections. After receiving evidence, on April 18, 2016, the district court issued an order awarding a direct reimbursement of medical expenses and premiums to Merie.

DHHS and the director argue that the district court erred in ordering it to pay the insurance expenses and premiums, because such order exceeded the scope of our mandate in

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[4] *Id.*

[5] See *id.*

[6] See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

Merie B. I. On the other hand, Merie argues that the mandate required DHHS to reinstate Brayden's waiver services effective November 11, 2012, and that therefore, any adverse consequences that were directly caused by the wrongful termination should be remedied, including her termination from the HIPP program. We agree with DHHS and the director that the district court exceeded the scope of the mandate, and we therefore vacate the district court's April 18, 2016, order.

[4,5] It is well established that after receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.[7] We have also said that a party may not extend his or her request for relief beyond that which was initially determined by this court.[8] For example, in *Gates v. Howell*,[9] we ordered the district court to enter a judgment on remand invalidating the tax treatment of mobile homes as motor vehicles. After the district court complied with that mandate, a new tax was imposed on the mobile homes by the assessor. Thereafter, the appellants filed an application for relief, which the district court denied. On appeal, we affirmed the district court's decision, reasoning:

> "'Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on, or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any

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[7] *State ex. rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010). See, also, *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986).

[8] *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007), citing *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982).

[9] *Gates v. Howell, supra* note 8.

> effect, even though it may be such as the appellate court ought to have directed.'"[10]

These principles of law control this appeal.

In *Merie B. I*, this court reversed the district court's judgment, which was the final determination of the rights of the parties in the action. Accordingly, our disposition of that appeal constituted a final determination of the rights of the parties in an action.[11] In other words, there were no further issues before the district court on remand to resolve.

Although we are sympathetic to the district court's attempt to render a remedy due to the special needs of Brayden and the failure to act by DHHS, the district court was without authority to expand the mandate and hold an evidentiary hearing on Merie's "Motion to Determine Expenses." On remand, the district court was to perform only the purely ministerial act of spreading the judgment on its record. Any additional remedy sought by Merie must be pursuant to another proceeding—not as an enlargement of this appeal. For the reasons set forth above, we vacate the district court's April 18, 2016, order, which also awarded Merie additional fees.

CONCLUSION

We determine that the district court exceeded the scope of our mandate in *Merie B. I*, and therefore, the district court's order of April 18, 2016, is hereby reversed, and the cause is remanded with directions to vacate the judgment.

Reversed and remanded with directions.

Stacy, J., not participating.

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[10] *Id.* at 89, 317 N.W.2d at 775.

[11] See Neb. Rev. Stat. § 25-1301 (Reissue 2016). See, also, *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014).

State of Nebraska, appellee, v. Ricky J. McCumber, appellant.

893 N.W.2d 411

Filed February 24, 2017. No. S-16-446.

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. **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.
3. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
4. **Constitutional Law: Statutes: Courts: Judgments.** All challenges to the constitutionality of a statute should be heard by a full Supreme Court, and a supermajority is required to declare any statute unconstitutional, without regard to whether the challenge is facial or as-applied.
5. **Constitutional Law: Statutes.** The constitutionality of a statute presents a question of law.
6. **Constitutional Law: Statutes: Standing: Proof.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question, and to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, he or she is, or is about to be, deprived of a protected right.

7. **Constitutional Law: Statutes: Words and Phrases.** A challenge to a statute asserting that no valid application of the statute exists because it is unconstitutional on its face is a facial challenge.
8. **Constitutional Law: Statutes: Proof.** A plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
9. **Constitutional Law: Statutes: Pleadings: Waiver.** In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
10. **Constitutional Law: Statutes.** A motion to quash is the proper method to challenge the constitutionality of a statute, but it is not used to question the constitutionality of a statute as applied.
11. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.
12. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution guarantees against unreasonable search and seizure.
13. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

Appeal from the District Court for Wayne County: James G. Kube, Judge. Affirmed in part, and in part vacated and remanded with directions.

George T. Babcock, of Law Offices of Evelyn N. Babcock, for appellant.

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

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

Kelch, J.

I. INTRODUCTION

Ricky J. McCumber appeals following his convictions and sentences for refusing to submit to a chemical test, refusing to

submit to a preliminary breath test (PBT), and driving without a license. He challenges the constitutionality of Neb. Rev. Stat. §§ 60-6,197 (Cum. Supp. 2016) and 60-6,197.04 (Reissue 2010). In accordance with *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), we conclude that § 60-6,197 is unconstitutional as applied to McCumber. However, we reject McCumber's remaining assignments of error. Consequently, we affirm in part, and in part vacate and remand to the district court with directions.

II. BACKGROUND

1. Pretrial Proceedings

On November 22, 2013, the State charged McCumber with aggravated driving under the influence (DUI), refusing to submit to a chemical test, refusing to submit to a PBT, and driving without a license. (The State ultimately dismissed the DUI charge on its own motion.)

Prior to trial, McCumber filed a motion to quash the charges for refusing to submit to a chemical test under § 60-6,197 and refusing to submit to a PBT under § 60-6,197.04. He asserted that both statutes were facially invalid in that they violated the U.S. and Nebraska Constitutions by conditioning the privilege of driving a motor vehicle upon drivers' consenting to warrantless searches.

The district court held a hearing on the motion to quash and denied it with respect to both offenses. The district court found that McCumber had failed to meet his burden to establish that either statute was facially invalid. That is, McCumber failed to demonstrate that there was "no set of circumstances under which the statutes he addresses would be valid." The district court did not address *Birchfield v. North Dakota, supra*, or our opinion in *State v. Cornwell*, 294 Neb. 799, 884 N.W.2d 722 (2016) (applying *Birchfield* and rejecting facial challenges to consent and refusal statutes), given that neither case had been decided at the time of the district court's ruling in this case.

Prior to trial, McCumber also filed three motions to suppress. The first motion sought suppression of any and all items seized from McCumber, his vehicle, or any other place in which McCumber had an expectation of privacy. McCumber alleged, among other things, (1) that the items were seized without reasonable suspicion or probable cause; (2) that the search and seizure violated McCumber's rights under the 4th, 5th, and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, § 7; (3) that the search and seizure were not incident to a lawful arrest; and (4) that the search and seizure were not conducted pursuant to a lawfully issued warrant.

In the second motion to suppress, McCumber requested that the district court suppress any and all pretrial admissions or statements made by McCumber to law enforcement personnel. McCumber asserted that he did not waive his rights knowingly, intelligently, and voluntarily and that his statements were obtained in violation of the 4th through 6th and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, §§ 7 and 12, and in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The third motion sought to suppress all evidence seized from McCumber, including any visual and auditory observations made by law enforcement personnel, because they lacked probable cause to stop and detain him.

2. Suppression Hearing

At the hearing on the motions to suppress, McCumber's counsel primarily argued that in light of the U.S. Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), it is unconstitutional for the State to criminalize his refusal to submit to unlawful warrantless searches in the form of the PBT and a chemical blood test or for the State to use such evidence against him at trial.

Officer Dylan Jensen of the Wayne Police Department testified that on June 8, 2013, at about 6:55 p.m., he received

information from a Nebraska State Patrol officer that McCumber's pickup was parked outside a local business. The State Patrol officer informed Officer Jensen that based on a citation he had issued previously, he knew that McCumber did not possess a valid Nebraska operator's license. Officer Jensen contacted dispatch and confirmed that McCumber's license was expired. Officer Jensen then printed off a picture of McCumber and drove to the business where McCumber's empty pickup was parked.

According to Officer Jensen, soon after he arrived, McCumber entered his pickup, engaged in a cell phone call, and began driving. Officer Jensen followed the pickup in his patrol car. After driving for a few blocks, McCumber pulled over to park on the street, swiftly exited the pickup, and started walking away, at which point Officer Jensen pulled up next to McCumber and told McCumber that he needed to speak with him.

Officer Jensen testified that when he asked for identification, McCumber provided an expired operator's license. Officer Jensen stated that as he wrote McCumber a citation for driving without a valid operator's license, he noticed that McCumber smelled of alcohol; had watery, bloodshot eyes and slurred speech; was having difficulty balancing; and repeatedly asked the same questions.

Officer Jensen testified that he asked McCumber if he had been drinking and that McCumber admitted he had consumed two alcoholic beverages just before seeing Officer Jensen. Officer Jensen asked McCumber to perform field sobriety tests, which McCumber refused to do. Next, Officer Jensen asked McCumber to submit to a PBT. McCumber refused.

Officer Jensen testified that at that point, he arrested McCumber for DUI and refusing to submit to a PBT. Subsequently, Officer Jensen transported McCumber to a hospital for a blood draw. Officer Jensen read McCumber the postarrest chemical test advisement, a copy of which was received into evidence. McCumber refused to submit to the blood draw.

Officer Jensen transported McCumber to the police department for booking and ultimately cited him for DUI, refusal to submit to a chemical test, and refusal to submit to a PBT. Officer Jensen acknowledged that a warrant was not obtained before taking McCumber to the hospital for the blood draw. He also acknowledged that it would have been feasible to obtain a warrant, but that he opted not to do so because he did not think a warrant was necessary. Officer Jensen did not recall reading McCumber his *Miranda* rights.

Following the hearing, the district court denied McCumber's motions to suppress.

Specifically, the district court found that Officer Jensen had probable cause to stop and detain McCumber. The district court further declined to suppress any of McCumber's statements, finding them all to be voluntary and lawfully obtained with no violation of McCumber's *Miranda* rights or the 4th through 6th or 14th Amendments to the U.S. Constitution. Regarding McCumber's challenge to Nebraska's statutory implied consent scheme, the district court found that Nebraska's implied consent law penalizes a suspect for refusing to submit to a chemical test only if there were "reasonable grounds" to require the test and, accordingly, that the statute authorizes a search that would be facially reasonable under the Fourth Amendment. Finally, the district court noted that in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the U.S. Supreme Court cited with approval the application of implied consent laws in the United States. The district court's order did not specifically address Nebraska's PBT statute.

3. Stipulated Bench Trial and Verdict

After the district court denied McCumber's pretrial motions, the State dismissed the DUI charge and the parties agreed to proceed with a stipulated bench trial on the three remaining charges of refusing to submit to a chemical test, refusing to submit to a PBT, and driving without a license.

The State's evidence consisted of a copy of the preliminary hearing from county court, the postarrest chemical test advisement form, DVD's of McCumber's interactions with law enforcement personnel, a copy of the vehicle registration for McCumber's pickup, a copy of the citation issued to McCumber, a copy of the Department of Motor Vehicles' report of the incident, and a transcript of the suppression hearing. The district court received this evidence without objection, except for McCumber's renewal of his motion to quash and motions to suppress.

The district court found McCumber guilty of all three remaining charges. After an enhancement hearing, the district court imposed a $100 fine for refusing to submit to a PBT and sentenced McCumber to concurrent terms of 24 months' probation for the two remaining offenses of driving without a license and refusing to submit to a chemical test. This appeal followed.

III. ASSIGNMENTS OF ERROR

McCumber assigns and argues that the district court erred by (1) determining that § 60-6,197 (the chemical test implied consent statute) is valid, facially and as applied, and does not violate the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 7 and 12, of the Nebraska Constitution; (2) determining that Nebraska statutes may condition the privilege of driving upon the waiver of rights guaranteed by the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 7 and 12, of the Nebraska Constitution, to withhold consent to a warrantless search of one's blood; and (3) determining that § 60-6,197.04 (the PBT implied consent statute) was constitutionally valid, facially and as applied, and did not conflict with the 4th, 5th, and 14th Amendments to the U.S. Constitution, and article I, §§ 7 and 12, of the Nebraska Constitution.

IV. STANDARD 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. *State v. Carman*, 292 Neb. 207, 872 N.W.2d 559 (2015).

[2] 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. *State v. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016).

V. ANALYSIS

1. Constitutional Challenge to Chemical Test

McCumber contests his conviction and sentence for refusal to submit to a chemical test for alcohol. Nebraska's implied consent statute for chemical testing, § 60-6,197(1), provides:

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

And any person who refuses to submit to a test could be found guilty of a crime and, upon conviction, punished as provided in Neb. Rev. Stat. §§ 60-6,197.02 to 60-6,197.08 (Reissue 2010 & Cum. Supp. 2016). See § 60-6,197(3). McCumber contends that the district court erred by determining that Nebraska statutes criminalizing refusal to submit to a warrantless search of one's blood are valid, facially and as applied, and do not violate the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 7 and 12, of the Nebraska Constitution.

[3-5] We begin by noting that a statute is presumed to be constitutional, and all reasonable doubts are resolved in favor

of its constitutionality. *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012). All challenges to the constitutionality of a statute should be heard by a full Supreme Court, and a supermajority is required to declare any statute unconstitutional, without regard to whether the challenge is facial or as-applied. Neb. Ct. R. App. P. § 2-109(E) (rev. 2014). The constitutionality of a statute presents a question of law. *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

[6] Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question, and to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, he or she is, or is about to be, deprived of a protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). With McCumber having been convicted and sentenced pursuant to § 60-6,197, he has standing.

[7-11] A challenge to a statute asserting that no valid application of the statute exists because it is unconstitutional on its face is a facial challenge. *State v. Cornwell*, 294 Neb. 799, 884 N.W.2d 722 (2016). A plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications. *Id.* In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. *Id.* But it is not used to question the constitutionality of a statute as applied. *Id*. Instead, challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty. *Id*. Here we have both a facial and an as-applied challenge.

(a) Facial Challenge

McCumber argues that "[b]ecause [§] 60-6,197 compels submission to a blood test, in all cases, it is facially invalid,"

by violating the Fourth Amendment as set forth by *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). We note that *Birchfield* had not been released prior to the trial or sentencing in this case. But with *Birchfield* pronouncing a new constitutional rule, it applies retroactively to any case on direct appeal. See *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

[12] The Fourth Amendment to the U.S. Constitution guarantees against unreasonable search and seizure. It provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Thus, the U.S. Supreme Court has determined that "'[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.'" *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). However, a warrantless search of the person has been found reasonable if it falls within a recognized exception. *Riley v. California, supra*; *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013); *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Prior to the opinion in *Birchfield v. North Dakota, supra*, the U.S. Supreme Court had reviewed the warrantless taking of a blood test sample in *Schmerber v. California, supra*, and found that the exigent circumstance exception may constitute grounds for a warrantless search when an emergency leaves police insufficient time to seek a warrant. In *Schmerber,* the Court found that drunk driving may represent an exigent circumstance if an officer reasonably believed that he was confronted with an emergency that left no time to seek a warrant because "the percentage of alcohol in the blood begins

to diminish shortly after drinking stops." 384 U.S. at 770. But the Court also emphasized that it based its holding on the specific facts of the case. Later, the Court affirmed the case-by-case approach to the exigent circumstance exception and held that the natural dissipation of alcohol from the bloodstream does not always constitute an exigency justifying the warrantless taking of a blood sample. See *Missouri v. McNeely, supra*.

The Court in *Birchfield* noted that the taking of a blood sample or the administration of a breath test is a search within the Fourth Amendment, which in most instances requires a warrant unless there is an exception. In *Birchfield*, the Court considered whether the search incident to arrest exception applied to breath and blood tests. The search incident to arrest exception allows for the warrantless search of a person arrested for the purposes of protecting the arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See, *Riley v. California, supra*; *Arizona v. Gant, supra*; *Schmerber v. California, supra*.

The discussion in *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), contrasted the relative levels of intrusiveness of breath and blood tests. The Court found that a breath test did not "'implicat[e] significant privacy concerns'" because the physical intrusion is negligible and is capable of revealing only how much alcohol is in the subject's breath. *Id.*, 136 S. Ct. at 2176. Further, the Court observed that participation in the test was "not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest." *Id.*, 136 S. Ct. at 2177. The Court drew an opposite conclusion in regard to a blood test, which requires a physical intrusion that is "significantly more intrusive than blowing into a tube." *Id.*, 136 S. Ct. at 2178. Nor can the State rely upon implied consent laws to obtain a warrantless blood test. *Birchfield v. North Dakota, supra.*

Ultimately, in *Birchfield*, the Court concluded that a breath test and a blood test had differing compelling interests under

the Fourth Amendment. As a result, law enforcement officials do not need a warrant to conduct a breath test pursuant to a search incident to a lawful arrest for drunk driving, but a warrant is required for a blood test. See *Birchfield v. North Dakota, supra*.

Here, in addressing McCumber's facial challenge to the constitutionality of § 60-6,197, we must determine whether no set of circumstances exists under which § 60-6,197 would be valid in view of the decisions by the U.S. Supreme Court and Nebraska law. See *State v. Cornwell*, 294 Neb. 799, 884 N.W.2d 722 (2016). In part, we have already answered that question. In *Cornwell*, we rejected a facial challenge to § 60-6,197. We determined that a warrantless *breath test* is reasonable pursuant to *Birchfield* and does not violate the Fourth Amendment or Neb. Const. art. I, § 7, which this court has found does not offer any more protection than the U.S. Constitution. See *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986). Thus, in *Cornwell*, we have previously applied *Birchfield* and found that § 60-6,197 is not unconstitutional on its face in allowing breath tests, since there are circumstances under which that section is valid.

Furthermore, in regard to blood tests, *Birchfield* points to two circumstances that defeat McCumber's facial challenge. First, *Birchfield* noted that there are instances where a drunk driver could behave in such a manner as to refuse to submit to a blood test even when facing a valid warrant. The Court in *Birchfield* noted that some officials are reluctant to forcibly draw blood where the drunk driver creates a risk to law enforcement or medical personnel, which, in turn, could lead to a charge of refusal to submit to a chemical test. In this case, we are not called upon to determine whether such a situation represents a refusal, but it certainly would constitute another circumstance wherein § 60-6,197 would be valid. Second, exigent circumstances may present a situation whereby a warrantless blood test could be authorized. See *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908

(1966). Again, this issue, which would be decided on a case-by-case basis pursuant to § 60-6,197, is not before us.

Therefore, McCumber has not shown that § 60-6,197 is unconstitutional on its face, since circumstances exist under which refusal to submit to a blood test would be valid.

(b) As-Applied Challenge

McCumber argues that as applied,

> [§] 60-6,197 violated his Fourth Amendment rights since he was directed to submit to a warrantless blood draw; no exception to the warrant requirement compelled his submission to a blood draw; and the State criminalized the assertion of his Fourth Amendment right to withhold consent to the warrantless search.

Brief for appellant at 29. Certainly, it is true that the State did not seek a warrant for McCumber's blood test, that there were no exigent circumstances set forth for a warrantless search, and that the State criminalized his refusal to consent to the blood test. Therefore, the issue is whether the State could demand a blood test as a search incident to a lawful arrest for drunk driving, as the district court found. And on this issue, the State concedes that in view of the U.S. Supreme Court's decision in *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), "§ 60-6,197 is unconstitutional as applied to McCumber, and . . . his conviction and sentence for refusing to submit to a chemical blood test in violation of § 60-6,197 should therefore be vacated." Brief for appellee at 11. We agree with the State.

In this instance, without a warrant, nor exigent circumstance, the State could only rely upon the exception of a warrantless search incident to a lawful arrest for drunk driving in order to demand a blood test from McCumber. With the U.S. Supreme Court in *Birchfield* categorically finding that the exception of a warrantless search incident to a lawful arrest for drunk driving is unconstitutional in regard to a blood test, even under an implied consent law, we find § 60-6,197

is unconstitutional as applied to McCumber. Consequently, we hereby vacate McCumber's conviction and sentence for refusing to submit to a chemical blood test in violation of § 60-6,197.

(c) Adverse Evidentiary Inference

[13] Further, McCumber argued in his brief that "[b]y allowing admission of [McCumber's] testimonial refusal to submit a blood test that the officer could not lawfully compel, [§] 60-6,197(6), facially and as applied, offends both the Fourth and Fifth Amendments and their Nebraska counterparts." Brief for appellant at 34. However, McCumber did not assign this proposition as error. And an appellate court does not consider errors which are argued but not assigned. *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

2. Constitutional Challenge to PBT

Lastly, McCumber claims that the district court erred by determining that § 60-6,197.04, Nebraska's PBT statute, was constitutionally valid, facially and as applied, and did not conflict with the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 7 and 12, of the Nebraska Constitution. Having been convicted and sentenced pursuant to § 60-6,197.04, McCumber has standing to question its constitutionally, and we consider the issue in accordance with the principles of constitutional analysis set forth above. See, *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016); *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012); *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999).

Section 60-6,197.04 provides:

> Any peace officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any person who operates or has in his or her actual physical control a motor vehicle in this state to submit to a [PBT] for alcohol concentration if the officer has reasonable

> grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident. Any person who refuses to submit to such [PBT] or whose [PBT] results indicate an alcohol concentration in violation of section 60-6,196 shall be placed under arrest. Any person who refuses to submit to such [PBT] shall be guilty of a Class V misdemeanor.

McCumber asserts that § 60-6,197.04 is facially invalid because it allows a search, compelled on pain of criminal penalty, without reasonable suspicion of the commission of a crime for which evidence is sought or any showing that an exception to the warrant requirement applies. Likewise, he argues that § 60-6,197.04, as applied to him, violated his Fourth Amendment right to be free from unreasonable searches and seizures.

We dealt with a similar argument in *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010). In that case, the defendant contended that § 60-6,197.04 was unconstitutional because it did not require probable cause to administer a PBT. In finding that § 60-6,197.04 was constitutional as applied and on its face, we distinguished a PBT from a formal arrest and concluded that the administration of a PBT need not be supported by probable cause. We explained:

> [W]e [have] noted that . . . field sobriety tests were more akin to a *Terry* stop as authorized by *Terry v. Ohio*, [392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968),] and were reasonable so long as an officer could point to "'specific articulable facts'" supporting the stop and limited intrusion. In this case, we agree that the administration of a PBT is more in line with field sobriety testing and a *Terry* stop than it would be with a formal arrest. . . .
>
> . . . [A]n officer is reasonable in administering a PBT if he can point to specific, articulable facts indicating that an individual has been driving [while] under the influence of alcohol.

State v. Prescott, 280 Neb. at 110-11, 784 N.W.2d at 885-86. Here, Officer Jensen cited specific articulable facts to support administering the PBT: He witnessed McCumber driving and immediately afterward observed unmistakable signs that McCumber was under the influence of alcohol. Further, with § 60-6,197.04 mandating only a *PBT*, as opposed to a search incident to a lawful arrest, the opinion in *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), does not affect our holding in *Prescott*. Thus, we find that § 60-6,197.04 is constitutionally valid, facially and as applied to McCumber, and does not conflict with the 4th, 5th, and 14th Amendments to the U.S. Constitution, and article I, §§ 7 and 12, of the Nebraska Constitution.

VI. CONCLUSION

We find that § 60-6,197 is unconstitutional as applied to McCumber for his conviction on count III, refusing to submit to a chemical blood test, in violation of § 60-6,197, and said conviction and sentence are hereby vacated. We find no merit to McCumber's remaining assignments of error, and the decision of the district court is affirmed as to those issues. In view of our holding, and because the original sentencing order did not separately state the sentence for each count, the district court shall resentence McCumber on the remaining counts.

Affirmed in part, and in part vacated
and remanded with directions.

State of Nebraska, appellee, v. Brian D. Smith, appellant.

892 N.W.2d 52

Filed March 3, 2017. No. S-16-199.

1. **Breach of Contract: Plea Bargains.** When the facts are undisputed, the question of whether there has been a breach of a plea agreement is a question of law.
2. **Constitutional Law: Sentences: Words and Phrases: Appeal and Error.** Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal 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.
4. **Plea Bargains: Specific Performance: Pleas.** When the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea.
5. **Courts: Plea Bargains.** Courts enforce only those terms and conditions about which the parties to a plea agreement did in fact agree.
6. **Sentences: Statutes: Time.** The good time law in effect at the time a defendant's convictions become final is the law that is to be applied to the defendant's sentences.
7. **Convictions: Sentences: Final Orders: Time: Appeal and Error.** A defendant's convictions and sentences become final on the date that the appellate court enters its mandate concerning the defendant's appeal.
8. **Constitutional Law: Sentences: Statutes: Time.** When a defendant's original sentence has been vacated for being unconstitutional and void, the good time law to be applied to the defendant's new sentence is the law in effect at the time that sentence becomes final.

9. **Constitutional Law: States: Minors: Convictions: Sentences: Probation and Parole.** It is unconstitutional for a state to impose a sentence of life imprisonment without parole on a juvenile convicted of a nonhomicide offense.
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. **Sentences.** In determining the sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

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

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

Kelch, J.

I. NATURE OF CASE

In 1983, Brian D. Smith pled guilty to kidnapping, a Class IA felony—a crime Smith committed when he was 16 years old. Smith's sentence of life imprisonment was later vacated, and he was resentenced to 90 years' to life imprisonment. Smith appeals this sentence, alleging that it is excessive and violates the 8th and 14th Amendments to the U.S. Constitution and the principles set forth in the U.S. Supreme Court case *Graham v. Florida*.[1]

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[1] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

II. FACTS

1. Overview

Smith was 16 years old when he pled guilty to the crimes of burglary and kidnapping. In exchange for Smith's pleas, the State dismissed charges of robbery, first degree sexual assault, and felony murder. Smith's crime of kidnapping was a Class IA felony because the kidnapping victim was not voluntarily released or liberated alive and in a safe place without having suffered serious bodily injury. In fact, the victim was later found dead. For the burglary, Smith was sentenced to 5 to 20 years' imprisonment. For the kidnapping, the court imposed a concurrent sentence of life imprisonment. Smith's codefendant, Dale Nollen, pled guilty to first degree murder and was also sentenced to life imprisonment.

In 2010, the U.S. Supreme Court decided *Graham*,[2] in which it held that the Eighth Amendment prohibits the imposition of life imprisonment without parole upon juvenile offenders who have not committed homicide. In 2012, in *Miller v. Alabama*,[3] the Supreme Court held that the Eighth Amendment prohibits mandatory life imprisonment without parole for juvenile offenders.

In 2015, Smith filed an application for a writ of habeas corpus in Lancaster County District Court. After an evidentiary hearing, the district court determined that Smith was entitled to relief under *Graham* and vacated Smith's life sentence. Smith's case was remanded to the Washington County District Court, where he was resentenced to 90 years' to life imprisonment. From that sentence, Smith appeals.

2. Resentencing Hearing

At the resentencing hearing, Smith's counsel argued that Smith should receive a lenient sentence because of his immaturity, vulnerability, and lack of true depravity at the time

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[2] *Id.*

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

of the crime. Smith offered and the court received several exhibits, including (a) Nollen's application to the Board of Pardons, containing Nollen's statement about what happened on January 11, 1983; (b) Smith's 1983 presentence report, which contains Smith's statement about what happened on January 11, 1983; (c) a psychological evaluation of Smith conducted in 1983; (d) a psychological evaluation of Smith conducted in 2015; (e) Smith's misconduct and progress reports from the Nebraska Department of Correctional Services and the Missouri Department of Corrections; (f) amici briefs submitted in U.S. Supreme Court cases; and (g) a transcript of a deposition of Dr. Kayla Pope. We discuss the relevant portions of each exhibit before discussing the disposition of the case.

(a) Nollen's Statement

In 2007, Nollen submitted an application for commutation to the Board of Pardons in which he described his "story of the crime."

In the application, Nollen confessed that it was his idea to rob a doughnut shop in Blair, Nebraska. He had worked there previously and needed $50 to pay his portion of a gas bill. When Nollen had worked there, the money from each day's sales was left in the store overnight and deposited the next morning by the owner. Nollen explained in the application, "[A]ll I would have to do is go in the back door, go down stairs to the basement and wait until everyone left. Then, go upstairs, get the money and leave." Nollen told Smith about the plan and asked Smith if he wanted to go with him. Nollen wrote, "[Smith] said he liked the idea and did want to go."

At around 3 p.m. on January 11, 1983, Smith and Nollen went into the doughnut shop to see who was working. It was 21-year-old Mary Jo Hovendick (Mary Jo). After Smith and Nollen talked to Mary Jo briefly, they left the doughnut shop through the front door, walked around to the back alley, through a back door of the doughnut shop, and into the basement of the shop.

Smith and Nollen waited in the basement. According to Nollen, he and Smith "smoked a couple bowls of pot and talked about how pretty Mary Jo is and what a nice body she has." Nollen made a comment "about the only way [they] would have a chance with her would be to take it." According to Nollen, Smith asked him if he wanted to, and Nollen laughed and said "okay." Nollen said that they got up and walked toward the stairs and that Nollen then stopped and said, "[F]___ that, if we did that we would have to kill her so she wouldn't tell on us." Smith and Nollen went back and sat down again.

Nollen wrote that he and Smith did not talk much for the next hour or so. During that time, Nollen was thinking about how pretty Mary Jo was and "how nice it would be to have sex with her." Nollen knew Mary Jo from school. Nollen wrote, "She had the reputation of being really quiet, shy - a loner but popular. She never had a boyfriend, so I was thinking if I had sex with her and messed up, she would never know because she has never been with anyone." Nollen "fell asleep thinking about [Mary Jo]," and Smith woke him up about an hour later.

Because neither Smith nor Nollen had a watch, neither one knew how long they had been waiting. Without knowing what time it was, they walked upstairs to see if they could hear anything. Nollen said they knew the store was closed because Mary Jo was in the office. They could hear her counting the money. Nollen told Smith that she was getting the money ready for deposit, which meant that she would take it to the bank and there would be only $20 left in the register (instead of about $200). Nollen wrote, "I asked [Smith] what he wanted to do. He said let's get it all."

According to Nollen, they went over to the office door. Smith then ran to the stairs and hid, and Nollen waited by the office door. After Mary Jo saw Nollen, he walked up to her and put his hand over her mouth so she would not scream. Nollen took her out to the hallway and instructed Smith to go and get the money. Smith got the money and put it in his pockets.

Nollen asked Mary Jo about her car, and she told him where it was. Nollen told Smith that he was going to get the car and that when Nollen honked the horn, Smith was to come out with Mary Jo. Smith complied. After the two of them got into the car with Nollen, he drove off. They stopped at a gas station, and Smith got out and put gas in the car, then went in and paid for it. After they left the gas station, Smith said he wanted to drive, so Smith and Nollen changed places. Smith drove around country roads while Nollen went through Mary Jo's purse, took $20 and gave it to Smith, then threw her purse out the window.

According to Nollen, Mary Jo had been sitting on the center console, so Nollen told her she could sit on his lap and pulled her toward him. Mary Jo slid over and sat on one of Nollen's legs. Nollen started thinking about having sex with Mary Jo again. He wrote, "It was really intense now, because I could smell her perfume and feel how soft her skin is." Nollen told Smith to pull over, and he did. Nollen forced Mary Jo into the back seat and climbed back there with her. He told Mary Jo to take her clothes off. Nollen tried to penetrate her with his penis, but was unsuccessful because Mary Jo kept pushing him away. Nollen said, "I was mad because I was not getting what I wanted, so I rubbed against her until I got off." He then asked Smith "if he wanted to come back," and Smith said that he did. The two switched places. Nollen could hear Smith telling Mary Jo to kiss him, and then Nollen "turned the radio up and started to figure out how [they] were going to get out of this." Nollen wrote that he "knew that the only way would be to kill Mary Jo but, [he] did not know how it would happen."

Eventually, Smith and Nollen traded places again and Smith drove the car back toward Blair. Nollen told Mary Jo to get dressed, and he tied her hands up with a ribbon that had been around her neck. Nollen then got back in the front seat of the car. Smith drove the car through Blair to a trailer park "by the river."

Smith and Nollen got out of the car and looked around. Nollen wrote, "We did not talk but, I think we both knew what was going to happen. I look at the bridge and thought we could throw her over the side. So I told [Smith] that when we get half way [sic] over the bridge to stop, he said okay . . . ." When the car got halfway across the bridge, Nollen got scared and worried that someone might see, so he told Smith to keep driving. Smith drove across the bridge and turned to go underneath it. They pulled up to the second dock by the river. Nollen got out of the car, and Smith followed.

Nollen wrote, "I figured, I would kill her by stabbing her [with a knife taken from the doughnut shop]. I asked [Smith] for the knife, he reached into the car and got it." Nollen pulled the passenger seat forward and looked at Mary Jo. When Nollen brought the knife toward Mary Jo, she screamed and started crying. Nollen said he looked at her and told her he was sorry. She kept crying, and Nollen threw the knife into the river and told her, "'[S]ee, I [sic] not going to hurt you.'" According to Nollen, after he told Smith that he "can not do this," "[Smith] shrugged and leaned into the car." Nollen wrote, "The car jumped forward and I jumped back. The car rolled down the dock into the river. I seen the car hit the water and I just stood there. . . . The car was still floating in the water when we left."

(b) Smith's Statement

In 1983, Smith was interviewed by a probation officer about the events that led to his kidnapping and burglary convictions. This interview was submitted as part of Smith's presentence report, which was admitted into evidence.

In the interview, Smith told the probation officer that when he agreed to rob the doughnut shop with Nollen, he thought they were just going to go in and get the money after the shop closed. His story was similar to Nollen's, but with some differences. Smith did not mention anything about smoking marijuana in the basement. Also, as to Smith's sexual assault of Mary Jo, Smith told the probation officer that Nollen asked

Smith if he wanted to get into the back of the car and that Smith said, "I guess so." Smith said he "got into the back and started to rape her, but decided [he] couldn't do it."

According to Smith, it was Nollen who drove the car across the bridge to the Iowa side. Smith also said that at the time the car was parked at the dock, he and Smith had not discussed what to do with Mary Jo. At that time, Nollen got into the back seat and tied Mary Jo's hands behind her back. Next, Nollen started to roll the passenger's side window down halfway and told Smith to do the same thing to the driver's side window. Smith complied. According to Smith, Nollen told Smith to put the car in gear, and Smith complied. Nollen then aided the car into the river by pushing on it.

(c) 1983 Psychological Evaluation

About 1 month after Smith began serving his sentences, the Nebraska Department of Correctional Services conducted a psychological evaluation of Smith. During an interview for the evaluation, Smith again denied sexually assaulting Mary Jo. Smith's evaluator wrote:

> Smith tends to be an impressionable individual and strikes this examiner as more of a follower than a leader. One gets the impression that his co-defendant tended to be the more dominant party in the relationship, and this seems to be true when one tries to visually reconstruct the events for which . . . Smith is currently incarcerated.

The evaluator also wrote:

> [Smith] has little insight into the seriousness of his current offense. He is fairly overwhelmed by the prison environment and the length of his sentence. He is seen as having an elevated potential for violence based on testing. He may be susceptible to pressuring and negative peer influences.

(d) 2015 Psychological Evaluation

For purposes of the resentencing hearing, Smith's counsel referred Smith to Dr. Matthew Huss for a current

psychological evaluation. Among other things, Dr. Huss evaluated Smith's social, educational, and occupational history. Dr. Huss also evaluated Smith's history of drug and alcohol use and assessed Smith's risk for general violence and sexual violence. The evidence set forth in Dr. Huss' evaluation is summarized below.

(i) Social History

As a child, Smith lived mostly with his mother, his older sister, and two older brothers. From ages 9 to 12, Smith also lived with his stepfather and stepsiblings. Smith, Smith's sister, and Smith's mother all described life with the stepfather as a difficult time. The stepfather was apparently very possessive and controlling of Smith's mother, and he favored his own children over his stepchildren. Smith's sister explained to Dr. Huss that because of the stepfather, all of the older siblings moved out as soon as they were able; Smith's sister got married at age 16, and one brother enrolled in the Navy at age 17. Dr. Huss noted that Smith now has a good relationship with his family.

Smith reported that as he was growing up, he generally got along with other children and had friends as well as girlfriends. His mother stated that Smith "'was a magnet for older girls'" and was able to make friends without problems. At some point, Smith got married but divorced within a year. He admitted to an ongoing relationship with a woman he met in his childhood and that he would like to marry her if he were released from prison. However, he has told her to "live her life without him because of his sentence[s]" and is not naive that she will eventually move on one day.

Smith denied any history of physical abuse as a child, but admitted to being sexually abused as a child and to being sexually assaulted while in prison by a cellmate. When Smith was in the fourth or fifth grade, his high-school-age stepbrother sexually assaulted him about six times. Smith said that in the 1990's, he was sexually assaulted by a cellmate, but was able to transfer cells in order to stop the assaults. Smith also stated

that when he was in the seventh grade, his stepgrandfather had tried to grope him, but Smith rejected his advances and the assault did not escalate.

(ii) Educational and Occupational History

Smith reported that he disliked school. He stated that he was placed in "'learning disabled classes,'" which only made him like school less. Smith started skipping school in the fourth grade, about one or two times per month. Although Smith was suspended one time for getting caught smoking cigarettes, Smith denied ever getting into serious trouble at school. Smith completed the 10th grade and attended a few weeks of 11th grade before dropping out.

After Smith completed the 10th grade, he performed a variety of jobs. He worked for a local trash company, filling in whenever they called him. Smith "performed several lawn care jobs, painted and worked in the bean fields." Smith's mother stated that it was difficult for him to find work when he was 16 years old "because the college kids in town would normally get the jobs teenagers could get."

Smith stated that he "'always had a job'" while incarcerated. Smith admitted that before he got sober, he would frequently lose jobs for smoking marijuana. After Smith was transferred to Missouri, he worked in a carpentry shop. Smith also became involved as a trainer in the "Puppies for Parole" program, which allows offenders to train dogs and make them more adoptable at local shelters. According to the records of the Missouri Department of Corrections, Smith's position training dogs is "an elite position (but with very little pay)" that requires offenders "to maintain exceptional behavior and attitude in order to remain a trainer."

(iii) History of Drug and Alcohol Use

Smith reported that he first used alcohol when he was 10 or 11 years old. Prior to his incarceration, Smith would drink

a couple of times per month. Smith said that when he drank, he would drink to excess, and that he "blacked out" a couple of times. During a 2- to 2½-year period within the first 5 years of his incarceration, Smith drank alcohol one to two times per week, but he claimed to have quit using alcohol entirely when he was 29 years old.

Smith reported that he first smoked marijuana when he was 9 years old. Smith said that he rarely smoked marijuana before his incarceration, but that after incarceration and prior to getting sober, he would smoke anytime he could obtain marijuana. Smith said he last used marijuana when he was 34 years old.

Smith denied using any drugs or alcohol after he was transferred to Missouri in 2000. Smith's progress reports from Missouri corroborate this; of the 47 urinalysis tests conducted over the course of 15 years, all of Smith's samples were negative for drugs or alcohol. However, there was a problem with one test. When Smith submitted a urine sample on April 16, 2003, the test showed that his urine was diluted, and Smith received a misconduct report for the incident.

(iv) Risk for General Violence and Sexual Violence

Dr. Huss determined that, compared to the general community, Smith was at low risk to commit both general violence and sexual violence. As for general violence, Dr. Huss had initially determined that Smith was a "moderate risk," but after reviewing Nollen's statement, Dr. Huss amended his assessment to indicate that Smith was a "low risk."

(e) Misconduct Reports

As noted above, Smith argued to the district court that he should be given a lenient sentence because the crimes he committed as a minor do not reflect that he is irredeemably depraved (and thus should spend his life in prison). To support Smith's "'capacity to change,'"[4] he offered his

[4] Brief for appellant at 44.

progress reports and misconduct reports from Missouri and Nebraska.

The reports show that Smith had fewer misconduct reports after he entered into his mid-thirties. The decrease in misconduct reports also corresponds with the time that Smith was transferred to Missouri and the time that he became sober. According to Smith, he transferred to Missouri because he realized he needed to change.

(f) Amici Briefs

To support Smith's arguments about his immaturity, vulnerability, and lack of true depravity at the time of the crime, he offered amici briefs submitted to the U.S. Supreme Court in previous cases. We note that although the State did not object to the offering of the briefs, they provided minimal authority for the trial court.

(g) Dr. Pope

As further support for Smith's argument that he should be given a lenient sentence, Smith offered into evidence a deposition of Dr. Pope, a director for neurobehavioral research at Boys Town National Research Hospital. Dr. Pope is board certified in child and adolescent psychiatry, as well as adult psychology.

Dr. Pope testified about a landmark study in neuroscience wherein "Nitin Gogtay and Jay Giedd at the National Institute of Mental Health . . . scanned [the brains of] normal developing children . . . between the ages of 5 and 20 [over the course of 15 years]." From the scans, the researchers were able to determine that the brain develops from the bottom to the top and from the back to the front. The study showed that the last part of the brain to develop is the frontal cortex. The frontal cortex allows for higher-order thought processes, like executive functioning, the ability to pay attention to something, the ability to repress impulsivity, and the ability to think through emotional situations. The frontal cortex also helps regulate subcortical areas, like the amygdala.

The amygdala controls a person's reaction to emotions, especially fear.

Dr. Pope explained that because adolescents' prefrontal cortices have not fully developed, they do not have full cognitive regulation of emotional responses, and therefore, "adolescents . . . are easily angered. They misread emotional cues, they act impulsively." Dr. Pope also testified that adolescents tend to undervalue risk and overvalue reward and are unable to appreciate the long-term consequences of their behavior. According to Dr. Pope, the frontal cortex does not fully develop until the mid-twenties.

3. District Court's Disposition

During closing arguments, the State argued that Smith should receive a sentence equivalent to or similar in length to that of Smith's codefendant, Nollen, who was resentenced to not less than 90 years nor more than life in prison. The State also suggested that Smith could be sentenced to life imprisonment pursuant to *Miller*.[5] Smith objected to the State's argument and alleged that the State's suggestion that "this is a [*Miller*] case" was a breach of the 1983 plea agreement. Smith also moved to withdraw the 1983 plea agreement. After reviewing the plea agreement, the court overruled the objection and the motion.

Before announcing Smith's sentence, the district court discussed with Smith what it considered to be the relevant facts for purposes of sentencing:

> [Y]ou and . . . Nollen had opportunities to abandon the abduction and sexual assault and ultimate murder of [Mary Jo]. The two of you, as counsel indicated, were simply going to go in and burglarize the place and steal some money. [Mary Jo] was found there. You guys hid downstairs and she was found. Rather than running away out the back door, the two of you decided to abduct her. You then stole her car. I think you actually drove the car

[5] *Miller v. Alabama, supra* note 3.

to a gas station here in Blair and you actually went inside and paid, as I recall.

Obviously, I understand the argument that you were under the will of . . . Nollen, but there were opportunities to get away from this thing. You actually went into the gas station and paid for it. You could have gone away or done something different. You didn't do that. . . .

. . . .

The evidence is clear that over a several-hour period you . . . had numerous opportunities to avoid the final decision to take the life of [Mary Jo], and it appears to me that you had a reasonably comparable level of culpability with . . . Nollen in the criminal activities that happened that day, including the final decision to put her body — or to put her in the back of the car and put the car into the Missouri River.

In determining what sentence ought to be imposed upon the defendant, this Court has considered the nature and circumstances of the crime, the history, character, and condition of the defendant, including the defendant's age, mentality, education, experience, social and cultural background, all as back in January of 1983, which was the date of the offense.

The Court has considered the lack of a previous criminal record of the defendant, the motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the offense.

. . . .

. . . [T]he Court recognizes and acknowledges the efforts you have made to improve yourself over the last 32 or 33 years, especially since 2000 when you made a decision to put yourself in a different venue to try and get yourself headed in the right direction, and you have done some good things. I acknowledge that from the [resentencing] hearing and what was — what was added to the presentence investigation report.

> The Court can't however . . . overlook the numerous opportunities you had to avoid the ultimate decision, and I do recognize the mitigating qualities of youth and the immaturity and the lack of development to the prefrontal cortex of the brain, the decision-making part, I acknowledge all those things.
>
> However, again, I look at the opportunities you had, the ultimate decision to drown [Mary Jo] in the manner in which it happened, the terror that was inflicted by you and . . . Nollen for several hours leading up to her death, and the manner in which she died has been described several ways today, but it's horrific the way that she died.

After citing the usual sentencing factors, as well as mitigating factors set forth in Neb. Rev. Stat. § 28-105.02 (Reissue 2016), the district court sentenced Smith to 90 years' to life imprisonment. In advising Smith of his parole eligibility, the court was unsure of which good time law would apply—the law at the time Smith committed the crime or the current good time law. If the current good time law applies, Smith will be eligible for parole when he is 62 years old. If the 1983 good time law applies, Smith will be eligible for parole when he is 77 years old.

III. ASSIGNMENTS OF ERROR

Smith assigns, restated, that the district court erred in overruling his objections and motions related to the State's alleged breach of the plea agreement and that the district court abused its discretion in imposing an excessive sentence. Smith also assigns that the sentence of 90 years' to life imprisonment is a "*de facto* sentence of life imprisonment without parole" in violation of *Graham*,[6] the 8th and 14th Amendments to the U.S. Constitution, and article I, §§ 9 and 15, of the Nebraska Constitution.

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[6] *Graham v. Florida, supra* note 1.

IV. STANDARD OF REVIEW

[1] When the facts are undisputed, the question of whether there has been a breach of a plea agreement is a question of law.[7]

[2] Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law.[8] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[9]

[3] A sentence imposed within statutory limits will not be disturbed on appeal 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.[10]

V. ANALYSIS

1. Plea Agreement

[4] We first address Smith's argument that the State breached the plea agreement and that the district court erred in overruling his objection and motions for specific performance or withdrawal of the plea agreement. Smith is correct that when the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea.[11] However, it is clear from the record that the State did not breach any of the terms or conditions in the plea agreement.

[5] Smith claims that the State broke its promise to dismiss the first degree murder charge when it argued that Smith

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[7] See, *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

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

[9] See, *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[10] *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[11] *State v. Gonzalez-Faguaga, supra* note 7.

should receive the same sentence as someone convicted of murder, i.e., life imprisonment. However, courts enforce only those terms and conditions about which the parties to a plea agreement did in fact agree,[12] and nothing within the plea agreement restricted the State from recommending a life sentence. In fact, the record shows that at the time the agreement was entered into, the mandatory sentence for Smith's crime of kidnapping, as well as for felony murder, was life imprisonment. So, clearly, the parties contemplated that the State would advocate for Smith to receive life imprisonment. As such, the State did not breach the plea agreement, and the district court did not err in overruling Smith's objections and motions related to that assertion.

2. Good Time Law

As noted above, the district court was unsure of which good time law would apply to Smith's sentence—the current law or the law in effect at Smith's original conviction. In the State's brief and at oral argument, the State addressed issues relating to Smith's sentence on the premise that Smith's parole eligibility would be calculated using current good time law; however, on rebuttal at oral arguments, Smith's counsel advised the court that the Nebraska Department of Correctional Services had changed Smith's parole eligibility date on its website and is now calculating Smith's parole eligibility using the old good time law. If the current law applies, Smith will be eligible for parole when he is 62 years old. If the 1983 good time law applies, Smith will be eligible for parole when he is 77 years old. With both parties arguing the impact that Smith's parole eligibility date has on this case, we shall first determine when Smith will be eligible for parole.

[6-8] We conclude Smith will be eligible for parole on January 11, 2028, when Smith is 62 years old, because the *current* good time law is the correct law to be applied. In

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[12] See *State v. Landera*, 285 Neb. 243, 253, 826 N.W.2d 570, 577 (2013).

State v. Schrein,[13] we held that the good time law to be applied to a defendant's sentences is the law in effect at the time the defendant's convictions become final. We explained that a defendant's convictions and sentences become final on the date that the appellate court enters its mandate concerning the defendant's appeal. Because an action for habeas corpus constitutes a collateral attack on a judgment and only void judgments may be collaterally attacked,[14] the order granting Smith's application for a writ of habeas corpus and vacating his original life sentence voided that original sentence. A void sentence is no sentence.[15] With Smith's original kidnapping sentence being considered as having been no sentence imposed, then, the rule in *Schrein* would apply to Smith's current kidnapping sentence of 90 years' to life imprisonment. This sentence will be final on the date this court enters its mandate concerning this appeal. Therefore, the applicable good time law is the law currently in effect, which means that Smith will be parole eligible at age 62.

3. Smith's Life Expectancy

The parties also contend that Smith's life expectancy is relevant to our constitutional analysis. Evidence of his life expectancy can be found in his presentence report. According to the federal government's Centers for Disease Control and Prevention, a person of Smith's age has an average life expectancy of 78.8 years old.

The presentence report also contains a document entitled "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences" which seems to suggest that the life expectancy of incarcerated youths is significantly reduced compared to that of the general population. This same document was

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[13] *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

[14] *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[15] *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

also considered by the Supreme Courts of Iowa and Wyoming. And like those courts, "we do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates."[16]

Although we decline to find that average life expectancy is the sole controlling issue, we acknowledge that it is a matter the court can consider along with all other sentencing factors. Here, the presentence report supports that the average life expectancy for someone Smith's age is 78.8 years, and as discussed above, Smith is eligible for release at 62 years of age.[17] Accordingly, Smith's sentence of 90 years' to life imprisonment allows for parole eligibility almost 17 years before his average life expectancy.

4. Constitutionality of Kidnapping Sentence

We next address the assignments of error relating to Smith's kidnapping sentence. Smith claims that his sentence of 90 years' to life imprisonment is excessive and amounts to a de facto life sentence, in violation of *Graham*,[18] the 8th and 14th Amendments to the U.S. Constitution, and article I, §§ 9 and 15, of the Nebraska Constitution. We address Smith's constitutional claim before addressing whether the sentence is excessive.

First, we review the law on juvenile sentencing for nonhomicide offenses. In *Graham*, the U.S. Supreme Court reaffirmed that for purposes of sentencing, juvenile offenders are less culpable than adult offenders because (1) juveniles have "a '"lack of maturity and an underdeveloped sense of

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[16] *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013). Accord *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014). See, *Miller v. Alabama, supra* note 3; *Graham v. Florida, supra* note 1.

[17] See Neb. Rev. Stat. § 83-1,110 (Reissue 2014).

[18] *Graham v. Florida, supra* note 1.

responsibility,"'" (2) they "'are more vulnerable or susceptible to negative influences and outside pressures,'" and (3) their characters "are 'not as well formed.'"[19]

[9] Because of these differences, the *Graham* Court held that it is unconstitutional for a state to impose a sentence of life imprisonment without parole on a juvenile convicted of a nonhomicide offense.[20] The Court in *Graham* explained that the Constitution requires that juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," but left it to the states, "in the first instance, to explore the means and mechanisms for compliance."[21]

We note that the U.S. Supreme Court has not decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole.[22] However, a number of jurisdictions have concluded that such sentences may trigger the protections afforded under *Graham* and *Miller*.[23] While Smith was not sentenced to life imprisonment without parole, we shall review the sentence to determine whether it comports with the principles set forth in *Graham*.

Although the U.S. Supreme Court provided little guidance as to what constitutes a "meaningful opportunity to obtain

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[19] *Id.*, 560 U.S. at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

[20] *Graham v. Florida, supra* note 1.

[21] *Id.*, 560 U.S. at 75.

[22] *U.S. v. Cobler*, 748 F.3d 570 (4th Cir. 2014), *cert. denied* 574 U.S. 892, 135 S. Ct. 229, 190 L. Ed. 2d 173.

[23] See, e.g., *Casiano v. Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), *cert. denied* 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014); *State v. Null, supra* note 16; *State v. Zuber*, 442 N.J. Super. 611, 126 A.3d 335 (2015), *reversed* 277 N.J. 422, 152 A.3d 197 (2017); *Bear Cloud v. State, supra* note 16. See, also, *Miller v. Alabama, supra* note 3; *Graham v. Florida, supra* note 1.

release based on demonstrated maturity and rehabilitation," a number of courts have held that sentences that allow the juvenile offender to be released in his or her late sixties or early seventies satisfy the "meaningful opportunity" requirement.[24] The usual reasoning applied by these courts is that as long as the offender's opportunity for release falls within his or her life expectancy, the offender's sentence does not violate *Graham*.[25] This was the reasoning applied by the Colorado Court of Appeals in holding that a sentence of 76 years' to life imprisonment was not unconstitutional where it allowed for the defendant's release at age 67.[26] It was also the reasoning applied by a Florida court which held that a 50-year sentence that allowed for the defendant's release at age 68 did not violate *Graham*.[27]

As noted by Smith, other courts have interpreted *Graham* to mean that the juvenile offender must be released a certain number of years *before* his life expectancy.[28] For example, in *State v. Null*,[29] the Iowa Supreme Court held that a sentence with a mandatory minimum of 52½ years' imprisonment, which would have allowed the offender to be released at 69 years old, triggered the protections afforded by *Graham*. In reaching this conclusion, the court stated:

> Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential

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[24] *Graham v. Florida, supra* note 1, 560 U.S. at 75. See, *People v. Lehmkuhl*, 369 P.3d 635 (Colo. App. 2013); *Williams v. State*, 197 So. 3d 569 (Fla. App. 2016); *State v. Zuber, supra* note 23. See, also, *Silva v. McDonald*, 891 F. Supp. 2d 1116 (C.D. Cal. 2012); *Thomas v. State*, 78 So. 3d 644 (Fla. App. 2011).

[25] See, *Silva v. McDonald, supra* note 24; *People v. Lehmkuhl, supra* note 24; *Williams v. State, supra* note 24; *Thomas v. State, supra* note 24.

[26] *People v. Lehmkuhl, supra* note 24.

[27] *Williams v. State, supra* note 24.

[28] *Casiano v. Commissioner of Correction, supra* note 23; *State v. Null, supra* note 16; and *Bear Cloud v. State, supra* note 16.

[29] *State v. Null, supra* note 16.

> future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller.* The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society as required by *Graham*.[30]

In *Casiano v. Commissioner of Correction*,[31] the Connecticut Supreme Court held that the principles set forth in *Graham* must be applied to a sentence of 50 years' imprisonment without parole. Quoting *Graham,* the Connecticut Supreme Court reasoned that "a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'"[32]

After reviewing other jurisdictions' interpretation of *Graham*, we conclude that there appears to be no consensus as to what constitutes a meaningful opportunity for release. However, because Smith will be parole eligible at age 62, we do not agree that his sentence represents a "geriatric release"[33] or equates to "'no chance for fulfillment outside prison walls,'"[34] because in today's society, it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62 or even at age 77. Like the court in *State v. Zuber*,[35] we also "do not believe *Graham* mandates that defendants have a 'meaningful life outside of prison' in which to 'engage meaningfully' in a career or raising a

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[30] *State v. Null, supra* note 16, 836 N.W.2d at 71. See, *Miller v. Alabama, supra* note 3; *Graham v. Florida, supra* note 1.

[31] *Casiano v. Commissioner of Correction, supra* note 23.

[32] *Id.* at 79, 115 A.3d at 1047.

[33] *State v. Null, supra* note 16, 836 N.W.2d at 71.

[34] *Casiano v. Commissioner of Correction, supra* note 23, 317 Conn. at 79, 115 A.3d at 1047.

[35] *State v. Zuber, supra* note 23, 442 N.J. Super at 631, 126 A.3d at 347.

family." Rather, *Graham* requires only a meaningful and realistic opportunity to obtain release.[36]

Overall, after considering all sentencing factors, we conclude that Smith's kidnapping sentence does not violate the principles set forth in *Graham* and that Smith's assignment of error is without merit.

5. Whether Kidnapping Sentence Is Excessive

The only remaining issue is whether the district court abused its discretion in imposing Smith's kidnapping sentence. We find it did not.

[10,11] 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.[37] Relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[38] Because Smith was under the age of 18 when he committed a Class IA felony, § 28-105.02 dictates that the sentencing judge must also consider mitigating factors, such as the defendant's (1) age at the time of the offense, (2) impetuosity, (3) family and community environment, and (4) ability to appreciate risks and consequences of the conduct, as well as (5) the outcome of a comprehensive mental health evaluation of the defendant conducted by an adolescent mental health professional licensed in Nebraska.

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[36] *Id.*

[37] *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016).

[38] *Id.*

The district court considered each of the factors listed above and so stated at the sentencing hearing. The court received considerable evidence as to Smith's life, history, maturity, and susceptibility to peer pressure at the time of the crime. At the sentencing hearing, the judge stated that he understood Smith's argument that he was "under the will of . . . Nollen," and the court "recognize[d] the mitigating qualities of youth and the immaturity and the lack of development to the prefrontal cortex of the brain, the decision-making part." However, in imposing Smith's kidnapping sentence, the court emphasized the horrific nature of the crime and "the numerous opportunities [Smith] had to avoid the ultimate decision [to drown Mary Jo]."

Having reviewed the record and the evidence considered by the court at sentencing, we cannot say that the sentence imposed was an abuse of discretion. Certainly, Smith desires a minimal sentence, but the reality is that even in nonhomicide cases, sometimes the factors set forth by Nebraska law require lengthy terms of incarceration. We conclude that Smith's assignment of error challenging his kidnapping sentence is without merit.

VI. CONCLUSION

We find Smith's assignments of error to be without merit and affirm his sentence of 90 years' to life imprisonment.

Affirmed.

Raymond J. O'Connor and Jennifer S. O'Connor, husband and wife, appellees, v. Kearny Junction, L.L.C., a Nebraska limited liability company, appellant.

893 N.W.2d 684

Filed March 3, 2017. No. S-16-230.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, 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 from the conclusion reached by the trial court.
2. **Equity: Appeal and Error.** On appeal from an equity action, when credible evidence is in conflict on material issues of fact, the 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.
3. **Actions: Final Orders: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage. The doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.
4. **Summary Judgment: Final Orders.** Partial summary judgments are usually considered interlocutory. They must ordinarily dispose of the whole merits of the case to be considered final.
5. **Estoppel.** When a party has unequivocally asserted a position in a proceeding and a court accepts that position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding.
6. ____. Judicial estoppel should be applied with caution within a single action.
7. **Contracts: Specific Performance.** In an action where specific performance is decreed, courts ordinarily attempt to place the parties in

the same position in which they would have been if the contract had been performed at the time agreed upon.

8. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
9. ____: ____. Mitigation of damages is an affirmative defense, as to which the defendant has the burden of proof.
10. **Vendor and Vendee: Specific Performance.** The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price.
11. **Equity.** Equity treats things agreed to be done as actually performed.
12. **Courts: Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.

Appeal from the District Court for Buffalo County: Mark J. Young, Judge. Affirmed as modified.

Kenneth F. George and Luke M. Simpson, of Ross, Schroeder & George, L.L.C., for appellant.

Arend R. Baack, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellees.

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

Cassel, J.

I. INTRODUCTION

The assignees of a purchase option in a lease of real estate sought specific performance. The landlord initially resisted, asserting that a condition precedent had not been fulfilled. The landlord later moved for specific performance, which was ordered, but now appeals from a judgment awarding equitable monetary relief for lost rentals. We conclude that based on the content of the motion and the resulting order, the landlord

was judicially estopped from asserting the condition precedent in avoidance of equitable monetary relief. Because we also conclude that the landlord was entitled to offset the monetary award with the interest on the unpaid purchase price, we modify that part of the judgment. As so modified, we affirm the court's judgment.

II. BACKGROUND

Kearny Junction, L.L.C. (Landlord), leased commercial real estate to a third party (Tenant), who was not a party to this suit. The lease agreement provided an option to purchase "conditional upon [Tenant's] full and faithful performance of all of [Tenant's] duties and obligations under the Lease." These words created a condition precedent.

In 2007, Tenant assigned this purchase option to Raymond J. O'Connor and Jennifer S. O'Connor, husband and wife (Assignees). At the time, Tenant had fully performed all obligations under the lease.

But for several years after the assignment, Tenant paid less than the full amount of the rent. The parties disputed who discovered the underpayment. But Landlord conceded that it had agreed Tenant could pay the delinquent rent and continue the lease. Tenant did so and thereafter paid the full monthly rental payments.

1. Assignees' Attempt to Exercise Option

In October 2013, Assignees attempted to exercise the purchase option. At the time of the attempted exercise, no rent was past due. Nonetheless, Landlord rebuffed their attempt, returning their tendered downpayment. Landlord maintained that because of the rental underpayments, Tenant had failed to satisfy the condition precedent. Further, Landlord maintained that the condition precedent could never be met.

Assignees objected and argued that the default had been cured. But Landlord contended that with respect to the purchase option, the acceptance of rent did not waive the default.

2. Settlement Negotiations and Lawsuit

Assignees and Landlord attempted to resolve the dispute by negotiating through counsel. After these negotiations were unsuccessful, Assignees filed a complaint in March 2014 and sought (1) a declaratory judgment determining that they had a valid purchase option and had duly exercised that option to purchase and (2) specific performance of the purchase option and costs associated with the action. Landlord filed an answer that asserted the option was lost and forfeited upon the default in rent.

Despite its stated position, Landlord offered in October 2014 to sell the property to Assignees and value the property pursuant to the terms of the purchase option by averaging three appraisals. However, a disagreement arose as to the selection of the three appraisers and the negotiations apparently halted.

In November 2014, Assignees obtained permission to amend their complaint. Before they filed their amended complaint, Landlord filed a motion. The district court treated it as a motion for summary judgment. We pay particular attention to its content.

Landlord's motion requested the court to declare that "[Assignees] have an option to purchase from [Landlord] the real property" and that "[Assignees] have duly exercised the Option." Landlord stated that it was making the motion "[n]otwithstanding the affirmative defense specifically and particularly alleged in [p]aragraph 17" of its earlier answer.

Assignees then filed their amended complaint that purported to add a third "cause of action" that sought "damages" for Landlord's delay in allowing Assignees to exercise the purchase option. Landlord filed an answer to the amended complaint, once again denying that Assignees had a right to exercise the purchase option. But in this answer, Landlord suggested that it had "consented to [Assignees'] exercise of the option" and requested that "both parties should be specifically

ordered to perform all of the terms and provisions of the Purchase Option."

3. Partial Summary Judgment Order

After a hearing on Landlord's motion, the district court issued an order sustaining it. Landlord's counsel prepared both the motion and the order. The order declared that "[p]ursuant to the Lease . . . [Assignees] have an option to purchase . . . and [Assignees] have duly exercised the Option to purchase." It also ordered specific performance by both parties pursuant to the purchase option agreement in the lease. The order continued a previously scheduled trial, apparently on the third "cause of action," to be rescheduled "upon motion of either party."

Pursuant to this order, the purchase price was calculated by averaging three appraisals. Landlord then sold the property to Assignees, and the sale closed in March 2015. The matter proceeded to trial on the remaining issue of monetary relief.

4. Judgment

After the trial, the district court entered a judgment, styled as an order, in Assignees' favor. The court found that the summary judgment order had already determined that Assignees had a purchase option and that they had exercised it. And the court stated that its previous determination was "the law of the case."

The judgment also required Landlord to pay "damages" of $135,426 to Assignees. This figure represented lost profits between May 1, 2014—"the date provided for closing in [the purchase option]"—and the date when the sale closed—which was March 18, 2015 (although the court once referred to March 10, which appears to be a scrivener's error). The amount was calculated by subtracting the costs of maintaining the property from the total lost rents.

Landlord filed a motion for new trial, requesting a new trial or, in the alternative, to amend or alter the district court's

judgment. The district court revised minor details of the judgment but in all material aspects overruled the motion. Landlord timely appealed, and we granted its petition to bypass review by the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Landlord assigns that the district court erred in (1) finding that the Assignees had duly exercised the purchase option "as a matter of right"; (2) finding that under the law-of-the-case doctrine, the Assignees had a right to exercise the option "as a matter of law"; and (3) awarding damages of $135,426 plus costs.

IV. STANDARD OF REVIEW

Although Assignees characterized their claim as three "causes of action" (for declaratory judgment, specific performance, and damages), in substance, they asserted only one cause of action—for specific performance of the purchase option. This subsumed both the declaratory and the monetary relief. In that light, we recite the appropriate standard of review.

[1,2] An action for specific performance sounds in equity, and on appeal, 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 from the conclusion reached by the trial court.[1] On appeal from an equity action, when credible evidence is in conflict on material issues of fact, the 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.[2]

V. ANALYSIS

1. Law of the Case

[3] The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should

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[1] *Ficke v. Wolken*, 291 Neb. 482, 868 N.W.2d 305 (2015).

[2] *Id.*

not be relitigated at a later stage.[3] The doctrine requires a final order.[4] A party is not bound by a court's findings in an order that it was not required to appeal.[5]

[4] But, here, before the judgment, there was no final, appealable order. Partial summary judgments are usually considered interlocutory.[6] They must ordinarily dispose of the whole merits of the case to be considered final.[7] Here, the summary judgment order did not decide the issue of monetary relief. Between the filing of the motion and the order sustaining it, Assignees filed their amended complaint. And the summary judgment order expressly reserved the unresolved issue of the third "cause of action." Thus, it did not dispose of the whole merits of the case and was not a final, appealable order. It necessarily follows that the law-of-the-case doctrine did not apply.

[5,6] Although the law-of-the-case doctrine did not apply, another rule of law dictated the same result. When a party has unequivocally asserted a position in a proceeding and a court accepts that position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding.[8] Although we have said that judicial estoppel should be applied with caution within a single action,[9] the circumstances here support its use.

Landlord's motion and the resulting order established both elements of judicial estoppel. In its motion, Landlord admitted that Assignees "h[ad] an option to purchase" and that they had "duly exercised the Option." If the condition

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[3] *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012).

[4] *Id.*

[5] *Id.*

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

[7] *Id.*

[8] *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

[9] See *id.*

precedent had not been satisfied, there would have been no contract and, thus, nothing to exercise. But Landlord's motion expressly stated otherwise. In this regard, Landlord's position was unequivocal. And by ordering the sale, the district court accepted Landlord's position.

In arguing that the condition precedent was not satisfied, Landlord merely attempts to escape the consequences of the unequivocal position taken in its motion. Because the court accepted Landlord's position, Landlord was estopped from later asserting an inconsistent position.

2. Equitable Monetary Relief

[7,8] In an action where specific performance is decreed, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the time agreed upon.[10] While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.[11] The term "damages" is not precisely correct in this context. Because the monetary relief flows from a claim for specific performance and not for breach of contract, it is not "legal damages" or awarded as a matter of a right. It is equitable compensation to make the injured party whole.

Landlord assigns that the district court erred in awarding compensatory damages of $135,426 plus costs. In its brief, Landlord sets forth three supporting arguments.

(a) Mitigation of Damages

[9] Landlord argues that Assignees failed to offer evidence showing that they attempted to mitigate their damages. However, mitigation of damages is an affirmative defense, as to which the defendant has the burden of proof.[12] Therefore,

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[10] *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988).

[11] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[12] *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

Landlord, not Assignees, was required to present evidence of Assignees' failure to mitigate. This argument lacks merit.

(b) Calculation of Ownership Expenses and Costs

Landlord argues that the monetary award was improper because the district court did not account for all the costs and expenses associated with obtaining the rents and profits. Specifically, Landlord argues that the court failed to subtract from the award the monthly interest charges the Assignees would have had to pay on a loan for the purchase money between May 2014 and March 2015 as "costs associated with purchasing and owning the Property in order to collect rent."[13]

Landlord relies upon our decision in *III Lounge, Inc. v. Gaines*.[14] There, we articulated a rule that "governs the *vendor's* right to allowance for expenses."[15] In that context, we stated that "if the [purchaser] is awarded rents, rental value, or profits from the premises during the delay [in performance], the [vendor] may deduct from them ordinary carrying charges he may have paid during the delay, including taxes, insurance, utilities, and reasonable repairs."[16] But Landlord focuses on the language that followed immediately after the rule, where we explained that "if the [purchaser] were awarded rents or profits, [the purchaser] would also be saddled with expenses associated with obtaining the rents or profits."[17] Landlord is arguing that as part of these expenses, Assignees should have proved what their mortgage interest payments would have been.

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[13] Brief for appellant at 22.

[14] *III Lounge, Inc. v. Gaines, supra* note 10.

[15] *Id.* at 592, 419 N.W.2d at 148 (emphasis supplied).

[16] *Id.*

[17] *Id.*

But, here, Landlord is mixing apples and oranges. Read in context, we were explaining the rule governing the *vendor's* right to expenses. Assignees were the purchasers, not the vendor. The rule allows the vendor to deduct its expenses during the period of delay so that it disgorges only the net rentals it collected during the delay. And our language makes clear that it applies only to those costs *actually expended* by the vendor.

The district court allowed Landlord to deduct its real estate taxes and insurance. The court excluded the evidence of any of Landlord's other expenses. No error is assigned to those evidentiary rulings. Thus, Landlord failed to prove that it had any other expenses. This argument also lacks merit.

(c) Equitable Placement of Parties in Grant of Specific Performance

Third, Landlord argues the court failed to place both parties in the same position they would have been if the purchase option had been exercised in October 2013. Landlord argues that Landlord should have received interest on the purchase money between May 2014 and March 2015. We agree.

[10,11] Long ago, we articulated a rule derived from basic underlying principles. The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price.[18] In other words, Landlord owes Assignees the property's rents and profits and Assignees owe Landlord interest on the purchase price. These consequences flow from

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[18] *Russell v. Western Nebraska Rest Home, Inc.*, 180 Neb. 728, 144 N.W.2d 728 (1966). See, also, *Sechovec v. Harms*, 187 Neb. 70, 187 N.W.2d 296 (1971).

the idea that equity treats things agreed to be done as actually performed.[19]

Once again, we stated this rule somewhat differently in *III Lounge, Inc. v. Gaines*.[20] There we said, "If the delay in the performance of a contract was caused by the vendor, and the purchaser is not awarded rents, rental value, or profits, and has not been in possession of the property during the delay, the purchaser is not liable for interest on the unpaid purchase money."[21] But our language in that case was focused on a situation where the purchaser was *not* awarded rents. In the present case, rents *were* awarded. Thus, under the general rule, Assignees are liable to account for the interest on the purchase price.

We have treated rents and profits as analytically distinct from interest on the purchase price. Other jurisdictions sometimes blend these concepts. Thus, some jurisdictions allow a vendor to offset an award of ancillary damages in a decree for specific performance with expenses of owning the property, as well as the legal rate of interest on the sale price since the scheduled closing date.[22] But where the vendor wrongfully delayed performance, the vendor will typically not be allowed to collect interest that exceeds the ancillary

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[19] See *Dixon v. O'Connor*, 180 Neb. 427, 143 N.W.2d 364 (1966).

[20] *III Lounge, Inc. v. Gaines, supra* note 10.

[21] *Id*. at 595, 419 N.W.2d at 149.

[22] See, generally, *Qantum Communications Corp. v. Star Broadcasting*, 491 F. Supp. 2d 1123 (S.D. Fla. 2007); *Lewis v. Lockhart*, 379 P.2d 618 (Alaska 1963); *Dato v. Mascarello*, 197 Ill. App. 3d 847, 557 N.E.2d 181, 145 Ill. Dec. 411 (1989); *Crockett v. Gray*, 39 Kan. 659, 18 P. 905 (1888); *Wilcox v. Commonwealth R. & T. Co.*, 248 Mich. 527, 227 N.W. 678 (1929); *Bonds v. Rhoads*, 203 Miss. 440, 35 So. 2d 437 (1948); *Volk v. Atlantic Acceptance & Realty Co.*, 142 N.J. Eq. 67, 59 A.2d 387 (1948); *Leafgreen v. Drake's Exrs.*, 300 Pa. 369, 150 A. 656 (1930); *Greensleeves, Inc. v. Smiley*, 942 A.2d 284 (R.I. 2007); *Amoss v. Bennion*, 23 Utah 2d 40, 456 P.2d 172 (1969); *Barnett v. Cloyd's Ex'rs*, 125 Va. 546, 100 S.E. 674 (1919).

damages awarded to the purchaser or the purchaser may waive reasonable rents so as not to pay interest on the sale price.[23]

Of course, these jurisdictions are applying equitable principles to specific situations, as we are here. We perceive two common threads in the case law. First, the vendor should not profit from its own delay. Second, the purchaser should not receive a windfall that unfairly penalizes the vendor. This aligns with our understanding of the applicable equitable principles and is compatible with our case law.

With this understanding, we turn to the specific remedy applicable to this appeal. Assignees have already received specific performance of the conveyance. At this point, we are concerned only with the accounting attributable to the delay in performance.

As we have already explained, equity requires us to treat the real estate as held by Landlord in trust for Assignees. Accounting for the net rents and profits is straightforward. The district court awarded rents, net of taxes and insurance, of $135,426. Other than Landlord's argument regarding Assignees' interest expenses, which we have rejected, it does not quarrel with this aspect of the equitable accounting.

But the other side of the equitable accounting requires us to hold Assignees liable for interest on the purchase price. There may be circumstances where a vendor's conduct in delay of performance is so egregious that equity would deny any interest on the purchase price. That is not the situation here.

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[23] See *id.* See, also, *Reis v. Sparks*, 547 F.2d 236 (4th Cir. 1976) (within trial court's discretion to award or deny interest to vendors on purchase price); *A., T. & S.F. R.R. Co. v. C. & W.I. R.R. Co.*, 162 Ill. 632, 657, 44 N.E. 823, 830 (1896) (disallowing interest entirely where vendor "willfully" and "wrongfully" delayed performance of contract); *Coal Co. v. Findley*, 128 Iowa 696, 105 N.W. 206 (1905) (disallowing interest entirely where vendor delayed performance of contract).

The difficulty stems from the imprecise evidence regarding an appropriate rate of interest. While mathematical certainty is not required for Assignees' remedy, the mathematics of interest requires a rate. Ordinarily, the interest rate on a purchase price is set forth in the contract between the parties. Here, the parties failed to agree upon a rate.

[12] Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.[24] One option would be a legal rate. In Nebraska, the legal interest rate is 6 percent.[25] But to allow Landlord to offset the award to Assignees with interest at a rate of 6 percent would reward it for the delay in performance. There is no evidence that it could have invested the purchase price at that rate. However, not allowing Landlord to offset the award with at least some interest on the unpaid purchase price would grant a windfall to Assignees. One of the Assignees testified that the interest rate on the loan to purchase the property was more than 3 percent and that he was unsure whether it was less than 4 percent. This provides some evidence of a rate of interest on the purchase price.

Upon our de novo review and in order to ensure an equitable result, we reduce the Assignees' monetary relief by the amount of $65,000, which approximates interest on the purchase price of $2.4 million, less the $50,000 deposit, for the period of delay, at a rate somewhat in excess of 3 percent. We modify the district court's judgment in this respect and subtract this interest from the award to Assignees, thereby reducing the monetary relief granted to Assignees from $135,426 to $70,426 and the taxable costs in the district court.

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[24] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[25] Neb. Rev. Stat. § 45-102 (Reissue 2010).

VI. CONCLUSION

Because Landlord's motion admitted that Assignees had an option and that the option was exercised and because the district court expressly entered an order relying upon these admissions, Landlord was judicially estopped from asserting its inconsistent position that the condition precedent was not satisfied. We also conclude that Landlord was entitled to interest on the purchase price for the period of delay and reduce the monetary relief granted to Assignees from $135,426 to $70,426 and the taxable costs in the district court. As so modified, we affirm the judgment of the district court.

Affirmed as modified.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Lori Anne Ubbinga, respondent.

893 N.W.2d 694

Filed March 3, 2017. No. S-16-373.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

Per Curiam.

INTRODUCTION

On April 11, 2016, formal charges containing one count were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Lori Anne Ubbinga, respondent. Respondent filed an answer to the formal charges on July 5. A referee was appointed, and the referee held a hearing on the charges. Respondent did not appear at the hearing.

The referee filed a report on December 2, 2016. With respect to the formal charges, the referee concluded that respondent's conduct had violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a) and (b) (communications); 3-501.15(d)

(safekeeping property); 3-501.16(d) (declining or terminating representation); 3-508.1(a) and (b) (bar admission and disciplinary matters); and 3-508.4(a), (c), and (d) (misconduct). The referee further found that respondent had violated her oath of office as an attorney licensed to practice law in the State of Nebraska. See Neb. Rev. Stat. § 7-104 (Reissue 2012). With respect to the discipline to be imposed, the referee recommended a 1-year suspension and that upon reinstatement, if applied for and accepted, respondent be placed on monitored probation for a period of 2 years. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. § 3-310(L) (rev. 2014) of the disciplinary rules. We grant the motion for judgment on the pleadings and impose discipline as indicated below.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 20, 2001. At all times relevant to these proceedings, she was engaged in the practice of law in Homer, Nebraska.

On April 11, 2016, relator filed formal charges against respondent. The formal charges contain one count generally regarding respondent's failure to communicate with a client and respondent's failure to perform the legal work for the client for which respondent had been paid. The formal charges alleged that by her conduct, respondent violated her oath of office as an attorney and professional conduct rules §§ 3-501.1; 3-501.3; 3-501.4(a) and (b); 3-501.15(d); 3-501.16(d); 3-508.1(a) and (b); and 3-508.4(a), (c), and (d).

Because respondent failed to file an answer or other pleading within 30 days of being served with summons and a copy of the formal charges, relator filed a motion for judgment on the pleadings on June 22, 2016. On June 30, respondent sent an email to relator in which she requested additional time to respond to the motion and formal charges. Relator responded,

stating that it would not object to respondent's filing her answer out of time, so long as it was filed by July 5. On July 5, respondent filed a motion for extension of time to respond, which this court sustained, and, accordingly, her answer was filed. In her answer to the formal charges, respondent admitted some of the factual allegations and denied others. She denied the violations alleged in the formal charges.

A referee was appointed on August 5, 2016. On August 25, relator sent a letter to respondent asking to schedule a time to take her deposition. Respondent did not respond. On August 29, relator left a voicemail message asking respondent to call.

On August 30, 2016, a prehearing conference was held by telephone with the referee, respondent, and relator. A progression schedule was established, whereby discovery was to be completed by October 7 and a hearing was set for October 25.

On September 8, 2016, relator sent an email to respondent asking her to advise relator when she would be available for her deposition. Respondent did not reply. On September 12, relator left a voicemail message for respondent and sent an email to respondent stating that relator had scheduled her deposition for September 22. Respondent did not respond to the email. Relator placed a followup call to respondent on September 15 and left a voicemail message.

Because respondent had failed to respond to relator's emails and voicemail messages, relator had the sheriff personally serve a subpoena duces tecum on respondent, which changed the date of respondent's deposition to September 29, 2016. On September 26, respondent contacted relator and requested that the date of the deposition be rescheduled because she had a funeral to attend on September 29. Relator rescheduled the deposition for October 4, and respondent's deposition was taken on October 4.

On October 5, 2016, relator and respondent exchanged emails regarding witnesses, exhibits, and a stipulation of facts. Relator sent a proposed stipulation of facts for respondent's

review and consideration. Respondent did not respond to relator's proposed stipulation of facts. Respondent sent an email in which she asked relator if she could send her witness and exhibit lists at a later date. Respondent did not provide relator or the referee with respondent's list of witnesses or exhibits before the hearing.

According to the referee's report, on October 25, 2016, at approximately 6:10 a.m., respondent left a voicemail message with the referee stating that she was ill and would not be able to attend the hearing on the formal charges scheduled for that day. Respondent stated that relator "'could put on what he needs to put on and that maybe I could submit something in writing in maybe a week or so.'" Respondent further stated that the referee could call her. She did not request a continuance of the hearing.

At approximately 7:35 a.m., respondent left a voicemail message with relator indicating that she was ill and would not be attending the hearing. According to the referee's report, respondent stated in the message that she would like a continuance "but understood that [relator] was ready to proceed with the hearing and she did not want to interfere with that so she said go ahead and make your record." She further stated that she would request permission to submit something in writing to the referee on a later date. Respondent did not submit any such writing to the referee.

At approximately 8 a.m., the referee called relator and communicated the content of respondent's voicemail. Relator stated that he wanted to proceed with the hearing, and the referee advised relator that he would allow relator to make his request as to how he wanted to proceed on the record.

At approximately 10 a.m., relator appeared at the hearing with his witness. Respondent did not appear. Relator stated on the record that he wished to proceed with the hearing, to offer exhibits, and to have his witness testify. Relator stated that he would not object if respondent submitted something in writing later.

At approximately 10:10 a.m., before allowing relator to put on evidence, the referee called respondent and left a voicemail message asking her to call him. Respondent did not return the referee's call. Thereafter, relator called respondent, but she did not answer. The referee stated that he would proceed with the hearing on the formal charges. The hearing was held at approximately 10:30 a.m. on October 25, 2016. Respondent did not appear. At the hearing, relator offered and the referee received 32 exhibits, and relator called one witness, respondent's client, to testify.

After the hearing was completed, relator rested its case "[s]ubject to whatever [respondent] does." The referee did not close the record and stated that as a matter of due process, he wanted to give respondent some opportunity to review the record, appear, and testify.

On October 26, 2016, the referee filed a posthearing order which he emailed to respondent and relator. The order stated in part that copies of the transcript and exhibits received at the hearing were being sent to respondent and that respondent would have 10 days to review them. The order further stated that at the end of the 10 days, the referee would contact the parties to schedule a date, time, and place for respondent to appear and present evidence.

On November 4, 2016, the referee mailed and emailed to the parties copies of the transcript and exhibits which had been received at the hearing. The referee advised that he would contact the parties on November 14 to schedule a time and place for respondent to present evidence. On November 14 at approximately 9 a.m., the referee called respondent at her home and cell phone numbers. No one answered his call at respondent's home number; no answering machine picked up. The referee left a voicemail message on the cell phone number asking respondent to call back. Respondent did not return the referee's call. At approximately 9:30 a.m., the referee called respondent's cell phone and left another message. At approximately 9:35 a.m., the referee called relator and advised him

that respondent had not returned the referee's calls. Relator then made a motion for the referee to close the record of the hearing on the formal charges. The referee sustained relator's motion. The relator then set a schedule for the parties' briefing. Relator submitted a brief, but respondent did not.

On December 2, 2016, the referee filed his report and recommendation. The substance of the referee's findings may be summarized as follows: In December 2014, a client hired respondent to represent him in a child visitation case. The client had been represented at trial by a different lawyer. After the trial, the court filed a decree on December 22, awarding sole custody of the three minor children to the children's mother. The client was granted supervised visitation during the first 3 months following the decree to begin with supervised visitation every other weekend from noon to 5 p.m. on Saturday and noon to 5 p.m. on Sunday. The client was also granted supervised visitation each Wednesday from 5 to 7 p.m. Supervision was to be provided by the children's mother, the children's maternal grandmother, or any other third person agreed to by the parties. At the client's sole discretion and cost, such supervision could be provided by a neutral third-party agency.

The client contacted respondent regarding the decree and the visitation ordered by the court. Respondent and the client agreed they would not appeal from the decree.

The dispute between the client and the children's mother was over the supervised visitation of the children. The client insisted upon exercising his visitation in his home with a neutral third-party agency, and the children's mother would not agree.

At the hearing on the formal charges, the client testified that he hired respondent to help him with his visitation issue. The client expected that respondent would talk to the attorney for the children's mother in order to facilitate visitation and to obtain contact information so the client could talk to his children. The client further testified that he told respondent that

if visitation could not be quickly resolved, he wanted respondent to file a contempt motion against the children's mother. The client testified that respondent was willing to file such a contempt motion.

In his report, the referee noted that the client's testimony as to the amount he paid respondent is not consistent with Facebook messages between the client and respondent, in which the client stated to respondent: "'Well I gave you 1200 total and you sent 4 e-mails so I believe you earned the 200, but I think its fare [sic] to say I deserve $1,000 back.'"

With respect to attorney fees, the client testified that he made an initial payment of $500 cash to respondent, and in January 2015, he gave respondent a $1,000 check. It was the client's understanding that it would only cost him $1,500 for respondent to represent him in the visitation matter and for some unrelated matters.

In contrast, respondent testified that the client first contacted her in November 2014, that he had contacted her multiple times via Facebook, and that she informed him that he needed to pay her some attorney fees. Respondent testified their first meeting in person was in December 2014, and she quoted him a fee of $2,500 for representing him in various matters. She testified that although the original agreement was for $2,500, the client paid her only $1,000. Respondent also testified that the client paid her $200 as a filing fee for another case, but that she did not file anything.

With respect to representation, the client testified that respondent represented him from January to May 2015. The referee found that on January 8, 2015, the client sent a Facebook message to respondent stating that he wanted to exercise his visitation because it had been a year since he had seen his children. On January 9, the client met with respondent and paid her $200. The client asked that respondent assist him in arranging for his visitation through the attorney for the mother's children, and respondent stated she would email the attorney to make the arrangements. The client testified that

he asked respondent several times to file a contempt motion against the children's mother, but that respondent did not do so.

Because the client did not hear from respondent, on January 12, 2015, he sent respondent two messages asking if she had heard from the other attorney. On January 13, respondent sent the client a message stating she would call the other attorney again that morning. The client asked respondent if he could file a contempt motion if the other attorney did not respond, and respondent replied that she would file an appearance in the case and that a contempt motion could be filed.

On February 6, 2015, respondent spoke by telephone with the attorney for the children's mother regarding the client's visitation with the children. Respondent suggested that visitation begin on February 14, but no agreement was reached during that call. On February 9, the other attorney sent respondent an email informing her that visitation on February 14 would not work, and instead proposed that visitation occur on February 21 if the client would agree that the children's maternal grandmother would supervise the visit at her house. The attorney asked respondent to let him know if respondent's client would agree to this visitation. Respondent did not respond to the other attorney until February 20.

The client did not want to exercise visitation at the maternal grandmother's house, so he asked respondent to help make arrangements for a third party to supervise the visit at his house. By February 20, 2015, respondent was unable to make these arrangements for the client's supervision on February 21. On February 20 at 2:44 p.m., respondent sent an email to the other attorney stating that the client would exercise his visitation at his house with a third-party counselor, even though she had been unable to make arrangements for a third party to supervise the visit. At 4:41 p.m., the other attorney responded, stating that visitation could not be arranged on such short notice and that because he had not heard from respondent in answer to his February 9 email, he assumed the client did not

want to exercise visitation on February 21. The other attorney reiterated the children's mother's position that the first visitation should occur at the children's mother's house. He also asked for 1 week's notice for future visitations.

On February 23, 2015, the client sent a message to respondent asking about his visitation. Respondent replied that she had sent an email to the other attorney on February 20, but she did not receive a response. Respondent stated she would forward the email to the client that evening, but the client did not get a copy of the email. The client responded that if the children's mother denied his visitation, he wanted to file a motion for contempt.

On February 24, 2015, the client sent respondent two Facebook messages asking about the February 20 email respondent sent to the other attorney and about future visitation. On February 25, respondent sent the client a message stating that the other attorney had not responded to her email and that she would forward her February 20 email to him later that day. She did not forward the email to the client. The client stated that he believed they should file a contempt motion. On February 26, respondent emailed the client implying that she had not received a response from the other attorney regarding her February 20 email. Respondent told the client that she would send another request to the other attorney and that if she did not receive a response, she would file a motion for contempt. The referee stated in his report that respondent's statements that she did not receive a response from the other attorney regarding her February 20 email were false and that respondent knew they were false when she made them.

At no time between February 20 and 26, 2015, did respondent seek to arrange for the client's visitation for February 28. On February 26, respondent sent an email to the other attorney "complaining that it was his fault that [the client] did not have visitation on February 14 or February 21." She stated that the client would exercise visitation on March 7

at his house with a third-party supervisor. Respondent sent a copy of this email to the client. On February 26, the other attorney responded and reiterated the children's mother's position that the initial visitation must be in a familiar environment supervised by a person the children know and trust. The other attorney asked respondent to let him know if the client changed his mind; otherwise, the other attorney stated he would wait for whatever action respondent and the client would take.

On March 2, 2015, respondent sent an email to the other attorney indicating that the client had not changed his mind about visitation at his house with a third-party supervisor. Respondent did not renew her request for visitation for March 7; however, she stated that she was going to file a motion for contempt. The other attorney did not respond to this email. After March 2, there were no further telephone calls, emails, or other correspondence between respondent and the other attorney.

On March 3, 2015, the client sent a message to respondent asking if she was going to file a motion for contempt. On March 4, respondent told the client she would file a motion for contempt, but she wanted to wait for the children's mother to refuse visitation one more time. On March 6, the client sent a message to respondent stating that if he did not get visitation on March 7, he wanted respondent to file a motion for contempt on March 9.

On March 9, 2015, the client sent a message to respondent asking if she was going to file the contempt motion that day. Respondent replied, stating, "'[Y]es filing a contempt.'" Respondent did not file a motion for contempt on March 9. On March 10, the client sent respondent a message asking if the contempt motion had been filed. Respondent responded that the motion would be filed the next day. On March 11, the client sent a message to respondent asking again if the contempt motion had been filed. Respondent did not respond. At 11:10 a.m., on March 12, the client sent respondent another

message, again asking if the contempt motion had been filed. Respondent did not respond.

At 2:27 p.m. on March 12, 2015, the client sent a message to respondent stating that he spoke to the clerk of the court and learned that respondent had not filed any pleading in his case involving the children's mother. The client directed respondent to send him an invoice and refund his money so he could hire another lawyer. At 2:59 p.m., respondent sent the client a message stating, "'Sorry you feel that way. I will get your file together.'"

On March 13, 2015, the client and respondent exchanged several messages. Respondent stated, "'I will get your file together and invoice sent to you next week.'" After further messages, the client agreed to let respondent continue with his case so long as the contempt motion was filed. Respondent stated, "'I will have your contempt ready to file Monday.'"

On Monday, March 16, 2015, the client sent a message to respondent asking if the contempt motion had been filed. Respondent responded that it would be done the next day. On March 17, the client sent a message to respondent asking when the contempt motion would be filed. Respondent replied that she was going to "'call court and get date to put in the order for hearing.'" Respondent stated she would contact the client the next day. On the evening of March 18, the client sent respondent a message asking if she was going to call him. Respondent did not respond.

On March 19, 2015, the client and respondent exchanged several messages. The client asked if the contempt motion had been filed, and respondent stated she would file it "'this week.'" The client reminded respondent that it was Thursday and that the workweek ended the next day. On March 20, respondent sent a message to the client stating that the contempt hearing was scheduled for April 20 at 10 a.m.

Between April 6 and 17, 2015, the client sent three messages to respondent asking about the contempt hearing. Respondent did not respond to the messages. On April 19, respondent sent

a message to the client informing him that the hearing on the motion for contempt set for April 20 had to be continued for a couple weeks because the notice of hearing was not served in time.

On April 21, 2015, the client sent a message to respondent informing her that he checked with the court and learned that no contempt motion had been filed, nor was there an order setting the hearing date signed by the judge. The client directed respondent to send him his file so he could hire another lawyer to take over his case. Respondent replied that she would mail everything to the client. The referee noted in his report that at no time in February, March, or April 2015 did respondent file a motion for contempt to find the children's mother in contempt for failing to allow the client to exercise his visitation with his children.

On May 2, 2015, the client sent respondent a message asking if she had sent his file to him, and respondent did not reply. On May 7, the client sent a message to respondent stating that if he did not have his file by Monday, May 11, he would contact the Counsel for Discipline. On May 11, respondent sent a message to the client stating that his file would be ready on Wednesday, May 13. She asked if he wanted her to mail the file to him or if he wanted to pick it up. The client directed respondent to mail the file to him, and he also asked for a refund of half the money he had paid respondent. Respondent did not mail anything to the client.

On May 18, 2015, the client filed a grievance with relator alleging that respondent had neglected his case and lied to him about filing the motion for contempt.

On May 20, 2015, respondent sent a message to the client stating that she would send him a detailed itemization and his file. The client renewed his request for a refund of the fees he paid respondent. It was agreed that the client would meet with respondent at her office on May 26. Early in the morning on May 26, respondent sent the client a message that she wanted to meet on May 27 instead. The client responded that meeting

today would be better for him and suggested meeting later in the day. Respondent did not respond.

On May 27, 2015, respondent sent the client a message asking to change their meeting to Saturday, May 30. The client responded by asking respondent to just mail the documents to him rather than rescheduling the meeting. Respondent replied that she could send the documents, but she wanted to see the client. The client replied, "'Ok so what do you feel is fare [sic] money wise that I deserve to get back.'" Respondent stated, "'You decide. I don't need a fight with my medical problems. If you believe I deserve nothing so be it. I assume you will withdraw your complaints.'" The client replied that he wanted $1,000 back and that he would withdraw his complaints if respondent returned the money.

Respondent and the client did not meet on May 30, 2015, and respondent did not send the file or refund the money to the client. The referee noted in his report that as of May 30, 2016, respondent had not delivered to the client his file, an itemized statement of her time working on his cases, or a refund of his payments.

On July 1, 2015, in her initial response to relator regarding the client's grievance, respondent stated that she met with the client on February 9 and that "'it was decided we would get a court date for a contempt and see how things shook out. This was done and court set for April 21 [sic], 2015, service was not perfected and new date would be provided.'" On July 8, relator sent a letter to respondent asking her to respond to certain questions and to provide certain documents regarding her representation of the client. In her July 24 response, respondent claimed that she had prepared the contempt documents, secured a hearing date, and gave the documents to a process server who failed to properly serve the documents. Respondent claimed because the documents were not properly served, she did not file an application to show cause, and that is why there was no order for hearing signed by the judge.

On July 28, 2015, relator sent respondent a letter asking her to provide a copy of her transmittal letter to the process server who was to serve the contempt motion on the children's mother, and to include copies of the documents to be served. In her September 8 response, respondent included a copy of a letter dated March 4, 2015, to a process server, in which he was instructed to serve the application to show cause on the children's mother. Respondent also enclosed a copy of an application to show cause. She did not include any other documents in her September 8 response.

The referee determined in his report, with respect to the allegations set forth in the formal charges, that based on respondent's actions, she did not act promptly or diligently; did not keep the client reasonably informed about the status of the matter; engaged in conduct involving dishonesty, deceit, or misrepresentation; failed to provide an accounting to the client; and failed to deliver the client's file to him. Accordingly, the referee found that respondent violated her oath of office as an attorney and professional conduct rules §§ 3-501.1; 3-501.3; 3-501.4(a) and (b); 3-501.15(d); 3-501.16(d); 3-508.1(a) and (b); and 3-508.4(a), (c), and (d).

The referee identified certain aggravating factors, including that respondent failed to cooperate fully with relator and made false statements to relator. Respondent also failed to cooperate with the referee and to comply with the referee's orders. The referee noted that respondent has not accepted responsibility for her conduct and has shown no remorse. The referee also found as an aggravating factor that respondent's dishonest conduct adversely reflects on her fitness to practice law and her representation of the client "raises questions as to whether the Respondent is competent to practice law." The referee further stated that it is an aggravating factor that respondent's failure to properly represent the client resulted in a substantial delay in his being able to visit his children and that the outcome of the case would have been different had respondent competently represented the client.

The referee identified certain mitigating factors. The referee noted that there was no evidence presented indicating that respondent was not in good standing with the Nebraska State Bar Association. The referee also noted that respondent had practiced law in Nebraska for 14 years without any prior disciplinary complaints filed against her or penalties imposed on her.

With respect to sanctions to be imposed for the foregoing actions, considering the aggravating and mitigating factors, the referee recommended that respondent be suspended for a period of 1 year and that if reinstated, respondent be placed on monitored probation for a period of 2 years.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under § 3-310(L). When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Boyum*, 291 Neb. 696, 868 N.W.2d 326 (2015). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude that the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Thebarge*, 289 Neb. 356, 854 N.W.2d 914 (2014). Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014). See, also, *State ex rel. Counsel for Dis. v. Tighe, ante* p. 30, 886 N.W.2d 530 (2016).

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been

established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-501.1; 3-501.3; 3-501.4(a) and (b); 3-501.15(d); 3-501.16(d); 3-508.1(a) and (b); and 3-508.4(a), (c), and (d) of the professional conduct rules. The record also supports a finding by clear and convincing evidence that respondent violated her oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances. See *State ex rel. Counsel for Dis. v. Boyum, supra*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, disciplinary rule § 3-310(N).

With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Boyum, supra*. For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors. *Id*.

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Tighe, ante* p. 30, 886 N.W.2d 530 (2016).

The evidence in the present case establishes, among other facts, that respondent agreed to represent the client with respect to the exercise of his visitation with his children. However, respondent failed to complete such work and failed to communicate with the client regarding the actual status of her work. Respondent failed to provide the client with an accounting when asked, and respondent failed to provide the client with his file. In addition, respondent failed to cooperate with the relator's investigation in a timely manner, and respondent failed to comply with the referee's orders.

As aggravating factors, we note, as did the referee, that respondent has not taken responsibility for her actions. The referee further noted that respondent's dishonest conduct adversely reflects on her fitness to practice law and that "the evidence concerning the Respondent's representation of [the client] raises questions as to whether the Respondent is competent to practice law." As a further aggravator, the referee noted that respondent's failure to properly represent the client resulted in a substantial delay in the client's being able to visit his children.

As mitigating factors, we acknowledge, as did the referee, that respondent was in good standing with the Nebraska State Bar Association and that respondent had not received any prior discipline.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that

respondent should be suspended for a period of 1 year. Upon reinstatement, if applied for and accepted, respondent shall be placed on monitored probation for a period of 2 years, and the monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved by the Counsel for Discipline. Respondent shall submit a monitoring plan with her application for reinstatement which shall include, but not be limited to, the following: During the first 6 months of the probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above. Respondent shall work with the monitor to develop and implement appropriate office procedures to ensure that the clients' interests are protected. Respondent shall reconcile her trust account within 10 workings days of receipt of the monthly bank statement and provide the monitor with a copy within 5 working days. Respondent shall submit a quarterly compliance report with the Counsel for Discipline, demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of the probation. If at any time the monitor believes respondent has violated the professional conduct rules or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. Finally, respondent shall pay all

the costs in this case, including the fees and expenses of the monitor, if any.

CONCLUSION

The motion for judgment on the pleadings is granted. Respondent is suspended from the practice of law for a period of 1 year, effective immediately, after which period respondent may apply for reinstatement to the bar. Should respondent apply for reinstatement, her reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms outlined above. Acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan the terms of which are consistent with this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

State of Nebraska, appellee, v. Leodan Alarcon-Chavez, appellant.

893 N.W.2d 706

Filed March 3, 2017. No. S-16-456.

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. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **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. 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.
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: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, 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. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

8. **Effectiveness of Counsel: Proof: Appeal and Error.** In a nonplea context, to establish the prejudice prong of a claim of ineffective assistance of counsel, the defendant must show a reasonable probability that the result would have been different had counsel not performed deficiently.
9. ____: ____: ____. The two prongs of the test governing a claim of ineffective assistance of counsel, deficient performance and prejudice, may be addressed in either order.
10. **Effectiveness of Counsel: Presumptions.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.
11. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of ineffective assistance, an appellate court will not second-guess a trial counsel's reasonable strategic decisions. And an appellate court must assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.
12. **Effectiveness of Counsel: Appeal and Error.** In addressing the prejudice component of the test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
13. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice as a result of ineffective assistance of counsel, the petitioner 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 is a probability sufficient to undermine confidence in the outcome.
14. **Rules of the Supreme Court: Trial: Records.** Although court rules require transcription of voir dire examination and of opening and closing statements of parties when requested by counsel, any party, or court, recordation of those parts of trial is not made mandatory by the rules, and failure to require recordation cannot be said, ipso facto, to constitute negligence or inadequacy of counsel.
15. **Effectiveness of Counsel: Pleas: Proof.** The right to effective assistance of counsel extends to the negotiation of a plea bargain, and claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
16. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.
17. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy,

even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.

18. **Attorneys at Law: Effectiveness of Counsel.** A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
19. **Trial: Effectiveness of Counsel: Evidence.** A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel.
20. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
21. **Judgments: Appeal and Error.** When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, an appellate court will affirm.
22. **Postconviction: Appeal and Error.** 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.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Martin V. Klein, of Carney Law, P.C., for appellant.

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

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

Stacy, J.

Leodan Alarcon-Chavez appeals from an order of the district court for Madison County denying his motion for postconviction relief after an evidentiary hearing. Finding no error, we affirm.

I. FACTS

In 2011, Alarcon-Chavez was charged with first degree murder, use of a deadly weapon to commit a felony, and tampering with a witness in connection with the stabbing death of

Maria Villarreal. The following factual summary is taken from our prior opinion in *State v. Alarcon-Chavez*.[1]

Events Prior to Stabbing

Alarcon-Chavez and Villarreal began dating and moved into an apartment together in January 2009. Alarcon-Chavez was the sole leaseholder for their apartment, which was located in Norfolk, Nebraska. Their relationship ended after Alarcon-Chavez informed Villarreal that he was seeing another woman. After the breakup, Villarreal stayed in the apartment and Alarcon-Chavez moved in with a friend. While he was living with his friend, Villarreal called to threaten him on several occasions. Once, she told him that her boyfriend would "adjust accounts" with him.

On two occasions when he knew Villarreal would not be present, Alarcon-Chavez went back to the apartment he had shared with Villarreal. One time, he noticed another man's clothes.

In late February 2010, Villarreal began dating Aniel Campo Pino, and he moved into the apartment with Villarreal and her 3-year-old son.

On March 9, 2010, Alarcon-Chavez saw Villarreal and Pino at a store. Alarcon-Chavez returned to his friend's house around 7 p.m. and began consuming alcohol. Around 11 p.m., he drove across town to Wal-Mart to purchase more beer. While at Wal-Mart, Alarcon-Chavez saw a set of Sunbeam knives, and he testified he decided to purchase them for cooking purposes. He purchased the knives and beer just after 11:30 p.m. He returned to his friend's house and took the beer inside, but left the knife set in the vehicle.

Alarcon-Chavez knew Villarreal went to work early in the morning. So, around 5 a.m. on March 10, 2010, he drove to the apartment where Villarreal was living. He testified that he intended to tell Villarreal and Pino to get

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

out of his apartment. He explained he did not want to live with his friend anymore because he had been sleeping on the floor and using clothes for a pillow.

Stabbing

Alarcon-Chavez arrived at the apartment around 5:10 or 5:20 a.m. He initially got out of the vehicle, but then, after remembering Villarreal's threat that Pino would "adjust accounts" with him, reentered it. Alarcon-Chavez then remembered the knife set, so he opened the package with his teeth and concealed one of the knives on his body.

Alarcon-Chavez entered the apartment and found Villarreal in the kitchen making her lunch. She had a knife in her hand. Villarreal came toward Alarcon-Chavez and grabbed his body and somehow dropped the knife. She was holding Alarcon-Chavez and yelling for the police and for Pino, and Alarcon-Chavez was struggling to escape her grip. Fearing that Pino would attack him, he drew the knife he had concealed on his body. Alarcon-Chavez and Villarreal continued to struggle, and as he tried to get loose, he stabbed Villarreal in the abdomen. Alarcon-Chavez did not remember stabbing her anywhere else. After the stabbing, Villarreal sat on the floor and leaned back onto the carpet. Alarcon-Chavez then heard someone coming and locked the door.

Pino had gone outside before Alarcon-Chavez arrived. He went back to the apartment after he heard Villarreal scream. When he arrived, the door was locked. Villarreal was screaming that he should not come in because a man was stabbing her. Pino told Alarcon-Chavez to come out of the apartment so he could help Villarreal, but Alarcon-Chavez did not respond. . . . Pino heard Villarreal saying, "Leo, don't kill me, Leo, don't kill me." Alarcon-Chavez then told Villarreal he was going to kill her and said, "I told you not to leave me because if you did this was going to happen to you." Pino told a neighbor to call the police and then retrieved a friend.

Police officers were dispatched to the apartment. One officer knocked at 6:06 a.m. and tried unsuccessfully to open the door. An officer standing outside of the apartment activated a tape recorder. Villarreal can be heard on the recording pleading for help. She told Alarcon-Chavez to go away and not to kill her. She said that she had been stabbed five times and that Alarcon-Chavez was still in the apartment with her. The recording also revealed numerous expressions of pain from Villarreal, several of which occurred just before the officers entered the apartment. Alarcon-Chavez testified that Villarreal was not asking him not to kill her, but, rather, was begging him not to kill himself.

When another officer arrived, he knocked and announced his presence and tried to open the door. Either Pino or his friend told the officers they needed to get inside. The officers entered the apartment by kicking the door several times. When the officers opened the door, they observed Alarcon-Chavez standing over Villarreal's body with a knife in each hand. Alarcon-Chavez was shot with an electric stun gun and handcuffed. He was covered in blood. As Alarcon-Chavez was being taken out of the apartment, Pino's friend asked him "why [he] didn't do this to [Pino and his friend]," and he responded that "he didn't want to do any harm to [them], the problem wasn't with [them]."

Although she was obviously in pain, Villarreal was alert, coherent, and talking when the officers first entered the apartment. Within a few minutes, her color turned to an ash gray and she stopped speaking. There was a large amount of blood around her. She died as a result of multiple stab wounds.[2]

Following a jury trial, Alarcon-Chavez was convicted of first degree murder, use of a deadly weapon to commit a felony,

[2] *Id.* at 323-26, 821 N.W.2d at 361-63.

and tampering with a witness. We affirmed his convictions on direct appeal.[3]

Alarcon-Chavez then filed a motion for postconviction relief. The district court appointed new counsel to represent Alarcon-Chavez in the postconviction matter. Alarcon-Chavez was granted leave to amend his postconviction motion several times, and an evidentiary hearing was held on all issues set forth in his fourth amended motion for postconviction relief. In a written order entered April 6, 2016, the district court denied postconviction relief on all grounds. Alarcon-Chavez timely appeals.

II. ASSIGNMENTS OF ERROR

Alarcon-Chavez assigns, restated and summarized, that the district court erred by not finding trial counsel was constitutionally ineffective for failing to (1) "verify, ensure and or preserve" a record was made of voir dire, (2) raise a challenge under *Batson v. Kentucky*[4] when the State struck a Hispanic juror from the venire, (3) communicate plea offers, (4) speak with witnesses before trial, (5) advise Alarcon-Chavez of his right to independently test DNA, (6) advise Alarcon-Chavez of his right to depose the State's expert witnesses, and (7) object during trial to the State's questioning of key witnesses and offers of exhibits. He also assigns that the court erred in not finding his constitutional rights were violated because he was unable to understand one of the court interpreters during trial.

III. 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.[5] An appellate

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[3] *State v. Alarcon-Chavez, supra* note 1.

[4] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[5] *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015).

court upholds the trial court's findings unless they are clearly erroneous.[6] In contrast, an appellate court independently resolves questions of law.[7]

[3,4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[8] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[9] an appellate court reviews such legal determinations independently of the lower court's decision.[10]

[5,6] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[11] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[12]

IV. ANALYSIS

1. Ineffective Assistance of Trial Counsel

Alarcon-Chavez was represented by the same three attorneys at trial and on direct appeal. As such, this postconviction proceeding is his first opportunity to assert that his attorneys were ineffective.[13]

[7-11] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the

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[6] *Id.*

[7] *State v. Harris*, 294 Neb. 766, 884 N.W.2d 710 (2016).

[8] *State v. Branch*, 290 Neb. 523, 860 N.W.2d 712 (2015).

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

[10] *State v. Branch, supra* note 8.

[11] *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[12] *Id.*

[13] See *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

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. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[14] In a nonplea context, the defendant must show a reasonable probability that the result would have been different had counsel not performed deficiently.[15] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[16] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.[17] When reviewing claims of ineffective assistance, an appellate court will not second-guess trial counsel's reasonable strategic decisions. And we must assess trial counsel's performance from the counsel's perspective when the counsel provided the assistance.[18]

[12,13] In addressing the prejudice component of the *Strickland* test, we focus on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.[19] To show prejudice, the petitioner 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 is a probability sufficient to undermine confidence in the outcome.[20]

(a) Failure to Record Voir Dire

At trial, the voir dire proceedings were not recorded, except when the State asked to make a brief record of its reasons

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[14] *State v. Branch, supra* note 8.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[19] *Id.*

[20] *Id.*

for striking a particular juror. Alarcon-Chavez alleged his counsel was ineffective for failing to ensure that voir dire was recorded. He further alleged that he did not waive the right to record voir dire.

At the evidentiary hearing, one of Alarcon-Chavez' attorneys testified that he explained the voir dire process to Alarcon-Chavez, including what would happen when the jury came in, the number of strikes per side, when a strike for cause could be made, and when peremptory strikes could be used. This defense attorney did not remember if there was any conversation about whether to record voir dire, or whether Alarcon-Chavez specifically waived the recording of voir dire.

[14] In its order denying postconviction relief, the district court noted there was no evidence that any party, or the court, requested voir dire be recorded. It then quoted from *State v. Jones*,[21] a case in which we held our court rules require the transcription of voir dire only "when requested by counsel, any party, or the court." In *Jones*, we reasoned that because recording voir dire is not made mandatory by the court rules, "the failure to require recordation cannot be said, ipso facto, to constitute negligence or inadequacy of counsel."[22]

Neb. Ct. R. § 2-105(A)(2) (rev. 2010) states:

> Upon the request of the court or of any party, either through counsel or pro se, the court reporting personnel shall make or have made a verbatim record of anything and everything said or done by anyone in the course of trial or any other proceeding, including, but not limited to . . . the voir dire examination . . . .

Neither *Jones* nor § 2-105(A)(2) provide that a verbatim record of voir dire is mandatory. On this record, we agree with the district court that Alarcon-Chavez failed to prove his trial counsels' performance was deficient, and he failed to prove any prejudice from the fact that voir dire was not recorded. The trial court correctly denied relief on this claim.

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[21] *State v. Jones*, 246 Neb. 673, 675, 522 N.W.2d 414, 415 (1994).

[22] *Id.* at 675, 522 N.W.2d at 415-16.

(b) Failure to Raise *Batson* Challenge

Alarcon-Chavez asserts his trial attorneys were ineffective for failing to raise a *Batson*[23] challenge after the State used a peremptory strike to remove a Hispanic juror from the panel. In striking the juror, the State voluntarily made a record of its reason for the strike even though no *Batson* challenge had been raised by Alarcon-Chavez.

During the evidentiary hearing, one of Alarcon-Chavez' trial attorneys testified he did not raise a *Batson* challenge because he, too, wanted the juror removed from the panel. Trial counsel explained that the juror was a criminal justice major who commented that it would be "an honor" to serve as a juror. Trial counsel thought the juror's comment suggested he was someone who wanted to be on the jury in order to return a conviction. Trial counsel testified that if the State had not used one of its peremptory strikes on that juror, he would have done so.

When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[24] Defense counsel's strategic decision not to raise a *Batson* challenge was reasonable and does not support a finding of ineffectiveness.

(c) Failure to Disclose Plea Offer

[15] Alarcon-Chavez asserts his attorneys were ineffective for failing to timely communicate a plea offer. The U.S. Supreme Court has established that the right to effective assistance of counsel extends to the negotiation of a plea bargain.[25] And claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland v. Washington*.[26]

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[23] See *Batson v. Kentucky, supra* note 4.

[24] *State v. Branch, supra* note 8.

[25] See *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

[26] See *id*.

According to Alarcon-Chavez, the State offered a plea deal which his attorneys did not convey to him until the night before trial. Alarcon-Chavez testified that he accepted the offer once conveyed, but when his attorneys communicated his acceptance to the State the next morning, the plea offer had been withdrawn.

At the evidentiary hearing, one of Alarcon-Chavez' trial attorneys testified he met with Alarcon-Chavez the night before trial and told him that they were looking at a very difficult case to win based on self-defense and that Alarcon-Chavez likely would be convicted. Trial counsel testified he told Alarcon-Chavez it might be advantageous to try and get a last-minute plea agreement for something that did not carry a mandatory life sentence. Trial counsel asked Alarcon-Chavez whether he would be willing to plead to second degree murder, use of a weapon, witness tampering, and making terroristic threats. According to trial counsel, Alarcon-Chavez agreed and authorized him to contact the State. Trial counsel contacted the prosecutor directly after this conversation with Alarcon-Chavez and communicated the plea offer. The prosecutor refused the plea offer and would not make a counter offer. Trial counsel relayed this information to Alarcon-Chavez the next morning. Trial counsel's version of events was confirmed by another of Alarcon-Chavez' trial attorneys, who testified in addition that she had approached the prosecution on several occasions during the pendency of the case requesting a plea offer, but each time, the prosecutor had refused.

[16] In its order, the court made factual findings consistent with the testimony of Alarcon-Chavez' trial attorneys, and the court concluded Alarcon-Chavez failed to prove his attorneys were ineffective for failing to timely communicate plea offers. In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.[27] We find no

[27] *State v. Branch, supra* note 8.

clear error in the district court's factual findings, and we agree that Alarcon-Chavez failed to prove his trial attorneys were ineffective for failing to communicate plea offers.

(d) Failure to Speak With Witnesses

At his first meeting with defense counsel, Alarcon-Chavez provided counsel the names of four witnesses he wanted to testify on his behalf. Alarcon-Chavez claims all four witnesses would have testified about the victim's threatening and blackmailing him and would have supported his claim of self-defense. Alarcon-Chavez claims his attorneys were ineffective, because they failed to contact or call these witnesses at trial.

At the evidentiary hearing, Alarcon-Chavez' attorneys testified that only one of the potential witnesses could be located. With respect to that witness, defense counsel concluded that based on the witness' reports to police, he would not have been a helpful witness. Additionally, after meeting with that witness, Alarcon-Chavez' counsel concluded he was unhelpful and bordering on hostile.

Counsel further testified, with respect to all four witnesses identified by Alarcon-Chavez:

> All of this information from these witnesses, if it came out, and I believed it would have — would not have helped [Alarcon-Chavez'] case. It would have shown that there was a prior relationship that involved threats and violence against each other, and that's the last thing I wanted the jury to hear was prior incidents of violent behavior toward this victim.

In its order, the district court made findings consistent with the testimony of Alarcon-Chavez' trial attorneys and concluded Alarcon-Chavez had failed to meet his burden of proof on this claim of ineffective assistance of counsel. We find no clear error in the trial courts findings, and we agree with its conclusion.

[17-19] The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a

finding of ineffectiveness of counsel.[28] A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[29] A reasonable strategic decision to present particular evidence, or not to present particular evidence, will not, without more, sustain a finding of ineffective assistance of counsel. We do not second-guess strategic decisions made by trial counsel, so long as those decisions are reasonable.[30] Here, trial counsels' decision not to pursue or call the four witnesses was reasonable, and counsel did not perform deficiently.

(e) Independent DNA Testing

Alarcon-Chavez argues his trial attorneys were ineffective for failing to independently test DNA evidence and for failing to advise him of his right to have DNA testing done. When asked what DNA evidence Alarcon-Chavez wanted his lawyers to find, Alarcon-Chavez responded:

> Well, I don't know how to explain it. Before [the prosecution] said that I was the only one in the apartment, true, and I testified that I was the one that stabbed her. So what I think is [my lawyers] should have informed me about the [sic] not doing the DNA test.

At the evidentiary hearing, one of Alarcon-Chavez' trial attorneys testified that he did not think DNA testing would have been helpful to the defense. Police officers found Alarcon-Chavez standing over the victim and holding two knives, and Alarcon-Chavez did not deny stabbing the victim. The issue at trial was not the identity of the perpetrator, but whether Alarcon-Chavez had acted in self-defense.

The district court found there was no merit to the claim that counsel were ineffective for failing to pursue independent testing of the DNA evidence, reasoning:

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[28] *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

[29] *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989).

[30] *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

> [Alarcon-Chavez'] former attorney testified that DNA analysis of the knife used would not have furthered [his] case. [Alarcon-Chavez] wanted to raise the affirmative defense of self-defense; therefore, no issue of identity existed. The evidence also revealed when the officers entered the apartment there were only two people present, the victim and [Alarcon-Chavez].

We find no error in the district court's findings on this issue. Defense counsels' decision not to conduct independent DNA testing was reasonable under the circumstances, and counsel did not perform deficiently for failing to independently test DNA evidence. Nor has Alarcon-Chavez shown any prejudice from counsels' failure to advise him of the right to have DNA testing done.

(f) Failure to Depose State's Expert Witnesses

Alarcon-Chavez asserts his defense attorneys were ineffective for failing to depose the State's expert witnesses. Neither his postconviction motion nor his briefing to this court identifies which expert witnesses his attorneys should have deposed, or what such depositions might have revealed.

One of Alarcon-Chavez' trial attorneys testified that after reviewing all the police reports, medical reports, hospital records, autopsy records, and the depositions of the police officers involved, he did not see a need to depose anyone else. The district court concluded Alarcon-Chavez failed to prove any prejudice as a result of his attorneys' not deposing the State's experts and found this claim of ineffective assistance to be without merit. It noted evidence showing that Alarcon-Chavez' trial attorneys hired an independent physician to review the State's pathologist's report and opinion, and the independent physician agreed with the State's expert's opinion regarding the cause and manner of death.

[20] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been

different.[31] We agree with the district court's determination that Alarcon-Chavez failed to establish prejudice as a result of defense counsel's failure to depose the State's experts. We therefore reject this claim of ineffective assistance of counsel.

(g) Failure to Object at Trial

Alarcon-Chavez claims his trial attorneys were ineffective due to their "failure to object to the State's questioning of key witnesses and offers of exhibits during the Trial." In his appellate brief, Alarcon-Chavez identifies the following instances where his counsel failed to object:

> During testimony of . . . Pino on direct examination by the Madison County Attorney, he testified to what Manuel Montalvo was saying to [Alarcon-Chavez], which was clearly hearsay. There was no objection made by the counsel for [Alarcon-Chavez]. . . . In addition, counsel for [Alarcon-Chavez] did not object to "Exhibit 9" . . . which was a picture of the victim lying on the floor. . . . At another time, . . . Pino was questioned about and testified to what the victim told him about her wound and when she received the same, and there was no objection by counsel for [Alarcon-Chavez]. . . . In another incident during his testimony, there were multiple questions about what the victim said to . . . Pino while she was laying [sic] on the floor after the police arrived, and there were no objections to any of those questions. . . . He testified to what he saw when he entered the apartment and discussed there being a child present in the apartment without objection. . . . Pino testified he saw [Alarcon-Chavez] holding the knives, but was lead [sic] into the question by the County Attorney asking "and did you see the knives?"[32]

The district court concluded Alarcon-Chavez failed to show how any of the questions or exhibits were objectionable or

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[31] See *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

[32] Brief for appellant at 22-23.

how he was prejudiced by the admission of the evidence. The court also found that although Alarcon-Chavez argued the cumulative effect of these failures amounted to ineffective assistance, "[n]o proof was made as to what cumulative effect these alleged failures may have had upon the jury." The court found no merit to this claim of ineffective assistance.

We agree with the district court's determination that Alarcon-Chavez failed to show prejudice from counsel's alleged deficient performance. We therefore conclude this assignment of error is meritless.

2. Problem Understanding Interpreters

Alarcon-Chavez speaks Spanish, and court interpreters were used during pretrial and trial proceedings. Alarcon-Chavez claims he had trouble understanding one of the two court interpreters, and consequently, "he could not assist in his own defense, there by [sic] denying his right to due process and violating his constitutional rights."[33]

We have held that a defendant's inability to comprehend criminal proceedings or communicate in English at such proceedings can result in a violation of the defendant's due process and Sixth Amendment rights.[34] Neb. Rev. Stat. § 25-2401 (Reissue 2016) provides that it is

> the policy of this state that the constitutional rights of persons unable to communicate the English language cannot be fully protected unless interpreters are available to assist such persons in legal proceedings. It is the intent of sections 25-2401 to 25-2407 to provide a procedure for the appointment of such interpreters to avoid injustice and to assist such persons in their own defense.

At the evidentiary hearing, Alarcon-Chavez testified that he is of Cuban descent. He testified that Cubans have a different dialect than other Spanish speakers, and that some

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[33] *Id.* at 24.

[34] See *State v. Bol*, 294 Neb. 248, 882 N.W.2d 674 (2016).

Spanish words have a different meaning in Cuba than they do in Mexico. Alarcon-Chavez also testified that on the first day of trial, he told one of his attorneys that he could not understand one of the interpreters, who he described as having a voice that "was very thick." Alarcon-Chavez testified that his attorney told the judge about the situation, but the judge said the interpreter would have to continue, because there were no other interpreters assigned to the case. The record contains no such discussion.

Alarcon-Chavez' trial attorney denied there was a hearing before the judge at which Alarcon-Chavez expressed displeasure with the interpreter. But trial counsel confirmed that at some point during the trial, Alarcon-Chavez mentioned to counsel that he was having trouble understanding one of the interpreters due to the interpreter's accent. According to trial counsel, he asked Alarcon-Chavez whether he generally understood what was happening and Alarcon-Chavez replied that he "was just having difficulty because of the accent and the kind of mumbling . . . but he said he generally understood what was going on." Trial counsel testified that he could not recall for certain, but thought he may have asked the interpreter to enunciate better. Additionally, trial counsel testified that each day after court, he met with Alarcon-Chavez using his own interpreter to make sure Alarcon-Chavez understood what was happening; Alarcon-Chavez never mentioned being unable to understand the proceedings.

The interpreter also testified. He has interpreted for the courts since 1991 and has been a certified court reporter since 2003. He has interpreted for Cuban clients and has never had difficulty speaking with them in Spanish. According to the interpreter, he had interpreted for Alarcon-Chavez before the murder trial and had no difficulty conversing with Alarcon-Chavez during the murder trial. The same interpreter was used during Alarcon-Chavez' sentencing hearing. The interpreter testified that he asked Alarcon-Chavez whether he understood him, and Alarcon-Chavez responded affirmatively.

The district court resolved this claim on the merits by finding that Alarcon-Chavez had failed to prove he could not understand the interpreter. We find no clear error in the district court's findings, but we affirm on this issue for a different reason: We conclude this postconviction claim is procedurally barred.

[21,22] When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, an appellate court will affirm.[35] 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.[36]

Alarcon-Chavez was aware of any difficulty understanding the interpreter at the time of his direct appeal and could have raised this issue on direct appeal, but did not. Nor, in this postconviction action, has Alarcon-Chavez asserted this claim as one of ineffective assistance of counsel. His claim that he had trouble understanding one of the interpreters is procedurally barred, and this assignment of error is meritless.

V. CONCLUSION

For all of the foregoing reasons, we conclude the district court did not err in denying Alarcon-Chavez' fourth amended motion for postconviction relief.

Affirmed.

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[35] *Luet, Inc. v. City of Omaha*, 247 Neb. 831, 530 N.W.2d 633 (1995).

[36] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

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