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State of Nebraska, appellee, v. Kashuan M. McCree, appellant.

___ N.W.3d ___

Filed September 18, 2026. No. S-24-972.

1. **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.
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. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
4. **Trial: Evidence: Appeal and Error.** On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
5. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, materially influenced the outcome of the case.
6. **Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
7. **Hearsay.** By definition, an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted.
8. ____. Statements are not hearsay if the proponent offers them to show their impact on the listener, and the listener's knowledge, belief, response, or state of mind after hearing the statements is relevant to an issue in the case.

9. **Rules of Evidence: Hearsay: Words and Phrases.** Hearsay included within hearsay, or double hearsay, is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in the Nebraska Evidence Rules.
10. **Jury Instructions: Appeal and Error.** When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.
11. **Trial: Juries: Appeal and Error.** The standard of review in a case involving discharge of a juror is whether the trial court abused its discretion.
12. **Trial: Juries.** A trial court has broad discretion to discharge a juror for cause so long as the court has a legal or factual basis to believe that the juror cannot serve as an impartial juror.
13. **Trial: Juries: Evidence.** If a court is informed of matters which might reasonably constitute grounds for a challenge for cause of one or more jurors, which grounds arose out of matters occurring after the jury was sworn, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause.
14. **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.
15. ____: ____. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors, as well as any applicable legal principles in determining the sentence to be imposed.
16. **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.
17. **Constitutional Law: Minors: Sentences.** A sentencing court may, consistent with the Eighth Amendment, impose an actual life-without-parole sentence on an individual under 18 years of age so long as the sentencing court retains discretion to impose a lesser penalty.
18. **Effectiveness of Counsel: Appeal and Error.** An appellate court resolves claims of ineffective assistance of counsel on direct appeal only where the record is sufficient to conclusively determine whether trial counsel did or did not provide effective assistance and whether the

defendant was or was not prejudiced by counsel's alleged deficient performance as matters of law.

19. ____: ____. Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law.
20. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
21. **Effectiveness of Counsel: Proof: Appeal and Error.** When reviewing an ineffective assistance of counsel claim on direct appeal, the question is whether the record affirmatively shows that the defendant's trial counsel's performance was deficient, and that the deficient performance actually prejudiced the defendant's defense.
22. **Effectiveness of Counsel: Proof.** A court may examine performance and prejudice in any order and need not examine both prongs if a defendant fails to demonstrate either.
23. ____: ____. To show deficient performance, the defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
24. ____: ____. 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.
25. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
26. **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.
27. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
28. ____. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
29. **Effectiveness of Counsel: Records: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record.
30. **Evidence.** Cumulative evidence means evidence tending to prove the same point to which other evidence has been offered.
31. **Trial: Convictions: Evidence: Appeal and Error.** 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.

32. **Motions to Strike: Jury Instructions.** When an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.
33. **Trial: Constitutional Law: Testimony.** A defendant has a fundamental constitutional right to testify.
34. **Trial: Attorney and Client: Testimony.** Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
35. **Trial: Attorney and Client: Testimony: Waiver.** The competence and soundness of defense counsel's tactical advice is crucial to whether counsel has presented sufficient information to the defendant to permit a meaningful voluntary waiver of the right to testify.

Appeal from the District Court for Lancaster County: Matthew O. Mellor, Judge. Affirmed.

Kristi J. Egger, Lancaster County Public Defender, and Sarah P. Newell for appellant.

Michael T. Hilgers, Attorney General, and P. Christian Adamski for appellee.

Funke, C.J., Cassel, Stacy, Papik, Freudenberg, Bergevin, and Vaughn, JJ.

Vaughn, J.

I. INTRODUCTION

Kashuan M. McCree was convicted by a jury of first degree murder and use of a firearm to commit a felony. On direct appeal, McCree challenges both his convictions and his sentences. McCree assigns multiple errors by the district court and multiple deficiencies of trial counsel, which he alleges rise to the level of deprivation of his right to effective counsel. For the following reasons, we affirm.

II. BACKGROUND

On the last day of March 2023, McCree attended a house party to celebrate the birthday of his cousin K.W. As many as 70 to 100 people attended, drugs and alcohol were present,

and many of the party attendees were intoxicated. There was loud music and balloons that were popped. The party concluded when party attendee Damien Brave suffered fatal gunshot wounds.

At trial, multiple party attendees testified to the events that led up to Brave's death, including Brave's friend K.R. K.R. testified that McCree had approached Brave, asking if he had marijuana, but Brave "shook his head no," despite K.R.'s marijuana being in Brave's backpack. According to K.R., McCree walked away but returned 2 to 3 minutes later, pulled out a tan-colored gun from his waistband, and pointed it at Brave's stomach and asked, "So if I shoot you and take your bag, there's not going to be anything in it?" Brave was calm, had his hands "[o]n his side," and did not respond. K.R. testified she turned to talk to another individual and, as K.R. turned her head back toward Brave, the gun fired. She observed Brave holding his stomach, and she ran. K.R. testified that she heard three gunshots total; that after he was shot, two men carried Brave to K.R.'s car; and that she drove Brave to the hospital. Brave died from three gunshot wounds, one to his torso and two to his right leg.

The day after the shooting, McCree left for Michigan. Investigator Jason Drager and Sgt. Mike Ripley traveled to Michigan to interview McCree. During the interview, McCree admitted to shooting Brave but told investigators that Brave had approached him seeking marijuana and then, when McCree would not give him any, Brave pulled out a gun. According to McCree, he then rushed Brave, Brave fired a shot, and then McCree shot Brave with a tan-colored gun.

Three 9-mm shell casings were recovered at the scene; all three were fired from the same gun, but no gun was recovered. A DNA analysis of a partial profile that was obtained from a combined swabbing of all three casings revealed that McCree was one of two DNA contributors.

Following the jury's verdicts of guilty on both counts, McCree was sentenced to consecutive terms of imprisonment

of not less than 70 years nor more than McCree's life on count I, first degree murder, a Class IA felony, and not less than 15 years nor more than 20 years on count II, use of a firearm to commit a felony, a Class IC felony. McCree received credit for 587 days served. McCree appeals and was appointed different counsel for the appeal.

III. ASSIGNMENTS OF ERROR

Of McCree's 15 assigned errors, all of which have been restated and renumbered, 5 assign errors of the district court and the remaining 10 assign errors of ineffective assistance of counsel.

McCree assigns district court errors regarding the admission of evidence, jury procedure, and sentencing. The admission of evidence assignments assert error in the court's (1) admitting evidence of McCree's purported propensity for violence, (2) overruling hearsay objections to statements made to law enforcement that were admitted for investigatory purposes, and (3) admitting evidence of McCree's desire to obtain a "teardrop tattoo."

McCree's jury procedure and sentencing assignments assert that the district court (1) failed to meaningfully inquire of juror No. 8 when she requested access to therapy after viewing Brave's autopsy photographs and (2) failed to consider the mitigating factors in Neb. Rev. Stat. § 28-105.02 (Reissue 2016) during sentencing, including the results of the comprehensive mental health evaluation.

McCree's remaining 10 assignments of error assert ineffective assistance of counsel. His first two ineffective assistance of counsel claims allege trial counsel performed deficiently by failing to (1) object to propensity evidence, place propensity evidence in context through cross-examination, and request a limiting instruction and (2) effectively impeach and cross-examine witnesses.

McCree's next three assignments of error assert trial counsel was ineffective for failing to (1) review discovery with

McCree, (2) adequately discuss plea negotiations and potential trial outcomes with McCree, and (3) request an analysis from "Dr. Matt Huss" as to the mitigation factors provided by § 28-105.02 and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

McCree's final five assignments of error assert that trial counsel performed deficiently by failing to (1) object to teardrop tattoo evidence under Neb. Rev. Stat. § 27-403 (Reissue 2016) and request a limiting instruction, (2) request a limiting instruction for statements made to law enforcement received "'for investigative purposes'" and not objecting to their receipt under § 27-403, (3) object to testimony about McCree's credibility and the lack of credibility of other favorable witnesses, (4) object to the State's improper bolstering of each lay witness, and (5) adequately advise McCree whether he should testify.

IV. STANDARD OF REVIEW

We set forth the applicable standards of review in the relevant sections of the analysis below.

V. ANALYSIS

1. District Court Errors Regarding Admission of Evidence

McCree assigns three errors of the district court regarding the admission of evidence. We first set forth the standard of review applicable to all three errors.

(a) Standard of Review

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025). 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 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. *State v. Price*, 320 Neb. 1, 26 N.W.3d 70 (2025).

[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. *State v. Corral*, 318 Neb. 940, 20 N.W.3d 372 (2025).

(b) Admission of Evidence of Propensity for Violence

McCree assigns the district court erred by admitting evidence of his purported propensity for violence under Neb. Rev. Stat. § 27-404 (Cum. Supp. 2024) because the State denied its intention to introduce such evidence during pretrial motions, McCree did not open the door, and the proper procedure for admitting such evidence was not followed. Specifically, it appears that McCree challenges the admission of messages between K.W.'s cell phone and "Menace Da Yung OG" on March 31, 2023; a message to a recipient named "POPS" on March 29, 2023; messages to a recipient named "BM" between March 8, 2023, and March 25, 2023; numerous photographs and videos of McCree's holding guns and marijuana; messages between the iCloud accounts "menacemccree@icloud.com" and "kemariondad@icloud.com"; and the testimony of Investigator Chris Fields related to these items.

(i) Additional Background

Prior to trial, McCree filed a motion for disclosure of the State's intention to use § 27-404 evidence, which was sustained; at the hearing, the State made no disclosures. At trial, the messages, videos, and photographs McCree argues represented improper character evidence under § 27-404 were admitted as exhibit 63 and were published to the jury. McCree objected to the admission of exhibit 63, but only

on hearsay and confrontation grounds. Thereafter, during Investigator Fields' testimony, the State sought to elicit testimony about specific messages contained in exhibit 63, and several objections were made. Only those arguably constituting § 27-404 objections and those required for context will be specifically discussed.

a. Messages Between menacemccree@icloud.com and kemariondad@icloud.com

Investigator Fields testified, over a relevance objection, that an outgoing message from "menacemccree@icloud.com" stated, "Yeah. Like I wasn't, auntie was, because I was trying to be cool of on my dead homie. Now I want to smoke a person." Investigator Fields then testified, over a "relevance, 404" objection, that another outgoing message from "menacemccree@icloud.com" stated, "But it ain't no beef but I still want to smoke him." He testified another outgoing message from "menacemccree@icloud.com" stated, "I was fitting to smoke him big bro and I can't stop thinking about this [expletive] on my baby. I upped. I was fitting to send them there bro." Over a relevance objection, he testified an incoming message from "kemariondad@icloud.com" stated, "Don't act on it bro." During his interview, McCree told law enforcement that his nickname is "Menace."

The actual February 14, 2023, messages, which are substantially similar to Investigator Fields' testimony, are contained within exhibit 63. Exhibit 63 also contains additional messages that were omitted during Investigator Fields' testimony and provide additional context.

b. Message to "POPS" on March 29, 2023

When the State sought to elicit testimony from Investigator Fields about specific messages "ending in 9783 pops" that were contained in exhibit 63, McCree objected on relevance and foundation. The State, in an effort to defeat McCree's objections, argued, "[I]t shows a propensity for violence. Even the night of [the incident, McCree] is making statements of

wanting to use his anger, shoot a [expletive], or things like that. It all goes to his state of mind." After hearing the State's argument, McCree responded that it was "improper character evidence." The district court overruled the objection and informed trial counsel that if he wanted "to reference this objection on any other messages coming up," he could, to which trial counsel responded, "I'll just reference 603." Investigator Fields then testified that a message dated March 29, 2023, stated, "Make sure you tell that [expletive] stay away from me cuz I'll get blick that." Exhibit 63 shows the March 29, 2023, message as being sent by "menacemccree@icloud.com" to a recipient named "POPS" whose phone number ended in "9783" and as stating, "[M]ake shur yu tell dat [expletive] stay away from me kuhz ill getblike dat."

c. Messages to "BM"

Investigator Fields testified, over objections of "foundation, relevance, [and] 603" that a message from menacemccree@icloud.com to a recipient named "BM," whose phone number ended in "2691," was sent on March 8, 2023, and stated, "Do you like my new pole." He then testified that a second message from menacemccree@icloud.com to the same recipient stated, "[Expletive] talks about shooting, you know I got blicks." Exhibit 63 contains the messages sent to "BM," which are substantially similar to what was testified to by Investigator Fields and shows that the second message was sent on March 25.

McCree does not point to any other objections made at trial asserting that exhibit 63 or Investigator Fields' testimony regarding exhibit 63 was improper character evidence, and McCree does not point to any request to strike exhibit 63 as improper character evidence under § 27-404. Although McCree's appellate brief appears to make other arguments as to why he believes this evidence is not admissible, these fall outside of the scope of his assignment of error and will not be considered.

(ii) Resolution

[3,4] A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *Id*. A defendant must make an objection at trial to the offer of evidence of other crimes, wrongs, or acts, which was the subject of a hearing before the court, in order to preserve an alleged error in its admission during trial. See *State v. Rush*, 317 Neb. 622, 11 N.W.3d 394 (2024), *modified on denial of rehearing* 317 Neb. 917, 12 N.W.3d 787, *disapproved on other grounds, State v. Rupp*, 320 Neb. 502, 28 N.W.3d 74 (2025).

McCree fails to point to anywhere in the record showing he objected to the admission of any of the complained-of evidence on the basis of nondisclosure at pretrial motions or improper process. At the time of McCree's § 27-404 objections, exhibit 63 had already been offered and received. Although McCree objected to exhibit 63 on grounds other than § 27-404, this did not properly preserve for appeal his argument that exhibit 63 constituted inadmissible character evidence under § 27-404, that it was not disclosed pretrial, or that the process was improper. See *Harris, supra*. Likewise, the pretrial motion itself did not serve to preserve any § 27-404 objection not raised at trial. See *Rush, supra*. However, that does not conclude our analysis.

We must also address whether the testimony of Investigator Fields was admitted in error and whether the testimony was prejudicial to McCree. This is necessary because "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." See Neb. Rev. Stat. § 27-103 (Reissue 2016).

[5] Harmless error jurisprudence recognizes that not all trial errors, even those of constitutional magnitude, entitle a

criminal defendant to the reversal of an adverse trial result. *State v. Torres Aquino*, 318 Neb. 771, 19 N.W.3d 222 (2025). An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *Id*. When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, materially influenced the outcome of the case. *Id*.

Any of the testimony of Investigator Fields that was not objected to on § 27-404 grounds was not preserved for appeal. The testimony of Investigator Fields that was arguably objected to on § 27-404 grounds, as discussed above, was not materially different than the evidence contained in exhibit 63, which was already in evidence. Accordingly, the district court's admission of Investigator Fields' undisclosed testimony, without proper procedure and over McCree's § 27-404 objections, was harmless beyond a reasonable doubt. The trial court's ruling, even if found to be in error, did not materially influence the outcome of the case, in light of the totality of the record.

(c) Admission of Statements to Law Enforcement for Investigatory Purposes

McCree assigns the district court erred by overruling his hearsay objections to numerous statements made to law enforcement that were admitted for investigatory purposes. McCree also argues that a limiting instruction should have been given to the jury.

(i) Additional Background

At trial, the following testimony was elicited, over hearsay objections. Sergeant Ripley testified that he received an anonymous call through dispatch that the caller "belie[ved] that [McCree] was fleeing to Michigan." Sergeant Ripley also testified that McCree's mother arrived at the crime scene and told Sergeant Ripley that "she had heard there was a

shooting at the house and she was concerned for her son's safety because he had been on runaway status for about three or three and a half months." Sergeant Ripley also testified that a concerned citizen who had "no firsthand knowledge . . . indicated to [him] that through social media she was hearing that [McCree] was the person responsible for the shooting up on North 27th." The State also elicited testimony from Investigator Drager that interviews with party attendees and phone line tips were also "identifying [McCree]."

(ii) Resolution

[6] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Mabior*, 314 Neb. 932, 994 N.W.2d 65 (2023). Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere. *Id*.

[7,8] Some statements can be determined not to be hearsay based solely on the definition of "hearsay." For example, by definition, an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted. *Id*. Thus, statements are not hearsay to the extent that they are offered for context and coherence of other admissible statements, and not for the truth or the truth of the matter asserted. *Id*. This court applied this principle in *State v. Corral*, 318 Neb. 940, 20 N.W.3d 372 (2025), when it found that statements made to law enforcement to explain the steps taken in an investigation of a defendant, rather than to prove the truth of the matter asserted, are generally admissible as nonhearsay provided the probative value of the evidence's nonhearsay purpose is not substantially outweighed by the danger of unfair prejudice.

Similarly, statements are not hearsay if the proponent offers them to show their impact on the listener, and the listener's knowledge, belief, response, or state of mind after hearing the statements is relevant to an issue in the case. *Mabior, supra.*

[9] Hearsay included within hearsay, or double hearsay, is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. *Corral, supra*.

The record establishes that the district court did not err in admitting the testimony regarding the interviews and phone line tips that identified McCree, the concerned citizen's statements, the anonymous caller's statements, or McCree's mother's statements because these statements were not offered to prove that McCree was responsible for shooting Brave. Instead, they were offered to explain why the investigation progressed the way it did and why law enforcement identified McCree as a suspect. Thus, the district court did not err in admitting the statements for this nonhearsay purpose.

[10] As to the absence of a limiting instruction, "[w]hen a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error." *State v. Hinrichsen*, 292 Neb. 611, 638, 877 N.W.2d 211, 229 (2016). McCree did not request a limiting instruction but now assigns error to the district court's failure to give one. Thus, this court reviews the failure to give a limiting instruction for plain error only and finds none.

(d) Admission of Evidence of Desire for Teardrop Tattoo

McCree assigns that the district court erred by admitting evidence of his desire to obtain a teardrop tattoo because the State laid inadequate foundation to reliably establish the tattoo's meaning and the foundation laid invited the jury to speculate that McCree had gang ties, which was inadmissible under Neb. Rev. Stat. §§ 27-401 (Reissue 2016) and §§ 27-403 and 27-404.

(i) Additional Background

Exhibit 63 contains the following April 2, 2023, messages between McCree's phone and a number marked "POPS":

> [McCree:] [W]ho yk do tattoo[o]s[?]

[McCree:] [I] need a teardrop on me[.]
["POPS":] No you don't[.]
[McCree:] [Y]es i do imma get one[.]
["POPS":] Real men don't show off we invisible[.]
["POPS":] Tear drop only put you in a bad category[.]

Investigator Fields testified regarding the messages and, over a foundation objection, stated that "[b]asically, gang members, if they have taken a life, they get a teardrop tattoo to signify how many people they've killed" and agreed the meaning is "pretty common knowledge," to his understanding. McCree objected again on foundation and opinion, which were ultimately sustained. The State then elicited testimony from Investigator Fields that he taught the motorcycle gang portion of new investigator training, was familiar with other types of gang activities, and had listened to other investigators' discussions about "facial teardrop tattoos." He was then asked again what his understanding was as to what a teardrop facial tattoo meant, and McCree objected on foundation. The trial court overruled the objection, and Investigator Fields testified that "[i]t's a tattoo that somebody gets on their face when they've taken somebody's life."

The State later elicited testimony highlighting another message sent from McCree's phone. The April 2, 2023, message, contained within exhibit 63, states "deez [expletive] wanna tat a yeardrop on me," which Investigator Fields read as "Dee's want a tat a teardrop on me." McCree did not lodge a specific objection at the inception of this testimony.

On cross-examination, Investigator Fields admitted that he did not know why McCree would have wanted to get a teardrop tattoo.

(ii) Resolution

McCree argues that highlighting and admitting, over confrontation and hearsay objections, the messages in exhibit 63 that McCree sent about wanting a teardrop tattoo, without sufficient foundation, allowed the jury to speculate that

he had gang ties, which was inadmissible under §§ 27-401, 27-403, and 27-404. McCree also argues that the State's introduction of evidence tying McCree's interest in a teardrop tattoo to gang violence invited the jury to speculate not only that McCree had gang ties, but that those gang ties motivated the conflict with Brave and that there was no evidence this was the case. McCree further argues that allowing the State to compound the prejudicial effect of its "'drugs, firearms, and violence' theme" with the specter of gang involvement constitutes reversible error. Brief for appellant at 21.

McCree did not object to exhibit 63 or the testimony of Investigator Fields regarding the teardrop tattoo on the grounds of §§ 27-401, 27-403, and 27-404; thus, this argument has not been preserved and therefore will not be considered. See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

As to McCree's hearsay and Confrontation Clause objections, the messages attributable to McCree were his own statements offered against him, falling into the nonhearsay category of statements of a party opponent. See Neb. Rev. Stat. § 27-801(4)(b)(i) (Cum. Supp. 2024). For this same reason, their admission does not raise hearsay or Confrontation Clause concerns. See *State v. Vaughn*, 314 Neb. 167, 190, 989 N.W.2d 378, 397 (2023) ("'statement that is not hearsay raises no Confrontation Clause concerns'").

The statements within the messages authored by "POPS" do not violate hearsay rules or the Confrontation Clause, as they served only to assist the jury in understanding and assessing the messages from McCree; they were not offered to prove the truth of the matter asserted. See *State v. Mabior*, 314 Neb. 932, 965, 994 N.W.2d 65, 92-93 (2023) ("statements are not hearsay to the extent that they are offered for context and coherence of other admissible statements, and not for the '"truth or the truth of the matter asserted"'").

No other objections were made to the admission of exhibit 63, which contained the messages. Thus, the messages themselves are not inadmissible on confrontation or hearsay

grounds, and any error, if one exists, can only be based on Investigator Fields' explanation concerning the meaning of the teardrop tattoo over McCree's foundation objection.

McCree argues that the State laid inadequate foundation for Investigator Fields' testimony and that the foundation laid invited the jury to speculate that McCree had gang ties. We do not believe McCree has shown any error with respect to this assignment. As for foundation, Investigator Fields explained the basis for his knowledge as to the significance of a teardrop tattoo. We also disagree with McCree's suggestion that the foundation laid invited the jury to speculate that McCree had gang ties. To the contrary, Investigator Fields merely explained that he learned about teardrop tattoos and their significance through teaching and participating in law enforcement education regarding gang activities.

Furthermore, even if McCree could show that the district court erred, any error would be harmless. Despite giving a different account of the facts leading up to the shooting, McCree admitted during his interview that he shot Brave. Additionally, much of the testimony from the party attendees at trial corroborated the State's theory that McCree shot Brave after a dispute over Brave not wanting to give McCree his backpack or the contents thereof. Because the jury was instructed that they could find McCree guilty of first degree murder under felony murder, the State was required only to prove beyond a reasonable doubt that McCree killed Brave on or about March 31, 2023, in Lancaster County, Nebraska, and that McCree did so while in the commission of a robbery or did so in an attempt to commit a robbery. See *State v. Haynie*, 317 Neb. 371, 9 N.W.3d 915 (2024). Under this theory, an intent to kill, premeditation, and malice were not necessary. See *id*. Furthermore, Investigator Fields admitted that he did not know why McCree would have wanted to get a teardrop tattoo.

For these reasons, we conclude that the admission of Investigator Fields' testimony over McCree's foundation

objection did not, in light of the totality of the record, materially influence the outcome of the case and that therefore, any error was harmless. See *State v. Torres Aquino*, 318 Neb. 771, 19 N.W.3d 222 (2025).

2. District Court Errors Regarding Jury Procedure and Sentencing

McCree assigns the district court erred with respect to jury procedure and sentencing.

(a) Failure to Question Juror No. 8

McCree assigns that the district court erred by failing to "meaningfully inquire of" juror No. 8 when she requested access to therapy after viewing Brave's autopsy photographs.

(i) Standard of Review

[11] The retention or rejection of a juror is a matter of discretion for the trial court. *State v. Huff*, 298 Neb. 522, 905 N.W.2d 59 (2017). Thus, the standard of review in a case involving discharge of a juror is whether the trial court abused its discretion. *Id.*

(ii) Additional Background

On November 1, 2024, the district court informed counsel that juror No. 8 approached the bailiff outside the presence of the other jurors and reported that "[a]fter viewing evidence yesterday that was presented with photographs of [Brave's] body at the hospital, stated [she] became emotional and stated that she had panic attacks last night and asked if there were services available for once the trial is over to process through those things."

Upon learning of juror No. 8's inquiry, the parties proposed different courses of action be taken. McCree's trial counsel requested juror No. 8 be individually "questioned about their ability to follow the instructions, decide the case based on the evidence, and the evidence alone, and set aside any of the feelings of the trauma or — the trauma they're

feeling, to be able to set that aside, base their decision on the evidence alone" to determine whether juror No. 8 could go forward. The State objected, stating that juror No. 8 gave no indication this impacted her ability to "do the trial," but, rather, that it was "emotional" for her and she wondered if there were "additional services." The State further argued that questioning juror No. 8 would be akin to asking her to reach a conclusion or to "kind of" deliberate before the conclusion of the trial.

The trial court overruled the request to have juror No. 8 questioned, explaining that the juror did not say she could not be fair or impartial or that her decision was being swayed one way or the other, the comments were not made in the presence of other jurors, and she did not ask to do anything during the trial or to be excused as a juror. The trial court further stated that it believed that questioning juror No. 8 would start to encroach into the deliberation process.

(iii) Resolution

McCree argues that, while juror No. 8's emotionality did not equate to misconduct, questioning juror No. 8 was necessary to determine whether her emotionality was triggered by a prejudicial event and that such an inquiry would have allowed the district court to determine whether a curative instruction reminding the jury that its decision needed to be based solely on evidence and not on emotion, bias, or prejudice was necessary. At oral argument, McCree's counsel argued that the failure to question juror No. 8 constituted structural error.

[12,13] A trial court has broad discretion to discharge a juror for cause so long as the court has a legal or factual basis to believe that the juror cannot serve as an impartial juror. *State v. Figures*, 308 Neb. 801, 957 N.W.2d 161 (2021). When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually

occurred. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988). If so, "'the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial.'" *Id*. at 95, 430 N.W.2d at 289. A juror might testify as to whether extraneous prejudicial information was improperly brought to the jury's attention, but no evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith. *McDonald, supra*.

> [I]f the court is informed "of matters which might reasonably constitute grounds for a challenge for cause of one or more jurors, which grounds arose out of matters occurring after the jury was sworn, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury."

State v. Huff, 298 Neb. 522, 532, 905 N.W.2d 59, 68 (2017) (quoting *State v. Myers*, 190 Neb. 466, 209 N.W.2d 345 (1973)).

Despite the district court's becoming aware of juror No. 8's emotional response to the photographs and inquiry about services available after trial regarding the same, the district court was not obligated to inquire further. The district court had no information that there existed a legal or factual basis to believe that juror No. 8 could not serve as an impartial juror, there were no allegations of misconduct, and the district court was not informed of any matters which might reasonably constitute grounds for a challenge for cause. Additionally, jury instruction No. 1 stated, in part, that a juror "must not allow sympathy or prejudice to influence your verdict." Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. Barnes*, 317 Neb. 517, 10 N.W.3d 716 (2024).

For the above reasons, this court finds no abuse of discretion by the district court in its decision not to further inquire into the statements made by juror No. 8.

(b) Failure to Consider Mitigating Factors in § 28-105.02 at Sentencing

McCree argues the district court failed to consider the mitigating factors in § 28-105.02, including the results of the comprehensive mental health evaluation under § 28-105.02(2)(f), when it sentenced him to consecutive terms of imprisonment of not less than 70 years nor more than McCree's life for first degree murder and not less than 15 years nor more than 20 years for use of a firearm to commit a felony. This court interprets McCree's assignment as arguing that the district court abused its discretion by failing to adequately consider the factors in § 28-105.02, which resulted in excessive sentences and was in violation of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), thus constituting cruel and unusual punishment. We disagree.

(i) Standard of Review

[14] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025).

(ii) Resolution

[15] The sentences imposed by the district court for each conviction were within the respective statutory limits. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2024). See, also, § 28-105.02. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors, as well as any applicable legal principles in determining the sentence to be imposed. *State v. Rejai*, 320 Neb. 599, 29 N.W.3d 225 (2026).

[16] When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *State v. Flores*, 321 Neb. 284, 34 N.W.3d 106 (2026).

McCree was convicted of a Class IA felony for the offense of first degree murder, and he was under the age of 18 when he committed that offense. Thus, the district court was also obligated to consider the mitigating factors listed in § 28-105.02(2). One of the factors contained in § 28-105.02(2) is "[t]he outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional . . . ." McCree argues that the district court should have inquired as to the status of the evaluation when one was not presented at sentencing because the court had authorized a comprehensive mental health evaluation at the time of the guilty verdicts and Matthew Huss, Ph.D., had been retained.

The record refutes McCree's assertion that the district court failed to consider the appropriate sentencing factors and that his sentences were excessive. At sentencing, the district court specifically mentioned having considered the statutory factors, including the mitigating factors found in § 28-105.02, as well as "the case at *Miller* [*v.*] *Alabama*, and other cases along those lines." (Emphasis supplied.) Had McCree submitted the outcome of a comprehensive mental health evaluation, the district court would have been required to consider it. However, because § 28-105.02 provides that a "convicted person *may* submit mitigating factors to the court, including, but not limited to: . . . (f) The outcome of a comprehensive mental health evaluation," McCree's failure to submit one does not impose an obligation upon the district court to inquire as to the same. (Emphasis supplied.)

[17] Additionally, McCree's sentences are not contrary to *Miller*, even if they do, as McCree argues, amount to a de facto life sentence because since *Miller*, this court has recognized that a sentencing court may, consistent with the Eighth Amendment, impose an actual life-without-parole sentence on an individual under 18 years of age so long as the sentencing court retains discretion to impose a lesser penalty. See *Flores, supra*. Application of § 28-105.02, which provides for "a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment" and contains a list of mitigating factors for a sentencing court to consider, satisfies this requirement. Thus, the district court did not abuse its discretion in sentencing McCree.

3. Ineffective Assistance of Counsel Claims

McCree claims that he received ineffective assistance of counsel in multiple respects. We first set forth the standard of review and certain legal principles that govern such claims on direct appeal.

(a) Standard of Review

[18-20] An appellate court resolves claims of ineffective assistance of counsel on direct appeal only where the record is sufficient to conclusively determine whether trial counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance as matters of law. *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025). An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id.* Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *Id.* An appellate court reviews questions of law independently of the lower court's conclusion. *State v. Ramos*, 319 Neb. 511, 23 N.W.3d 640 (2025).

(b) Legal Principles

[21,22] When reviewing an ineffective assistance of counsel claim on direct appeal, the question is whether the record affirmatively shows that the defendant's trial counsel's performance was deficient, and that the deficient performance actually prejudiced the defendant's defense. *Kruger, supra*. A court may examine performance and prejudice in any order and need not examine both prongs if a defendant fails to demonstrate either. *Id*.

[23-25] To show deficient performance, the defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *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.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In determining whether there is a reasonable probability that any deficient performance of trial counsel would have resulted in a different outcome in the proceeding, an appellate court may properly consider the strength of the admissible evidence relating to the controverted issues in the case. *Id.*

[26] When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. *Id*. There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id*. Ultimately, the Constitution guarantees criminal defendants only a fair trial and a competent attorney. *Id.*

(c) Claims Assigned

McCree asserts 10 instances of ineffective assistance. Two of McCree's claims lack specificity, and the record is not sufficient to address three of his claims. The record is sufficient to address the remaining five claims, but they lack merit.

(i) Claims Lacking Specificity

[27] 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. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). Claims of ineffective assistance of counsel are no exception. See *id.* On direct appeal, claims of ineffective assistance of counsel must be both specifically assigned and specifically argued in the appellant's brief. See *id.*

[28] An appellate court is not required to look to the remainder of the brief to supplement a lack of specificity in an assignment of error. See *State v. Garcia*, 315 Neb. 74, 994 N.W.2d 610 (2023). A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered. *Filholm, supra.* Similarly, an argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it. *Id*. Two of McCree's claims lack the required specificity.

a. Failures Regarding Propensity Evidence

McCree assigns that trial counsel failed "to object to evidence about McCree's purported propensity towards violence under . . . §§ 27-404 and 27-403, failing to place these comments in context through cross-examination, and failing to request a limiting instruction as to 'state of mind.'"

McCree's assignment, which requires this court to look to the remainder of his brief to determine which evidence McCree alleges constitutes propensity evidence, does not provide the required specificity and will not be considered. See *Garcia, supra*.

b. Failure to Impeach and Cross-Examine

McCree assigns that his trial counsel "performed deficiently in failing to effectively impeach and cross-examine witnesses. This violated McCree's right to effective assistance of counsel and a fair trial under the state and federal constitutions."

Similar to McCree's first ineffective assistance of counsel claim regarding propensity evidence, McCree's assignment lacks the necessary specificity because it does not specify which of the many witnesses McCree is referring to, and, thus, it will not be considered.

(ii) Record Insufficient to Resolve Claims

[29] The record on appeal is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025). Conversely, an ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record. *Id.* We are unable to address three of McCree's claims due to an insufficient record.

a. Failure to Review Discovery With McCree

McCree assigns that trial counsel failed to review discovery with him so he could make an informed decision about the plea offer, decide whether to testify, and assist with trial strategy decisions. As mentioned above, on direct appeal, an appellate court only addresses claims of ineffective assistance of counsel that can be conclusively determined from the record. *Id*.

The record here does not establish what discovery existed, what discovery was reviewed with McCree, or any insight into trial counsel's strategy. From our review of the record, we cannot conclusively determine whether trial counsel's performance in review of discovery with McCree did or did not constitute ineffective assistance of counsel. The record is, therefore, not sufficient to resolve this claim on direct appeal.

b. Failure to Discuss Plea Negotiations and Trial Outcomes

McCree assigns trial counsel failed to adequately discuss plea negotiations and potential trial outcomes with him and

that this violated his right to effective assistance of counsel and a fair trial under the state and federal constitutions. McCree concedes he was informed of the plea offer but asserts he was unable to make an informed decision because he did not have access to discovery and was not informed he could make a counteroffer.

We cannot conclusively determine from the record whether trial counsel adequately discussed plea negotiations and potential trial outcomes or whether a competent attorney would have necessarily engaged in additional discussions. The record is, therefore, not sufficient to review this claim on direct appeal, and we decline to consider it at this time. See *id*.

c. Failure to Request Mitigation Factor Analysis

McCree assigns that trial counsel was deficient for failing to request an analysis from Huss as to the mitigation factors provided by § 28-105.02 and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). More specifically, McCree asserts Huss, if asked, could have produced a report identifying at least three mitigating factors. We agree with McCree and the State that the record is not sufficient to review this claim on direct appeal, and, thus, we decline to consider it at this time. See *Kruger, supra.*

(iii) Claims Lacking Merit

The record is sufficient to address McCree's remaining five claims, but they lack merit.

a. Failure to Object to Teardrop Tattoo Evidence

McCree assigns that trial counsel failed to object to the teardrop tattoo evidence under § 27-403 and failed to request a limiting instruction.

McCree argues that to the extent trial counsel is determined to have failed to object on § 27-403 grounds to the admission of the teardrop tattoo evidence in the assignment discussed

above, his trial counsel was deficient and that trial counsel was deficient for failing to request a limiting instruction. The State argues that McCree's trial counsel was not ineffective because the evidence was admissible and that McCree's assignment is not specific because it does not specify what limiting instruction should have been requested.

McCree's assertion that trial counsel was deficient for failing to request a limiting instruction does not specify which type of instruction McCree alleges should have been given. Thus, it does not meet the specifically assigned requirement, as it fails to advise this court of the issue submitted for decision and will not be considered. See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). However, McCree's assigned failure to object under § 27-403 must be considered.

As stated above, when reviewing ineffective assistance of counsel claims on direct appeal, a court may examine performance and prejudice in any order and need not examine both prongs if a defendant fails to demonstrate either. See *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025). Here, given McCree's admission that he shot Brave, the fact that much of the testimony at trial corroborated the State's theory that McCree had been attempting to rob Brave, the State's inclusion of felony murder, and Investigator Fields' admission that he did not know why McCree would have wanted to get a teardrop tattoo, even if trial counsel's performance was deficient, McCree is unable to demonstrate a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. See *id*. In light of the totality of the record, we find McCree was not prejudiced by trial counsel's failure to object to the teardrop tattoo evidence under § 27-403.

b. Failure to Object to and Request Limiting Instruction for Evidence Admitted for Investigatory Purposes

McCree assigns that trial counsel failed to request a limiting instruction that statements to law enforcement received

"'for investigative purposes'" should not be considered for the truth of the matter asserted or McCree's propensity to commit the alleged crimes and for not objecting to their receipt under § 27-403. The complained-of statements appear to be those discussed above regarding McCree's assignment alleging the district court erred in admitting statements to law enforcement for "investigatory purposes."

The State argues McCree's trial counsel was not ineffective because the evidence that McCree went to Michigan and that McCree was being identified as a suspect was cumulative, and it argues that McCree's "runaway status" had no relevance to guilt. We agree.

[30,31] Cumulative evidence means evidence tending to prove the same point to which other evidence has been offered. *State v. Sawyer*, 319 Neb. 435, 22 N.W.3d 650 (2025). 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. *Id*.

The testimony regarding the anonymous call informing law enforcement that McCree "fle[d]" to Michigan is cumulative to the messages between McCree and "POPS," as well as McCree's interview statements. Additionally, the testimony that interviews, social media, and phone line tips had identified McCree is cumulative of his own admission to shooting Brave. Thus, any deficient performance from trial counsel in not objecting to the admission or not requesting a limiting instruction did not prejudice McCree. See *id.* (even if trial counsel performed deficiently in not objecting to witness' testimony, defendant was not prejudiced because witness' testimony was cumulative of other evidence).

As to the testimony that McCree's mother informed law enforcement he was on "runaway status," this statement did not implicate him in the alleged crimes, and there is not a reasonable probability that its absence or the addition of a limiting jury instruction as to this evidence would have resulted in

a different outcome in these proceedings. See *Kruger, supra*. Thus, any deficient performance in trial counsel's failure to object to its admission or to not request a limiting instruction did not prejudice McCree.

c. Failure to Object to Credibility Evidence

McCree assigns that trial counsel performed deficiently by failing to object to testimony elicited by the State about McCree's credibility and the lack of credibility of other favorable witnesses. In support of his assignment, McCree describes Investigator Drager's testimony as "urg[ing]" that K.W.; her boyfriend, N.M.; and L.S., an associate of McCree and a party attendee, were "untruthful" and that Jordan O'Connor, a party attendee, was "'impartial'" and truthful from the start. Brief for appellant at 29. K.W., N.M., and L.S. did not testify at trial. Because McCree's assignment does not assign error to trial counsel's failure to object to testimony that spoke favorably to O'Connor's credibility, we do not address that argument.

i. Additional Background

McCree cites to a section of Investigator Drager's trial testimony that spans approximately 3 pages but does not provide any additional specificity on exactly what statements should have been objected to. After our review of the cited testimony, it appears the following testimony of Investigator Drager on the State's redirect is likely the testimony complained of as error:

> Q. Why didn't you follow up with the witnesses you already interviewed after you interviewed [McCree]?
>
> A. They had already given their statements. [McCree] specifically mentioned [K.W.] We had her statement where she said she didn't see anything.
>
> [McCree's trial counsel:] Objection, hearsay.
>
> THE COURT: Overruled.
>
> [Investigator Drager:] We interviewed [N.M.] [N.M.] told us he didn't know who [McCree] was. We interviewed

[L.S.] twice already to that point. And [L.S.], ultimately, was found to not have told the truth.

[McCree's trial counsel:] Objection, same objection.

THE COURT: Overruled.

BY [the State:]

Q. Sorry, what was your answer?

A. We ultimately found she had lied in her interview to begin with. She accompanied [McCree] to Detroit and we interviewed her after the trip and she, again, didn't make any mention of it, so.

Q. Why didn't you re-interview, for instance, Jordan O'Connor?

A. Well, he already gave us his statement. And — he already gave his statement. He was aware of who [McCree] was and as an impartial witness, for the most part. We had no reason to believe he wasn't telling the truth to begin with.

Q. So it's not common to keep doing follow-up interviews when a witness has given a statement; is that correct?

A. Correct.

Q. Did you find [McCree] to be credible in his interview with law enforcement?

A. No.

[McCree's trial counsel:] Objection, speculation, foundation.

[The State:] I can lay some foundation, Your Honor.

THE COURT: I'll sustain that. The jury will disregard that statement.

BY [the State:]

Q. Investigator Drager, how long have you been a certified law enforcement officer?

[Investigator Drager:] Over 11 years.

Q. How many suspects have you interviewed as part of your duties as a law enforcement officer?

A. Thousands.

Q. And as part of your duties of interviewing witnesses, can you tell when a witness is being truthful with you at times?

A. I believe so, yes.

Q. In your interview with [McCree], he gave, initially, a story that was completely false?

A. Yes. For nearly an hour he denied being the person responsible.

Q. And when confronted with the text message that he sent . . . , he continued to be — he continued to deny involvement, correct?

A. Yes. He admitted to sending the message, but again denied being the person responsible.

Q. And then he gave a second story to law enforcement?

A. Correct.

Q. Did any other witnesses give a second story to law enforcement?

A. Did any other witnesses give [a] second story? No.

ii. Resolution

McCree cites *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992), in support of his argument that trial counsel performed deficiently by failing to object to testimony elicited by the State about McCree's credibility and the lack of credibility of other favorable witnesses. In *Welch*, an investigator was permitted to testify, over an objection, that he was trained in interrogation techniques, which allowed him to detect deception through verbal and nonverbal communications during an interview. The investigator then testified to changes in the defendant's demeanor during certain lines of questioning and opined that based on his experience and training, those behaviors tended to indicate deception. See *id*. This court found the admission of this testimony to be in error and found that the error could not be said to be harmless because the defendant's credibility was central to the issue in the case. See *id*.

McCree argues that this case is similar to *Welch* because, here, McCree's credibility was central to evaluating the "'he said/she said'" nature of the evidence and that it was error to allow investigators to discuss witness credibility in a way that signaled to the jury they believed the State's witnesses were telling the truth while McCree and his friends were lying. Brief for appellant at 30.

We discuss the testimony related to McCree separate from that of K.W., N.M., and L.S.

a) Credibility of McCree

[32] As to the testimony regarding McCree's truthfulness, Investigator Drager's statement that he did not find McCree credible was stricken after McCree's trial counsel's objection, and the jury was instructed to disregard the statement. Thus, trial counsel did not fail to object, and there was no prejudice. See *State v. Jones*, 232 Neb. 576, 579, 441 N.W.2d 605, 607 (1989) ("[o]rdinarily, however, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice").

As to Investigator Drager's later testimony that McCree initially supplied a false story to law enforcement denying involvement in Brave's death, McCree could not have been prejudiced by that statement. The story was false, as McCree admitted in a later interview that he shot Brave.

b) Testimony Regarding K.W., N.M., and L.S.

Neither can McCree demonstrate ineffective assistance in trial counsel's failure to object to Investigator Drager's testimony regarding K.W., N.M., and L.S. As to those witnesses, Investigator Drager testified only that L.S. was found to be untruthful. That testimony, however, was in response to a question about why L.S. was not interviewed a second time. And, as noted above, L.S. did not testify at trial. McCree has not shown that the testimony regard-

ing L.S. was inadmissible or, even if it was, how it could have prejudiced McCree.

d. Failure to Object to Improper Bolstering

McCree assigns that trial counsel performed deficiently by failing to object to the State's improper bolstering of each lay witness. The State argues that these lines of questioning were asked due to the age of the witnesses and that even if the questioning was in error, McCree was not prejudiced.

i. Additional Background

At trial, based on the testimony cited by McCree, the State asked many of its witnesses if they understood the need to tell the truth, whether they understood the difference between the truth and a lie, and whether they would tell the truth to the best of their ability. At least one other witness was asked similar questions. They answered all of these questions in the affirmative. At the time of trial, some, but not all, of these witnesses were minors.

ii. Resolution

Neb. Rev. Stat. § 27-608(1)(b) (Reissue 2016) provides that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Even as to children, this court has stated that best practice dictates child competency hearings should "take place outside the presence of the jury. However, the failure of the trial court to do so is not necessarily reversible error. Instead, an appellate court must consider whether the defendant was prejudiced by the trial court's actions." *State v. Fleming*, 280 Neb. 967, 977, 792 N.W.2d 147, 156 (2010).

The lines of questioning, laid out above, which McCree asserts constituted improper bolstering, took place in the presence of the jury and with both minor and adult witnesses. However, because this court may examine performance and prejudice in any order and need not examine both prongs if

a defendant fails to demonstrate either, we will first consider whether McCree was prejudiced by trial counsel's failure to object. See *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025).

As we have stated, 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. *State v. Garcia*, 315 Neb. 74, 994 N.W.2d 610 (2023). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

As previously stated above, absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. See *State v. Barnes*, 317 Neb. 517, 10 N.W.3d 716 (2024). Here, the jurors were instructed in jury instruction No. 18, in part, that they were "the sole judges of the credibility of the witnesses and the weight to be given to their testimony." Additionally, pursuant to Neb. Rev. Stat. § 27-603 (Reissue 2016), before testifying, every witness was required to declare that he or she would testify truthfully by oath or affirmation. Thus, prior to testifying, each witness was instructed to raise their right hand and asked by the district court, "Do you solemnly swear or affirm that the testimony you're about to give will be the whole truth and nothing but the truth?" Each witness responded in the affirmative.

Given the jury instruction, and the presumption resulting therefrom, as well as the similarities between the oath required by § 27-603 and the questions alleged to be improper bolstering, we cannot conclude that the lines of questioning, or trial counsel's failure to object thereto, prejudiced McCree.

e. Failure to Advise Regarding Testifying

McCree assigns that trial counsel failed to adequately advise him whether he should testify. He alleges that trial counsel was deficient because, had counsel given him reasonable advice, he would not have waived his right to testify.

i. Background on Right to Testify

[33-35] A defendant has a fundamental constitutional right to testify. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone. *Id*. Instead, defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make. *Id*. In discussing this responsibility, the U.S. Court of Appeals for the 11th Circuit has explained the important role counsel's advice plays in securing a defendant's right to testify or not:

> This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege." . . . Moreover, if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand with the advice of competent counsel.

U.S. v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) (emphasis in original). The competence and soundness of defense counsel's tactical advice is crucial to whether counsel has presented sufficient information to the defendant to permit a meaningful voluntary waiver of the right to testify. *Iromuanya, supra*.

Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable. *Id*.

ii. Resolution

Here, the record shows that at the close of the State's evidence, McCree waived his right to testify on the record. Because the record shows trial counsel did not interfere with

McCree's decision not to testify, the only issue is whether trial counsel's advice was unreasonable and prevented McCree from meaningfully waiving his right to testify.

McCree argues that, if trial counsel would have fully disclosed digital evidence, McCree would have had a significantly different impression of the State's case. He alleges that his testimony would have clarified for the jury that he had no need to rob Brave because McCree had his own "more substantial" marijuana stash. Brief for appellant at 34. McCree argues that, while he did make statements to this effect in a recorded jail call, discussed in detail below and which were placed into evidence, his tone was "flippant" and "easily misconstrued" in light of the inconsistent statements he made to investigators. *Id*. McCree alleges his testimony would have reconciled inconsistencies and provided a more balanced perspective on the circumstances surrounding the conflict with Brave (i.e., the number of people present during the conflict, how the conflict originated, et cetera). McCree alleges that this testimony would have been invaluable given the "'he said/she said'" nature of the conflict, *id*. at 30, and that his testimony would have helped the jury see him more accurately as "a scared, stupid kid than a remorseless thug," *id*. at 34.

At trial, McCree's jail call audio and the video evidence of McCree's interview with law enforcement were received into evidence and published to the jury. During the jail call audio, McCree was asked, "Don't tell me that [expletive] was really over a bag of weed," to which McCree responded, "Man come on, man, look, I got all this money and all this weed. Why the [expletive] do I want an ounce from this [expletive] bro?" Additionally, during his interview with law enforcement, McCree gave his account of the events leading up to the shooting of Brave, which included his statement that he did not know how many people attended the party.

We conclude that because the record shows that the jury heard McCree's explanation from the jail call audio of his

having his own marijuana and heard his statement of the events from his interview with law enforcement, McCree was not prejudiced by any failure of trial counsel to reasonably advise him regarding his right to testify. See *Iromuanya, supra*. Thus, his assignment of error fails.

VI. CONCLUSION

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

AFFIRMED.