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STATE OF NEBRASKA, APPELLEE, V. MARK M. PORTER, JR., APPELLANT.

___ N.W.3d ___

Filed September 22, 2026. No. A-25-361.

1. **Trial: Joinder: Proof: Appeal and Error.** A denial of a motion to sever will be reversed only if an abuse of discretion is shown that caused the defendant substantial prejudice amounting to a miscarriage of justice.
2. **Criminal Law: Joinder: Presumptions.** A clear presumption exists in favor of a joinder of offenses and against severance.
3. **Trial: Joinder: Appeal and Error.** Whether offenses were properly joined involves a two-stage analysis: (1) whether the offenses were sufficiently related so as to be joinable and (2) whether the joinder was prejudicial to the defendant.
4. **Constitutional Law: Criminal Law: Trial: Joinder.** There is no constitutional right to a separate trial on different charges.
5. **Joinder: Proof: Evidence.** Prejudice from joinder generally cannot be shown if the evidence of one charge would have been admissible in a separate trial of another charge.
6. **Joinder: Proof.** A defendant opposing joinder must meet a high burden of proving prejudice therefrom by showing compelling, specific, and actual prejudice from the court's refusal to grant a motion to sever.
7. **Joinder: Evidence.** Cross-admissibility of evidence pertaining to joined charges is only one consideration in determining prejudice.
8. **Trial: Joinder: Juries: Evidence.** Prejudice usually does not occur from joined charges if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations.
9. **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.

10. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that is reviewed independently of the trial court's determination.
11. **Confessions: Police Officers and Sheriffs.** The test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined.
12. **Constitutional Law: Criminal Law: Confessions.** The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the 14th Amendment.
13. **Confessions: Police Officers and Sheriffs.** Courts examine police conduct in light of the totality of the circumstances, including the tactics used by the police and the details of the interrogation.
14. **Confessions: Proof.** The State has the burden to prove that a defendant's statement was voluntary and not coerced.
15. **Confessions.** Whether a defendant's statement was voluntarily given depends on the totality of the circumstances. Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.
16. **Evidence: Polygraph Tests.** While the result of a polygraph examination is not admissible at trial, statements made in response to questioning during the course of a polygraph examination most usually are.
17. **Polygraph Tests.** It is not improper to inform an accused that the results of a polygraph test indicated deception by the accused.
18. **Confessions: Police Officers and Sheriffs.** Questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne.
19. **Trial: Pretrial Procedure: Pleadings: Evidence: Juries: Appeal and Error.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular

evidence is offered at trial in order to predicate error before an appellate court.

20. **Pretrial Procedure: Pleadings: Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. An appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.
21. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** The constitutionality of a statute for purposes of article V, § 2, of the Nebraska Constitution and Neb. Ct. R. App. P. § 2-109(E) (rev. 2024) includes both facial and as-applied challenges.
22. ____: ____: ____: ____. Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2024) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.
23. ____: ____: ____: ____. Without strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2024), an appellate court will not address a constitutional challenge to a statute.
24. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
25. **Sexual Assault: Words and Phrases.** Once the perpetrator's lips or tongue touches any part of a female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia.
26. **Sexual Assault: Testimony.** When a trier of fact observed the witnesses' testimony, any observations of emotional trauma could validly be used in determining the extent of serious personal injury to victims of sexual assault.
27. **Sexual Assault.** One need not be specially trained in medicine or psychology to recognize and appreciate the injury from a forceful sexual intrusion into another's body and invasion of the mind and very personality of another human being.
28. **Motions for Mistrial: Appeal and Error.** An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the trial court has abused its discretion.

29. **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.
30. **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.
31. **Motions for Mistrial: Proof: Appeal and Error.** To prove error predicated on the failure to grant a mistrial, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
32. **Motions for Mistrial: 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.
33. **Trial.** When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and ensure a fair and impartial trial for the defendant.
34. **Trial: Presumptions: Police Officers and Sheriffs.** Reason, principle, and common human experience counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial.
35. **Motions for New Trial: Appeal and Error.** The standard of review for a trial court's denial of a motion for new trial after an evidentiary hearing is whether the trial court abused its discretion in denying the motion.
36. **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.
37. ____: ____. 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 and applicable legal principles.
38. **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.

39. ____. The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and of all the facts and circumstances surrounding the defendant's life.
40. ____. A sentencing court is not required to articulate on the record that it has considered each sentencing factor nor to make specific findings as to the facts pertaining to the factors or the weight given them.
41. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance.
42. **Effectiveness of Counsel: Proof.** Generally, to prevail on a claim of ineffective assistance of counsel under the framework 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), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
43. ____: ____. To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
44. **Trial: Attorneys at Law: Effectiveness of Counsel: Presumptions: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics and, in considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel acted reasonably.
45. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** An appellate court will not second-guess the reasonable strategic decisions of trial counsel.
46. **Effectiveness of Counsel: Proof.** To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
47. **Words and Phrases.** A reasonable probability of prejudice is a probability sufficient to undermine confidence in the outcome.
48. **Effectiveness of Counsel: Appeal and Error.** 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.

49. ____: ____. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must properly raise on direct appeal any issue of trial counsel's deficient performance which is either known to the defendant or is apparent from the record. Any known or apparent issue of deficient performance not properly raised on direct appeal will be procedurally barred in a subsequent postconviction proceeding.
50. **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.
51. **Effectiveness of Counsel: Appeal and Error.** A defendant seeking to raise a claim of ineffective assistance of counsel on direct appeal is not required to make specific allegations of prejudice. However, anytime a defendant seeks to raise an ineffective assistance claim, whether on direct appeal or in a postconviction motion, the defendant must specifically assign and specifically argue the alleged deficient performance, and must do so with sufficient particularity.
52. ____: ____. To sufficiently allege deficient performance of counsel, the allegations must include a description of the specific conduct alleged to constitute deficient performance.
53. **Effectiveness of Counsel: Records: Appeal and Error.** The description of deficient performance of counsel must be particular enough to (1) allow an appellate court to determine whether the claim can be decided upon the trial record and (2) allow a district court reviewing a later postconviction motion to recognize whether the claim was raised on direct appeal.
54. **Effectiveness of Counsel: Appeal and Error.** To allege deficient conduct of counsel with specificity requires more than generalities of inadequate preparation or failures to introduce beneficial evidence. An allegation will be sufficiently specific when it addresses a specific issue that does not require additional information to understand precisely what the assignment attacks.
55. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that a claim of ineffective assistance of counsel is properly raised on direct appeal does not mean it can be resolved on direct appeal. The determining factor is whether all the facts necessary to the analysis are part of the appellate record.
56. ____: ____: ____. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record.
57. **Trial: Attorneys at Law: Effectiveness of Counsel: Records: Appeal and Error.** If the record on direct appeal conclusively establishes

both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense, an appellate court can determine trial counsel was ineffective. Conversely, if the record on direct appeal conclusively establishes either that trial counsel's performance was not deficient or that any deficient performance did not prejudice the defendant's defense, an appellate court can determine trial counsel was not ineffective.

58. **Effectiveness of Counsel: Records: Appeal and Error.** If the record on direct appeal does not conclusively establish or refute a claim of ineffective assistance, then the issue cannot be resolved on direct appeal and must be properly raised in a subsequent postconviction proceeding.
59. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
60. **Effectiveness of Counsel: Trial: Appeal and Error.** Appellate courts do not use perfect hindsight to criticize unsuccessful trial strategies. Rather, they must assess trial counsel's performance from counsel's perspective when counsel provided the assistance.
61. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess counsel's reasonable strategic decisions.
62. **Effectiveness of Counsel: Trial: Appeal and Error.** It is more the exception than the rule that defense counsel's strategy can be reasonably inferred from the trial record on direct appeal.
63. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument to the trial court.
64. **Trial: Constitutional Law: Testimony: Attorney and Client: Waiver.** A defendant has a fundamental constitutional right to testify, and the right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.
65. **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.
66. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance of counsel 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.
67. **Effectiveness of Counsel: Postconviction: Witnesses: Appeal and Error.** When the claim of ineffective assistance on direct appeal

involves uncalled witnesses, the defendant must give the names or descriptions of any uncalled witnesses forming the basis of a claim of ineffective assistance of trial counsel; what the witness would have said may be part of the witness' description when the name is unknown.

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

Mona Burton, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

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

Moore, Pirtle, and Welch, Judges.

Welch, Judge.

I. INTRODUCTION

Mark M. Porter, Jr., appeals from his jury convictions and sentences in the Lancaster County District Court for two counts of first degree sexual assault of a child and two counts of second degree sexual assault of a child. Porter asserts that the district court erred in overruling various pretrial motions, finding that the evidence was sufficient to support his convictions, overruling his motions for a mistrial and his motion for a new trial, and imposing excessive sentences and that he was denied effective assistance of counsel during the trial. For the reasons stated herein, we affirm.

II. STATEMENT OF FACTS

1. Background

(a) Initial Report of Sexual Abuse by Porter

In early December 2022, 14-year-old A.M. disclosed to her mother that Porter, the man who had effectively acted as her stepfather since she was 4 years old, had been sexually abusing her for nearly a decade. After law enforcement investigated A.M.'s allegations, including a forensic interview of

A.M. at a child advocacy center and two separate interviews of Porter over the course of 2 days, Porter was arrested and was initially charged with first degree sexual assault of a child and felony child abuse.

(b) Additional Reports of Abuse by Porter

After Porter's arrest, three other victims came forward to report sexual abuse by Porter—one of the victims had been one of A.M.'s best friends, and two of the victims were A.M.'s cousins.

A.E., who was one of A.M.'s best friends when A.E. was approximately 6 to 8 years old, reported that during some of her frequent visits to A.M.'s house during that time period, Porter would push her up against a beam, pull down her pants, and use his tongue to touch her vagina.

A.M.'s cousin, S.B., reported that sometimes when she was at A.M.'s house, Porter would place S.B.'s hand on Porter's penis, sometimes over his clothes and sometimes under his clothes, and that Porter would make her "[m]ove [her hand] up and down." S.B. also alleged that, within a year before Porter's arrest, she was 12 years old and was at A.M.'s house trying to take a nap in A.M.'s room when Porter came into the room and put his hand under her underwear and rubbed her bare vagina.

A.M.'s younger cousin, K.B., reported that when she was 5 or 6 years old and was visiting A.M.'s house, Porter would pull down his pants, place K.B. on his lap, and pick her up and put her down on his lap. K.B. stated that she could feel Porter's "private spot" underneath of her, which she described felt "[l]ike a rock." During these incidents, which K.B. reported happened five or six times, Porter used his finger to touch K.B.'s vagina over her clothes.

2. OPERATIVE INFORMATION

Following an investigation into the additional reports of alleged sexual abuse by Porter, Porter was charged, in the

operative information, with two counts of first degree sexual assault of a child under Neb. Rev. Stat. § 28-319.01(1) (Reissue 2016) and two counts of second degree sexual assault of a child under Neb. Rev. Stat. § 28-320.01(2) (Reissue 2016).

Count 1 alleged that, between approximately January 1, 2013, and April 8, 2021, Porter (who was at least 19 years of age) subjected A.M. (a person under 12 years of age) to sexual penetration, or Porter (who was at least 25 years of age) subjected A.M. (a person who was at least 12 years of age but less than 16 years of age) to sexual penetration.

Count 2 alleged that, between February 7, 2013, and February 7, 2017, Porter (a person at least 19 years of age) subjected A.E. (a person under 12 years of age) to sexual penetration, or Porter (who was at least 25 years of age) subjected A.E. (a person at least 12 years of age but less than 16 years of age) to sexual penetration.

Count 3 alleged that, between December 13, 2021, and December 13, 2022, Porter (who was at least 19 years of age) subjected S.B. (who was a person 14 years of age or younger) to sexual contact causing serious personal injury to S.B.

Count 4 alleged that, between May 22, 2019, and December 13, 2022, Porter (who was at least 19 years of age) subjected K.B. (who was a person 14 years of age or younger) to sexual contact causing serious personal injury to K.B.

3. Pretrial Motions

(a) Motion to Suppress

In November 2023, Porter filed a motion to suppress requesting that the court suppress all pretrial admissions or statements made by Porter to any law enforcement personnel, because the statements were not made knowingly, intelligently, and voluntarily; were obtained in violation of his constitutional rights; and were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Porter alleged that the statements were obtained "only following repeated denials and [Porter's] participation in a

polygraph interview, the results of which are inadmissible." Porter further asserted that "the use and results of the . . . polygraph examination [were] inextricably intertwined with [his] subsequent admissions, and that the use of such inadmissible tactics and stratagems in order to obtain alleged admissions and confessions violate[d] his rights" under the U.S. and Nebraska Constitutions.

Following the hearing thereon, the district court entered an order finding that Porter agreed to an interview to be held at the police station and that early in the interview, an officer informed Porter he was not under arrest and advised Porter of his *Miranda* rights, which Porter waived both verbally and in writing. Later, Porter agreed to voluntarily return the following day to take a polygraph examination. Prior to the polygraph test, Porter was once again advised that he was not under arrest and was advised of his *Miranda* rights, which he again waived in writing. After the polygraph examination was conducted, Investigator Michael Barry informed Porter that Porter failed the examination. Although Porter initially continued to deny allegations made against him, he eventually made admissions that led to his arrest. The court found that the investigators' references to the polygraph results were not so coercive as to deem Porter's statements involuntary and that Porter's statements to law enforcement were made freely, voluntarily, and knowingly. It overruled Porter's motion to suppress.

(b) Motion in Limine

Porter also filed a motion in limine requesting that the court prohibit the State from introducing at trial "any testimony, any audio/video recordings or other evidence, or argument with respect to or relating to any requests by officers to have [Porter] submit to a polygraph, [Porter's] submitting to a polygraph and/or any results or interpretations of results of any such polygraph administered to [Porter] by [law enforcement]" because the Nebraska appellate courts have

consistently held that results obtained from polygraph tests are inadmissible.

The district court held the matter of Porter's motion in limine in abeyance while the parties conferred in an attempt to reach an agreement regarding the statements and possible redactions.

(c) Motion to Quash

In September 2024, Porter filed a motion to quash counts 3 and 4 of the operative information charging him with two counts of second degree sexual assault of a child, in violation of § 28-320.01(2), because there was "a defect apparent on the face of the record, to wit: . . . § 28-320.01(2) and the applicable statutory definitions contained therein are unconstitutionally vague and overbroad." Porter specifically alleged that "the definition of 'serious personal injury,' as set forth in § 28-320.01(2) and § 28-318[,] is unconstitutionally vague for the reason that 'extreme mental anguish and mental trauma' is not defined in statute or any applicable caselaw." He further alleged:

> [T]he definition of serious personal injury and 'extreme mental anguish and mental trauma[']' is 'so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case . . . .

Following a hearing, the district court overruled the motion to quash on the following basis:

> Under Neb. Rev. Stat. § 28-320.01(2) both anguish and trauma are common vernacular terms and whether anguish and trauma are "extreme" is up to the trier of fact. *See State v. Martin*, 232 Neb. 385 (1989)[,] and *State v*[.]*Bunner*, 234 Neb[.] 879 (1990).
>
> As the Nebraska Supreme Court demonstrated in *Martin* and *Bunner*, the phrases, "serious personal injury" and "extreme mental anguish or trauma" as used in Neb.

> Re[v]. Stat. [§§] 28-318(4) and 28-320.01(2), provide reasonably clear guidelines to give defendants fair notice and warning of what conduct is prohibited.

(d) Motion to Sever Charged Offenses

In January 2025, Porter filed a motion to sever the four counts contained in the operative information, alleging that failing to sever the charges "would unfairly prejudice" Porter and "permit the introduction of otherwise inadmissible evidence" during the trial that "is not relevant . . . , [is] unfairly prejudicial, [is] confusing, [is] misleading . . . , and constitutes inadmissible evidence of other crimes, wrongs, or acts." Porter further alleged that a joint trial was not warranted because the alleged offenses were different in character, were not part of the same act or transaction, and did not constitute part of a common scheme or plan.

The district court denied Porter's motion to sever, finding as follows:

> The four charges contained in the [operative] Information allege sexual assault on a child, either in the 1st [or] 2nd degree. Therefore, the charges are of the same or similar character.
>
> The evidence presented shows that all of the alleged offenses involved pubescent or prepubescent girls. The majority of the events are alleged to have taken place in the same location, and three of the four girls have a parent that are related. The time frames of the alleged incidents are in close relation to each other and all of the allegations involved illegal sexual contact.
>
> . . . .
>
> . . . In this matter, evidence of each offense would be admissible in the trial of the other offenses to establish the intent, plan, or method of operation of [Porter].
>
> Additionally, the evidence supporting each of the charges in the [operative] Information are relatively straight forward and distinct from each other.

(e) Motion to Redact Video or Motion in Limine

Porter also filed a "Motion to Redact Video/Motion in Limine" "redacting certain pretrial statements made by Investigator . . . Barry on or about December 13, 2022[,] and preserved in video recordings," claiming said statements should be redacted and excluded from use during Porter's trial. Porter specifically objected to the following three statements made by Investigator Barry that were preserved in video recordings: (1) "That's because it did happen. That's the problem, I believe [A.M.]"; (2) "I wanna be able to tell her that it's okay to be believed"; and (3) "What do you want me to tell her because, I believe her." Porter also moved that "any and all other evidence or testimony, including video evidence or transcripts, in which law enforcement or other witnesses express a belief in the veracity of allegations by any witness against . . . Porter, be excluded from the trial."

The court denied the motion to redact or motion in limine. However, the court found that providing the jury with a limiting instruction was proper and stated that it would "coordinate with counsel as to the specifics of that instruction."

4. Trial

A 5-day jury trial was held in March 2025. The evidence established that A.M. was born in April 2008, A.E. was born in February 2008, S.B. was born in June 2010, and K.B. was born in May 2013. Porter was born in October 1986. In addition to the facts set forth in this section, more facts will be set forth as necessary in the analysis section of this opinion.

(a) A.M.'s Testimony

A.M., who was 16 years old at the time of the trial, testified that Porter was her "brother and sisters' dad" and that he lived with her family for a period of time. She testified that Porter first touched her inappropriately when she was in kindergarten. She stated that, when she was in her room,

Porter touched her vagina "[u]nder [her] underwear" with his fingers for about 3 seconds. On another occasion, while A.M. was still in kindergarten, Porter was drying A.M. off with a towel after she had showered. While A.M. was lying down and unclothed, Porter opened A.M.'s legs and "licked" her vagina. Then, when A.M. was 7 years old, Porter put A.M.'s mouth on his penis for approximately 1 minute. And on another occasion, while she and Porter were watching a movie, Porter touched A.M.'s vagina with his fingers. A.M. also testified that, when she was approximately 8 years old, Porter moved A.M.'s hand to touch his penis.

According to A.M., the last time that Porter touched her inappropriately, she was around 12 years old. During that incident, Porter entered A.M.'s room when she was on her bed. Porter "licked" A.M.'s vagina. A.M. stated that, even though she was scratching him, hitting him, and pulling his hair, Porter continued for approximately 10 minutes. A.M. confirmed that, on each of these occasions, she was referring to "the lips" of her vagina. However, she admitted that, during her deposition, when she was asked whether any part of Porter's body had ever gone inside of her, including his fingers, his tongue, or his lips, she responded, "I don't know."

(b) A.E.'s Testimony

A.E., who was 17 years old at the time of the trial, testified that between first and second grade, she was approximately 6 to 8 years old. During that time period, A.M. was one of her best friends. She explained that her and A.M.'s mothers were close friends and that she would frequently go to A.M.'s house. A.E. testified that, during some of the times that she was at A.M.'s house, Porter touched her inappropriately. She stated that in the downstairs of the house, Porter would put her up against a beam, pull down her pants, and use his tongue to touch her vagina. A.E. switched schools in fourth grade, and at that time, she stopped seeing A.M. On cross-examination, A.E. testified that Porter's tongue did not go inside of her body.

(c) S.B.'s Testimony

S.B., who was 14 years old at the time of trial, testified that she and A.M. are cousins. She testified that she often went to A.M.'s home to "play games and just hang out." On several occasions, Porter placed S.B.'s hand on his penis, sometimes over his clothes and sometimes under his clothes. She also explained that Porter would "[m]ove [her hand] up and down." S.B. testified that within the year prior to Porter's arrest, she was at A.M.'s house trying to take a nap in A.M.'s room and Porter came into the room and used his hand to touch her bare vagina. She further testified that Porter warned her that "if [she] told anyone [then her] cousins would hate [her] for . . . having their dad go away."

S.B. testified that she still has nightmares about Porter's being out of jail and coming to get her, that she had used a blade to cut her wrist, and that she was placed on probation because she stopped attending school because she was "scared" to attend.

(d) K.B.'s Testimony

K.B., who was 11 years old at the time of the trial, testified that she was A.M.'s cousin. During her testimony, K.B. held a stuffed animal, "Mr. Cuddles," and at one point, the prosecutor asked her to "slide Mr. Cuddles over a little bit and see if [she saw Porter] in the courtroom" that day. K.B. complied and identified Porter.

K.B. testified that when she was about 5 or 6 years old, she visited A.M.'s house and sometimes needed to use the bathroom, and that, as she exited the bathroom, Porter would stop her, grab her wrists, and ask her if she wanted to play a game. K.B. explained that the game was called the "up and down game," which involved Porter's pulling down his pants, placing K.B. on his lap, and picking her up and putting her down on his lap. K.B. stated that she could feel his "private spot" underneath of her, which she described felt "[l]ike a rock." During the "up and down game," Porter used his finger to

touch K.B.'s vagina over her clothes. K.B. testified that Porter made her play the "up and down game" five or six times. Porter also told K.B. that "if [she] told, [her] cousins would hate [her]."

K.B. stated that as a result of Porter's actions, she has had nightmares that make her sad and scared and she sometimes has trouble sleeping. She also stated that she used to see Porter when she closed her eyes when she was in the shower. K.B. also admitted that school is hard for her and that she starts crying at school, "[b]ecause it gets stuck in my head what happened to me."

(e) Forensic Examination of Victims

(i) Forensic Examination of A.M.

Jessica Blake, a nurse practitioner specializing in child abuse and maltreatment and a sexual abuse nurse examiner (SANE), testified that, in December 2022, she performed a sexual assault forensic examination on A.M. Blake explained that a sexual assault forensic examination is a specialized medical examination performed where there is a concern of sexual abuse.

Blake testified that A.M. reported that she was being molested by Porter, who was her mother's boyfriend. A.M. stated that Porter had "touched her ass" with "[h]is hands and his dick." When asked if Porter's "hands and . . . dick" touched the inside or outside of her "ass," A.M. responded, "Both." A.M. also stated that Porter touched her vagina with "[h]is hands and his dick and his mouth." And when Blake asked, "[D]id his hands touch the inside or outside of the big lips," A.M. responded, "Both." A.M. also stated that Porter's penis touched the inside of her vagina and that his mouth touched her vagina more than once. A.M. also told Blake that Porter put his penis in A.M.'s mouth or he would grab A.M.'s hand and make her masturbate him and that these events happened more than once. A.M. stated that the first time Porter touched her, she was 3 or 4 years old, and the last time it

happened, she was 12 years old. A.M. declined an anogenital examination that would have allowed Blake to examine A.M.'s genital region.

(ii) Forensic Examinations of K.B. and S.B.

Nurse Lauren Wade testified that she is a SANE, and that she conducted a SANE examination of S.B. in May 2023 and conducted a SANE examination of K.B. in January 2024.

During Wade's examination of S.B., S.B. stated that Porter had touched her vagina and made her touch his penis and that although she could not remember the first time the sexual touching happened, the last time occurred 3 weeks before Porter was "taken away." S.B. expounded that when she awoke from sleeping, Porter was touching her vagina and rubbing his hand in a circle. She further stated that the touching happened three or four times and that when she told him to stop, he stopped. S.B. also stated that Porter had tried to make her touch his penis but that she had pulled her hand away. S.B. expressed that she has a fear of older men whom she does not know, she is afraid to be in public, and she is scared at school.

During Wade's examination of K.B., K.B. stated that Porter touched her vagina and her "butt" with his hands on top of her clothes and that it happened more than one time. When Wade asked if Porter's touching went inside of K.B.'s vagina, K.B. responded, "[N]o."

Wade did not perform an anogenital examination on either S.B. or K.B., because both girls declined the examination. Additionally, Wade testified that a SANE kit was not collected in either S.B.'s or K.B.'s case because "[a] SANE kit in [the case of] a prepubescent child is only done within 72 hours of the assault" and neither examination was within that window of time.

K.B. and S.B.'s mother reported to Wade that, prior to Wade's examination of the girls, S.B. had preexisting diagnoses of depression, anxiety, anger, and bipolar disorder and

K.B. had a preexisting mental health history of separation anxiety and a current diagnosis of post-traumatic stress disorder. S.B. disclosed that she had self-harmed in the past, by cutting her leg, due to a medication she was taking and that she was receiving therapy at school on an as-needed basis.

Wade's report stated that a history of sexual abuse places victims at risk for long-term mental health complications including being "at a high risk for [those] such as [post-traumatic stress disorder], depression, anxiety, body dysmorphia, [and] eating . . . disorders." Wade recommended that both girls begin therapy with a therapist that specializes in trauma-focused patient care.

(f) Law Enforcement Interviews of Porter

Investigator Frank Foster and Investigator Barry conducted the December 12 and 13, 2022, interviews of Porter. Both worked in the special victims unit, which included investigations of sexual assault of children.

After the disclosures made by A.M. during her forensic interview, on December 12, 2022, Investigator Foster contacted Porter by phone to request that Porter come to the police department to talk. Porter agreed and came to the police department later that day. Investigator Foster conducted an interview of Porter, which interview was recorded on video. A redacted copy of that interview was received into evidence. Before the video of the interview was played for the jury, the court gave the jury this limiting instruction:

> More than likely, you're going to hear some portions of this interview, so, obviously, . . . Porter was interviewed by Investigator Foster, and that interview is now in evidence.
>
> The statements of Investigator Foster made during the interview were not received, or are not to be received, for the truth of the matters asserted therein, but rather for the limited purpose of placing the statements of . . . Porter in context.

> You are to consider the statements of the investigator during the interview only for that limited purpose and none other.

The video showed Porter being advised of his *Miranda* rights and signing the form waiving those rights. A copy of the signed *Miranda* warning and waiver was admitted into evidence.

Investigator Foster explained that during the first 50 minutes of the interview, he talked with Porter about "non-abuse events," including Porter's background, military service, and jobs, to establish rapport with Porter, which makes both parties more comfortable and which sets the tenor of the conversation. Over an hour into the interview, Investigator Foster directly confronted Porter with the allegations made by A.M., which Porter denied. Investigator Foster explained that during his interview with Porter, Porter was questioned about A.M., but not the other victims in the case because law enforcement was not aware of any other victims at that time.

Near the conclusion of the interview, Investigator Foster also asked if Porter would come back to the police station for an interview with a different investigator. Porter agreed, and after the interview ended, Investigator Foster gave Porter a ride to Porter's workplace and agreed to pick up Porter the next day at 10 a.m.

The next day, Porter advised Investigator Foster that Porter was running late and they eventually met up near Porter's workplace shortly before noon. Porter walked to Investigator Foster's car and mentioned that he was hungry, so they stopped at a fast-food restaurant. Investigator Foster remained in the car when Porter went inside the restaurant to get food. Investigator Foster then drove Porter to the police station for Porter's interview with Investigator Barry. During the rides that Investigator Foster gave Porter on December 12 and 13, 2022, they were in an unmarked car, Porter was not handcuffed, and Porter rode in the front seat.

After Investigator Foster and Porter arrived at the police station on December 13, 2022, Investigator Barry conducted a video-recorded interview of Porter. A redacted copy of that interview was received into evidence as two video exhibits, over defense counsel's renewed objections raised in the pretrial motion to suppress and a pretrial motion in limine. The interview was split into two exhibits because of the length of the interview—the first exhibit was approximately 1 hour long and the second was approximately 2 hours long.

During the initial portion of the interview, Investigator Barry talked with Porter about background information, including Porter's education, employment history, relationships, and family, explaining that talking about these topics helped put people at ease and made them more comfortable about talking to a police officer. About half an hour into the discussion, Investigator Barry read Porter the *Miranda* warnings, which Porter waived both verbally and in writing. Porter's waiver of his *Miranda* rights was captured by the video, and a copy of Porter's written waiver of his *Miranda* rights was received into evidence over defense counsel's renewed objection as raised in his motion to suppress. During the interview, Porter also signed a second form, which was redacted for trial. That redacted form stated:

> I, [Porter], do hereby freely and voluntarily without threats, duress, coercion, promise, reward or immunity, agree to submit to a[n] examination conducted by the Lincoln Police Department, [redacted] I do so of my own free will, fully understanding that my statements [redacted] may be used against me in a court of law.

This redacted form was admitted into evidence as exhibit 37.

When Investigator Barry reached the point in the interview where he confronted Porter about the allegations regarding A.M., Porter spent 15 to 20 minutes denying those allegations. At trial, near the start of the publication of the second video exhibit capturing Investigator Barry's interview with Porter, the court instructed the jury as follows:

> Before we go any further, ladies and gentlemen, I'm going to instruct you that you've listened to an interview by Investigator Barry, and obviously that interview is in evidence.
>
> The statements of [Investigator] Barry made during the interview are not to be received for the truth of the matters asserted therein, but rather for the limited purpose of placing the statements of . . . Porter in context. You are to consider the statements of Investigator Barry during the interview only for that limited purpose and none other.

Investigator Barry testified that Porter eventually admitted to licking A.M.'s vagina two times while in Lincoln, Nebraska, with the first time being when she was in second or third grade, and he admitted that he digitally penetrated A.M. when she was 7 or 8 years old by putting his finger between the lips of her vagina and that he did so for sexual gratification. Porter stated that period of time "was a dark time for him," that he was "working constantly," and that he was having issues with A.M.'s mother. Porter stated he wanted Investigator Barry to tell A.M. that "he was sorry," that "he didn't mean to put her in this predicament," and that he was having "adult issues and did something horrible."

At about 3:20 p.m., Investigator Barry exited the interview room and Investigator Foster entered the interview room. When Investigator Foster entered the interview room, Porter was texting on his phone. Law enforcement investigation later determined that the text message sent by Porter at that time was sent to A.M.'s mother and stated, "I failed I'm sorry." At the conclusion of the interview, Porter handwrote a letter to A.M. that was received as evidence over Porter's renewed objection related to his motion to suppress. That handwritten letter to A.M. stated, in part:

> [I] am really sorry for my actions and [t]o have betrayed you on so many levels. Time has come to face the music. I took [an] adult problem, and made it yours. . . . [T]he

> only one that gave a fuck about me was you . . . and you provided the one thing your mother talks about [h]uman touch. I'm sorry that I put you and your mother and siblings through this. I feel awful [and] always have. I knew thing[s] would come crashi[n]g down.

After the interview ended, Porter was arrested and transported to jail.

Approximately 2 hours after being taken to jail, Porter made a phone call to A.M.'s mother. The recording of this jail call was received into evidence. During the call, Porter talked to one of his children and said, "'So sorry. Daddy's been a monster for a long time, and y'all deserved it better.'"

(g) Psychologist's Testimony

Dr. Barbara Sturgis, a psychologist, provided generalized testimony of how children report sexual abuse, based on her experience, training, education research, and her work with child victims of sexual assault, but not based upon the particular facts of the instant case. Dr. Sturgis testified that "most kids don't tell when they are children" and that "delayed disclosure" meant that "when kids do tell, they oftentimes wait a long time before doing so." Reasons she explained for children's delayed disclosure of sexual abuse include that (a) younger children do not understand what is happening to them; (b) as they get older, children feel guilty, ashamed, and responsible for what happened to them and may recognize that disclosure would disrupt the family and the family finances if the offender is the "breadwinner"; (c) they are afraid of being blamed and of making the nonoffending caretaker angry; (d) they delay reporting because they are protecting younger siblings; (e) they do not want to get the perpetrator in trouble; or (f) they may have been threatened by the perpetrator. Dr. Sturgis also explained that children do not understand other people's motivations and that children have difficulty specifying exactly when the abuse occurred—"kids can remember what happens"

but "[i]t is hard for them to pin down what happened in any particular time."

(h) State Rests Its Case-in-Chief, Porter Waives His Right to Testify, and Defense Presents Evidence

After the State rested its case-in-chief, Porter moved to dismiss the charges, which request was overruled by the district court. Defense counsel then notified the court that Porter had decided to waive his right to testify. The court and Porter then had a colloquy regarding Porter's absolute right to decide whether Porter wanted to testify, after which the court found that Porter had waived his right to testify freely, voluntarily, knowingly, and intelligently.

The defense then called A.M.'s mother as its only witness. A.M.'s mother testified A.M. was born during a previous relationship. When A.M.'s mother met Porter, A.M. was approximately 4 years old. After A.M.'s mother met Porter, they had three children together and Porter acted as a father figure to A.M. However, at a certain point, A.M. expressed that she did not want Porter to live with them anymore. After A.M. disclosed Porter's abuse to her mother in early December 2022, A.M.'s mother banned Porter from returning to the home. A.M.'s mother also testified that when she confronted Porter with A.M.'s allegations, he responded, in "the softest tone," he was not angry and was not offended. After A.M.'s mother's testimony concluded, the defense rested.

5. Motions for Mistrial

During the course of the trial, Porter made three motions for mistrial.

(a) First Motion for Mistrial

Porter's first motion for mistrial occurred shortly after opening statements when, during a sidebar, trial counsel stated, "I think the record should reflect that from outside of the courtroom, there has been audible crying that would be audible to

counsel, to the parties, and to the jury. And I'm concerned about the prejudicial effect of that at this time." The court then took a recess, during which defense counsel stated:

> Judge, I would like the record to reflect that, following [defense counsel's] opening statement, at such time as [the prosecutor] was excused to bring in the State's first witness, [A.M.], that what could be heard from inside the courtroom from where I am seated, which is further away from the door than where the jury is seated, was audible screams and sobs and a voice being heard to say, I don't want to go in there. . . . I want to go home.
>
> I believe that the jury would have heard this. I believe that they should be admonished to disregard what was heard. . . . I would move for a mistrial at this time, but I anticipate that the Court is unlikely to sustain that under the circumstances.

The court overruled the motion for mistrial and recessed court for approximately 15 minutes, after which the court admonished the jury, "Ladies and gentlemen[,] what, if anything, you may have heard from outside of the courtroom before we took our break is not, obviously, to be considered by you as evidence or for any other purpose in this trial."

(b) Second Motion for Mistrial

Porter's second motion for mistrial occurred on the second day of trial, after defense counsel noted that the officer transporting Porter to the courtroom was visible to the jury. The court overruled this motion for mistrial.

(c) Third Motion for Mistrial

Porter's third motion for mistrial occurred on the third day of trial. After the morning break, before trial resumed, a juror reported to the court that when she was using the restroom prior to the beginning of trial that morning, she overheard a conversation wherein an unknown woman told Wade, the nurse who conducted forensic SANE examinations of K.B.

and S.B. and who had not yet testified at that time, things like "'I know you're nervous,'" "'You can do this,'" and "'Just take a lot of deep breaths.'" At that time, the juror was unaware that Wade would be the next witness. In response to questioning by the court, the juror stated that Wade and the other woman did not discuss anything about the case, that overhearing the conversation would not impact the juror's ability to be a fair and impartial juror, and that the juror could set aside anything that the juror overheard and decide the case based on the facts introduced in the courtroom and the instructions of law provided by the court. Defense counsel again moved for a mistrial, which was overruled by the district court.

6. Jury Instructions and Verdicts

The court instructed the jury regarding counts 1 and 2, first degree sexual assault of a child: "Depending on the evidence, you will either find . . . Porter: 1. Guilty of Sexual Assault of a Child, 1st degree, or 2. Not Guilty." Regarding counts 3 and 4, second degree sexual assault of a child, the court instructed the jury: "Depending on the evidence, you may return one of three possible verdicts: 1. Guilty of Sexual Assault of a Child, 2nd Degree, 2. Guilty of Sexual Assault of a Child, 3rd Degree, or 3. Not Guilty." The jury found Porter guilty of the four charged offenses.

7. Motion for New Trial

Porter filed a motion for a new trial "on the basis of an irregularity in the proceedings of the court and abuse of discretion by which [Porter] was prevented from having a fair trial, as well as errors of law occurring during trial." Specifically, he alleged errors regarding the court's rulings about allowing the redacted polygraph waiver form into evidence. At the hearing thereon, defense counsel argued:

> [M]y recollection of the proceedings is that Investigator Foster testified and was cross-examined. Following that

> cross-examination, the State made a motion to introduce . . . a redacted version of the polygraph waiver. The Court denied the . . . admission . . . at that time and agreed with the defense that cross-examination had not opened the door to questioning of voluntariness.
>
> In an effort to try to abide by the Court's ruling with regard to that issue, defense withheld questioning relating to voluntariness of . . . Porter's statements during that initial recross examination of Investigator Foster, as well as during the cross-examination of Investigator Barry.
>
> It's our position that having to do so in an effort to abide by the Court's ruling did, given the Court's subsequent reversal of that ruling, prejudice[] . . . Porter's right to have those witnesses cross-examined contemporaneously relating to the voluntariness of the statements, as well as his right to confront those witnesses with regard to that issue.
>
> We think that the Court's ruling, as we objected at trial, was contrary to law. We think that it constituted an irregularity in the proceedings. And so, we are asking the Court to grant . . . Porter a new trial on that basis.

During the hearing, defense counsel raised an issue at Porter's request that had not been included in the written motion for a new trial, i.e., that during their testimony, A.M. and K.B. were "each holding a teddy bear, and each essentially using the teddy bear essentially as a shield to avoid having to look at . . . Porter or be seen by the jury," which counsel alleged denied Porter the right to confront the witnesses against him and had an overly prejudicial effect on the jury.

The State objected to the "teddy bear" issue as being noncompliant with Neb. Rev. Stat. § 29-2103 (Reissue 2016), which provides that a motion for new trial must be made by written application and state all the grounds under which it is brought. The State also argued that the court had ruled the redacted form was admissible in evidence during a break in Investigator Foster's direct examination and that, because

Porter had the ability to cross-examine Investigator Foster after that ruling was made and because Porter had the opportunity to call both Investigator Foster and Investigator Barry during his presentation of evidence, Porter was not denied either due process or his right of confrontation. The district court overruled Porter's motion for a new trial.

8. Sentencing

The district court sentenced Porter to 35 to 50 years' imprisonment for each conviction of first degree sexual assault of a child and sentenced Porter to 15 to 20 years' imprisonment for each conviction of second degree sexual assault of a child. The sentences were ordered to run consecutively to each other and to any other sentence previously imposed on Porter, and Porter received credit for 799 days previously served. Porter was also notified that he was subject to Nebraska's Sex Offender Registration Act and lifetime parole supervision. Porter has appealed from his convictions and sentences, represented by new counsel on appeal.

III. ASSIGNMENTS OF ERROR

Porter assigns, renumbered and restated, that the district court erred in (1) overruling his motion to sever the charged offenses; (2) overruling his motion to suppress; (3) overruling his motion in limine; (4) overruling his motion to quash based on his claim that the phrase "[s]erious personal injury" contained in Neb. Rev. Stat. § 28-318(4) (Cum. Supp. 2024) was unconstitutionally vague; (5) finding that the evidence was sufficient to support his convictions; (6) overruling his motions for mistrial based upon (a) the jury's hearing A.M. crying outside the courtroom prior to her testimony, (b) the jury's ability to determine Porter was in custody during the trial, and (c) a juror's overhearing a conversation between State's witness Wade and another individual during a trial break; (7) overruling his motion for new trial because Porter was prejudiced by the redacted polygraph waiver form

(exhibit 37); and (8) imposing excessive sentences; and that (9) Porter's trial counsel was ineffective in (a) failing to object to A.M.'s and K.B.'s each using a stuffed animal during testimony to shield themselves from Porter, (b) failing to object to opposing counsel's closing argument suggesting the jury could infer trauma or extreme mental anguish from S.B.'s demeanor, (c) inferring in opening statements that Porter would testify when he later elected not to testify, (d) failing to object to trial observers' encouraging A.M. during her testimony, (e) failing to adequately prepare Porter to testify and thus contributing to his decision not to testify, and (f) failing to call two named witnesses to testify regarding inconsistencies in K.B.'s and S.B.'s statements.

IV. STANDARD OF REVIEW

Due to the numerous standards of review relevant in this case, the appropriate standard of review will be included within our analyses of Porter's assignments of error.

V. ANALYSIS

1. Motion to Sever

Porter assigns that the district court erred in overruling his motion to sever the four charges against him. Porter argues that failing to sever the charges unfairly prejudiced him, permitted the introduction of otherwise inadmissible evidence, and was confusing and misleading to the jury.

(a) Standard of Review

[1] A denial of a motion to sever will be reversed only if an abuse of discretion is shown that caused the defendant substantial prejudice amounting to a miscarriage of justice. *State v. White*, 321 Neb. 1, 32 N.W.3d 256 (2026).

(b) Analysis

[2,3] As the Nebraska Supreme Court recently stated in *State v. White*, 321 Neb. at 22-23, 32 N.W.3d at 274:

> A clear presumption exists in favor of a joinder of offenses and against severance. The joinder or severance of charges for trial is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2016), which expresses a rule of liberal joinder of offenses to achieve judicial economy and is construed broadly in favor of joinder. Section 29-2002 states, in relevant part: "(1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. . . . (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint . . . the court may order an election for separate trials of counts, indictments, informations, or complaints . . . or provide whatever other relief justice requires." Thus, whether offenses were properly joined involves a two-stage analysis: (1) whether the offenses were sufficiently related so as to be joinable and (2) whether the joinder was prejudicial to the defendant.

[4] There is no constitutional right to a separate trial on different charges. *State v. Corral*, 318 Neb. 940, 20 N.W.3d 372 (2025).

(i) Properly Joinable

We first address whether the charges against Porter were properly joinable.

[5] Prejudice from joinder generally cannot be shown if the evidence of one charge would have been admissible in a separate trial of another charge. *State v. Corral, supra*.

Here, although the charges against Porter involved different victims, the charges involved the same or similar

character, i.e., first degree sexual assault of a child and second degree sexual assault of a child. Further, the similarities in the offenses far outweigh their differences. The charges all related to Porter's sexual contact of minor girls, and the timing of the sexual assaults overlapped. Further, the victims included A.M., in relation to whom Porter essentially acted as a stepfather, and the other charges related to Porter's sexual contact of other minor girls connected to A.M.—two cousins and a friend. All of the victims spent time at Porter's home, which was where all of the offenses occurred. See *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014) (charges involving one child victim and charges involving three other child victims were of same or similar character and, thus, could be joined for trial). Based on the similarities in character between the offenses, the crimes here were joinable.

(ii) Compelling, Specific, and Actual Prejudice

[6,7] Regarding the defendant's burden of proving compelling, specific, and actual prejudice from the court's denial of a motion to sever, in *State v. White*, 321 Neb. 1, 25, 32 N.W.3d 256, 275-76 (2026), the Nebraska Supreme Court explained:

> If two or more offenses are properly joinable, courts must next determine whether joinder would be prejudicial to the defendant. Under § 29-2002(3), even if prejudice is shown, the determination as to any remedy that may be necessary is left to the sound discretion of the district courts. A defendant opposing joinder must meet a high burden of proving prejudice therefrom by showing compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever. This is not merely a better chance of acquittal in separate trials or spillover of evidence from one count to another, but an appreciable chance that the defendant would have had for an acquittal in a severed trial.

> While prejudice from joinder cannot be shown if the evidence of one charge would have been admissible in a separate trial of another charge, the converse is not true. Cross-admissibility of evidence pertaining to joined charges is only one consideration in determining prejudice. We also consider whether, to the extent not cross-admissible, the evidence for one charge is sufficiently distinct from the evidence of the other charge so the jury can keep the evidence pertaining to each separate, rather than combining evidence of both to find guilt it would not have found in a separate trial.

[8] Prejudice usually does not occur from joined charges if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations. *State v. Knutson, supra*.

[9] Here, the evidence supporting each charge was distinct from the evidence of the other offenses, such that the jury could separate the charges and associated evidence, without combining evidence of other charges to find guilt on a charge that it would not have found if the court had ordered separate trials. See *State v. Corral*, 318 Neb. 940, 20 N.W.3d 372 (2025). The court instructed the jury that it "must come to a separate decision regarding each crime." And absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. White, supra*. The trial record in this case does not overcome the presumption that the jury followed its instructions to keep separate what was relevant to each charge. Porter points to no evidence, other than that he was found guilty, that the jury did not follow its instructions. Accordingly, Porter has not demonstrated improper joinder of the charges in this case or compelling, specific, and actual prejudice resulting from the joinder of the charges. This assignment of error fails.

2. Motion to Suppress

Porter's second assignment of error is that the district court erred in overruling his motion to suppress because investigators

confronted Porter by inaccurately accusing him of failing the polygraph test that led to Porter's subsequent involuntary admissions. Porter argues that his "will was overborne by references to a coercive inadmissible procedure. His statements . . . were the fruit of this coercive tactic and should have been suppressed. This is especially true when looking at the entirety of the lengthy interview including the investigator's offerings of help and guidance." Brief for appellant at 29.

(a) Standard of Review

[10] When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Weber*, 320 Neb. 934, 31 N.W.3d 229 (2026). 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 is reviewed independently of the trial court's determination. *Id.*

(b) Analysis

[11-13] Before considering Porter's claim that his statements to Investigators Foster and Barry were involuntary, we review the Nebraska Supreme Court's dictates in *State v. Price*, 320 Neb. 1, 47-48, 26 N.W.3d 70, 107 (2025):

> The test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the 14th Amendment.
>
> Coercive police activity is a necessary predicate to a finding that a confession is not voluntary. As we have explained, "[t]he prohibition on the use of involuntary

> confessions is at its core—like other constitutional rights—a limitation on the power of government. Thus, the focus of this inquiry is on the conduct of governmental actors."
>
> Courts examine police conduct in light of the totality of the circumstances, including the tactics used by the police and the details of the interrogation. If the trial judge is satisfied that under the totality of the circumstances, the defendant was able to reason, comprehend, or resist, the statements are to be admitted. Cases in which a self-incriminating statement was compelled, despite police adherence to the dictates of *Miranda*, are rare.

[14,15] And, in *State v. Montoya*, 304 Neb. 96, 114, 933 N.W.2d 558, 574-75 (2019), the court stated:

> The State has the burden to prove that a defendant's statement was voluntary and not coerced. Whether a statement was voluntarily given depends on the totality of the circumstances. Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne. While the circumstances surrounding the statement and the characteristics of the individual defendant at the time of the statement are potentially material considerations, coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.

Here, the district court did not clearly err in its factual determinations that Porter agreed to an interview to be held at the police station; that early in the interview, Porter was informed that he was not under arrest; and that Porter was advised of his *Miranda* rights, which Porter waived both verbally and in writing. Additionally, Porter agreed to voluntarily return the following day to take a polygraph examination. Prior to the polygraph test, Porter was once again advised that he was

not under arrest and was advised of his *Miranda* rights, which he again waived in writing. After the polygraph examination was conducted, Investigator Barry informed Porter that Porter failed the examination. Although Porter initially continued to deny allegations made against him, he eventually made admissions, which led to Porter's arrest.

[16-18] The gravamen of Porter's argument here is that the investigator's accusation that Porter had failed the polygraph test before Porter made his admissions rendered those admissions involuntary. But as the State points out in its brief, while the result of a polygraph examination is not admissible at trial, statements made in response to questioning during the course of a polygraph examination most usually are. See *State v. Houser*, 234 Neb. 310, 450 N.W.2d 697 (1990) (single-judge opinion). And more specifically, as the Eighth Circuit Court of Appeals held in *Jenner v. Smith*, 982 F.2d 329 (8th Cir. 1993), it is not improper to inform an accused that the results of a polygraph test indicated deception by the accused. In fact, as the Eighth Circuit Court also indicated in *Jenner*:

> Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. *See, e.g., Miller v. Fenton*, 796 F.2d 598, 607 (3d Cir.), *cert. denied*, 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986); *Martin v. Wainwright*, 770 F.2d 918, 925-27 (11th Cir.1985). "[T]here is nothing inherently wrong with efforts to create a favorable climate for confession." *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir.), *cert. denied*, 488 U.S. 900, 109 S.Ct. 247, 102 L.Ed.2d 236 (1988). As the Supreme Court said in *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973), "very few

> people give incriminating statements in the absence of official action of some kind."

982 F.2d at 334.

After reviewing the entirety of the record, we find no error with the district court's finding that Porter's admissions were voluntary and not the result of conduct by law enforcement officials designed to overbear, or that resulted in overbearing, Porter's will or were in any way obtained through coercion. To the contrary, the record reveals that Porter voluntarily agreed to the interviews, agreed to the polygraph examination, was advised he was not under arrest, and was provided his *Miranda* rights, which he waived both verbally and in writing. Further, the interviews of Porter were completely devoid of physical threats or coercion, and the interviewing officers used no improperly coercive questioning tactics. This assignment of error fails.

3. Motion in Limine

Porter's third assignment of error is that the district court erred in overruling his motion in limine seeking to exclude certain statements made by Investigator Barry during his interrogation of Porter involving his stated belief in A.M.'s accusations. Porter contends that the court's denial of his motion in limine and the limiting instruction given to the jury insufficiently addressed the issue because the jury instruction did not identify the specific statements at issue and did not specify that Investigator Barry's comments on A.M.'s believability or credibility should not weigh into the jury's determination of whether A.M. was credible.

[19] The Nebraska Supreme Court has

> repeatedly held that a motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when

> the particular evidence is offered at trial in order to predicate error before an appellate court.

State v. Ferrin, 305 Neb. 762, 770, 942 N.W.2d 404, 411 (2020). See, also, *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

[20] Although Porter's brief states that defense counsel objected at trial to Investigator Barry's comments that Investigator Barry "believed" A.M., which objection had previously been raised in Porter's pretrial motion in limine, Porter did not assign error to the court's rulings during trial. See brief for appellant at 29.

> To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
>
> An appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.

State v. Ferrin, 305 Neb. at 770-71, 942 N.W.2d at 411-12. Because Porter's assignment of error challenges only the district court's ruling on the motion in limine, it presents nothing for appellate review.

4. Motion to Quash

Porter's fourth assignment of error is that the district court erred in overruling his motion to quash because the phrase "[s]erious personal injury" defined in § 28-318(4), which is an element of second degree sexual assault of a child, is unconstitutionally vague. The State argues that Porter is due no relief because he failed to comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2024). We agree.

[21-23] Rule 2-109(E) provides, in pertinent part, that "[a] party who asserts that a Nebraska statute is unconstitutional under the Nebraska Constitution or the U.S. Constitution must file and serve notice thereof with the Clerk." The constitutionality of a statute for purposes of article V, § 2, of the

Nebraska Constitution and § 2-109(E) includes both facial and as-applied challenges. *State v. Sutton*, 319 Neb. 581, 24 N.W.3d 43 (2025). Strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized. *Id*. "An appellant challenging the constitutionality of a statute must strictly comply with § 2-109(E). Without strict compliance with § 2-109(E), this court will not address a constitutional challenge to a statute." *State v. Sutton*, 319 Neb. at 599, 24 N.W.3d at 60.

Since Porter failed to file a notice that he was challenging the constitutionality of a Nebraska statute, we decline to address this assignment of error.

5. Insufficiency of Evidence

Porter's fifth assignment of error is that the evidence was insufficient to support each of his convictions. As to count 1, he claims that A.M.'s disclosures regarding sexual abuse were inconsistent. As to count 2, Porter claims that the evidence was insufficient to prove penetration of A.E. As to counts 3 and 4, Porter contends that the evidence was insufficient to prove that K.B. and S.B. suffered severe personal injury or "extreme mental anguish."

(a) Standard of Review

[24] In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Clausen*, 318 Neb. 375, 15 N.W.3d 858 (2025). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

(b) Analysis

(i) Count 1—First Degree Sexual Assault of A.M.

Porter assigns as error that the evidence was insufficient to show that he sexually penetrated A.M. We note that, in Porter's brief, he argues:

> A.M. admitted her disclosures regarding sexual abuse were inconsistent. She admitted telling the child advocacy interviewer she could not recall whether any part of [Porter's] body ever went inside her body. . . . Yet at the time of trial, even more time had passed since the allegations and her testimony changed. A.M. also admitted she did not like [Porter] as he was mean and not nice to her mother. . . . Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime in Count [1] had been proven.

Brief for appellant at 37. This argument asks this court to pass on the credibility of witnesses and to reweigh the evidence, which is the province of the finder of fact and not an appellate court. See *State v. Tucker*, 301 Neb. 856, 920 N.W.2d 680 (2018). We now proceed to consider whether the evidence was sufficient to support Porter's conviction of the first degree sexual assault of A.M.

Section 28-319.01 provides, in pertinent part:

> (1) A person commits sexual assault of a child in the first degree:
>
> (a) When he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older; or
>
> (b) When he or she subjects another person who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older.

"Sexual penetration" is statutorily defined as

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical, nonhealth, or nonlaw enforcement purposes. Sexual penetration shall not require emission of semen.

§ 28-318(6).

[25] During the trial, A.M. testified, among other instances of sexual abuse by Porter, that when A.M. was 7 years old, Porter put A.M.'s mouth on his penis for approximately 1 minute. A.M. also testified that, when she was in kindergarten, Porter "licked" her vagina. "[O]nce the perpetrator's lips or tongue touches any part of a female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia." *State v. Brown*, 225 Neb. 418, 429, 405 N.W.2d 600, 607 (1987). Viewing the evidence in the light most favorable to the State, we find that the evidence is sufficient to support Porter's conviction of the first degree sexual assault of A.M.

(ii) Count 2—First Degree Sexual Assault of A.E.

Porter next contends that the evidence was insufficient to show that he sexually penetrated A.E. We set forth the statutory language in the preceding section and do not repeat it here.

During the trial, A.E. testified that, when she was approximately 6 to 8 years old, she and A.M. were best friends and A.E. would frequently visit A.M.'s home. During some of those visits, Porter would put her up against a beam in the downstairs of the home, pull down her pants, and use his tongue to touch her vagina. As we stated previously, "Once the perpetrator's lips or tongue touches any part of a female's

genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia." *Id*. Viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to support Porter's conviction of the first degree sexual assault of A.E.

(iii) Count 3—Second Degree Sexual Assault of S.B.

Porter next argues that the evidence was insufficient to support his conviction of the second degree sexual assault of S.B.

A person commits second degree sexual assault of a child if he or she is at least 19 years of age and subjects another person 14 years of age or younger to sexual contact and causes serious personal injury to the victim. § 28-320.01(1) and (2). "Sexual contact" is statutorily defined as

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact also means the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact includes only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact also includes the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual abuse by a school employee under section 28-316.01 or sexual assault of a child under sections 28-319.01 and 28-320.01.

§ 28-318(5).

"Serious personal injury" is statutorily defined as "great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." § 28-318(4).

Although Porter does not argue that the evidence was insufficient to support the determination that he subjected S.B. to sexual contact, S.B., who was 14 years old at the time of the trial, testified that Porter touched her vagina and placed her hand on his penis and moved her hand "up and down." That testimony was sufficient to support a finding by the jury that Porter, who was over the age of 19, subjected S.B., who was 14 years of age or under, to sexual contact.

Porter separately argues that "the State had the burden to prove [S.B.] suffered severe personal injury which can include extreme mental anguish or trauma" and that the State failed to prove S.B. suffered "extreme mental anguish." Brief for appellant at 38.

[26,27] The Nebraska Supreme Court has acknowledged that when a trier of fact observed the witnesses' testimony, "any observations of emotional trauma could validly be used in determining the extent of serious personal injury to the victims." *State v. Martin*, 232 Neb. 385, 397, 440 N.W.2d 676, 685 (1989). Further, in *State v. Bunner*, 234 Neb. 879, 888, 453 N.W.2d 97, 102-03 (1990), the Nebraska Supreme Court stated:

> Consequently, it is all too evident that one need not be specially trained in medicine or psychology to recognize and appreciate the injury from a forceful sexual intrusion into another's body and invasion of the mind and very personality of another human being. The nature of a sexual assault through force, a crime which Bunner has admitted by his guilty pleas, furnished a basis for a judicial determination that a sexual assault victim sustained "serious personal injury" in the form of "extreme mental anguish or mental trauma."

Although the Nebraska Supreme Court's statements in *Martin* and *Bunner* were made in the context of considerations of a sentencing court following the defendants' convictions of first degree sexual assault, the Supreme Court's dictates

inform our analysis of the sufficiency of the evidence to support the jury's verdict in this context.

During her testimony, S.B., who was 14 years old, testified that Porter's touching her made her uncomfortable and scared, testified that she has nightmares about Porter's being out of jail and coming to get her, testified that she was placed on probation because she stopped attending school because she was "scared" to attend, and that she had used a blade to cut her wrist. In addition, during S.B.'s testimony, she cried, whispered, and said, "I'm just scared. I just want to go home." Based on S.B.'s demeanor while testifying and her attestations that Porter's conduct caused her to have nightmares about Porter, caused her to cut her wrist, and resulted in her extended absences from school because she became too scared to attend, we find that, when viewed in the light most favorable to the State, this evidence supports the jury's determination that Porter caused S.B. extreme mental anguish or trauma. This claim fails.

(iv) Count 4—Second Degree Assault of K.B.

Similarly to his previous claim, Porter contends that the State failed to meet its burden to prove that K.B. suffered extreme mental anguish. We set forth the statutory language in the preceding section and do not repeat it here.

Although Porter does not argue that the evidence was insufficient to support the determination that he subjected K.B. to sexual contact, K.B., who was 11 years old at the time of the trial, testified that when she was about 5 or 6 years old, Porter used his finger to touch K.B.'s vagina over her clothes. This testimony was sufficient to support a finding by the jury that Porter, who was over the age of 19, subjected K.B., who was 14 years of age or under, to sexual contact.

And regarding Porter's claim that the State failed to meet its burden to prove that K.B. suffered extreme mental anguish, K.B. whispered and cried while testifying. She testified that

she has had nightmares due to the sexual assaults, which make her sad and scared, and that she sometimes has trouble sleeping. She also stated that she used to see Porter when she closed her eyes when she was in the shower. K.B. also admitted that school is hard for her and that she starts crying at school, "[b]ecause it gets stuck in my head what happened to me." We find that, when viewed in the light most favorable to the State, this evidence supports the jury's determination that Porter caused K.B. extreme mental anguish or trauma. This claim fails.

6. Motions for Mistrial

Porter assigns that the district court erred in overruling his motions for mistrial.

(a) Standard of Review

[28,29] An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the trial court has abused its discretion. *State v. Ramos*, 319 Neb. 511, 23 N.W.3d 640 (2025). 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.*

(b) Analysis

[30,31] As the Nebraska Supreme Court recently stated in *State v. Parks*, 319 Neb. 773, 814, 25 N.W.3d 146, 180-81 (2025):

> 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. To prove error predicated on the failure to grant a mistrial, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. In the context of a

> denial of a motion for mistrial, actual prejudice means "prejudice that is '"[e]xisting in fact; real."' In defining the term, we have drawn on its meaning in similar legal contexts to determine that actual prejudice requires 'a reasonable probability that, but for [the] errors, the result of the proceeding[s] would have been different.' 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

[32] 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. *State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025).

(i) First Motion for Mistrial

Porter's first claim regarding the denial of a motion for mistrial occurred shortly after opening statements when, during a sidebar, trial counsel stated, "I think the record should reflect that from outside of the courtroom, there has been audible crying that would be audible to counsel, to the parties, and to the jury. And I'm concerned about the prejudicial effect of that at this time." The court then took a recess, during which defense counsel stated:

> Judge, I would like the record to reflect that, following [defense counsel's] opening statement, at such time as [the prosecutor] was excused to bring in the State's first witness, [A.M.], that what could be heard from inside the courtroom from where I am seated, which is further away from the door than where the jury is seated, was audible screams and sobs and a voice being heard to say, I don't want to go in there. . . . I want to go home.
>
> I believe that the jury would have heard this. I believe that they should be admonished to disregard what was heard. . . . I would move for a mistrial at this time, but I anticipate that the Court is unlikely to sustain that under the circumstances.

The court overruled the motion for mistrial, recessed court for approximately 15 minutes, and then immediately admonished the jury, "Ladies and gentlemen[,] what, if anything, you may have heard from outside of the courtroom before we took our break is not, obviously, to be considered by you as evidence or for any other purpose in this trial."

The question here becomes whether A.M.'s emotional outburst, outside of the courtroom and prior to taking the stand, constitutes an event occurring during the course of trial which is of such a nature that its damaging effect could not be removed by proper admonition or instruction to the jury, thereby preventing a fair trial. We hold that it was not.

[33] In support of his contention that A.M.'s outburst actually prejudiced him, Porter simply argues that "any rational jury would be impacted by hearing the emotional cries and pleas of the victim prior to testimony." Brief for appellant at 40. Porter fails to cite any legal authority for this proposition. To the contrary, in *State v. Sellers*, 279 Neb. 220, 226, 777 N.W.2d 779, 786 (2010), the Nebraska Supreme Court held:

> We have reviewed episodes of emotion during trial on several occasions. In *Wamsley v. State*, [171 Neb. 197, 106 N.W.2d 22 (1960),] we recognized that when there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and ensure a fair and impartial trial for the defendant.

In this case, following A.M.'s emotional outburst indicating her desire not to be present at the courthouse, the trial court immediately admonished the jury to disregard the outburst and not consider it as evidence in the trial. There is nothing in the record to suggest that this outburst had any bearing on the jury's view of Porter's guilt or innocence, and, on this record, we find no abuse of discretion in the trial

court's dealing with the outburst with a timely admonition so as to ensure the judicial atmosphere and ensure a fair trial. We reject this assignment of error.

(ii) Second Motion for Mistrial

Porter's second motion for mistrial occurred on the second day of trial, after defense counsel noted that the officer transporting Porter to the courtroom was visible to the jury. The court overruled this motion for mistrial.

Again, we review Porter's claim under the same standard—that is, whether the presence of a transporting officer in the courtroom constitutes an event occurring during the course of trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction.

[34] Porter's limited argument in support of his claim of prejudice here is that "[t]he fact jurors can clearly see correctional staff and discern [Porter's] custodial circumstance obviates any benefits from trial counsel's pretrial motions to remove restraints and allow civilian clothing during the trial." Brief for appellant at 40. Again, Porter cites no authority for this proposition. But as the State points out in its brief, to the contrary, in *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), the U.S. Supreme Court stated that "'reason, principle, and common human experience,' . . . counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial."

Porter failed to make a record of where the complained-of official or officials were stationed in the courtroom or describe their appearance. On this record, we find no indication of inherent prejudice to Porter by the presence of a security guard or guards located in the courtroom, and the trial court did not abuse its discretion in denying Porter's motion for a mistrial on this basis.

(iii) Third Motion for Mistrial

Porter's third motion for mistrial occurred on the third day of trial. After the morning break, before trial resumed, a juror

reported to the court that when she was using the restroom prior to the beginning of trial that morning, she overheard a conversation wherein an unknown woman told Wade things like "'I know you're nervous,'" "'You can do this,'" and "'Just take a lot of deep breaths.'" At that time, the juror was unaware that Wade would be called as the State's next witness. Upon questioning by the court, the juror stated that Wade and the other woman did not discuss anything about the case, that overhearing the conversation would not impact the juror's ability to be a fair and impartial juror, and that the juror could set aside anything that the juror overheard and decide the case based on the facts introduced in the courtroom and the instructions of law provided by the court. Defense counsel again moved for a mistrial, which was overruled by the district court.

In support of his contention that this limited interaction resulted in prejudice to him, Porter argues that "[w]hile not intentional, this juror was able to assess the witness's demeanor outside the courtroom which is somewhat akin to doing research which is forbidden for jurors." Brief for appellant at 41. And once again, Porter provides no citation to authority in support of his contention.

But as this court held in *State v. McSwine*, 24 Neb. App. 453, 890 N.W.2d 518 (2017), a trial court did not abuse its discretion in denying a motion for mistrial when a juror received information from her husband that their trial was the subject of a local newspaper article because, notwithstanding that communication, the juror did not otherwise receive extraneous information about the specifics of the case. Stated differently, we found that "[a] juror's knowledge that an article about the case appeared in the local newspaper, without any additional information, would not affect the average juror's ability to remain impartial." *Id.* at 469, 890 N.W.2d at 531. We make a similar finding here.

Although the juror rightly reported having heard the witness talking in the bathroom, the communication was limited

to describing nervousness in testifying and did not involve any communication that would impact an average juror's ability to remain impartial, and the juror specifically acknowledged to the court that she could remain impartial following direct questioning by the trial court on the subject. We find no abuse of discretion by the district court in denying this motion for mistrial on this record.

7. Motion for New Trial

Porter's seventh assignment of error is that the district court erred in overruling his motion for a new trial because Porter was prejudiced by the admission of exhibit 37, the redacted polygraph waiver form, into evidence during the trial.

(a) Standard of Review

[35] The standard of review for a trial court's denial of a motion for new trial after an evidentiary hearing is whether the trial court abused its discretion in denying the motion. *State v. Ramos*, 319 Neb. 511, 23 N.W.3d 640 (2025).

(b) Analysis

In Porter's trial, a key issue raised by Porter was whether Porter's statements to law enforcement were voluntary. Porter contends that admitting the redacted polygraph waiver form was superfluous due to the admission of his *Miranda* waiver forms and that the redacted polygraph waiver form would likely confuse the jury. However, the redacted polygraph waiver form signed by Porter stated that Porter was submitting to an examination "freely and voluntarily without threats, duress, coercion, promise, reward or immunity, [and that he did] so of [his] own free will, fully understanding that [his] statements may be used against [him] in a court of law." This language, which differed from the language contained in the *Miranda* forms, was relevant to the issue raised by Porter of whether his statements were voluntary.

The specific basis of Porter's claim here is that the admission of the redacted form was unfairly prejudicial to him. Having already determined that the evidence itself was relevant to the issue of the voluntariness of Porter's later statements to law enforcement, we read his argument as claiming the document was nevertheless unfairly prejudicial to him.

Neb. Rev Stat. § 27-403 (Reissue 2016) provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Porter appears to focus on the form as constituting a needless presentation of cumulative evidence, claiming the State made its case on voluntariness by noting Porter was provided his *Miranda* rights and waived them. But the language contained in the redacted form offered and received as exhibit 37 contained different language regarding Porter's voluntary consent to proceed with Porter's interview. On this record, we find that the differing language in the redacted form received as exhibit 37 did not constitute the "needless presentation of cumulative evidence" and was therefore not unfairly prejudicial to Porter. See § 27-403.

Porter separately argues that, because of certain pretrial rulings governing the same subject, he was prejudiced by the actual admission of exhibit 37 because he made efforts not to open the door to the admission of that exhibit and carefully worded his examination of Investigators Foster and Barry to avoid this result. He claims this separately prejudiced his defense because, once the trial court decided to admit exhibit 37 into evidence, he was no longer in a position to properly question Investigators Foster and Barry, thereby negatively impacting his defense strategy. But as the State indicates in its brief, Porter did in fact cross-examine both Investigators Foster and Barry after the trial court made its ruling admitting exhibit 37 into evidence.

For the reasons stated above, we reject Porter's claim that the trial court abused its discretion in overruling Porter's motion for a new trial.

8. Excessive Sentences

Porter's eighth assignment of error is that the district court abused its discretion in imposing excessive sentences. Porter argues that a "sentence higher than one-hundred years does not fit the offender." Brief for appellant at 50.

(a) Standard of Review

[36] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

(b) Analysis

Porter was convicted of two counts of first degree sexual assault of a child, Class IB felonies, and two counts of second degree sexual assault of a child, Class II felonies. See §§ 28-319.01(1) (first degree sexual assault of a child) and 28-320.01 (second degree sexual assault of a child). Porter's sentences of 35 to 50 years' imprisonment for each count of first degree sexual assault of a child are within the statutory sentencing range for Class IB felonies, which are punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2024) (felonies; classification of penalties). Additionally, first degree sexual assault of a child, first offense, carries a mandatory minimum sentence of 15 years' imprisonment. § 28-319.01(2). Porter's sentences of 15 to 20 years' imprisonment for each count of second degree sexual assault of a child are within the statutory sentencing range for Class II felonies, which are punishable by a minimum of 1 year of

imprisonment and a maximum of 50 years' imprisonment. See § 28-105. Each of Porter's sentences is within the statutory limits.

[37-39] 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 and applicable legal principles. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026). 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. *Id.* We have acknowledged that while these factors should instruct a sentencing court, they do not comprise a mathematical formula that must be rigidly implemented, and that a sentence should be tailored and based on factors that fit the offender and not merely the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and of all the facts and circumstances surrounding the defendant's life. *Id*.

[40] During the sentencing hearing, the district court stated that it had reviewed the presentence investigation report and considered the required sentencing factors. A sentencing court is not required to articulate on the record that it has considered each sentencing factor nor to make specific findings as to the facts pertaining to the factors or the weight given them. *State v. Greer*, 309 Neb. 667, 962 N.W.2d 217 (2021).

At the time of sentencing, Porter was 37 years old, a high school graduate, and an Army veteran. He was divorced with three dependents. Although Porter's criminal history is limited to traffic offenses and a conviction for third degree domestic assault, the presentence investigation report indicated that Douglas County, Nebraska, had issued an arrest

warrant for Porter for four counts of first degree sexual assault of a child. Porter reported that he has been diagnosed with post-traumatic stress disorder, depression, and anxiety. The level of service/case management inventory assessed Porter as a high risk to reoffend. When asked by the probation officer conducting the interview who was to blame for what happened, Porter stated, "'I don't think I should answer that. [T]hese are the questions my attorney told me not to get into.'" Additionally, Porter did not want to answer why he believed he got in trouble for the offenses, how he believed the victims felt, or how serious of a problem he believed that he had with sexual offending. The probation officer noted:

> Throughout the interview, . . . Porter did not express any remorse for his actions. He appeared to deflect any questions pertaining to the events of the present offense. Additionally, he appeared to place blame elsewhere, saying, "I'll just say that a big blow up happened the night before I was accused of these offenses." He did not acknowledge his victims and continued deflecting anything about them, noting that he was advised not to speak about certain topics by his attorney.

K.B. and S.B. submitted victim impact statements. Fourteen-year-old S.B. wrote that she will have to live with Porter's abuse for the rest of her life. She stated that she is more distant, is not as active or energetic, and does not enjoy things that she used to enjoy. She stated that she is scared to attend school and has been placed on probation as a result of her absences. S.B. said that she is "terrified" of Porter, writing, "[H]e took my childhood, my [confidence,] my trust . . . took my whole life away [and] ruined my life!" Eleven-year-old K.B. wrote that, because of Porter's abuse, she has almost nightly nightmares, fears adult men, and has trust issues, depression, and anxiety. She also has a difficult time focusing during school. She stated that she tends to "shut [herself] out" and that "[w]hat [Porter] did makes [her] sad, mad, and alone."

Based on factors, including that Porter's sentences are within the relevant statutory sentencing ranges, the nature of the offenses and number and ages of the victims, his high risk to reoffend, the continuing emotional harm to the victims, and Porter's refusal to accept responsibility for the offenses and his tendency to divert blame for his actions, the sentences imposed by the district court did not constitute an abuse of discretion. This assignment of error fails.

9. Ineffective Assistance of Counsel

In his ninth assignment of error, Porter, who is represented by new counsel on direct appeal, contends that his trial counsel was ineffective in various ways.

(a) Standard of Review

[41] Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance. *Id*.

(b) Principles and Requirements When Examining Ineffective Assistance of Counsel Claims Raised on Direct Appeal

[42-48] The Nebraska Supreme Court recently recounted the governing principles and requirements in examining ineffective assistance of counsel claims raised on direct appeal in *State v. Lopez, supra*. In addressing the general principles regarding ineffective assistance of counsel claims, the Supreme Court stated:

> Generally, to prevail on a claim of ineffective assistance of counsel under the framework 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),] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defense. To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Trial counsel is afforded due deference to formulate trial strategy and tactics and, in considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel acted reasonably. Thus, an appellate court will not second-guess the reasonable strategic decisions of trial counsel.
>
> To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability of prejudice is a probability sufficient to undermine confidence in the outcome. 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.

State v. Lopez, 231 Neb. at 146-47, 32 N.W.3d at 891-92.

In identifying the specific requirements for raising ineffective assistance of counsel claims on direct appeal, the Supreme Court stated:

> The need for finality in the criminal process generally requires that a defendant bring all claims for relief at the first opportunity. Our cases hold that when a defendant is represented by the same lawyers at trial and on direct appeal, the defendant's first opportunity to assert claims of ineffective assistance of counsel is in a postconviction motion. But as we explain next, when a defendant is represented by new counsel on direct appeal, the procedural

> posture of the case requires the defendant to raise, on direct appeal, any known or apparent claims of ineffective assistance.

State v. Lopez, 231 Neb. 118, 147-48, 32 N.W.3d 868, 892 (2026).

[49] Further,

> When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must properly raise on direct appeal any issue of trial counsel's deficient performance which is either known to the defendant or is apparent from the record. Any known or apparent issue of deficient performance not properly raised on direct appeal will be procedurally barred in a subsequent postconviction proceeding.

Id. at 148, 32 N.W.3d at 892.

[50-54] The Supreme Court also recited the standards that the defendant must specifically assign and specifically argue trial counsel's allegedly deficient conduct:

> In every appeal in Nebraska, 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. Although claims of ineffective assistance of counsel are not, technically speaking, assignments of error by the trial court, our cases require such claims to be included in the separate "assignments of error" section of the brief and to be separately numbered and paragraphed.
>
> Although prevailing on a claim of ineffective assistance under *Strickland* requires proving both that counsel's performance was deficient and that the deficient performance actually prejudiced the defendant, a defendant seeking to raise a claim of ineffective assistance on direct appeal is not required to make specific allegations of prejudice. However, anytime a defendant seeks to raise an ineffective assistance claim, whether on direct appeal or in a postconviction motion, the defendant must specifically

> assign and specifically argue the alleged deficient performance, and must do so with sufficient particularity.
>
> To sufficiently allege deficient performance, the allegations must include a "description of the specific conduct alleged to constitute deficient performance." The description of deficient performance must be particular enough to (1) allow an appellate court to determine whether the claim can be decided upon the trial record and (2) allow a district court reviewing a later postconviction motion to recognize whether the claim was raised on direct appeal. To allege deficient conduct with specificity requires "more than generalities of inadequate preparation or failures to introduce beneficial evidence." An allegation will be sufficiently specific "when it addresses a specific issue that does not require additional information to understand precisely what the assignment attacks." Although the argument section of the brief should elaborate on the alleged deficiencies by discussing legal authority and its application to the trial record, the argument section should not be used to set forth, for the first time, what the allegedly deficient conduct was.

State v. Lopez, 321 Neb. 118, 148-50, 32 N.W.3d 868, 892-93 (2026).

[55-58] Finally, the Supreme Court reiterated that not all ineffective assistance of counsel claims can be resolved on direct appeal:

> The fact that a claim of ineffective assistance of counsel is properly raised on direct appeal does not mean it can be resolved on direct appeal. The determining factor is whether all the facts necessary to the analysis are part of the appellate record.
>
> An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record. But if the record on direct appeal conclusively establishes both that trial counsel's performance was deficient and that the deficient

> performance prejudiced the defendant's defense, an appellate court can determine trial counsel was ineffective. Conversely, if the record on direct appeal conclusively establishes either that trial counsel's performance was not deficient or that any deficient performance did not prejudice the defendant's defense, an appellate court can determine trial counsel was not ineffective. However, if the record on direct appeal does not conclusively establish or refute a claim of ineffective assistance, then the issue cannot be resolved on direct appeal and must be properly raised in a subsequent postconviction proceeding.

Id. at 150, 32 N.W.3d at 893-94 (2026).

(c) Analysis

We now apply these principles to the ineffective assistance of counsel claims alleged by Porter in this direct appeal.

(i) Failure to Object to A.M.'s and K.B.'s Holding Stuffed Animal While Testifying

Porter's first claim of ineffective assistance of trial counsel is based upon counsel's "fail[ure] to object when A.M. and K.B. utilized a stuffed animal during testimony to shield themselves from [Porter]." Brief for appellant at 44. He cites to *State v. Parker*, 276 Neb. 661, 673, 757 N.W.2d 7, 18 (2008), *modified on denial of rehearing* 276 Neb. 965, 767 N.W.2d 68 (2009), for the proposition that the use of a screen placed in the courtroom to prevent a child witness from seeing the defendant "was inherently prejudicial to [the defendant's] right to a fair trial." Although we agree with this proposition of law, we disagree with its application to the case at bar.

In *Parker*, the screen placed between the child victim and the defendant was described as "a large opaque screen" which "remained a constant presence during [the child victim's] testimony. The screen stood there protecting [the victim] as she told the jury how fearful she was of [the defendant]. The screen was, in effect, a judicially sanctioned prop that lent

credence to the witness' claims." 276 Neb. at 672, 757 N.W.2d at 17.

The facts present in the instant case are distinguishable from those present in *Parker*. In the instant case, there was no screen separating the witnesses and Porter. And although Porter's brief argues that both A.M. and K.B. brought a stuffed animal with them while testifying, the record only reflects that K.B., who was 11 years old when she testified, held a stuffed animal during her testimony. K.B. was visibly upset during her testimony, was crying, and spoke softly. And the only time when the presence of the stuffed animal was brought to the jury's attention during K.B.'s testimony was when the prosecutor asked if K.B. could "slide [the stuffed animal] over a little bit" so she could more clearly see Porter in order to identify him. A comfort item held by a young victim while testifying is not the equivalent of a "large opaque screen" designed to restrict the witness from seeing the defendant. See *id*. at 672, 757 N.W.2d at 17.

[59-62] We recognize that trial counsel's decision not to object to A.M.'s or K.B.'s use of a stuffed animal while testifying may fall within the ambit of trial strategy. And as the Nebraska Supreme Court recently stated in *State v. Corral*, 318 Neb. 940, 960, 20 N.W.3d 372, 394 (2025):

> Trial counsel is afforded due deference to formulate trial strategy and tactics. We do not use perfect hindsight to criticize unsuccessful trial strategies. Rather, we must assess trial counsel's performance from counsel's perspective when counsel provided the assistance. There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess counsel's reasonable strategic decisions. We have cautioned that it is more the exception than the rule that defense counsel's strategy can be reasonably inferred from the trial record on direct appeal.

Because we cannot infer the basis for trial counsel's strategy from this record, and because of the dearth of direct

authority on this topic in our state, we find the record on direct appeal is insufficient to address this ineffective of assistance of counsel claim, and this claim is preserved.

(ii) Failure to Object to State's Closing Argument

Porter's next claim of ineffective assistance of trial counsel is counsel's failure to object to the State's closing argument suggesting the jury could infer trauma or extreme mental anguish from S.B.'s demeanor.

The following quotation is the portion of the State's closing argument talking about extreme mental trauma and anguish:

> So, let's talk about extreme mental anguish or trauma. What is the best evidence of [S.B.'s] extreme mental anguish or trauma? It's not the things that she testifies about, it's how she testified. You saw her testify. She was scared. She was soft-spoken. On cross-examination, she said she was scared and just wanted to go home. She started crying. She asked, "Are we almost done?" *Her demeanor is evidence*. You can consider that. She is a terrified kid.
>
> But she also testified about things that have happened to her. She's had nightmares about [Porter's] getting out and coming to get her. She doesn't go to school. She's on probation because of how much [school] she [has] missed. She's scared to, because it stresses her out.
>
> And of the things that have happened to her in the past, probably the most important: she cuts herself. She cuts her inner thighs; she cuts her wrist. It's tough to imagine an emotional trauma so deep and disturbing that physical pain, which we all try to avoid, is a relief. It's even harder to imagine that for a child, rather than an adult.

(Emphasis supplied.) In his brief, Porter specifically directs this court to the emphasized language "Her demeanor is evidence."

[63] As we noted earlier in this opinion, the Nebraska Supreme Court has acknowledged that when a trier of fact

observed the witnesses' testimony, "any observations of emotional trauma could validly be used in determining the extent of serious personal injury to the victims." *State v. Martin*, 232 Neb. 385, 397, 440 N.W.2d 676, 685 (1989). Because we find a witness' testimonial demeanor is evidence upon which a jury may rely in assessing credibility or, in this case, the extent of "serious personal injury," the State was permitted to comment on it during closing argument. See *id*. As such, Porter's counsel was not ineffective for failing to make a meritless claim. As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument to the trial court. *State v. Jaeger*, 311 Neb. 69, 970 N.W.2d 751 (2022). This claim fails.

(d) Defense Counsel's Reference During Opening Statements Related to Porter's Testifying During Trial

Porter next alleges that his trial counsel was ineffective when he implied during opening statements that Porter would testify, when he later elected not to. Specifically, Porter objects to this part of trial counsel's opening statement:

> You may also be hearing testimony from . . . Porter himself. He will describe for you the events leading up to his arrest, his home life, becoming aware of these allegations, and questioning to which he was subjected . . . by law enforcement, and most importantly, his routine and continued denials of these allegations against him.

Porter elected not to testify during the trial.

A somewhat analogous situation was addressed by the Nebraska Supreme Court in *State v. Loding*, 296 Neb. 670, 682-83, 895 N.W.2d 669, 681 (2017), wherein the court considered whether defense counsel's failure to call the victim's mother as a defense witness despite stating in opening statements that she would testify:

> As [the defendant] conceded at oral argument, his brief misstated the record when he argued that counsel

> failed to explain why [the victim's] mother did not testify. The record shows that [defense] counsel explained, "We said we would call the mother . . . we said that in the beginning because we thought the state would prove its case, and it has not."
>
> During closing argument, counsel explained multiple times that the burden of proof was on the State to prove beyond a reasonable doubt that [the defendant] was guilty. Counsel then reviewed the evidence and explained to the jury why the State had not met its burden. Outside the presence of the jury, [defense counsel] confirmed on the record that the mother did not want to testify and that he did not want her to testify.
>
> But the record does not explain why, during opening statement, counsel elected to tell the jury that [the victim's] mother would be called to testify. Although the record shows how the problem was addressed, the record does not show how it came about. Under these circumstances, we conclude that the record is not sufficient to address this matter on direct appeal.

Similarly, in *State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018), the Nebraska Supreme Court concluded that the record was insufficient on direct appeal to resolve the defendant's claim that trial counsel was ineffective for failing to call the victim's parents as witnesses after informing the jury of those witnesses' testimonies during opening statements.

Here, the record is also insufficient to address this matter on direct appeal. During opening statements, defense counsel informed the jury that Porter "may" testify, but then Porter did not testify at trial. Further, unlike the situation in *Loding, supra*, the record in the instant case does not contain any explanations for defense counsel's reference to Porter's testimony during trial. Accordingly, the record before this court is not sufficient to address this matter on direct appeal.

(e) Failure to Object to Trial Observers' Encouraging A.M. During Her Testimony

Porter next contends that his trial counsel was ineffective in failing to object to trial observers' encouraging A.M. during her testimony.

The record reflects that, near the start of A.M.'s testimony, she was crying and visibly upset. After a spectator made an encouraging comment to A.M., defense counsel requested a sidebar during which he informed the court, "[O]ne of the spectators said, or half whispered, but loud enough that I could hear it, 'You got this,' in the direction of the witness." Although the court stated that it had not heard the comment, the prosecutor confirmed that he had also heard the comment but could only identify that the comment came from one of two women in the gallery. The court directed the prosecutor to "admonish [the spectators] that they will no longer be in the courtroom if they continue to act in such a manner."

Porter argues that "[t]rial counsel, at the least, should have requested the court to admonish the observers . . . " Brief for appellant at 48. Although not requested by defense counsel, the court directed the prosecutor to admonish the spectators. Here, Porter cannot claim ineffective assistance of counsel where Porter admits that the desired result was achieved, i.e., that the spectators were admonished. This claim fails.

(f) Failure to Adequately Prepare Porter to Testify

Porter next contends that trial counsel was ineffective in failing to adequately prepare Porter to testify, which contributed to Porter's decision not to testify.

[64-66] A defendant has a fundamental constitutional right to testify, and the right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026). 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.* Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance of counsel 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*.

Porter contends that he decided not to testify because he did not feel prepared, in that trial counsel reviewed potential questions for a brief amount of time and did not practice potential cross-examination questions. We conclude that this allegation of deficient performance was alleged with sufficient particularity, but the record on direct appeal is insufficient to resolve it. Because the record is insufficient on direct appeal to address this claim, it is preserved.

(g) Failure to Call Witnesses

Porter next contends that his trial counsel was ineffective in failing to call two witnesses to testify about inconsistencies in K.B.'s and S.B.'s statements. (The names of the witnesses are identified in the brief for appellant but have been redacted here.)

[67] As the Nebraska Supreme Court recently stated in *State v. Rupp*, 320 Neb. 502, 524, 28 N.W.3d 74, 90 (2025):

> [W]hen the claim of ineffective assistance on direct appeal involves uncalled witnesses, the defendant must give the names or descriptions of any uncalled witnesses forming the basis of a claim of ineffective assistance of trial counsel. The defendant need not make specific factual allegations as to what an uncalled person or persons would have said, which will not be found in the appellate record, but what the witness would have said may be part of the witness' description when the name is unknown.

Although Porter has identified the witnesses that he contends trial counsel should have called at trial, this claim of

ineffective assistance of counsel is unable to be addressed on direct appeal. Because the record is insufficient on direct appeal to address this claim, it is preserved.

VI. CONCLUSION

For the reasons stated above, we reject Porter's assigned errors except for his claims that his trial counsel was ineffective in failing to object when A.M. or K.B. utilized a stuffed animal while testifying; failing to adequately prepare Porter to testify, which contributed to Porter's decision not to testify; implying during opening statements that Porter "may" testify, when he later elected not to; and failing to call two named witnesses to testify about inconsistencies in K.B.'s and S.B.'s statements, which errors have been sufficiently alleged but cannot be resolved on the appellate record.

AFFIRMED.