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STATE OF NEBRASKA, APPELLEE, V. WALTER M. ALEXANDER, APPELLANT.

___ N.W.3d ___

Filed September 25, 2026. No. S-24-829.

1. **Trial: Expert Witnesses: Judgments: Appeal and Error: Words and Phrases.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony, and an appellate court reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Trial: Expert Witnesses: Pretrial Procedure.** To sufficiently call specialized knowledge into question under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.
5. **Trial: Expert Witnesses: Pretrial Procedure: Evidence.** An opponent's challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect

to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.

6. **Rules of Evidence: Expert Witnesses.** The admission of expert testimony under Neb. Rev. Stat. § 27-702 (Reissue 2016) is governed by a legal framework initially set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and later adopted by the Nebraska Supreme Court in *Schafersman v. Agland Coop.*, 262 Neb. 215, 631 N.W.2d 862 (2001).
7. **Trial: Expert Witnesses.** Under the framework established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), if an expert's opinion involves scientific or specialized knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable). It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.
8. **Rules of Evidence: Expert Witnesses: Words and Phrases.** The *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), standards apply not only to scientific knowledge, but to all types of expert testimony that are admitted pursuant to Neb. Rev. Stat. § 27-702 (Reissue 2016), which includes specialized knowledge.
9. **Assault: Words and Phrases.** Reckless assault is not an intentional crime that may serve as the predicate offense for use of a deadly weapon to commit a felony under Neb. Rev. Stat. § 28-1205(1) (Cum. Supp. 2024).
10. **Convictions: Weapons: Intent.** Under Neb. Rev. Stat. § 28-1205(1) (Cum. Supp. 2024), a person cannot be convicted of use of a deadly weapon to commit a felony when the underlying felony is an unintentional crime.
11. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
12. **Criminal Law: Juries: Verdicts.** Where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act.

Petition for further review from the Court of Appeals, Pirtle, Bishop, and Welch, Judges, on appeal thereto from the District Court for Sarpy County, George A. Thompson, Judge. Judgment of Court of Appeals affirmed.

Todd A. West, Sarpy County Public Defender, and John P. Hascall for appellant.

Michael T. Hilgers, Attorney General, and Erin E. Tangeman for appellee.

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

Bergevin, J.

I. INTRODUCTION

Walter M. Alexander was convicted by a jury of multiple felony offenses, including manslaughter, a Class IIA felony,[1] and use of a deadly weapon to commit a felony, in this case, a firearm, a Class IC felony.[2] Alexander appealed to the Nebraska Court of Appeals and assigned that the district court erred by granting the State's motion in limine, which prohibited his proposed expert witness from testifying at trial, and by instructing the jury that an unintentional act can serve as the predicate offense for use of a deadly weapon to commit a felony. The Court of Appeals determined that the district court did not err by granting the State's motion in limine.[3] However, the Court of Appeals reversed the use of a deadly weapon to commit a felony conviction corresponding to the manslaughter conviction, vacated the sentence for that conviction, and remanded the cause for a new trial on that charge. Alexander petitions for further review. We affirm.

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[1] See Neb. Rev. Stat. § 28-305 (Reissue 2016).

[2] See Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2024).

[3] See *State v. Alexander*, 33 Neb. App. 872, 28 N.W.3d 104 (2025).

II. BACKGROUND

In 2023, Alexander shot and killed his wife, Brittany Alexander. At the time, the two were not living together, but Alexander would visit Brittany at her home. One night after an argument, Brittany removed Alexander from her home and changed the access code to her entry door. Alexander returned to Brittany's home the next day, and Brittany let him in to retrieve his belongings. Alexander and Brittany began arguing when he retrieved his handgun from inside Brittany's bedroom. Alexander's sister, who was living at Brittany's home, saw the two struggle for the gun. The gun went off, projecting a bullet into Brittany's chest, killing her. Alexander left the scene in his vehicle and was later apprehended by law enforcement after a high-speed chase.

1. Trial Proceedings

Alexander was charged by a second amended information with murder in the second degree, terroristic threats, two counts of use of a deadly weapon to commit a felony, operating a motor vehicle to avoid arrest, obstructing a peace officer, leaving the scene of a property damage accident, and refusal to submit to a preliminary breath test. Alexander pleaded no contest to leaving the scene of a property damage accident and refusal to submit to a preliminary breath test. A jury trial was held for the remaining charges, during which evidence consistent with the events recounted above was adduced.

(a) Expert Witness

Alexander sought to call Larry Barksdale to testify as an expert witness at trial. Barksdale is a crime scene reconstructionist, former law enforcement officer, and retired forensic science professor. His proposed expert testimony involved conclusions that could be drawn from physical evidence, including bloodstains, and his crime scene reconstruction. Ultimately, Barksdale planned to testify to his conclusion that a struggle

between Alexander and Brittany could not be excluded "'as a part of a reasonable explanation of the shooting."[4]

Prior to trial, the State filed a motion in limine requesting that the district court exclude Barksdale from testifying. In its motion, the State also requested an evidentiary hearing for the district court to determine whether Barksdale qualified as an expert under Neb. Rev. Stat. § 27-702 (Reissue 2016), and how the factors from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[5] which were later adopted by this court in *Schafersman v. Agland Coop*[6] (*Daubert*/*Schafersman*), applied to Barksdale's testimony. The State asked the court to determine, among other things, whether the reasoning and methodology underlying Barksdale's conclusions were scientifically valid and reliable, whether Barksdale's theory or technique could be tested, whether Barksdale's theory or technique had been subject to peer review and publication, whether Barksdale's theory or technique had a known or potential rate of error, whether there was a general acceptance of Barksdale's theory or technique in the relevant scientific community, and whether Barksdale's theory or technique was properly applied to the facts at issue.

The district court held an evidentiary hearing on the State's motion. Barksdale testified at the hearing, and the court received his deposition, curriculum vitae, and consultation report into evidence. Barksdale testified that his analysis in reconstructing a crime scene is based on physical evidence and a "cognitive process." According to Barksdale, the cognitive process, which Barksdale referred to as "fallibility," involves making an initial conclusion about what occurred at a crime scene, then testing that conclusion by arguing against it.

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[4] Brief for appellant in support of petition for further review at 10.

[5] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[6] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

Barksdale did not know if his methodology was generally accepted in the scientific community. He agreed that "a lot of people don't adhere to [his] methodology." Barksdale also testified that there cannot be a rate of error for his methodology because it is not something that can be measured. Barksdale testified that none of his work recreating bloodstain patterns was peer reviewed to ensure accuracy.

Before trial commenced, the district court entered an order granting the State's motion in limine and prohibiting Barksdale from testifying. The court determined that Barksdale did not qualify as an expert witness under § 27-702 in blood spatter evidence, bloodstain patterns, ballistics, DNA, physics, or gunshot residue. The court found that Barksdale purported to be a "crime scene analyst 'expert'" and proposed to testify to his "theory" of the case. The court found such testimony would be improper and would invade the province of the jury.

The district court also noted that it could not determine whether the reasoning or methodology underlying Barksdale's testimony was valid (reliable) or could be properly applied to the facts at issue. The court determined that Barksdale's testimony did not meet the standards for reliability under the *Daubert*/*Schafersman* framework.

(b) Jury Instructions

As part of a standard step instruction, the district court instructed the jury on the elements of manslaughter after the instruction for murder in the second degree. The manslaughter instruction stated, in pertinent part:

> The material elements of the crime of Manslaughter as charged in Count 1, are:
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> 1. That [Alexander] killed [Brittany]; and
>
> 2. That [Alexander] did so either:
>
> a. Intentionally upon a sudden quarrel; or
>
> b. Unintentionally during the commission of an unlawful act, that is, by [Alexander] knowingly, intentionally, or recklessly causing bodily injury to [Brittany].

The district court also instructed the jury on the elements of use of a deadly weapon to commit a felony. That instruction, in pertinent part, stated:

> The elements which the State must prove beyond a reasonable doubt in order to convict [Alexander] of Use of a Firearm to Commit a Felony are:
>
> 1. That [Alexander] committed the felony of Murder in the Second Degree, or alternatively, Manslaughter, as set forth in the instruction to Count 1 above; and
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> 2. That [Alexander] used a firearm to commit the felony of Murder in the Second Degree, or alternatively, Manslaughter, as set forth in the instructions to Count 1 above[.]

In its instruction on use of a deadly weapon to commit a felony, the district court did not instruct the jury that it could not convict Alexander of use of a deadly weapon to commit a felony if it found Alexander committed unlawful act manslaughter by committing reckless assault.[7] Alexander had previously objected to the district court's instruction on the elements of use of a deadly weapon to commit a felony during the jury instruction conference. He argued that the instruction permitted an unintentional act to serve as the predicate felony offense.

Alexander offered an alternate instruction that instructed the jury that if it found Alexander not guilty of murder in the second degree, and not guilty of manslaughter based on a "sudden quarrel,"[8] then it must find him not guilty of use of a deadly weapon to commit a felony. During the jury instruction conference, the district court overruled Alexander's objection and rejected his proposed instruction.

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[7] See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002) (holding unlawful act manslaughter committed with reckless intent cannot serve as predicate felony for use of weapon to commit felony under § 28-1205).

[8] See § 28-305(1).

The jury found Alexander guilty of manslaughter, both counts of use of a deadly weapon to commit a felony, and the remaining counts. The district court accepted the jury's verdicts and adjudged Alexander guilty of all counts. The court ordered a presentence investigation and scheduled the matter for sentencing. Alexander subsequently filed a motion for new trial. The court overruled Alexander's motion after holding an evidentiary hearing.

At the sentencing hearing, the district court sentenced Alexander to terms of imprisonment of 18 to 20 years for manslaughter; 2 to 3 years for terroristic threats; 20 to 30 years for each count of use of a deadly weapon to commit a felony; 1 to 2 years for operating a motor vehicle to avoid arrest; 6 to 12 months for obstructing a peace officer; and 3 to 6 months for leaving the scene of a property damage accident; as well as a fine of $100 for refusal to submit to a preliminary breath test. The court ordered that the sentences for all counts be served consecutively.

Alexander timely appealed.

2. COURT OF APPEALS

On appeal, Alexander assigned, restated and reordered, that the district court erred by (1) sustaining the State's motion in limine which precluded Barksdale from providing his opinions in the fields of bloodstain pattern recognition, bullet trajectory, and crime scene reconstruction, and (2) instructing the jury on use of a deadly weapon to commit a felony (manslaughter) because it allowed an unintentional act to be the predicate offense for that use of a deadly weapon conviction. Alexander's appeal included other assignments of error that are not at issue in his petition for further review and which we do not discuss further.

(a) Barksdale's Testimony

Alexander argued that the State's motion in limine did not sufficiently articulate its objections to Barksdale as an expert

witness. Alexander also argued that the district court erred in applying the *Daubert*/*Schafersman* factors to determine the admissibility of Barksdale's testimony as an expert witness. Alexander contended that those factors are inapplicable because Barksdale's testimony is based on specialized knowledge, rather than scientific knowledge.

The Court of Appeals did not address Alexander's argument that the State insufficiently articulated its objections to Barksdale's being an expert witness. The Court of Appeals also did not address the portion of Alexander's argument concerning Barksdale's testimony about bullet trajectory. It found that Alexander did not make an offer of proof about that testimony. The Court of Appeals determined that Alexander failed to meet his burden to show Barksdale's reasoning or methodology was reliable and concluded that the district court did not err by granting the State's motion in limine.

(b) Use of Deadly Weapon Instruction

Alexander argued that the district court erred in instructing the jury on the use of a deadly weapon to commit a felony (manslaughter) charge. The State agreed. So too did the Court of Appeals. It noted that the jury was instructed on alternate theories of manslaughter: that Brittany was killed either intentionally upon a sudden quarrel or that her death was caused unintentionally during the commission of an unlawful act. The court observed that under the second theory, the predicate unlawful act was third degree assault, which required that Alexander "knowingly, intentionally, or recklessly caus[ed] bodily injury to Brittany."[9] The court highlighted that the state of mind required to convict for reckless assault does not rise to the level of "'knowing'" or "'intentional.'"[10] Relying on *State v. Pruett*,[11] the Court of Appeals concluded that the

[9] See *State v. Alexander, supra* note 3, 33 Neb. App. at 891, 28 N.W.3d at 121.

[10] *Id*. at 893, 28 N.W.3d at 122.

[11] *State v. Pruett, supra* note 7.

district court erred in not instructing the jury that it could not convict Alexander of use of a deadly weapon to commit a felony if he committed unlawful act manslaughter based on reckless assault.

The Court of Appeals further concluded that the district court's error did not affect the manslaughter conviction but that the error was not harmless as to the corresponding use of a deadly weapon to commit a felony charge. Accordingly, the Court of Appeals reversed the use of a deadly weapon to commit a felony conviction and vacated the sentence for that conviction. The court concluded that the Double Jeopardy Clause of the U.S. and Nebraska Constitutions did not preclude a retrial of the use of a deadly weapon to commit a felony charge.[12] Therefore, it remanded the cause for a new trial on that charge.

Alexander timely filed a petition for further review, which we granted.

III. ASSIGNMENTS OF ERROR

Alexander assigns, restated and reordered, that the Court of Appeals erred by (1) determining that the district court did not err in granting the State's motion in limine and (2) reversing, vacating, and remanding Alexander's use of a deadly weapon to commit a felony (manslaughter) conviction, but not Alexander's manslaughter conviction.

IV. STANDARD OF REVIEW

[1,2] We review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony, and we review for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.[13] An abuse of discretion occurs when a trial court's decision is based upon reasons that are

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[12] See, U.S. Const. amend. V; Neb. Const. art. I, § 12; *State v. Simons*, 315 Neb. 415, 996 N.W.2d 607 (2023).

[13] See *Slater v. Ichtertz*, 320 Neb. 159, 26 N.W.3d 504 (2025).

untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[14]

[3] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.[15]

V. ANALYSIS

First, we address Alexander's assignment of error regarding his proposed expert witness, Barksdale. We then address his assignment of error relating to the remand of the use of a deadly weapon to commit a felony (manslaughter) charge.

1. Alexander's Proposed Expert Witness

Alexander presents two arguments to support his contention that the district court erred in sustaining the State's motion in limine and precluding his proposed expert witness, Barksdale, from testifying: Alexander argues that the State insufficiently articulated its objections to Barksdale's testimony in its motion in limine and that the district court incorrectly applied the *Daubert*/*Schafersman* factors to determine whether Barksdale's testimony was reliable. We address each argument in turn.

(a) Sufficiency of State's Objections

Alexander contends that the State's motion in limine did not sufficiently articulate its objections to Barksdale's being an expert witness. After reviewing the motion in limine, we agree with the State that the motion sufficiently raised its objections to Barksdale's proposed expert testimony.

[4,5] To sufficiently call specialized knowledge into question under *Daubert*/*Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent

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[14] *Id.*

[15] *State v. Dolinar*, 319 Neb. 565, 24 N.W.3d 30 (2025).

of any pretrial proceeding.[16] An opponent's challenge to the admissibility of evidence under *Daubert*/*Schaefersman* should identify, in terms of the *Daubert*/*Schaefersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.[17]

Here, the State filed a motion in limine in which it objected to Barksdale's qualification as an expert under § 27-702. It also questioned Barksdale's reliability as an expert witness under several specific *Daubert*/*Schafersman* factors. The State's objection contained sufficient specificity.

(b) Application of *Daubert*/*Schafersman* Factors

Alexander argues that the *Daubert*/*Schafersman* factors do not apply to Barksdale's testimony because it is based on specialized knowledge—not scientific knowledge. Alexander asserts that Barksdale's specialized knowledge includes his education, experience, training, and independent research. According to Alexander, *scientific* knowledge "falls into" the *Daubert*/*Schafersman* framework,[18] but when an expert's testimony is based on *specialized* knowledge, a court must consider the reasoning behind the expert's opinion instead of analyzing its reliability under *Daubert*/*Schafersman*.

The State contends that Barksdale did not qualify as an expert witness under § 27-702. Further, the State argues that Alexander failed to meet his burden of establishing the reliability of Barksdale's reasoning and methodology.

[6,7] The admission of expert testimony under § 27-702 is governed by a legal framework initially set forth by the U.S. Supreme Court in *Daubert* and later adopted by this court in *Schafersman*. Under our *Daubert*/*Schafersman* framework, if an expert's opinion involves scientific or specialized

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[16] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[17] See *id.*

[18] Brief for appellant in support of petition for further review at 9.

knowledge, a trial court must determine whether the reasoning or methodology underlying the testimony is valid (reliable).[19] It must also determine whether that reasoning or methodology can be properly applied to the facts in issue.[20]

In doing so, a trial court can consider several nonexclusive factors in determining the reliability of an expert's opinion: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.[21]

[8] The *Daubert*/*Schafersman* factors apply to Barksdale's proposed testimony. Alexander's argument against applying these factors to Barksdale's testimony appears to rely on the U.S. Supreme Court's explanation in *Kumho Tire Co. v. Carmichael*[22] that the test of reliability in *Daubert* is "'flexible'" and that its "list of specific factors neither necessarily nor exclusively applies to all experts or in every case." However, this court has previously held that the *Daubert*/*Schafersman* standards apply not only to scientific knowledge, but to all types of expert testimony that are admitted pursuant to § 27-702,[23] which includes specialized knowledge.[24]

Even though Barksdale's testimony may have involved specialized knowledge, it was still necessary for the district court to use the *Daubert*/*Schafersman* framework in

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[19] *Freeman v. Hoffman-La Roche, Inc.*, 300 Neb. 47, 911 N.W.2d 591 (2018).

[20] *Id.*

[21] *Id.*

[22] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). See, also, *State v. Gleaton*, 316 Neb. 114, 3 N.W.3d 334 (2024).

[23] See *Schafersman v. Agland Coop, supra* note 6.

[24] See *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

determining the reliability of that testimony. On our de novo review, we conclude that the court did not err by applying the *Daubert*/*Schafersman* factors to determine the reliability of Barksdale's testimony.

Having determined that the district court did not err by analyzing the admissibility of Barksdale's testimony under the *Daubert*/*Schafersman* framework, we next address its decision to exclude Barksdale from testifying.

(c) Exclusion of Barksdale's Testimony

Alexander argues that Barksdale's reasoning, when viewed in the context of his specialized knowledge, was reliable and that the district court failed to consider that reasoning. We disagree. At the pretrial evidentiary hearing, Barksdale testified that he did not know whether his methodology for "crime scene reconstruction[]" was generally accepted among the scientific community. He also testified that a lot of people "don't adhere" to his methodology. Further, Barksdale testified that none of his work re-creating bloodstain patterns was peer reviewed to ensure accuracy. Barksdale also believed that there could not be a rate of error for his methodology. Ultimately, Barksdale planned to opine on his theory of the case—that a struggle between Alexander and Brittany could not be excluded "as a part of a reasonable explanation of the shooting."[25] We agree with the Court of Appeals that the district court did not abuse its discretion by determining that Barksdale's testimony was unreliable and would invade the province of the jury.

2. Use of Deadly Weapon to Commit Manslaughter

On further review, Alexander and the State remain in agreement that the use of a deadly weapon to commit a felony charge should be remanded for a new trial. We agree with the parties and the Court of Appeals' resolution of that

[25] Brief for appellant in support of petition for further review at 10.

issue. The district court's error allowed the jury to convict Alexander of use of a deadly weapon to commit a felony even if it found that he committed unlawful act manslaughter based on reckless assault. Such an error is not harmless, as it might have materially influenced the jury in reaching a verdict adverse to a substantial right of Alexander.[26]

However, Alexander contends that the Court of Appeals erred by remanding only the use of a deadly weapon to commit a felony charge. He argues that on remand, a jury cannot decide that charge in isolation because it "is not an independent offense, but a wholly derivative one that cannot be litigated without first determining the specific, intentional predicate felony upon which it rests."[27]

Alexander notes that the jury did not specify a theory of manslaughter that supported its finding of guilt on that charge. One of the manslaughter theories, unlawful act manslaughter by committing reckless assault, does not qualify as a predicate offense for the charge of use of a deadly weapon to commit a felony.[28] Alexander argues that remanding the use of a deadly weapon to commit a felony charge by itself would ask the jury to deliberate on that charge without considering one of its essential elements: whether Alexander committed a qualifying predicate offense. To avoid this error, Alexander maintains that the Court of Appeals should have remanded for a new trial both the manslaughter charge and the use of a deadly weapon to commit a felony charge. This way, the jury would decide whether Alexander committed manslaughter with the requisite intent before deliberating on the use of a deadly weapon to commit a felony charge.

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[26] See *State v. Madren*, 308 Neb. 443, 954 N.W.2d 881 (2021) (holding that in jury trial of criminal case, harmless error exists when there is some incorrect conduct by trial court which, on review of entire record, did not materially influence jury in reaching verdict adverse to substantial right of defendant).

[27] Brief for appellant in support of petition for further review at 6.

[28] See *State v. Pruett, supra* note 7.

The State argues that the Court of Appeals did not err by remanding only the use of a deadly weapon to commit a felony charge. It contends that the manslaughter charge should not be remanded because the district court did not err in instructing the jury on that charge.

[9,10] We note that the Court of Appeals relied on *State v. Pruett* in remanding the use of a deadly weapon to commit a felony charge.[29] In *Pruett*, this court held that reckless assault is not an intentional crime that may serve as the predicate offense for use of a deadly weapon to commit a felony under § 28-1205(1) (Reissue 1995).[30] Beginning with our decision in *State v. Ring*,[31] we have interpreted § 28-1205(1) (Cum. Supp. 2024) to provide that a person cannot be convicted of use of a deadly weapon to commit a felony when the underlying felony is an unintentional crime.[32] The State has not asked us to reevaluate our interpretation of § 28-1205(1) in this case.

We agree with the Court of Appeals' decision to remand only the use of a deadly weapon to commit a felony charge. Contrary to Alexander's argument, that charge is not coupled with the manslaughter charge such that remand of one requires remand of both. It is a separate and distinct offense from the underlying crime of manslaughter.[33] Alexander's counsel conceded at oral argument that the jury on remand can determine the intent underlying the manslaughter charge without that charge being remanded. Such determination would allow the

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[29] See *State v. Alexander, supra* note 3.

[30] See *State v. Pruett, supra* note 7.

[31] *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), *disapproved on other grounds, State v. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016).

[32] See, *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019); *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009); *State v. Pruett, supra* note 7; *State v. Ring, supra* note 31.

[33] See § 28-1205(4) ("[a] violation of this section shall be treated as a separate and distinct offense from the underlying crimes being committed").

jury to reach a verdict on the single charge of use of a deadly weapon to commit a felony.[34]

[11] Double jeopardy principles do not bar retrial of the use of a deadly weapon to commit a felony charge. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[35] The evidence at trial showed that before Alexander's gun was fired and a bullet went into Brittany's chest, Alexander and Brittany were arguing and struggling over Alexander's gun. Such evidence would have permitted a jury to conclude that Alexander used a firearm to kill Brittany either intentionally during a sudden quarrel or unintentionally while committing third degree assault intentionally or knowingly. Because the evidence at trial was sufficient to sustain Alexander's convictions for manslaughter and use of a deadly weapon to commit that felony, we agree with the Court of Appeals' conclusion that double jeopardy does not bar a second trial on the use of a deadly weapon to commit a felony charge.

[12] The district court's error in instructing the jury on the use of a deadly weapon to commit a felony charge does not affect the manslaughter conviction. We agree with the State that the court did not err in instructing the jury on the manslaughter charge. As noted above, the jury was instructed on alternate theories of manslaughter. We have stated that where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the

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[34] See, also, *State v. Rye*, 14 Neb. App. 133, 705 N.W.2d 236 (2005) (Court of Appeals remanded use of firearm charge for new trial but affirmed conviction and sentence for predicate offense of terroristic threats committed intentionally or recklessly).

[35] *State v. Simons, supra* note 12.

defendant violated the law by committing the act.[36] Thus, there is no cause for reversing Alexander's manslaughter conviction, as the jury unanimously found him guilty of committing that offense.

VI. CONCLUSION

We find no error in the Court of Appeals' determination that the district court did not err by granting the State's motion in limine, which led to the exclusion of Barksdale's testimony. Likewise, the Court of Appeals did not err by remanding Alexander's use of a deadly weapon to commit a felony charge for retrial and not his manslaughter charge. Accordingly, we affirm the judgment of the Court of Appeals.

AFFIRMED.

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[36] *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016).