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V. CONCLUSION

Although for different reasons, we agree with the district court's determination that as a matter of law, Nickel had no liability to Riggs under theories of premises liability or common-law negligence. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH D. HOTZ, APPELLANT.
795 N.W.2d 645

Filed April 1, 2011. No. S-10-105.

1. **Rules of Evidence.** In proceedings in which the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Insanity: Proof.** The two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.
6. **Criminal Law: Intoxication: Intent.** Intoxication has never been considered a justification or excuse for a crime, although intoxication may be considered to negate specific intent.
7. **Criminal Law: Intoxication: Jury Instructions.** Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime

had been committed or to determine the degree where the offense consists of several degrees.

8. **Criminal Law: Intoxication: Mental Competency.** As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces psychosis or delirium.
9. **Constitutional Law: Criminal Law: Due Process.** Under the Due Process Clause of the 14th Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. The U.S. Supreme Court has long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.
10. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

Appeal from the District Court for Dawes County: BRIAN C. SILVERMAN, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Paul Wess, Dawes County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Joseph D. Hotz appeals from his convictions of second degree murder, attempted second degree murder, terroristic threats, and three counts of use of a deadly weapon to commit a felony. Hotz filed a petition to bypass, alleging that his case presented a new or novel issue of law, and we granted his petition. The underlying issue in this case is whether the voluntary use of drugs may give rise to a defense of insanity rather than voluntary intoxication. We find that the insanity defense instruction may not be given and that the proper jury instruction is the voluntary intoxication instruction. But because we find that Hotz was deprived of a fair trial due to irregularities in the proceedings, we reverse, and remand for a new trial.

II. FACTS

1. Events of December 5, 2008

The facts of this case are largely undisputed. Hotz and the victim, Kenneth Pfeiffer, were roommates in Chadron, Nebraska. On December 5, 2008, at approximately 4 p.m., both Hotz and Pfeiffer consumed psilocybin mushrooms and smoked marijuana.

At approximately 6 p.m., the Chadron Police Department received the first of several 911 emergency dispatch calls from Susan Jensen. Jensen testified that she called 911 after she thought someone was trying to break into her house located on King Street. Jensen stated that she saw Hotz through a window, that he did not appear to be in his right mind, and that he was yelling, "'Oh, my God, please help me.'" Jensen testified that after Hotz left, there was a crack in the door and red smears on the door that had not been there before.

A second 911 call was made from the home of Rolland Sayer and his wife, which home was also located on King Street. Sayer's wife was watching television in her living room when Hotz came through the front door holding two knives. Hotz had entered the home by breaking the glass of a small window near the door. Sayer was in the shower at the time Hotz entered the home. Sayer's wife testified that Hotz walked past her, went into the kitchen, and turned on the light. She stated that she exited the house and that Hotz did not follow her out. Sayer's wife then got inside the car parked in the driveway and locked the door. When Hotz came out of the house a short time later, she hid in the car until she thought he was gone.

Sayer testified that he was in the bathroom shaving when he heard an unusual noise, but when he called out to his wife, she did not respond. Sayer opened the door to find Hotz blocking his way. At that point, Hotz said, "'I want all your weapons,'" and Sayer responded, "'I do not have any weapons.'" Hotz then asked for all Sayer's possessions, and when Sayer said he did not have any possessions, Hotz stated, "'I'm going to kill you.'" Hotz dropped a cordless telephone in front of Sayer, who grabbed the telephone, barricaded himself in the bathroom, and dialed 911. Hotz began battering the door with

the knives, stabbing through the door. Sayer stated that Hotz' knives came within 6 or 8 inches of his hand. Sayer further testified that when the noise outside the bathroom door ceased, he exited the bathroom to check on his wife.

Patty Howard, the 911 dispatcher, also testified. She stated that the first 911 call came through at 6:08 p.m. from Jensen. Sgt. Shawn Banzhaf was present with Howard when the first call came in, so she immediately passed the information along to him. The second 911 call came in at 6:11 p.m. from Sayer. Howard stated that in the background of Sayer's call, she could hear a man shouting, "'Now give me the keys to your car. Give me the fucking keys.'"

Banzhaf, Sgt. Mike Loutzenhiser, and Lt. Richard Hickstein, all with the Chadron Police Department, responded to the 911 calls. Upon arrival at the intersection of Eighth and King Streets, Loutzenhiser saw Hotz come through a gate at the house on the southwest corner of the intersection. Loutzenhiser testified that Hotz' shirt was covered in blood and that he held a knife. Loutzenhiser identified himself as a police officer and ordered Hotz to stop. Hotz ran away, and Loutzenhiser pursued him on foot.

Hotz was apprehended shortly thereafter. Hotz was able to follow Loutzenhiser's instructions to put his hands behind his head and lie down on the ground. Loutzenhiser asked Hotz if he needed medical attention, and Hotz said that he did not. Because Hotz appeared to be covered in blood, Loutzenhiser asked Hotz where the blood had come from, and Hotz stated that it had come from his roommate and possibly "this old gentleman in this house." Loutzenhiser asked Hotz where his roommate was, and Hotz said "935 Shelton." Loutzenhiser then put Hotz in the back of the patrol car. The camera recording from the patrol car, offered as an exhibit, was played for the jury. In the recording, Hotz calls for his parents, demands his rights, screams obscenities, and pleads for God to save him, but he is also able to answer some questions.

After leaving Hotz with Banzhaf, Loutzenhiser went to 935 Shelton Street to check on Pfeiffer. When Loutzenhiser approached, he observed a broken sliding glass door and

broken glass on the porch. Loutzenhiser and Hickstein entered the house through the broken door and saw Pfeiffer's body lying in the hallway and blood all over the walls. One of the first floor bedrooms, later identified as Hotz', showed signs of forced entry on the door and latch.

2. Police Interviews With Hotz

Sgt. Monica Bartling of the Nebraska State Patrol interviewed Hotz beginning late in the evening on December 5, 2008, and continuing into the early morning hours of December 6. During the interview, Bartling asked Hotz to tell her what had happened. Hotz stated that he had taken mushrooms and that he had begun to have a horrible feeling of "not existing." Hotz also stated that he believed he had been tricked into behaving in a certain way. Hotz stated that this occasion marked the third time he had consumed mushrooms. He stated that on one prior occasion, he had experienced anxiety and the belief that "the CIA was after him." Hotz stated that on this occasion, he felt as though Pfeiffer was "mocking" him and all his intellectual pursuits. Hotz also said that he felt it was "kill or be killed."

Hotz stated that Pfeiffer would not leave him alone. Hotz brandished a knife to get Pfeiffer to back off, and they scuffled. Hotz dropped the knife and ran downstairs to the basement. When Hotz came upstairs again, Pfeiffer still would not leave him alone, and Hotz said that he had the feeling that Pfeiffer was going to kill him. Hotz stabbed Pfeiffer in the arm, and Pfeiffer yelled at him, saying, "Joey, this is real! This is real!" Hotz stated that they struggled in the hallway. Hotz stated that he did not remember much about stabbing Pfeiffer.

Trooper Mark Van Horn, a drug recognition expert with the Nebraska State Patrol, interviewed Hotz around midnight on December 5, 2008. Van Horn stated that at the time he conducted his interview, Hotz was no longer psychotic or hallucinating. Van Horn also testified that the amount of mushrooms Hotz ingested, one-eighth of an ounce, would be considered a heavy dose.

Dr. Peter Schilke performed Pfeiffer's autopsy. Schilke testified that Pfeiffer had marijuana and "psilocin" in his system at the time of his death. Psilocin is the metabolite of

psilocybin, which is the active ingredient in hallucinogenic mushrooms. Schilke documented 51 "sharp force" type injuries on Pfeiffer's body. Most of those wounds were superficial, but four wounds were potentially lethal: a stab wound to the right chest that punctured Pfeiffer's lung, a stab wound to the posterior left neck that cut the left carotid artery, a wound on the back of the head between the base of the brain and the upper spinal cord that caused a hemorrhage around the cerebellum, and an L-shaped wound in the right chest that also punctured the lung.

3. Trial Proceedings

Hotz timely filed a notice of intent to rely on the insanity defense as is required under Neb. Rev. Stat. § 29-2203 (Reissue 2008). Hotz claimed that he was temporarily insane when he killed Pfeiffer and that the crime was a direct result of his ingestion of the mushrooms. The State then filed a motion in limine to prohibit Hotz' expert witness from expressing an opinion concerning the insanity defense, because the evaluation of Hotz "did not show he was suffering from a mental disease, defect, or disorder as those terms are used in the context of an insanity defense." The State's position was that Hotz had taken psilocybin mushrooms in the past and so was aware of the possible negative effects the mushrooms would have on him. Hotz admitted that he had previously experienced anxiety and hallucinations after taking mushrooms, including the belief that "the CIA was after him." The record does not indicate how the trial court ruled on the motion in limine, although Hotz claimed that the trial court overruled it.

At the beginning of the trial, the district court gave the jury some preliminary instructions. Included in those instructions was the statement: "[Hotz] has also given notice of his intent to rely on the defense of not responsible by reason of insanity. [Hotz] has the burden of proving by the greater weight of evidence that he was insane at the time of the acts charged."

4. Testimony at Trial

At trial, Hotz presented testimony from an expert witness, Dr. Daniel Wilson, as to Hotz' mental state at the time of the crime. Wilson is board certified in forensic and general

psychiatry. Wilson testified that he reviewed the police reports, the toxicology results, the crime laboratory and interview reports, the camera recording from Banzhaf's patrol car, the police interviews, and the autopsy reports and photographs. Wilson also reviewed a medical report from the hospital in Chadron where Hotz had been transported.

Wilson testified that mushrooms are almost never associated with violent behavior. Wilson also stated that while most people have a significant change in their perception while using mushrooms, whether those effects are positive or negative is unpredictable. When asked about the definition of a psychosis, Wilson defined psychosis as "any derangement of reality whether it's perceptual with all these, you know, visions and hearing . . . . Or it can be quite complex . . . and develop into a delirium which is more chaotic and disturbing."

Wilson stated that he believed Hotz was developing a paranoid delusion that he was being threatened by his roommate, and was therefore misinterpreting cues in his environment. Hotz told Wilson that his memories of the altercation were indistinct, but that he remembered stabbing Pfeiffer several times. Hotz also told Wilson he believed there was a conspiracy to kill Hotz. Wilson stated that Hotz' calm responses to Sayer's wife and his violent behavior toward Sayer were indicative of a continuing psychosis. Wilson gave his expert opinion that Hotz had suffered from hallucinogen-induced psychosis and hallucinogen-induced delirium, both "DSM-IV"[1] disorders. Wilson stated that those disorders are generally accepted within the psychiatric community. Wilson called the video of Hotz in Banzhaf's cruiser a very rare and dramatic documentation of hallucinogen-induced psychosis and delirium.

Hotz' counsel asked Wilson if he had

> an opinion within a reasonable degree of psychiatric certainty whether the drug-induced psychosis and the drug-induced delirium impaired . . . Hotz's mental capacity at the time that he killed . . . Pfeiffer and committed these subsequent acts at the Sayer house to such an extent that

[1] See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000).

> he did not understand the nature and consequences of his actions?

At this point, the State objected on lack of foundation and relevancy, and argued that Wilson's opinion invaded the province of the jury. The district court sustained the objection. Hotz then made an offer of proof. In the offer, Wilson stated that Hotz' psychiatric illnesses at the time of Pfeiffer's death "so grossly impaired his awareness of reality that it's medically . . . all but impossible to attribute willful behavior to a man who is psychotic and delirious as was . . . Hotz." Wilson also stated that Hotz' illnesses "obliterated his ability to know right from wrong."

At the conclusion of evidence, Hotz asked the district court to instruct the jury on insanity, but the district court declined to do so. The jury was instructed on first degree murder, second degree murder, and manslaughter. The district court also gave the jury the following instruction on intoxication:

> There has been evidence that Hotz was intoxicated by drugs at the time the crimes charged were committed. Voluntary intoxication is a defense only when a person's mental abilities were so far overcome by the use of drugs that he could not have had the required intent. You may consider the evidence of drug use along with the other evidence in deciding whether [Hotz] had the required intent.

On November 6, 2009, during its deliberations, the jury submitted the following question: "From the beginning the jury was under the impression that we were to determine insanity or not. Why was the change made for our decision?" The district court referred the jury to instruction No. 1, paragraph 3, citing the district court's "duty to tell you what the law is." The jury then returned guilty verdicts on the charges of second degree murder, attempted second degree murder, terroristic threats, and three counts of use of a weapon to commit a felony.

Hotz made a timely motion for new trial, based in part on the district court's refusal to instruct on the insanity defense. Hotz also argued that he had relied on the district court's decision to overrule the State's motion in limine and claimed that he was deprived of a fair trial as a result. As part of his motion

for new trial, Hotz attempted to introduce several exhibits, including an affidavit from Hotz' trial counsel regarding the district court's decision on the motion in limine. The district court refused to accept the affidavit, finding that the grounds for a motion for new trial could not be proved by extraneous evidence outside the record.

The district court overruled Hotz' motion for new trial and sentenced Hotz to 20 to 50 years' imprisonment for second degree murder, 5 to 20 years' imprisonment on the corresponding use of a weapon to commit a felony, 10 to 20 years' imprisonment on attempted second degree murder, 5 to 20 years' imprisonment on the corresponding use of a weapon to commit a felony, 1 to 5 years' imprisonment on terroristic threats, and 5 to 20 years' imprisonment on the corresponding use of a weapon to commit a felony convictions. All sentences were ordered to run consecutively.

III. ASSIGNMENTS OF ERROR

Hotz assigns that the district court erred when it (1) excluded expert witness testimony concerning whether Hotz was legally insane at the time of the acts charged, (2) refused to give an insanity instruction, (3) refused to admit into evidence trial counsel's affidavit in support of Hotz' motion for new trial, (4) denied Hotz' motion for new trial, and (5) imposed consecutive sentences for Hotz' convictions for attempted second degree murder and terroristic threats.

IV. STANDARD OF REVIEW

[1] In proceedings in which the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[2]

[2] Whether jury instructions given by a trial court are correct is a question of law.[3]

[3] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show

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[2] See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

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

that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[4]

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[5]

V. ANALYSIS

1. Trial Court Did Not Err in Refusing to Instruct Jury on Insanity Defense or in Excluding Expert Witness Testimony on Insanity

Hotz first argues that the district court erred when it refused to allow his expert witness to give an ultimate opinion on whether Hotz met the legal definition of insanity at the time of the crime and when it refused to instruct the jury on insanity. We address these two assignments of error together. The underlying issue in this case is whether the voluntary use of drugs, rather than voluntary intoxication, may give rise to a defense of insanity. We have previously addressed whether voluntary alcohol intoxication can be used as a defense, but we have never addressed the use of drugs in this context. And, although we are remanding Hotz' cause for a new trial, we address these assignments of error first, because Hotz' motion for new trial rests on the assumption that he was entitled to an instruction on the insanity defense as a matter of law.

(a) Insanity and Intoxication in Nebraska Law

The insanity defense developed early at common law, and the *M'Naghten* rule is one of the most common definitions of insanity.[6] A number of states have adopted some version of the *M'Naghten* rule under common law, while other states have codified some version of the insanity defense by statute.[7]

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[4] *Id.*

[5] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[6] See Annot., 9 A.L.R.4th 526 (1981).

[7] *Id.*

Generally speaking, the *M'Naghten* rule requires that a defendant not know the nature and quality of his or her actions, as well as not knowing that what he or she was doing was wrong.[8]

Nebraska adopted by common law a modified *M'Naghten* rule for the first time in 1876, stating that "where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible."[9] Although the *M'Naghten* rule places the burden on the defendant to prove insanity, in 1876, this court shifted the burden to the prosecution to disprove it.[10]

[5] Under our current common-law definition, the two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.[11] While the insanity defense itself is a product of common law, the procedural aspects of the insanity defense are set out in § 29-2203. That statute also places the burden for proving insanity back on the defendant.

[6] In Nebraska, the intoxication defense has been available to a defendant under common law almost as long as the insanity defense.[12] However, intoxication has never been considered a justification or excuse for a crime, although intoxication may be considered to negate specific intent.[13] We first addressed the juxtaposition of intoxication and insanity in *Schlencker v. The State*.[14] In that case, the defendant had been charged with murder. Several witnesses testified to the defendant's strange conduct shortly before the crime. The jury was instructed

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[8] *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 10 Cl. & Fin. 200.

[9] *Wright v. The People*, 4 Neb. 407, 409 (1876).

[10] *Id.*

[11] See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[12] *O'Grady v. State*, 36 Neb. 320, 54 N.W. 556 (1893).

[13] See *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951).

[14] *Schlencker v. The State*, 9 Neb. 241, 1 N.W. 857 (1879), *reversed on rehearing on other grounds* 9 Neb. 300, 2 N.W. 710.

that "'*settled* insanity produced by intoxication affects the responsibility in the same way as insanity produced by any other cause. But insanity immediately produced by intoxication does not destroy responsibility when the patient, when sane and responsible, made himself voluntarily intoxicated.'"[15] We affirmed.

[7] We also addressed this issue generally in *Tvrz v. State*.[16] There, the defendant presented evidence that he had been very intoxicated at the time of the murder, that he did not remember anything that had occurred, and that there was evidence of mental instability in his family. We concluded that the defendant had not presented any evidence of a mental disease or defect, but also noted:

> "Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime had been committed, or to determine the degree where the offense consists of several degrees."[17]

Hence, the law in Nebraska is clear regarding the use of the insanity defense where a defendant is voluntarily intoxicated through the use of alcohol.[18] In contrast, we have never specifically addressed its application to voluntary drug use. Hotz argues that he was rendered temporarily insane as a result of his use of hallucinogenic mushrooms and marijuana. We read Hotz' argument as asking us to repudiate our previous position on intoxication and on whether a defendant can claim intoxication as a complete defense. Other states have addressed whether a defendant may assert the defense of insanity where he or she is voluntarily intoxicated through the use of drugs, however. We next turn to case law from those jurisdictions.

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[15] *Id.* at 252, 1 N.W. at 861 (emphasis in original).

[16] *Tvrz, supra* note 13.

[17] *Id.* at 651, 48 N.W.2d at 767.

[18] *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

(b) Insanity and Intoxication in Other Jurisdictions

The general rule in other jurisdictions is that voluntary intoxication through the use of drugs will not give rise to an insanity defense.[19] The State cites two of those cases in its brief: one from Iowa and the other from Vermont.[20] Even though Iowa follows a modified common-law *M'Naghten* rule and Vermont has codified its insanity defense by statute, the reasoning and conclusions are generally the same in both cases.[21]

The general rule can be summarized as follows:

> Insanity combined with, or resulting from, intoxication is a defense to homicide if it is of a permanent nature and meets the test of insanity generally, but a mere temporary frenzy induced by intoxication is not a defense.
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> . . . Insanity resulting from intoxication, in order to free a person from responsibility for a homicide, must be of such degree as would render a person irresponsible if the insanity were due to any other cause. Intoxication alone, however, is not insanity.[22]

In an Iowa Supreme Court decision, the defendant claimed that he had taken a pill causing him to believe that the victim was a dog and was about to kill him. He argued that as a result of this drug, he was temporarily insane at the time of the murder and that consequently, the jury should have been instructed on the insanity defense.[23] The trial court disagreed and instead instructed the jury on intoxication. On appeal, the Iowa Supreme Court stated, "This court has held that a temporary mental condition caused by voluntary intoxication from alcohol does not constitute a complete defense. . . . Is the rule the same when the mental condition results from voluntary ingestion of other drugs? We think so, and the cases so hold."[24]

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[19] See Annot., 8 A.L.R.3d 1236 (1966).

[20] *State v. Sexton*, 180 Vt. 34, 904 A.2d 1092 (2006); *State v. Hall*, 214 N.W.2d 205 (Iowa 1974).

[21] *Id.* See, *State v. Harkness*, 160 N.W.2d 324 (Iowa 1968); Vt. Stat. Ann. tit. 13, § 4801(a)(1) (2009).

[22] 40 C.J.S. *Homicide* § 23 at 386-87 (2006).

[23] *Hall, supra* note 20.

[24] *Id.* at 207 (citations omitted).

In *State v. Sexton*,[25] a Vermont Supreme Court case, the defendant had been using the drug LSD prior to the murder for which he was convicted. A court-appointed psychiatrist determined that the defendant had an underlying mental condition that, combined with the drug use, rendered him insane at the time of the offense. Another psychiatrist concluded the defendant's mental condition was due solely to his use of the drug. The trial court determined that the defendant could present evidence that his drug use had exacerbated an underlying mental condition resulting in his being insane at the time of the murder.

The Vermont Supreme Court held:

> [W]e have long held that, while voluntary intoxication may mitigate the crime charged, it will not operate as a total bar to criminal responsibility. . . . This is the rule nationally as well. . . .
>
> While the mental state resulting from extreme intoxication may in some cases be "tantamount to insanity" . . . its origin as a self-induced impairment fundamentally distinguishes it for most courts from a naturally occurring mental disease or defect that leads to insanity. . . . Indeed, it is universally recognized that a condition of insanity brought about by an individual's voluntary use of alcohol or drugs will not relieve the actor of criminal responsibility for his or her acts. . . .
>
> The only generally recognized exception to this rule is the doctrine known as "fixed" or "settled" insanity. Nearly every court and commentator that has addressed this doctrine has defined it as a permanent or chronic mental disorder caused by the habitual and long-term abuse of drugs or alcohol.[26]

The court further noted:

> The underlying rationale for the settled insanity doctrine is generally explained as an acknowledgment of "the futility of punishment, since the defective mental

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[25] *Sexton, supra* note 20.

[26] *Sexton, supra* note 20, 180 Vt. at 44-45, 904 A.2d at 1100-01 (citations omitted).

> state is permanent," . . . or, more commonly, as a compassionate concession that at some point a person's earlier voluntary decisions become so temporally and "morally remote" that the cause of the offense can reasonably be ascribed to the resulting insanity rather than the use of intoxicants.[27]

The court noted that the defendant had taken the drug LSD precisely because he wanted to alter his perceptions and experience hallucinations. The court stated:

> As we have seen, it is a fundamental tenet of our criminal code that a defendant must be held accountable for the consequences of his or her actions resulting from the voluntary ingestion of illegal drugs or alcohol, and this rule remains unaffected by the possibility that the substance will activate an unknown condition leading to an unexpected reaction.[28]

Therefore, the defendant was barred from asserting an insanity defense on the basis of voluntary intoxication, but he was not barred from adducing evidence of his mental disease or defect aside from that caused by intoxication.

A majority of states abide by the rule that intoxication is not a defense, except to the extent that it negates intent, and have particularly noted that temporary insanity brought on by voluntary intoxication is not an excuse.[29] The rationale in these jurisdictions is, much as the Iowa and Vermont courts noted, that temporary insanity brought on by voluntary intoxication is not a "mental disease or defect" as understood under the common law.[30]

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[27] *Id.* at 47, 904 A.2d at 1102.

[28] *Id.* at 53, 904 A.2d at 1107.

[29] See 8 A.L.R.3d, *supra* note 19.

[30] *Downing v. Com.*, 26 Va. App. 717, 496 S.E.2d 164 (1998); *State v. Sette*, 259 N.J. Super. 156, 611 A.2d 1129 (1992); *People v. Whitehead*, 171 Ill. App. 3d 900, 525 N.E.2d 1084, 121 Ill. Dec. 777 (1988); *State v. Stevenson*, 198 Conn. 560, 504 A.2d 1029 (1986); *Hanks v. State*, 542 S.W.2d 413 (Tex. Crim. App. 1976); *Parker v. State*, 7 Md. App. 167, 254 A.2d 381 (1969); *State v. Salmon*, 10 Ohio App. 2d 175, 226 N.E.2d 784 (1967).

(c) Insanity Defense and Legislature

Hotz argues that not allowing a defense of temporary insanity due to voluntary intoxication is a decision for the Legislature. He contends that the Legislature recently refused to pass a proposed law that would have prevented intoxication from being used as a defense unless the defendant could prove by clear and convincing evidence that the intoxication was involuntary. Hotz cites *State v. Klein*,[31] a Washington case, in support of his contention that the Legislature and not the courts ought to define "mental disease or defect."

In *Klein*, the Washington Supreme Court used the dictionary definition of "mental disease or defect," noting that there was no statutory definition. *Klein*'s reasoning is inapplicable in this state. Though Washington's insanity defense closely follows the *M'Naghten* rule, it is statutory based and is not a common-law construct.[32] In this state, however, the basis of our insanity defense is the common law.

The court in *Sexton*, the Vermont case previously cited, also addressed the argument that the legislature ought to make this sort of policy decision. The court noted that the insanity defense was a common-law construct. The court stated:

> As we have seen, it is well settled that, absent a fixed insanity developed over a prolonged period of abuse, the voluntary use of drugs or alcohol that triggers a psychotic reaction will not absolve a defendant of criminal responsibility. Our holding, therefore, is consistent with controlling common law, and does no violence to the separation of powers doctrine or the prerogatives of the Legislature.[33]

Therefore, even though Vermont has codified its insanity defense, the court in *Sexton* still relied on the common law, rather than the legislature.

Generally speaking, other states do not define temporary insanity as a result of voluntary drug use as a "mental disease

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[31] *State v. Klein*, 156 Wash. 2d 103, 124 P.3d 644 (2005).

[32] See Wash. Rev. Code Ann. § 9A.12.010 (West 2009).

[33] *Sexton, supra* note 20, 180 Vt. at 58, 904 A.2d at 1110.

or defect."[34] And some courts have found that a defendant may not plead insanity where there was voluntary intoxication because intoxication is a separate, if partial, defense.[35]

(d) Conclusion

Nebraska case law has consistently held that "'[v]oluntary intoxication is no justification or excuse for crime unless the intoxication is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent.'"[36] As noted above, other states that utilize the common-law insanity defense have held the same.

However, Hotz argues that even if we determine this decision is one best left up to the Legislature, two of our prior cases involve defendants who received the insanity defense after being voluntarily intoxicated. In *State v. Reeves*,[37] the defendant pled not guilty by reason of insanity to the murder of two women. The defendant claimed that he had been drinking alcohol and had consumed peyote prior to the murders. The defendant's expert testified that the defendant did not have the capacity to know what he was doing and that he did not know right from wrong. The trial court instructed the jury on the insanity defense, but the jury nevertheless found the defendant guilty on both counts.

Hotz claims that because the jury in *Reeves* was given the insanity instruction, he, Hotz, should have received that instruction as well. We disagree. In *Reeves*, although we did generally find that the jury had been properly instructed, we did not rule on the legitimacy of receiving the insanity instruction. The parties never raised the issue of whether a defendant may plead temporary insanity brought about by the voluntary use of drugs.

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[34] See, *id.*; *Downing, supra* note 30; *Sette, supra* note 30.

[35] See *People v. Free*, 94 Ill. 2d 378, 447 N.E.2d 218, 69 Ill. Dec. 1 (1983).

[36] *Reynolds, supra* note 18, 235 Neb. at 692, 457 N.W.2d at 423 (quoting *Prim, supra* note 18).

[37] *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

State v. Nielsen,[38] the second case Hotz cites, gives no more direction. In that case, the defendant presented evidence that he was very drunk when he killed his father-in-law and mother-in-law. The defendant relied upon the insanity defense even though no expert could testify that the defendant had met the legal standard of insanity at the time of the offense. In his motion for postconviction relief, the defendant alleged that his trial counsel was ineffective for relying on the insanity defense. We found that the defendant's counsel was not ineffective for choosing that particular trial strategy; but the issue of whether a defendant may claim temporary insanity through voluntary intoxication was never addressed.

Based on our past case law and the case law of other states, we find that the district court did not err when it refused to instruct the jury on insanity in the present case.

> While the mental state resulting from extreme intoxication may in some cases be "tantamount to insanity," . . . its origin as a self-induced impairment fundamentally distinguishes it for most courts from a naturally occurring mental disease or defect that leads to insanity. . . . Indeed, it is universally recognized that a condition of insanity brought about by an individual's voluntary use of alcohol or drugs will not relieve the actor of criminal responsibility for his or her acts.[39]

In this case, Hotz voluntarily ingested hallucinogenic mushrooms and marijuana. He had taken mushrooms in the past and had experienced anxiety and delusions. Hotz was well aware of the mind-altering effects the mushrooms might have. While Hotz may have experienced a state that was "tantamount to insanity," that state was temporary. Hotz took the mushrooms around 4 p.m. on December 5, 2008, and by late that night, he was lucid and able to respond to questions. Hotz had no history of mental illness, and there is no evidence that he suffered permanent mental problems from his use of drugs.

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[38] *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

[39] *Sexton, supra* note 20, 180 Vt. at 44, 904 A.2d at 1100 (citations omitted).

[8] As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces the sort of psychosis or delirium Hotz claims to have suffered. Because Hotz was not entitled to an insanity instruction, the trial court also did not err when it excluded testimony from Wilson, Hotz' expert witness. We find Hotz' first and second assignments of error to be without merit.

2. District Court Erred in Denying Hotz New Trial

Hotz next argues that the trial court erred by overruling his motion for new trial. Hotz argues that he relied solely on the insanity defense after the district court overruled the State's motion in limine. Hotz claims that the district court's decision not to instruct the jury on insanity therefore amounted to an "[i]rregularity in the proceedings" under Neb. Rev. Stat. § 29-2101(1) (Reissue 2008) because Hotz was deprived of that defense. Hotz also claims this deprivation affected his substantial right to due process of law and a fair trial as guaranteed by the 5th and 14th Amendments.

Although Hotz was not entitled to the insanity defense as a matter of law, we agree that he was led to believe that he would receive an insanity instruction. Under § 29-2101,

> [a] new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial . . . .

Hotz gave timely notice of his intent to rely on the insanity defense. The State made a motion in limine to exclude Hotz' expert testimony as to his insanity at the time of the offense. We do not have a record of the trial court's ruling on the motion in limine, but it is clear that Hotz proceeded under the assumption that he would be allowed to assert the insanity defense.

During voir dire, the prosecutor informed the jury that Hotz would be proceeding with a defense of "not responsible by reason of mental illness of insanity." Hotz' attorney also told prospective jurors that Hotz would be relying on the insanity

defense. Hotz' attorney questioned prospective jurors extensively as to their opinions on the use of the insanity defense when the defendant had been using drugs. At least one prospective juror was excused for cause because he stated that he could not find a defendant not guilty by reason of insanity if the person's mental state was a product of drug use, even if so instructed.

Both the prosecutor and Hotz' trial counsel stated during opening arguments that Hotz would be relying on the insanity defense. The trial court also informed the jury that Hotz would be relying on the insanity defense. Hotz' expert, Wilson, was allowed to testify regarding his evaluation of Hotz, as well as give extensive definitions of drug-induced delirium and drug-induced psychosis. The State objected to Wilson's opinion as to whether Hotz met the legal definition of insanity, and the trial court sustained this objection. This ruling appears to be the first indication Hotz had that the trial court was not going to give an instruction on the insanity defense.

After Hotz had rested his case, the trial court informed Hotz that it would not instruct the jury on the insanity defense. This last-minute decision required Hotz' counsel to try to explain during his closing argument why the jury would not receive an insanity instruction. We also note the jury's question shortly after deliberations began: "From the beginning the jury was under the impression that we were to determine insanity or not. Why was the change made for our decision?" Clearly, the jury believed that it was to determine the issue of insanity as well.

[9,10] "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."[40] The determination of whether procedures afforded an individual comport with constitutional requirements

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[40] *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

for procedural due process presents a question of law.[41] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.[42]

Given the circumstances, we find that Hotz' ability to mount a defense was severely compromised when he was barred from asserting the insanity defense at what amounted to the eleventh hour. Although Hotz is not entitled to an insanity instruction as a matter of law, he and the jury proceeded through trial with the assumption that the defense was available. Such amounted to an irregularity in the proceedings under § 29-2101(1), which irregularity prevented Hotz from receiving a fair trial and now entitles him to a new trial. We therefore reverse Hotz' convictions and remand the cause for a new trial. For that reason, we need not address Hotz' remaining assignments of error.

VI. CONCLUSION

In line with our prior case law concerning alcohol and the case law in a majority of states, we find that a defendant may not assert an insanity defense when the insanity was temporary and brought on solely by voluntary intoxication through the use of drugs. Because Hotz was not entitled to an insanity instruction, the trial court did not err in excluding Hotz' expert witness' testimony on insanity. However, Hotz was led to believe that he would be able to rely on the insanity defense, and this constituted an irregularity in the proceedings sufficient for a new trial under § 29-2101(1). We therefore reverse Hotz' convictions and remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

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[41] *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

[42] *Id.*