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Based upon our de novo review of the record made before the hearing master, to which no exceptions were taken, and our consideration of all pleadings and reports filed herein, this court adopts the hearing master's report in its entirety. Based on the report, we conclude that Respondent is a nonlawyer who has repeatedly engaged in the practice of law as defined by § 3-1001(A) and (B). We agree with the hearing master's recommendation that injunctive relief is appropriate and necessary given Respondent's "intractable attitude" in response to the Commission's efforts to obtain his voluntary compliance with our rules prohibiting the unauthorized practice of law. The undisputed facts presented in this record clearly demonstrate a very real risk of harm to the public if Respondent's conduct is not enjoined.

Accordingly, by separate order entered on April 22, 2011, Respondent will be enjoined from engaging in the unauthorized practice of law in any manner, including but not limited to: rendering legal advice or counsel to others for compensation; selecting, drafting, or completing for another entity or person legal documents or pleadings to be filed in the courts of this state; and filing any pleadings on behalf of another entity or person in any court of this state. Noncompliance with this order of injunction shall constitute contempt punishable under this court's inherent power and § 3-1019.

INJUNCTION ISSUED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY D. RILEY II, APPELLANT.
796 N.W.2d 371

Filed April 28, 2011. No. S-09-731.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

3. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
4. **Motions for Mistrial.** Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial.
5. **Polygraph Tests: Prejudicial Statements.** Although the results of a polygraph test are not admissible in evidence, the mere mention of the word "polygraph," absent more, does not constitute prejudicial error.
6. **Constitutional Law: Criminal Law: Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
7. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded for a new trial.

Peter K. Blakeslee for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Anthony D. Riley II appeals his convictions in the district court for Lancaster County for manslaughter and three counts of attempted second degree murder. We conclude that the district court erred when it overruled Riley's motion for a mistrial based on the polygraph testimony of the alternate suspect, Terrell Jones. We reverse the convictions, and because the evidence was sufficient to support the convictions, we remand the cause for a new trial.

STATEMENT OF FACTS

This case generally involves an incident in which shots were fired from one vehicle into another vehicle, causing one death

and injuries to the occupants of the second vehicle. Riley was charged with second degree murder in connection with the August 6, 2006, shooting death of Doyle Bryant and with three counts of attempted second degree murder with regard to three other men who were in the vehicle with Doyle when he was shot. Riley was also charged with one count of unlawful discharge of a firearm at an occupied vehicle and five counts of use of a weapon to commit a felony. A jury found Riley guilty of the lesser-included offense of manslaughter and the three counts of attempted second degree murder but returned verdicts of not guilty on the unlawful discharge of a firearm and use of a weapon charges.

According to testimony at trial, on the evening of August 5, 2006, Doyle, his brother Daryl Bryant, their cousin LaRon Tolbert, and their friend Lynell Green drove from Omaha, Nebraska, to Lincoln, Nebraska, to celebrate Doyle's recent graduation and new job. Sometime near midnight, the group went to a nightclub in downtown Lincoln, where there was a line to enter the club. They waited for a time but decided they were not going to get in. Tolbert and Green left to get the car, while Doyle and Daryl waited outside the club. While waiting for Tolbert and Green to pick them up, Doyle and Daryl witnessed a fight break out on the street outside the club.

With Green driving the car, Doyle in the front passenger seat, and Daryl and Tolbert in the back seat, the men drove around downtown Lincoln. As they approached the intersection of 27th and O Streets, Green noticed the driver of another car staring at them "like he had a problem or something." After Green turned the car onto O Street, the men decided to return to Omaha. As Green headed back to North 27th Street, he saw that the car he had noticed earlier was behind them. He was surprised because the car had been headed in another direction and would have needed to turn around in order to be behind them. Green drove north on North 27th Street, and when he stopped for a light at Cornhusker Highway, he saw that the other car was directly behind them.

When the light changed, Green continued north on North 27th Street and the other car followed. Eventually, near the intersection of North 27th Street and Folkways Boulevard, the

other car sped up and began to pass the car Green was driving. As the car passed in the left lane, five or six gunshots were fired into the car driven by Green. One bullet struck Green in the upper left thigh. He tried to stop the car by braking, but lost control. The car went off the street and hit a pole. In addition to Green's being shot in the thigh, Daryl was shot through the leg, and Doyle was shot through the arm and chest. Doyle died from the gunshot wounds.

A broadcast went out to Lincoln police with a description of the car involved in the shooting and a description of the driver. At about 2:30 a.m., two police officers responded to a call regarding a loud party. As they approached the house, they noticed a car parked near the house that matched the description of the car involved in the shooting. The officers saw two men standing next to the car, and one of the men matched the description of the driver of the car from which the gunshots were fired. The man identified himself to the police as O'Dari Wiley and told them that the car was owned by his cousin, Riley. The police then spoke to Riley, who first identified himself by a false name but later admitted his true name. Riley and Wiley were taken to a police station for interviews. Both denied being involved in the shooting and provided alibis for the evening. Green arrived at the police station and identified Wiley as the driver of the car from which the shots were fired.

Further investigation led police to determine that Jones and Tramel Patterson were also occupants of Riley's car at the time gunshots were fired from Riley's car. The men initially denied being in the car or being involved in the shooting, but eventually Wiley, Jones, and Patterson admitted that they were in the car at the time of the shooting, and they each asserted that Riley had fired the shots into the car driven by Green.

According to Wiley's testimony at trial, on the night of the shooting, Wiley, Riley, Jones, and Patterson had been at the same club where Doyle and his companions had waited in line. When they left the club, they became involved in a street fight with several other people. They then got into Riley's car, with Wiley driving, Patterson in the front passenger seat, Jones in the back seat on the driver's side, and Riley in the back seat

on the passenger's side. Jones and Riley were upset about the fight and angry that they had been "jumped" outside the club. Jones saw a car driving by and said that the occupants of the car looked like the men who had jumped them. Riley said, "I want to get them. I want to kill these guys." Riley asked Wiley to stop the car and pop open the hood. Wiley did not see what Riley did, but he knew that Riley kept a gun under the hood of the car.

They began following the car near the intersection of 27th and O Streets and followed it north on North 27th Street. Riley told Wiley to catch up to the other car, and Jones said he wanted to fight the men in the car. As Wiley pulled up in the left lane with the other car in the right lane, he signaled to the men in the car that he wanted to fight. The driver of the other car gave a signal that Wiley took to mean he agreed to fight. As the cars moved, Wiley heard five or six gunshots and thought that someone from the other car was firing at them. After the shooting stopped, he looked toward the back seat and saw that Riley had a gun in his left hand. Riley yelled that he hoped one of the men in the other car was dead. Riley waved the gun and told Wiley to drive him home. Riley went into his apartment and came out with a bag containing gun shells. Riley said he needed to get rid of the shells, and he dropped them into a street drain. Wiley drove to the party where the police later found him and Riley.

Riley was arrested for the shootings. The State charged him with second degree murder, three counts of attempted second degree murder, unlawful discharge of a firearm into an occupied vehicle, and five counts of use of a weapon to commit a felony.

Prior to trial, the State filed a motion in limine seeking an order to prevent Riley from "discussing in voir dire, opening statement, [or] closing argument, or adducing any evidence regarding . . . [p]olygraph results and any reference to taking or refusing to take polygraphs of any of the State's witness[es]." In another motion in limine, the State sought an order to prevent Riley from discussing or adducing "[e]vidence of the facts or circumstances [of the] State's Witnesses' convictions or arrests beyond eliciting whether they [sic] were convictions in

the last 10 years and whether they were felonies or crimes of dishonesty." The court sustained both motions in limine.

At trial, the focus of Riley's defense was that Jones rather than Riley fired the shots into the other car. Jones testified as a witness for the State. During Riley's cross-examination of Jones, Riley questioned Jones regarding a police interview of Jones. Jones acknowledged that the police investigator had told Jones that the police suspected him of being the shooter. Riley then asked Jones whether the investigator had said that one reason he suspected Jones was because Jones had "spent time for shooting at people in a car before." The State objected to the question on the basis of hearsay and because it violated the order in limine directing Riley not to ask about the facts or circumstances of the prior convictions of the State's witnesses. The court found that the question violated its order sustaining the motion in limine, and it sustained the State's objection. Riley thereafter made an offer of proof designed to show that the current shooting was similar to a "signature crime" for which Jones had previously been convicted. See Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008). Riley continued that if allowed to testify on the matter, Jones would say, inter alia, that in 2002, while traveling on North 27th Street, he had fired a gun from one moving vehicle into another and that he had been convicted and imprisoned for that crime.

Later in Riley's cross-examination of Jones, Riley questioned Jones regarding Jones' communications with Patterson, who was Jones' brother. Riley asked whether Jones communicated regularly with Patterson after Jones' arrest in connection with the current shooting incident and asked specifically whether Jones had called Patterson to discuss what he had told the police. During this questioning, the following exchange occurred:

> Q. [Riley's attorney] Okay. You called [Patterson] yourself and told him what you'd done —
>
> A. [Jones] Yeah.
>
> Q. — as far as the proffer's concerned.
>
> A. Uh, I believe so, yeah. No, when I talked to him I told him I had took — uh — a polygraph test. That's what I told him. That's when I talked to him.

Riley immediately asked permission to approach the bench and moved for a mistrial because the order sustaining the State's motion in limine prohibited references to polygraph tests. The court released the jury in order to hear argument on the motion outside the jury's presence. Riley noted that his questions did not lead Jones to say that he had taken a polygraph test. Riley argued that after the jury heard that Jones had taken a polygraph test, because Riley and not Jones was on trial as the shooter, the only conclusion the jury could reach was that Jones had passed the polygraph test and could not be the alternate suspect as urged by Riley in his defense. Riley also advised the court that in fact Jones had failed the polygraph test.

In considering the motion for a mistrial, the court received evidence, including the results of Jones' polygraph test which indicated that Jones had failed the test and that he had reacted both when he stated that Riley had fired the shots and when he denied that he himself had fired the shots. Riley asked that if the court overruled his motion for a mistrial, he be allowed to present the polygraph test results to the jury. The court found that Jones' mention of a polygraph test was inadvertent and overruled the motion for a mistrial. The court stated that there would be no evidence put before the jury of whether or not Jones took a polygraph test or of the results. The court struck Jones' answer and instructed the jury to disregard it.

In his defense, Riley testified that Jones fired the shots into the other car. Riley testified that he was not involved in the fight outside the club but that his companions apparently got involved in the fight while he was getting the car. He also disputed testimony by the other witnesses that he was in the back seat on the passenger's side when the shooting occurred. He testified instead that he was in the back seat on the driver's side and that Jones was on the passenger's side. Riley testified that Jones was angry about being jumped outside the club and that when they spotted the other car, Riley had no reason to think the men in the car had been involved in the fight. Riley testified that he saw Jones fire shots into the other car but that before Jones fired the shots, he did not know that Jones had a gun with him.

Riley testified that he initially lied to the police about the shooting because he was scared for his life. In connection with such testimony, Riley again attempted to present evidence of the 2002 shooting by Jones. The court allowed Riley to testify to what he had learned of the prior shooting for the limited purpose of establishing that Riley feared Jones. Prior to such testimony, the court instructed the jury that the evidence was not received for the purpose of showing that Jones acted in conformity with his prior acts in this instance but instead for the limited purpose of explaining why Riley did not initially tell police that Jones fired the shots. The court instructed the jury that it must not consider the evidence for any other purpose. Riley then testified that he had heard that in 2002, Jones "got into it with somebody at [a store] on 27th Street [and] ended up firing into the car" and that Jones then "ended up in another car with somebody else driving up 27th Street, firing at the same car."

Following its receipt of evidence, the court instructed the jury on manslaughter as a lesser-included offense of second degree murder. The court instructed that one of the elements of manslaughter was that the defendant caused the death of another "unintentionally while in the commission of an unlawful act." The court did not define "unlawful act," nor did it specify the unlawful act Riley was alleged to have been committing when he caused Doyle's death. Riley did not object to the manslaughter instruction, nor did he request an instruction defining "unlawful act" or specifying the unlawful act.

The jury returned guilty verdicts for manslaughter and three counts of attempted second degree murder. The jury, however, found Riley not guilty of unlawful discharge of a firearm at an occupied vehicle and not guilty of the five counts of use of a weapon to commit a felony.

Riley moved for a new trial on various bases. The court overruled the motion and thereafter sentenced Riley to imprisonment for 20 to 20 years on the manslaughter conviction and for 8 to 15 years on each of the three attempted second degree murder convictions. The court ordered all the sentences to be served consecutive to one another.

Riley appeals his convictions.

ASSIGNMENTS OF ERROR

Riley claims that the district court erred when it (1) overruled his motion for a mistrial based on Jones' testimony that he took a polygraph test, (2) refused thereafter to allow Riley to present evidence of the results of Jones' polygraph test, (3) limited Riley's cross-examination of Jones regarding Jones' prior shooting conviction and instructing the jury to limit its use of the evidence regarding the prior shooting, (4) gave a lesser-included offense instruction on the elements of manslaughter without specifying the underlying unlawful act, and (5) overruled Riley's motion for a new trial. Riley also asserts that there was not sufficient evidence to support the verdict, that his rights to due process and a fair trial were violated when the jury returned verdicts that were inconsistent, and that the cumulative effect of various trial errors deprived him of his "right to a public trial by an impartial jury."

STANDARDS OF REVIEW

[1,2] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). 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.*

ANALYSIS

The District Court Erred When It Overruled Riley's Motion for a Mistrial Based on Jones' Polygraph Testimony.

Riley claims that the district court erred when it overruled his motion for a mistrial after Jones testified that he had taken a polygraph test. We conclude that because Riley's assertion that it was Jones rather than Riley who fired the shots at the other car was central to Riley's defense, Jones' testimony that he had taken a polygraph test, accompanied by the fact that Jones was not the defendant and the implication that Jones had passed the test, were prejudicial to Riley, and the district court

erred when it denied Riley's motion for a mistrial. We reverse on this basis.

[3,4] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *Id*. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial. *Id*.

The basis of Riley's motion for a mistrial was Jones' testimony in response to a question on cross-examination about Jones' communications with Patterson, his brother, after Jones had been arrested in connection with the shooting. Although the question was not designed to elicit testimony regarding a polygraph test, Jones testified that "when I talked to him I told him I had took — uh — a polygraph test." Riley immediately moved for a mistrial, and the court dismissed the jury for the evening in order to hear argument from counsel and consider the motion outside the jury's presence. The court overruled the motion, and when the jury returned to the courtroom the next morning, the court instructed the jurors that "the last answer given by . . . Jones" the prior day was stricken and was to be disregarded by the jury and not considered for any purpose.

[5] We have stated that although the results of a polygraph test are not admissible in evidence, the "mere mention of the word 'polygraph,' absent more, does not constitute prejudicial error." *State v. Anderson and Hochstein*, 207 Neb. 51, 67, 296 N.W.2d 440, 451 (1980). In *State v. Beach*, 215 Neb. 213, 337 N.W.2d 772 (1983), we concluded that a reference to a polygraph test was not prejudicial and that therefore, the trial court did not err when it overruled a motion for a mistrial based on such reference. In *Beach*, we noted that the circumstances of the case were similar to those in *Anderson and Hochstein, supra*, and another case in which we had concluded that a reference to a polygraph test was not prejudicial. We noted that in all three cases, "the mention of a polygraph test was inadvertent and unrequested; the results of the tests were not

disclosed; the reference was properly objected to; and the trial court instructed the jury to disregard the references to the polygraph tests." 215 Neb. at 218, 337 N.W.2d at 776.

Although the factors in *Beach* and *Anderson and Hochstein* were also present in this case, the fact that the mention of the polygraph test was by Jones—who Riley claimed was the shooter—requires a different result. Similar to the previous cases, Jones' reference to the polygraph test was not prompted by the State, the results of the test were not disclosed, Riley objected immediately, and the court instructed the jury to disregard the answer that included the reference. However, there are other factors present in this case that lead us to conclude that Jones' reference to having taken a polygraph test was prejudicial to Riley and that therefore, the court should have granted Riley's motion for a mistrial.

Contrary to the cases noted above where we cited the fact that the polygraph test results were not disclosed as a factor tending to minimize prejudice to the defendant, in this case, the fact that the results were not disclosed to the jury increased the risk of prejudice to Riley. We note that a central part of Riley's defense was his assertion that he did not shoot into the other car and that instead it was Jones who fired the shots. Because both Riley and Jones testified at trial and accused each other of firing the shots, the relative credibility of each man's testimony was crucial to the jury's determination of whether there was a reasonable doubt whether Riley fired the shots. When Jones stated that he had taken a polygraph test, the jury could reasonably have inferred that Jones passed the polygraph test, because the State charged Riley with having fired the shots. If the jury presumed that Jones passed the polygraph test, such presumption could readily have caused the jury to find Jones' testimony more credible than Riley's. The jury's presumption that Jones passed the polygraph test could have given Jones an undeserved badge of credibility, because in fact Jones did not pass the polygraph test. In this regard, we note that in support of his motion for a mistrial, Riley presented evidence that Jones had failed the polygraph test and that Jones had specifically reacted to questions about whether he or Riley had fired the shots.

In *State v. Edwards*, 412 A.2d 983 (Me. 1980), the Supreme Judicial Court of Maine concluded that a brief mention of a lie detector test was prejudicial, because the witness who stated that she took the test was the victim of the alleged sexual misconduct and her credibility was central to the case against the defendant. The court stated:

> When the prosecutor's questioning inadvertently elicits a witness's reference to a polygraph test, there is cause for mistrial if, but only if, the reference to the test raises an inference about the result that substantially prejudices the defendant's case. . . . In deciding whether to grant or deny a defendant's motion for mistrial in such a situation, the trial court must weigh various factors bearing on the substantiality of any resulting prejudice to the defendant. Among other factors, it must determine (1) whether the inference as to the result of the test may be crucial in assessing the witness's credibility, and (2) whether "the witness's credibility play[s] a vital role in the case."

Id. at 985 (citations omitted). The court in *Edwards* concluded that the reference to the lie detector test was substantially prejudicial and required a mistrial because the victim's statement "was sufficient to inform the jury that she had taken the test, and the natural and reasonable implication of the reference was that she had passed it." *Id.* at 987.

Similarly, the Court of Appeals of Maryland in *Guesfeird v. State*, 300 Md. 653, 480 A.2d 800 (1984), concluded that a mistrial was required when the complaining witness inadvertently testified that she had taken a lie detector test. The court reasoned, "Knowing that a witness took a lie detector test, a jury might make the unmistakable inference that the results of the test were that the witness told the truth, and is telling the truth as he [or she] testifies." *Id.* at 661, 480 A.2d at 804.

The State notes that in *State v. Vrchota*, 212 Neb. 567, 324 N.W.2d 394 (1982), this court held that a mistrial was not required where an accomplice to a theft testified that he had taken a polygraph test. We noted that the reference to the polygraph test was volunteered by the witness, that the result of the test was not disclosed, that prompt objection was made to the reference, and that the court instructed the jury

to disregard the reference. The present case is distinguishable from *Vrchota* because Riley's theory of defense presents Jones as the alternate suspect for the shooting, and therefore the relative credibility of Jones' and Riley's testimony is more squarely at issue. Jones was not on trial as an accomplice. Where the witness is an accomplice, as in *Vrchota*, the evidence is that both persons took part in the crime. Where the witness is an alternate suspect, as in the present case, the witness' credibility is central to the case.

In *Hembree v. State*, 546 S.W.2d 235, 240 (Tenn. Crim. App. 1976), the court concluded that testimony a witness took a lie detector test was prejudicial and that the prejudice could not be cured by the trial court's striking the testimony, because the "proof was that either this witness or the [defendant] shot the deceased and the jury's knowledge of a successful lie detector test probably served to bolster and give greater weight to this witness's testimony." See, also, *Simeon v. State*, 520 So. 2d 81, 83 (Fla. App. 1988) (witness' reference to having taken lie detector test impermissibly bolstered his testimony and was not harmless where witness was "the defendant's primary accuser and the only alternative actual offender"); *Morris v. State*, 264 Ga. 823, 452 S.E.2d 100 (1995) (references to witness' having taken lie detector test bolstered his credibility and his testimony that he had nothing to do with murder).

We note further that the motion in limine to prevent references to polygraph tests was filed by the State, and the State had a duty to ensure that its witnesses did not make such references. In this regard, we refer to the observation of the Kansas Supreme Court which provides:

> Whether there is an order in limine or not, a prosecutor has the duty to guard against statements by his or her witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an inadmissible answer during his or her examination, the prosecutor must warn the witness to refrain from making such a statement.

State v. Crume, 271 Kan. 87, 101, 22 P.3d 1057, 1068 (2001).

We agree with the reasoning of the Kansas Supreme Court and note that in preparing Jones for trial, it would have been prudent for the State to have warned Jones to refrain from

mentioning that he had taken a polygraph test. Although Jones' reference to the polygraph test was made while he was being cross-examined by Riley, Riley's question to Jones was not designed to prompt Jones to mention the polygraph test. Jones was the State's witness, and it was the responsibility of the State to instruct Jones on his obligation to comply with the order in limine.

Because of the importance of Jones as the alternate suspect, we conclude that Jones' reference to having taken a polygraph test, accompanied by the inference that he passed the test, were prejudicial to Riley's defense and that the damaging effect of the testimony could not be removed by admonition or instruction to the jury. We therefore conclude that the district court abused its discretion when it overruled Riley's motion for a mistrial based on the polygraph reference. Because the district court should have granted the motion for a mistrial, we reverse Riley's convictions for manslaughter and three counts of attempted second degree murder.

Because the Evidence Was Sufficient to Support Riley's Convictions, a New Trial May Be Held on Remand.

Having found reversible error, we must consider whether Riley can be subjected to a retrial. We conclude that with regard to the charges of which Riley was convicted—one count of manslaughter and three counts of attempted second degree murder—the evidence introduced at the trial, whether erroneously or not, was sufficient to sustain the guilty verdicts and that therefore, Riley can be retried on such charges.

[6] The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

We note first that the jury acquitted Riley of one count of unlawful discharge of a firearm at an occupied vehicle and five counts of use of a weapon to commit a felony. Therefore, Riley

may not be retried for such charges on remand. See *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009) (Double Jeopardy Clauses of both federal and Nebraska Constitutions protect against, inter alia, second prosecution for same offense after acquittal). We note also that the jury acquitted Riley of second degree murder when it found him guilty of the lesser-included offense of manslaughter; therefore, Riley cannot be retried for second degree murder on remand. See *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998) (conviction of lesser-included offense was implied acquittal of greater offense, and defendant could not be retried for greater offense).

We must then determine whether the evidence admitted by the district court in this case was sufficient to sustain guilty verdicts for one count of manslaughter and three counts of attempted second degree murder and whether Riley may therefore be retried for such crimes. The manslaughter conviction related to the shooting and death of Doyle, and the three attempted second degree murder convictions related to attempts to cause the deaths of the other three occupants of the vehicle—Daryl, Green, and Tolbert.

With regard to the three attempted second degree murder convictions, we conclude that there was sufficient evidence to support the convictions. The State needed to prove that Riley intentionally engaged in conduct that constituted a substantial step in a course of conduct intended to culminate in the commission of murder in the second degree, which is defined as causing the death of each of the victims intentionally, but without premeditation. See Neb. Rev. Stat. §§ 28-201 and 28-304 (Reissue 2008). There was evidence, mainly the testimony of Wiley, Jones, and Patterson, from which the jury could have found that Riley intended to cause the deaths of all the occupants of the vehicle and that he took a substantial step in the commission of such crimes by firing a gun into the vehicle several times.

With regard to the manslaughter conviction, the court instructed the jury on second degree murder and the lesser-included offense of manslaughter. The jury rejected the second degree murder charge and found Riley guilty of manslaughter. The court instructed the jury that a conviction for manslaughter

required findings that Riley "killed Doyle . . . without malice" and that Riley "caused the death of Doyle . . . unintentionally while in the commission of an unlawful act."

We find that the evidence in this case supported the jury's verdict that Riley was guilty of manslaughter. There was evidence, including the testimony of Wiley, Jones, and Patterson, that Riley fired shots into the vehicle in which Doyle was a passenger. There was also evidence that Doyle was shot through the arm and chest and that the gunshot wounds caused his death. Therefore there was evidence from which the jury could find that Riley caused the death of Doyle. There was also evidence that the death was caused while Riley was in the commission of an unlawful act. Pursuant to Neb. Rev. Stat. § 28-1212.02 (Reissue 2008), it is a felony to "intentionally discharge[] a firearm at an . . . occupied motor vehicle." The testimony of Wiley, Jones, and Patterson supported a finding that Riley discharged a firearm at an occupied vehicle. We are not asked and we make no comment on whether there is or could be evidence of another unlawful act or acts which could serve as the unlawful act to support a manslaughter case upon retrial.

We note that Riley assigns error in this appeal to the district court's purported failure to give a jury instruction specifying the underlying unlawful act or acts or defining "unlawful act." We further note, however, that Riley failed to object to the manslaughter instruction or offer an alternate instruction at trial. Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). Because we have reversed the convictions on other grounds, we need not consider whether there was plain error in the manslaughter instruction, and although the issue may recur on remand where the court will be required to instruct the jury on the elements of manslaughter, Riley will have the opportunity to object to an instruction he believes to be deficient and to propose an alternate instruction.

We also note in this regard that on remand, the trial court should consider whether the underlying unlawful act to support

a conviction for manslaughter can be unlawful discharge of a firearm at an occupied vehicle when Riley was acquitted of such charge in this trial. See *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996) (under double jeopardy principles, acquittal of felony in previous trial prevents use of same felony as underlying felony to support felony murder prosecution in retrial). Again, we are not asked and make no comment on whether there is or could be evidence of another unlawful act or acts which could serve as the unlawful act to support a manslaughter case upon retrial.

We further note that Riley claims in this appeal that his rights to due process and a fair trial were violated when the jury returned verdicts that were inconsistent. He argues that no rational fact finder could acquit him of the charge of unlawful discharge of a firearm at an occupied vehicle and the five counts of use of a weapon to commit a felony but still find him guilty of manslaughter and three counts of attempted second degree murder. We have stated that when acquittals and guilty verdicts on different counts in a multicount prosecution are asserted to be inconsistent, we cannot speculate as to the reason for a jury's verdicts and instead must consider only whether the evidence can sustain the convictions without speculating about the reason the jury acquitted the defendant of other charges. See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). In addition, the U.S. Court of Appeals for the Eighth Circuit has stated that "a defendant may not challenge a conviction because it is inconsistent with another part of the jury's verdict." *U.S. v. Wisecarver*, 598 F.3d 982, 986 (8th Cir. 2010). But see *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010) (holding that in case involving conviction of compound felony, where compound felony and predicate felony are both charged, when defendant is acquitted of underlying predicate felony, conviction for compound felony cannot stand). Therefore, the fact that Riley was acquitted of one count of unlawful discharge of a firearm at an occupied vehicle and the five counts of use of a weapon to commit a felony does not change our conclusion above that the evidence in this case was sufficient to support the convictions for manslaughter and three counts of attempted second degree murder.

This Court Need Not Address Riley's Remaining Assignments of Error.

[7] Having determined that Riley's convictions should be reversed based on the polygraph issue, we need not address Riley's remaining assignments of error. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008). We discussed Riley's assignments of error with regard to the manslaughter instruction and the inconsistent verdicts to the extent necessary in connection with our review above of whether there may be a retrial on remand. We need not comment further on such issues, and we need not consider any of Riley's remaining assignments of error.

CONCLUSION

We conclude that the district court erred when it overruled Riley's motion for a mistrial based on Jones' testimony that he took a polygraph test. We therefore reverse Riley's convictions for manslaughter and three counts of attempted second degree murder. We further conclude that there was sufficient evidence to support Riley's convictions and that therefore, Riley may be retried on such charges on remand.

REVERSED AND REMANDED FOR A NEW TRIAL.

REX J. MOATS, APPELLANT, V. REPUBLICAN PARTY OF NEBRASKA, ALSO KNOWN AS THE NEBRASKA REPUBLICAN PARTY, APPELLEE.

796 N.W.2d 584

Filed April 28, 2011. No. S-09-929.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual