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Thus, Schuetz can hardly be heard to say that he fulfilled the probationary conditions that he not drink, let alone not drink and drive.

CONCLUSION

Because the sentence does not violate the Double Jeopardy Clause and we cannot say the sentence at issue was an abuse of discretion, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LANCE P. FICK, APPELLANT.

790 N.W.2d 890

Filed November 16, 2010. No. A-09-1222.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.
4. **Evidence: Judges.** The exercise of judicial discretion is implicit in determining the relevance of evidence.
5. **Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Constitutional Law: Hearsay.** If statements at issue are nontestimonial, then no further Confrontation Clause analysis is required.
7. **Hearsay.** The Nebraska Supreme Court has noted that in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court provided three formulations of the core class of testimonial statements.
8. **Rules of Evidence.** Neb. Rev. Stat. § 27-403 (Reissue 2008) provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
9. **Evidence: Jury Instructions.** The giving of a limiting instruction is mandatory when requested.
10. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether

> the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Wayne County: ROBERT B. ENSZ, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

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

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Lance P. Fick appeals an order of the district court for Wayne County, Nebraska, sentencing Fick to a term of 4 to 6 years' incarceration on a conviction for first degree sexual assault. On appeal, Fick challenges the court's admission into evidence of an audio recording, the court's failure to give a limiting instruction to the jury concerning the audio recording, and the court's failure to grant a directed verdict in his favor. We find no merit to the assertions on appeal, and we affirm.

II. BACKGROUND

On or about December 17, 2008, Fick was charged by information with three counts of first degree sexual assault. The information alleged that Fick had subjected the victim, C.S., to sexual penetration without her consent or while he knew or should have known that she was mentally or physically incapable of resisting or appraising the nature of her conduct. Fick was ultimately convicted on one of the three counts. Testimony at trial revealed that the relevant conduct occurred during a postictal period following C.S.' experiencing an epileptic seizure. Fick did not deny that sexual penetration occurred, and the factual issue for the jury to resolve at trial was whether

Fick knew or should have known that C.S. was mentally or physically incapable of resisting or appraising the nature of the conduct because she was in a postictal state.

C.S. was a 23-year-old college student in Wayne, Nebraska, at the time of the incidents involved in this case. C.S. has been diagnosed with intractable epilepsy. According to C.S., "intractable" means that her epilepsy "is hard to control and it sometimes is impossible to control" with medication or surgery. C.S. has experienced epileptic seizures since she was 12 years old.

C.S. testified that she sometimes is aware when she is about to experience a seizure. She testified that she sometimes experiences "an aura" where she has a copper or other metallic taste in her mouth or believes she smells something burning prior to the onset of a seizure. She testified that she does not always remember these auras after the seizure is over. She testified that she sometimes is able to find somebody and seek assistance prior to the onset of the seizure. C.S. testified that in the fall of 2008, she was averaging approximately six seizures per month, although the number of seizures could vary greatly from week to week and month to month.

C.S. testified that the period after a seizure is called a postictal period. She testified that after experiencing a seizure, she never remembers having it. She testified that it usually takes her at least 8 hours after a seizure to start remembering things. She testified that although each seizure is different and the length of time needed for her to recover and end the postictal period varies, if she experienced a seizure at night, she "may be 50 percent" recovered the next morning, and that it usually takes approximately 3 days to "be back to a hundred percent."

C.S. testified that she sometimes engages in activities the day after a seizure and has no memory of them. For example, she might get up, take a shower, get dressed, sit through a class, and engage in other normal daily activities and yet have no memory of any of it because she was in a postictal state. C.S. acknowledged that it was "possible" that a person who did not know her well would be unaware that she was in a postictal state, but she did not believe it likely.

C.S. attended college in Wayne because the school agreed to admit her as a student to live on campus without a personal assistant; 133 other colleges she contacted refused her request to do so. According to C.S., the dormitory resident assistants at her dormitory all knew about her condition, as did her friends, and her condition was generally well known on campus. C.S., along with her treating physicians, created a four-page written protocol explaining her seizure characteristics, how to perform interventions when she has a seizure, her treatment and medications, and her postictal characteristics and behaviors. The written protocol included a description indicating that in C.S.' postictal state, she has no memory of what has happened, is cognitively impaired, displays regressed behavior and an inability to speak, is amnesic for at least 8 hours, and experiences headaches and sensitivity to light, noise, and stimulation. A copy of the protocol was posted on C.S.' dormitory room door. C.S. testified that she met with all of the resident assistants, including Fick, in early September 2008 to discuss her condition and the protocol.

Fick testified that he had assisted during two or three of C.S.' seizures prior to the early September 2008 meeting. He also testified that he was at the early September 2008 meeting. Fick testified that he was involved in helping C.S. with approximately 8 to 12 seizures in the fall of 2008.

On or about October 9, 2008, C.S. found a letter in her dormitory room the morning after experiencing a seizure. The letter appears as if written by a child and reads, "Deer lanse, i stil want to be your speshl frind but i dont lik it wen you get hapy mad and hapy i sory i cant get slepign somtim[s] i hav brane goign crazy love [C.S.]" Two times in the letter, the letter "s" is written backward. C.S. testified that the writing in the letter looked the same as other writing she had completed while in previous postictal states. C.S. was concerned that Fick was uncomfortable caring for her, and she shared the letter with a friend who was also a resident assistant.

C.S. testified that after discussing the letter with her friend and thinking back over the previous weeks, she recalled two prior occasions when she had experienced soreness in her vaginal area the day after having a seizure while Fick had been on

duty at the dormitory and another time when she had discovered "a spot" on her sheets several days after a seizure. C.S. then asked her friend to make an audio recording of her during her next postictal state. After C.S. and her friend reviewed the recording of her next postictal state, C.S.' concerns about Fick were reported to the Wayne Police Department. A portion of the recording was ultimately played for the jury, over Fick's objections.

Fick was interviewed by a police officer on October 22, 2008. At the conclusion of the interview, Fick prepared a written statement in which he acknowledged having sexual contact with C.S. on October 6 and 8. He indicated that on October 6, C.S. asked him to "touch her where 'she went pee' and [he] did," and that C.S. "asked to play with [his] 'special finger' as she had called [it]" and he "let this happen for a short-time but quickly stopped when [C.S.] looked up at [him] again and [he] could tell she was not her normal self, but still in a wake-up stage." He indicated that on October 8, C.S. "asked [him] to . . . finger her again, because it felt good, so [he] did[, and s]he then asked [him] to hold and play with [his] penis, and [he] did let her for a short time."

At trial, Fick testified that after C.S.' seizure late on October 5, 2008, he stopped in to check on her after 2 a.m. on October 6. He testified that C.S. talked with him about homework and classes and that she asked him to stay. He testified that he watched television for some time and that he and C.S. had "a fairly lengthy discussion about the scientific aspects of [the] television show [C.S.I.], how much was real, how much was made up for TV, what part of that technology is true and what's not."

Fick testified that C.S. then asked him to "just lay beside her and cuddle for a while." He testified that C.S. asked him to "rub her shoulders and her arms" and that he proceeded to tickle her. He testified that C.S. "[e]ventually . . . started to make sexual gestures towards [him, then] asked [him] to tickle her some more, asked [him] to tickle her lower, [and] specifically [asked him to] tickle [her] where she went pee" and that she then moved his "hand down into her pants." He testified that C.S. asked him to pull down his shorts, that he did so,

and that C.S. "performed oral sex on [him] for a short period of time."

In further testimony, Fick stated that C.S. "performed [oral sex] for a short period of time[,] . . . took a break, came up, . . . asked how she was doing," and then commented that "'[her] dad used to do these things with [her].'" He testified that she refused to answer his questions about her comment and became very upset before he left. Fick testified that C.S. was coherent, was capable of adult conversation, and was able to use her iPod herself during this incident.

Fick acknowledged that during his interview with the police officer, within a couple of weeks of the incidents, he had been unable to recall what he watched on television, had indicated to the police officer that C.S. was "pretty silent" during the entire incident, and had never told the police officer about the conversations he had with C.S. concerning the television show C.S.I. He also acknowledged that he had told the police officer that he put the earphones of C.S.' iPod in her ears for her. He also acknowledged that he had never mentioned to the police officer anything about C.S.' indicating that events involving her father had taken place which were similar to those at issue involving Fick. He acknowledged that he had told the police officer,

> "[The oral sex ended] when [C.S.] started sucking her thumb and started to talk like a baby again, or, you know, just, she has a look in her eye when she's still waking up or when she's normal. She looked up and she had that look like she was still asleep."

He acknowledged that he had not provided many details about C.S.' actions to the police officer and indicated that he had a better recollection of the details at trial in September 2009 than he did during the police interview in October 2008.

The second incident between C.S. and Fick involving sexual contact occurred 2 days after the first incident. Fick testified that C.S. had a seizure at approximately 7:55 p.m. on October 8, 2008. He testified that he went to C.S.' room to check on her at approximately 10 p.m. He testified that C.S. was initially speaking in phrases, not complete sentences, and that C.S. was quiet and "extremely frightened" and said, "[B]ad people are going to come, protect me." He testified that he and C.S. were

alone at approximately 10:30 p.m. and that C.S. calmed down and fell asleep. He testified that he watched television again and that C.S. continued to sleep until "shortly after midnight." He testified that he and C.S. had a conversation about their favorite movies featuring Will Smith and made smalltalk about classes and that eventually, C.S. "again asked [him] to tickle her." He testified that he tickled her arms and shoulders and that "[s]he asked [him] to tickle her again lower." He testified that he "proceeded to finger [C.S.] again." He testified that he stopped because of a relationship he had been in with another female, that C.S. became "extremely upset . . . that [he] would no longer continue whatever type of relationship [he and C.S.] had," and that he eventually left. He testified that C.S. was speaking normally, that her attitude was normal, that she had no difficulty with balance or functioning on her own, and that he thought she was normal.

Fick again acknowledged that he had not provided details to the police officer during the interview in October 2008 and that he remembered more details at the time of trial. He acknowledged that his trial testimony was that on each occasion, it was C.S. who had been in charge of the sexual activity and she solicited him for sexual activity and he merely complied.

The jury ultimately convicted Fick on the charge of first degree sexual assault for the incident that occurred on or about October 8, 2008. The district court sentenced Fick to 4 to 6 years' imprisonment. This appeal followed.

III. ASSIGNMENTS OF ERROR

Fick has assigned three errors on appeal. First, Fick asserts that the district court erred in admitting the audio recording of C.S. made while she was in a postictal state. Second, Fick asserts that the court erred in failing to give the jury a limiting instruction about the audio recording. Finally, Fick asserts that the court erred in denying his motion for a directed verdict.

IV. ANALYSIS

1. Admission of Audio Recording

Fick first asserts that the district court erred in admitting into evidence the audio recording of C.S. made while she was in a

postictal state. Fick argues that the recording was not relevant, that it was hearsay, that there was insufficient foundation, that its admission violated Fick's right to confrontation, and that the recording was unfairly prejudicial. We find no merit to Fick's assertions.

The court received into evidence six audio segments recorded during C.S.' postictal state following an October 12, 2008, seizure. The total length of the admitted recordings is less than 20 minutes, and they reflect attempts by one of the resident assistants to communicate with C.S. during the initial hours of her postictal period. The resident assistant testified that he had cared for C.S. approximately 20 times after she had seizures and that the audio recording captured events typical of what C.S. was like in her initial postictal state.

During the audio recording, C.S. can be heard speaking and responding to various questions. Her voice sounds like that of a very young child, and it is difficult, if not impossible, to decipher the actual words she is speaking. Similarly, Fick testified that during C.S.' postictal recovery, she cannot communicate clearly. The district court overruled Fick's objections and allowed the jury to hear the six audio segments received; the court advised the jury that it would not be provided a transcript of the audio recording, that the audio recording would not be allowed into the jury room, and that the jury would have only one opportunity to listen to the segments received.

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009). A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *Id.*

(a) Relevancy

[4,5] We find no merit to Fick's assertion that the audio recording was not relevant. The exercise of judicial discretion is implicit in determining the relevance of evidence. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Evidence must be relevant to be admissible. See *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See *id.* Relevancy of evidence has two components: materiality and probative value. *Id.* Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. *Id.* Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. *Id.*

In the present case, Fick did not deny that sexual contact had occurred on the two occasions in question. Rather, he asserted that he did not know and should not have known that C.S. was incapable of consenting to sexual contact because she was in a postictal state. There was testimony presented concerning C.S.' demeanor and capacity during postictal states and testimony presented to demonstrate that the sexual contact on both occasions occurred during the first few hours after C.S. had suffered a seizure, and Fick acknowledged knowing about the seizures and their timing. The jury instructions informed the jury that C.S.' incapacity and Fick's knowledge of her incapacity were material elements of the crimes. We find that the audio recording and the testimony that it was an accurate representation of C.S.' demeanor and ability to communicate during a postictal state were relevant evidence on the issue of whether Fick knew or should have known that C.S. was incapable of resisting or appraising the nature of her conduct.

(b) Hearsay

We find no merit to Fick's assertion that the audio recording was hearsay. Neb. Rev. Stat. § 27-801(3) (Reissue 2008)

defines hearsay as a statement offered in evidence to prove the truth of the matter asserted. The audio recording in this case was not offered for the truth of any assertions made during the audio recording; indeed, there are no assertions made by C.S. during the audio recording concerning whether she had consented or had been capable of consenting to sexual contact by Fick. Rather, the audio recording was offered as evidence relevant to the question of whether Fick knew or should have known that C.S., while in a postictal state, was incapable of consenting.

(c) Foundation

We find no merit to Fick's assertion that there was insufficient foundation for admission of the audio recording. The resident assistant who recorded his conversation with C.S. during the postictal state testified about the circumstances of the recording and testified that it was a true and accurate representation of the conversation he had with C.S. on that occasion. To the extent the audio recording was not offered for the truth or veracity of any actual statements, but, rather, was offered as evidence relevant to the question of whether Fick knew or should have known that C.S., while in a postictal state, was incapable of consenting, sufficient foundation was laid.

(d) Confrontation

We find no merit to Fick's assertion that admission of the audio recording violated his right to confrontation. Both the resident assistant who made the recording and conversed with C.S. on the recording and C.S. herself were available and testified at trial and were subject to cross-examination by Fick. In addition, despite a passing statement by the district court that the audio recording was "testimonial in nature," the contents of the audio recording in this case do not fit within the definition of testimonial statements.

[6,7] If statements at issue are nontestimonial, then no further Confrontation Clause analysis is required. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). The Nebraska Supreme Court has noted that in *Crawford v. Washington*, 541 U.S. 36,

124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court provided three formulations of the core class of testimonial statements:

> "'In the first, testimonial statements consist of "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." . . . The second formulation described testimonial statements as consisting of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." . . . Finally, the third explained that testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." . . . While the Court declined to settle on a single formulation, it noted that, "[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed."'"

State v. Fischer, 272 Neb. at 970, 726 N.W.2d at 181-82, quoting *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004). In this case, the audio recording does not contain any statements that even resemble testimonial statements.

(e) Unfair Prejudice

[8] Finally, we find no merit to Fick's assertion that admission of the audio recording was unfairly prejudicial. Neb. Rev. Stat. § 27-403 (Reissue 2008) provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The fact that evidence is prejudicial is not enough to require exclusion under § 27-403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State*

v. Daly, 278 Neb. 903, 775 N.W.2d 47 (2009). While the audio recording was undoubtedly prejudicial, we conclude that it was relevant on the issue of C.S.' capacity during a postictal state and that it suggested a decision on a proper basis.

There was testimony that the audio recording was an accurate depiction of C.S.' demeanor during postictal states, and her demeanor as depicted therein was consistent with Fick's own testimony that C.S. was unable to communicate effectively during the first few hours after a seizure. There was also evidence presented that Fick had told a police officer that he stopped the first sexual contact when realizing that C.S. was still in a postictal state and that the second occasion of sexual contact, for which he was convicted and from which this appeal stems, occurred only a couple of days later. Fick had the opportunity to testify that C.S.' demeanor on that occasion was somehow different from what was represented on the audio recording. We do not find an abuse of discretion by the district court in concluding that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice.

2. Limiting Instruction

Fick next asserts that the district court erred in failing to give the jury a limiting instruction about the audio recording. Fick argues that he requested a limiting instruction and that the court refused to issue it. We disagree with Fick's characterization of the record and find no reversible error.

First, Fick asserts in his brief on appeal that "Fick requested a limiting instruction . . . ." Brief for appellant at 41. This is not an accurate representation of the record. Instead, the record reflects that Fick's counsel asked the court if it was concluding that the contents of the audio recording were not hearsay, and the court responded, "Yes, I'm making that determination." Fick's counsel responded, "Okay. Okay." The court then indicated, "So I don't intend to give [the jury] a limiting instruction." Fick's counsel responded, "Okay. That's what I wanted to find out." Fick's counsel then moved on to question the court about his objection to not being able to effectively cross-examine C.S. about the contents of the audio recording. Fick did not request a limiting instruction or propose a limiting

instruction, and Fick did not request a limiting instruction during the later jury instruction conference.

[9] Although Fick accurately indicates that the Nebraska Supreme Court, in *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), indicated that the giving of a limiting instruction is mandatory when requested, we conclude that that proposition of law is not applicable to the present situation. As noted, no limiting instruction was requested by Fick in this case. We already concluded above that the court did not err in allowing the audio recording, and in the absence of any request for a limiting instruction, we find no reversible error in the court's failure to give a limiting instruction. See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

3. Directed Verdict

Finally, Fick asserts that the district court erred in denying his motion for a directed verdict. Fick argues that the State failed to adduce sufficient evidence to demonstrate that there was nonconsensual sexual contact. We disagree.

[10] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

In this case, the State adduced substantial evidence concerning C.S.' medical condition, her seizures, and her postictal state after seizures. The State adduced evidence concerning C.S.' making the resident assistants aware of her condition and the proper protocol for caring for her. The State adduced evidence concerning Fick's knowledge of C.S.' condition and previous involvement in caring for her after seizures. The State adduced

evidence that Fick engaged in sexual contact with C.S. after her seizure on or about October 6, 2008, and that during the course of that sexual contact, Fick determined that, in his own words, C.S. "was not her normal self, but still in a wake-up stage." The State adduced evidence that nonetheless, 2 days later, when Fick was checking on C.S. within approximately 2 hours after she had a seizure, Fick again had sexual contact with C.S. The State presented sufficient evidence from which the jury could make a determination about whether C.S. was capable of consenting to sexual contact and about whether Fick knew or should have known whether C.S. was capable of consenting. This assertion of error is meritless.

V. CONCLUSION

We find no merit to Fick's assertions of error on appeal. We affirm.

AFFIRMED.