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considerations such as cost control or allocation of limited resources. Although the decision (or lack thereof) of a third-party payor contributed to the circumstances of this case, UNMC's decisions were still (according to its evidence) premised entirely upon the medical well-being of its patient. In a perfect world, difficult medical decisions like the one at issue in this case would be unnecessary. But we do not live in a perfect world, and we cannot say as a matter of law that UNMC's decisions in this case violated the standard of care.

CONCLUSION

For the foregoing reasons, the district court's order granting Robert's motion for new trial is reversed.

REVERSED.

WRIGHT and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ARMON M. DIXON, APPELLANT.
802 N.W.2d 866

Filed September 16, 2011. No. S-10-476.

1. **Venue: Appeal and Error.** An appellate court reviews the denial of a motion to change venue for abuse of discretion.
2. **Venue.** Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.
3. **Venue: Proof.** Unless a defendant claims that the pretrial publicity has been so pervasive and prejudicial that a court should presume the partiality of prospective jurors, a change in venue is evaluated under the following factors: These factors are (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which the publicity circulated in areas to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn.
4. **Venue: Due Process.** Mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process.
5. **Venue: Due Process: Proof.** To warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity. A defendant must show that publicity has made it impossible to secure a fair and impartial jury.

6. **Venue.** Press coverage that is factual cannot serve as the basis for a change of venue.
7. **Trial: Juries: Appeal and Error.** The decision to retain or reject a venireperson as a juror rests in the trial court's discretion, and an appellate court will reverse only when it is clearly wrong.
8. **Jurors: Appeal and Error.** Even if the trial court erroneously overrules a challenge for cause, an appellate court will not reverse the court's decision unless the defendant can show that an objectionable juror sat on the jury after the defendant exhausted his or her peremptory challenges.
9. **Trial: Jurors: Appeal and Error.** Under Neb. Rev. Stat. § 29-2006 (Reissue 2008), dismissal of a prospective juror is mandatory only if the prospective juror has formed an opinion about the defendant's guilt or innocence based on conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify.
10. **Juror Qualifications.** Nebraska law does not require that a juror be totally ignorant of the facts and issues involved in the case.
11. ____. A dismissal is not required if a prospective juror formed an opinion based on newspaper statements, communications, comments or reports, or upon rumor or hearsay if the prospective juror states under oath that he can render an impartial verdict and the court is satisfied of such.
12. **Trial: Jurors: Appeal and Error.** An appellate court gives deference to a trial court's determination of whether a prospective juror can apply the laws impartially.
13. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
14. **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.
15. **Motions for Continuance: Appeal and Error.** A court does not abuse its discretion in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice because of that denial.
16. ____: ____. Neb. Rev. Stat. § 25-1148 (Reissue 2008) requires motions for a continuance to be in writing. But a failure to put such a motion in writing is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.
17. **Criminal Law: Motions for Continuance.** When deciding whether to grant a continuance in a criminal case, courts must take into consideration the public interest in prompt disposition of the case.
18. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
19. **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 that 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.

20. **Motions for Mistrial.** Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.
21. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
22. **Motions for Mistrial.** A party must premise a motion for mistrial upon actual prejudice, not the mere possibility of prejudice.
23. **Motions to Dismiss: Evidence: Waiver: Appeal and Error.** When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the appellate right to challenge the trial court's overruling of the motion to dismiss. But the defendant may challenge the sufficiency of the evidence.
24. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence, it does not matter whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finders of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
25. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
26. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.
27. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.
28. **Prior Convictions: Records: Proof.** A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
29. ____: ____: ____. In reviewing criminal enhancement proceedings, a judicial record may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.
30. **Prior Convictions: Records: Names.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for the purpose of enhancing punishment and, in the

absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

31. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
32. **Statutes: Legislature: Intent.** A court's objective in interpreting a statute is to determine and give effect to the legislative intent of the enactment.
33. **Statutes: Appeal and Error.** When construing a statute, an appellate court looks to the statute's purpose and gives the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.
34. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
35. **Aiding and Abetting.** Aiding and abetting is not a separate crime; instead, aiding and abetting is simply another basis for holding one liable for the underlying crime.
36. **Sentences: Appeal and Error.** Sentences imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.
37. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, (6) motivation for the offense, (7) the nature of the offense, (8) and the violence involved in the commission of the crime.
38. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

A jury found Armon M. Dixon guilty of one count of first degree sexual assault and one count of robbery. The court determined that Dixon was a habitual offender as to both counts and sentenced Dixon to consecutive terms of 35 to 60 years in prison. Dixon asserts several errors, none of which have any merit. We affirm.

I. BACKGROUND

1. The Crime

In March 2009, the victim, S.I., arrived for work at a convenience store in Lincoln, Nebraska. S.I. worked alone during the morning shift, which began at 5 a.m. As she approached the front door, someone came up behind her, grabbed her left arm, pulled it behind her back, and then pinned her against a "propane cage." The assailant whispered to S.I., "[I have] been watching [you] for a while now, bitch." He asked S.I. if she had any money. When she responded that she did not, he said that he "was going to get something else instead."

The assailant then forced her to the back of the building. He told S.I. to remove her belt, which she did. He then tied S.I.'s hands behind her back with her belt and told her to sit down. The assailant then began to take off one of S.I.'s boots. Realizing what was happening, S.I. began to scream and attempted to kick the assailant. The assailant then grabbed S.I. by the throat and choked her. As he choked her, he asked her if she was going to stop screaming. She nodded yes. He then removed S.I.'s other boot and "yanked" her pants off.

S.I. began to scream again. The assailant then punched S.I. at least three times in the face, knocking her glasses off and bloodying her lip. Then he sexually assaulted her.

The assailant then asked for her driver's license. He retrieved it from her purse and, after confirming with her that it reflected her current address, told S.I. that if she did not do as he told her to, he was going to "either fuck with [her] or [her] family."

The assailant then led her to the front of the building. He used her keys to gain access to the building. Once inside, he had S.I. lead him to the safe and provide him with the code and keys to open it. He then put cash and coins into grocery bags and ordered S.I. to lie on her stomach. After tying S.I.'s feet to her hands behind her back, he left.

S.I. eventually managed to free herself and called the 911 emergency dispatch service. The police arrived shortly thereafter with a canine unit. The dog picked up a scent at the entrance to the convenience store and continued to track it. Following the dog's track, the officers found two condoms, one

inside the other, and some coins. DNA testing was unable to eliminate S.I. as a possible source of the DNA on the outside of the condom.

Later, the investigation focused on Dixon. An officer asked Dixon to supply a DNA sample, and Dixon did so by swabbing his mouth. Later testing was unable to eliminate Dixon as a source of the DNA that was inside the condom. The record showed the most conservative odds of a person other than Dixon sharing the genetic profile found inside the condom are 1 in 3.17 quintillion.

2. Dixon's Alibi Defense

At trial, Dixon presented an alibi defense; he claimed that he had been drinking with friends all night and thus could not have committed the crimes. Dixon's evidence showed that he had gone to bars in Omaha, Nebraska, that night with two friends, Roman Alexis Zuniga (Alexis) and Jonathan Zuniga (Jonathan). On the way back, outside of Wahoo, Nebraska, Alexis was arrested for driving under the influence. This occurred at about 2:20 a.m. The arresting officer left Dixon and Jonathan at the scene with the vehicle. After about 5 to 10 minutes, the two decided to drive back to Lincoln. According to Dixon, he drove Alexis' car to Alexis' father's house. Alexis' father testified that he then dropped off Dixon and Jonathan around North First Street and Cornhusker Highway before heading to Wahoo for Alexis.

Dixon testified that they then went to the home of one of Jonathan's friends and stayed there for "[m]ore than an hour and a half" before he was taken home. While riding home, Dixon claims that his alarm on his telephone went off, which he claims he usually set for 5:25 a.m. Dixon's sister, with whom he was staying at the time, testified that she awoke to hear him entering her apartment at about 6 a.m.

The jury found Dixon guilty of both charges. At the habitual criminal enhancement hearing, Dixon objected to the introduction of records of his prior convictions. He claimed that there was not sufficient evidence to prove that he was the same person referred to in the records of the prior convictions. He also argued that aiding and abetting was not a crime for

which later sentences could be enhanced under Neb. Rev. Stat. § 29-2221(1)(a) (Reissue 2008). The court overruled these objections and found Dixon to be a habitual criminal. The court sentenced him to consecutive terms of 35 to 60 years' imprisonment.

II. ASSIGNMENTS OF ERROR

Dixon assigns, restated and renumbered, that the district court erred as follows:

(1) in failing to sustain his motion for a change of venue;

(2) in failing to sustain his motion to strike jurors for cause;

(3) in failing to sustain his motion for a continuance when he could not produce a witness;

(4) in failing to sustain his motions for mistrial;

(5) in failing to sustain his motion for a directed verdict;

(6) in finding that the State had adequately proved his prior convictions so that he could be sentenced as a habitual criminal;

(7) in concluding that aiding and abetting first degree assault can serve as a predicate offense under § 29-2221(1)(a); and

(8) in imposing excessive sentences.

III. ANALYSIS

1. Motion for a Change of Venue

[1] Dixon contends that the court erred in overruling his motion to change venue. He claims that the pretrial publicity made it impossible for him to receive a fair trial in Lancaster County. We review the denial of a motion to change venue for abuse of discretion.[1]

[2,3] Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), we have held that a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.[2] Unless a defendant claims that the pretrial publicity has been so pervasive and prejudicial that a court should presume the partiality of prospective jurors—

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[1] See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), *cert. denied* 559 U.S. 1010, 130 S. Ct. 1887, 176 L. Ed. 2d 372 (2010).

[2] *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

which Dixon does not—a change of venue is evaluated under the following factors[3]: These factors are (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which the publicity circulated in areas to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn.[4]

[4,5] As we know, mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process.[5] To warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.[6] So, to secure a change of venue based on pretrial publicity, a defendant must show that the publicity has made it impossible to secure a fair and impartial jury.[7]

Dixon has presented exhibits containing many news accounts of the crimes and his arrest. These articles discuss all stages of the investigation and the lead-up to Dixon's trial. Some of the articles were written before Dixon emerged as a suspect, and so do not mention him by name, while others were written after Dixon had become a suspect.

The articles that do not specifically mention Dixon discuss efforts to find the suspect. Several describe reward funds that had been set up by area businesses, while another mentions that police had stepped up patrols and were seeking tips. Other articles recount requests by police to not have women open or close businesses alone.

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[3] See *Galindo, supra* note 1.

[4] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

[5] *Rodriguez, supra* note 4; *Strohl, supra* note 4.

[6] *Rodriguez, supra* note 4; *Strohl, supra* note 4; *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

[7] *Phelps, supra* note 6; *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

Generally, the articles that mention Dixon recount the allegations of the assault of S.I. as well as other assaults in which Dixon was a suspect. The articles also mention that while being questioned, Dixon lunged at an officer and tried to wrestle the officer's gun from him. One article recounts the prison sentences Dixon faced if convicted of the charges. Some articles discuss some of the evidence that the police had, such as DNA evidence or a witness identification.

Other articles discuss the pretrial proceedings. For example, one article describes how Dixon successfully moved to sever the charges relating to S.I. from charges relating to another victim. Another article discusses an officer's interrogation of Dixon that the district court suppressed because it had concluded that the interrogation had violated Dixon's *Miranda* rights.

Finally, the exhibits also contain articles that reflect more personally on Dixon. One recounts statements from Dixon's mother. His mother commented that she believed her son was innocent and that he had promised to change after he was released on parole. Another discusses Dixon's prior convictions.

[6] The above-mentioned articles are generally factual and none of them are misleading. Press coverage that is factual cannot serve as the basis for a change of venue.[8] The most important consideration "is whether the media coverage [is] factual, as distinguished from 'invidious or inflammatory.'"[9] Because the coverage was factual and not inflammatory, the court did not abuse its discretion in overruling Dixon's motion for a change of venue.

2. Motion to Strike Jurors

Dixon argues that the court erred in failing to strike nine jurors for cause. He claims that these jurors were exposed to publicity surrounding the trial. After peremptory challenges, only two of these jurors ultimately sat on the jury that decided the case.

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[8] E.g., *Galindo, supra* note 1; *Strohl, supra* note 4.

[9] *Galindo, supra* note 1, 278 Neb. at 638, 774 N.W.2d at 225.

[7,8] The decision to retain or reject a venireperson as a juror rests in the trial court's discretion, and we will reverse only when it is clearly wrong.[10] And even if the trial court erroneously overrules a challenge for cause, we will not reverse the court's decision unless the defendant can show that an objectionable juror sat on the jury after the defendant exhausted his or her peremptory challenges.[11] So, we consider only jurors Nos. 10 and 13, the only two challenged venirepersons to sit on the jury.

[9-12] Neb. Rev. Stat. § 29-2006 (Reissue 2008) establishes when jurors in a criminal trial may be challenged for cause. Under this statute, dismissal is mandatory only if the prospective juror has formed an opinion about the defendant's guilt or innocence based on "'conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify.'"[12] But the law does not require that a juror be totally ignorant of the facts and issues involved in the case.[13] A dismissal is not required if a prospective juror formed an opinion based on newspaper statements, communications, comments or reports, or upon rumor or hearsay if the prospective juror states under oath that he can render an impartial verdict and the court is satisfied of such.[14] We give deference to a trial court's determination of whether a prospective juror can apply the laws impartially.[15]

Juror No. 10 mentioned that he had previously heard something about the case on television several months earlier. He recalled that a robbery and an assault had occurred but did not recall anything more specific than that. He mentioned the name "Armon Dixon" was "vaguely familiar." He stated that he could disregard anything he might have heard and decide the case solely on the evidence introduced at trial.

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[10] *Galindo, supra* note 1.

[11] *Id.*

[12] *State v. Hessler*, 274 Neb. 478, 496, 741 N.W.2d 406, 421 (2007). Accord, *Galindo, supra* note 1; *Rodriguez, supra* note 4.

[13] *Galindo, supra* note 1; *Strohl, supra* note 4.

[14] *Hessler, supra* note 12.

[15] See *Galindo, supra* note 1.

Juror No. 13 had also heard about the case through television reports, which he said included images of Dixon. He also stated that he had heard that Dixon had been accused of "rape and burglary" and that there was "maybe DNA evidence." He stated that he had not yet formed an opinion and that he could disregard what he saw and decide the case solely on the evidence presented at trial.

Both jurors were exposed to only news accounts of the incidents, and neither was exposed before the trial to any testimony of the witnesses. Further, both jurors stated that they could render impartial verdicts based only on the evidence adduced at trial and the law as explained by the court. Nothing in the record refutes their statements. And the trial judge was in the best position to assess their attitudes and demeanors. The court was not clearly wrong in overruling Dixon's motion to strike these jurors.

3. Motion for a Continuance

Dixon argues that the court erred in overruling his motion for a continuance. To bolster his alibi defense, Dixon wanted to present the testimony of Jonathan, a friend that he was drinking with the night of the incident. Dixon claims that Jonathan's testimony would support his alibi. Jonathan, however, was the target of an unrelated arrest warrant and was thus making himself difficult to find.

[13-15] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.[16] 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 the evidence.[17] A court, however, does not abuse its discretion in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice because of that denial.[18]

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[16] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[17] *Id.*

[18] *Id.*

[16] Neb. Rev. Stat. § 25-1148 (Reissue 2008) requires motions for a continuance to be in writing; Dixon never submitted a written motion. Nevertheless, we have previously stated that the failure to put such a motion in writing "'is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.'"[19]

We conclude that the court did not abuse its discretion in denying Dixon a continuance. Dixon did not submit a written motion for a continuance even though he knew early on that securing Jonathan's presence would be difficult. Dixon's counsel mentioned the difficulty before voir dire of the jurors. But the motion was never put into writing. This weighs against Dixon.

[17] But more important, Dixon could not say when—if ever—he could serve Jonathan with a subpoena. To grant a continuance in such a circumstance would put the trial in limbo. When deciding whether to grant a continuance in a criminal case, a court must take into consideration "the public interest in prompt disposition of the case."[20] A potentially never-ending continuance would undermine such an interest.[21] The court did not abuse its discretion in denying the motion for a continuance.

4. Motions for Mistrial

[18] Dixon argues that the court erred in denying his motions for mistrial. Dixon twice moved for a mistrial—one motion stemmed from an allegation that the State violated a motion in limine, while the other related to an incident when Dixon became sick outside the presence of the jury. Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion.[22]

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[19] *State v. Davlin*, 272 Neb. 139, 151, 719 N.W.2d 243, 256 (2006), quoting *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991).

[20] Neb. Rev. Stat. § 29-1206 (Reissue 2008).

[21] See, *Davlin, supra* note 19; *State v. Newton*, 193 Neb. 129, 225 N.W.2d 562 (1975).

[22] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

(a) Questioning by the State

Before trial, Dixon moved in limine to bar any testimony indicating that Dixon could have tested the condoms for DNA but chose not to. The court granted this motion. While questioning the technician who had tested the material, the State asked "was there enough DNA in those exhibits . . . for other testing to be done on it?" Dixon objected as to relevancy and also moved for a mistrial. The court overruled both the objection and the motion. The court, however, instructed the State to rephrase the question. The State then asked the expert if, "in [her] testing of [the] samples[, she] consume[d] all the material." Dixon did not request the court to admonish the jury because he did not want to "highlight[] the issue for the jury."[23]

[19-21] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that 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.[24] Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.[25] And before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.[26] In brief, a mistrial is granted when "a fundamental failure prevents a fair trial."[27]

We conclude that the trial court did not abuse its discretion in overruling the motion for mistrial. As mentioned, a mistrial may be granted when there is an event whose damaging effect cannot be removed by an admonition or instruction to the jury. But Dixon did not ask for such an admonition because

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[23] Brief for appellant at 36.

[24] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[25] See, *id.*; *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[26] *Robinson, supra* note 22.

[27] *Beeder, supra* note 25, 270 Neb. at 803, 707 N.W.2d at 795.

he did not want to highlight the issue for the jury. It appears he thought the jury likely did not notice the question or would not assign any importance to it. This undercuts his claim that the error was so prejudicial that his trial was unfair. Stating the obvious—if the error was so minor that Dixon would gamble on a jury's not noticing it—it is doubtful that it could have resulted in a substantial miscarriage of justice. The trial court did not abuse its discretion in refusing to grant a mistrial.

(b) Dixon's Medical Incident

Dixon also moved for a mistrial after he became sick while being brought into court. Dixon apparently fell to the ground and began vomiting. This incident, however, occurred outside the jury's presence. Dixon does not claim that the jurors saw the incident as they were in the jury room when it occurred. Grasping at a slender reed, he suggests that the jurors may have heard the commotion from their room.

After the incident, the court told the jurors that an issue had arisen that required the court's attention. It released the jurors and asked that they return at 1:30 p.m. the following day. Although there were news accounts of the incident, the court had repeated its admonishment that the jurors avoid news accounts of the trial.

[22] We conclude that the court did not err in refusing to grant a mistrial because of Dixon's medical incident. The record fails to show that the jury ever knew it had happened. A party must premise a motion for mistrial upon actual prejudice, not the mere possibility of prejudice.[28] Dixon has failed to show that the incident prejudiced him.

5. Motion for a Directed Verdict

Dixon argues that the court erred in failing to grant his motion to dismiss. He argues that the State did not prove the elements of the crime beyond a reasonable doubt.

[23] When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the

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[28] *Robinson, supra* note 22.

appellate right to challenge the trial court's overruling of the motion to dismiss.[29] But the defendant may challenge the sufficiency of the evidence.[30] So we analyze Dixon's assignment of error as a challenge to the sufficiency of the evidence.

[24,25] When reviewing a criminal conviction for sufficiency of the evidence, it does not matter whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finders of fact.[31] The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[32] Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[33]

The information charged Dixon with first degree sexual assault[34] and first degree robbery.[35] The State can prove first degree sexual assault in one of three ways. Here, the State proved first degree sexual assault when it showed beyond a reasonable doubt that the defendant subjected another person to sexual penetration without that person's consent.

Viewing the evidence in the light most favorable to the prosecution, we determine the record reflects sufficient evidence to sustain the conviction beyond a reasonable doubt.

- S.I. testified that the assailant sexually penetrated her.
- S.I. did not consent; she kicked and screamed and, in response, was choked and punched in the face.[36]

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[29] See, *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[30] *Id.*

[31] See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

[32] *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

[33] *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[34] Neb. Rev. Stat. § 28-319 (Reissue 2008).

[35] Neb. Rev. Stat. § 28-324 (Reissue 2008).

[36] See Neb. Rev. Stat. § 28-318(8)(a)(iii) (Reissue 2008).

- Experts were unable to exclude S.I. and Dixon as contributors of the DNA found on the condom. The odds of its being someone other than Dixon were at least 1 in 3.17 quintillion.

Here, a rational trier of fact could find that the State proved that Dixon committed sexual assault beyond a reasonable doubt.

To prove robbery, the State must show beyond a reasonable doubt that the defendant, with the intent to steal, forcibly and by violence, or by putting in fear, took any money or personal property of any value whatever from another person. "To steal" is commonly understood to mean taking without right or leave with intent to keep wrongfully.[37] And the property need not be taken from the actual person, it is sufficient if the property is taken from an individual's protection or control.[38]

The State has presented evidence that would allow a rational trier of fact to find the material elements of the crime beyond a reasonable doubt.

- The DNA evidence allowed the jury to conclude that Dixon had assaulted S.I. And S.I.'s testimony established that the same person who assaulted her forced her into the store and to help open the safe.
- S.I.'s testimony also established that Dixon had threatened her and her family.
- The evidence showed that Dixon took money from the safe in the convenience store, where S.I. was an employee.

The State has presented evidence to allow the jury to find beyond a reasonable doubt that Dixon committed robbery.

But Dixon makes three arguments as to why a rational jury could not have found him guilty. First, he argues that the State did not challenge Dixon's alibi defense. Although the State did not explicitly argue that Dixon had not been with his friends at all that night, the State presented DNA evidence that tied Dixon to the assault of S.I. Obviously, if this DNA evidence was believed, this put Dixon at the convenience store; the jurors could not also believe Dixon's alibi.

Second, Dixon argues that he cannot be the man described in S.I.'s testimony. He argues that the man that S.I. described is

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[37] *Aldaco, supra* note 33.

[38] See *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989).

taller than Dixon. And he points out that S.I. testified that she did not smell alcohol on her assailant; Dixon claimed that he was drinking all night.

Third, Dixon contends that the State's DNA evidence was unreliable. First, he claims that the officer who collected his sample touched the swabs without gloves—although the officer denied this. Dixon also claims the DNA evidence is unreliable because the technician had a difficult time generating a complete profile from the sample.

Regarding these last two arguments, what Dixon asks us to do is to reweigh the evidence presented to the jury. But we do not reweigh evidence, resolve conflicts in the evidence, or assess the credibility of witnesses; that is the province of the jury.[39] Viewing the evidence most favorably to the State, we determine the evidence is sufficient to support the convictions beyond a reasonable doubt.

6. Proof of Prior Convictions

Dixon argues that under Neb. Rev. Stat. § 29-2222 (Reissue 2008), the court erred in concluding that the State had sufficiently proved his prior convictions. Section 29-2222 provides:

> At the hearing of any person charged with being a habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

[26,27] In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.[40] In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed

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[39] See *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

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

to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.[41]

[28,29] A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.[42] In reviewing criminal enhancement proceedings, a judicial record may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.[43]

The State introduced four exhibits showing certified felony convictions for an "Armon Dixon." Dixon argues that the State has failed to prove that he is the "Armon Dixon" convicted in these cases. Dixon does not argue that the defendant in the above exhibits was not represented by counsel during the earlier convictions. Nor does he argue that the defendant was not committed to prison for at least 1 year for these earlier crimes. His sole argument is that the State did not sufficiently prove that he was the person convicted in the four exhibits. We note that Dixon is referred to in court records before this court as "Armon M. Dixon." And, as mentioned, the record contains newspaper articles referring to the criminal investigation as well as the lead-up to Dixon's trial. A newspaper article dated May 16, 2009, states that Dixon is 29 years old. A July 2, 2009, article refers to Dixon as being 30 years old. His birth date then would fall either in late May or sometime in June. Further, it shows that Dixon was born in 1979.

The first conviction is a conviction from Illinois for delivery of a controlled substance. The "Armon Dixon" convicted in that case had a birth date of June 2, 1979. The second conviction is

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[41] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006).

[42] *Alford, supra* note 40.

[43] See *Epp, supra* note 41.

a conviction from Minnesota. It is another conviction for selling drugs. The "Armon Monet Dixon" convicted in that case had a birth date of June 2, 1979. The third conviction is from Lancaster County, Nebraska. Those records show convictions for possession of a controlled substance and theft by receiving stolen property. The "Armon M. Dixon" in that conviction was born on June 2, 1979. The final conviction introduced by the State is again from Lancaster County, and the defendant was "Armon Dixon." It is a conviction for aiding and abetting first degree assault. It does not include a birth date.

[30] Dixon's argument mirrors the one made by the appellant in *State v. Thomas*.[44] In *Thomas*, the defendant did not deny that he was the person referred to in the prior documents; instead, the defendant argued that the State failed to meet its burden. We stated that

> an authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.[45]

Likewise, Dixon never denied that he was the "Armon Dixon" in the earlier cases. Nor did he present any evidence showing that he was not that person. He simply argued that the State had not met its burden. We disagree.

The names in all four of the prior convictions are "Armon Dixon" or "Armon M. Dixon" and thus match Dixon's name. Because Dixon has not denied that he is the person referred to in these earlier convictions and has not presented any evidence contradicting the State's position, under *Thomas*, this is sufficient. Moreover, the birth dates reflected on three of the prior convictions are consistent with Dixon's age. The State has proved the prior convictions by a preponderance of the evidence.

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[44] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). See, also, *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989).

[45] *Thomas, supra* note 44, 268 Neb. at 590, 685 N.W.2d at 86.

7. Aiding and Abetting Under § 29-2221(1)(a)

[31] Dixon next argues that a conviction for aiding and abetting first degree assault cannot serve as a predicate offense under § 29-2221(1)(a). This assignment of error presents a question of statutory interpretation. Statutory interpretation is a question of law that we resolve independently of the trial court.[46]

Section 29-2221(1)(a) provides that if the defendant is convicted of one of several enumerated crimes and one of the defendant's two previous felony convictions is for one of those crimes, the minimum sentence is 25 years' imprisonment, as opposed to the 10-year minimum under § 29-2221(1). The offenses listed in § 29-2221(1)(a) are first degree murder,[47] second degree murder,[48] first degree assault,[49] kidnapping,[50] first degree sexual assault,[51] first degree sexual assault of a child,[52] first degree arson,[53] first degree assault on an officer,[54] and use of explosives to commit a felony.[55] The statute does not mention aiding and abetting.

[32-34] Our objective in interpreting a statute is to determine and give effect to the legislative intent of the enactment.[56] When construing a statute, we look to the statute's purpose and give the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.[57]

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[46] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[47] Neb. Rev. Stat. § 28-303 (Reissue 2008).

[48] Neb. Rev. Stat. § 28-304 (Reissue 2008).

[49] Neb. Rev. Stat. § 28-308 (Reissue 2008).

[50] Neb. Rev. Stat. § 28-313 (Reissue 2008).

[51] § 28-319.

[52] Neb. Rev. Stat. § 28-319.01 (Reissue 2008).

[53] Neb. Rev. Stat. § 28-502 (Reissue 2008).

[54] Neb. Rev. Stat. § 28-929 (Reissue 2008).

[55] Neb. Rev. Stat. § 28-1222 (Reissue 2008).

[56] See *Mena-Rivera, supra* note 46.

[57] See *id.*

Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[58]

Dixon points out that the record contains a previous conviction for aiding and abetting first degree assault. While first degree assault is a crime listed in § 29-2221(1)(a), aiding and abetting[59] is not. So, Dixon argues, he is not subject to the 25-year minimum sentence of imprisonment under § 29-2221(1)(a). But because aiding and abetting is not a separate crime in Nebraska,[60] we disagree.

At common law, there were four classes of parties to a felony: (1) principal in the first degree, (2) principal in the second degree, (3) accessory before the fact, and (4) accessory after the fact.[61] A principal in the first degree was the person who actually committed the felony.[62] A principal in the second degree was someone who was present while the crime was committed and aided and abetted the crime.[63] An accessory before the fact was not present at the crime but aided and abetted the crime before its commission.[64] Finally, an accessory after the fact was not present at the crime but helped the felon after the crime occurred.[65]

These common-law categories sometimes presented procedural difficulties.[66] For example, before a defendant could be convicted as an accessory, the principal must have been first convicted.[67] If the principal was acquitted, had died, or was otherwise unavailable to be tried, an accessory could not be

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[58] *Id.*

[59] Neb. Rev. Stat. § 28-206 (Reissue 2008).

[60] See *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

[61] See, 2 Wayne R. LaFave, Substantive Criminal Law § 13.1 (2d ed. 2003); 1 Charles E. Torcia, Wharton's Criminal Law § 29 (15th ed. 1993).

[62] 1 Torcia, *supra* note 61.

[63] See *id.*

[64] See *id.*

[65] See *id.*

[66] 2 LaFave, *supra* note 61, § 13.1(d).

[67] See 1 Torcia, *supra* note 61, § 34.

found guilty, no matter how clear the evidence was that he was an accessory to the crime.[68]

[35] Because of these procedural difficulties, today, all states have abolished the distinction between principals and accessories before the fact.[69] Many states, however, still treat accessories after the fact separately.[70] Under statutes that have abolished the distinction between principals and accessories before the fact, if a person is "charged as a party to the underlying crime and, if the evidence shows that he committed the prohibited act, or aided and abetted its commission, . . . he may be found guilty of the crime as a party."[71] That is, one who aids and abets crime X is not guilty of the crime of aiding and abetting; that person is guilty of crime X. Aiding and abetting is not a separate crime; instead, aiding and abetting is simply another basis for holding one liable for the underlying crime.[72]

Nebraska has followed this modern statutory trend of abolishing the distinction between principals in the first and second degree and accessories before the fact.[73] So, because aiding and abetting is not a separate crime,[74] Dixon's conviction is not for "aiding and abetting." His conviction was for first degree assault. As Dixon concedes, first degree assault is a crime listed under § 29-2221(1)(a). The district court did not err in concluding that Dixon's sexual assault conviction carried with it a 25-year minimum sentence.

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[68] See *id.*

[69] 2 LaFave, *supra* note 61, § 13.1(e).

[70] 1 Torcia, *supra* note 61, § 35. See, also, Neb. Rev. Stat. § 28-204 (Reissue 2008).

[71] 1 Torcia, *supra* note 61, § 35 at 207-08.

[72] See, e.g., *U.S. v. Ellis*, 525 F.3d 960 (10th Cir. 2008); *U.S. v. Garcia*, 400 F.3d 816 (9th Cir. 2005); *U.S. v. Hornaday*, 392 F.3d 1306 (11th Cir. 2004); *Contreras, supra* note 60; *Sanquenetti v. State*, 727 N.E.2d 437 (Ind. 2000); *State v. Nash*, 261 Kan. 340, 932 P.2d 442 (1997); *State v. Carrasco*, 124 N.M. 64, 946 P.2d 1075 (1997).

[73] See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). See, also, § 28-206.

[74] *Contreras, supra* note 60.

8. Excessive Sentences

Dixon's final argument is that the court erred in imposing excessive sentences. After finding Dixon to be a habitual criminal, the court sentenced Dixon to consecutive terms of 35 to 60 years' imprisonment.

As we explained earlier, the sentence for Dixon's sexual assault conviction is covered by § 29-2221(1)(a). The statutory limits under this section are 25 to 60 years' imprisonment. Dixon's sentence falls within these limits. Dixon's robbery conviction is covered by § 29-2221(1), which provides for a sentence of 10 to 60 years' imprisonment. Again, Dixon's sentence falls within the statutory limits.

[36] We will not disturb a sentence imposed within the statutory limits in the absence of an abuse of discretion.[75] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[76]

[37,38] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, (6) motivation for the offense, (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[77] Yet the appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[78]

The record shows Dixon has a long history of criminal activity, including crimes involving drugs and violence. The district court correctly noted that the offenses the jury found him guilty of were "simply terrifying . . . in a civilized society." Furthermore, the record shows that S.I. has suffered from

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[75] See *Dinslage, supra* note 32.

[76] See *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[77] *Id.*

[78] *Id.*

flashbacks, depression, anxiety, and sleeplessness. We affirm the convictions and sentences.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TREVELLE J. TAYLOR, APPELLANT.
803 N.W.2d 746

Filed September 16, 2011. No. S-10-794.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Rules of Evidence: Appeal and Error.** 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 such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. ____: ____. The exercise of judicial discretion is implicit in the determinations of relevancy under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.
4. **Trial: Evidence.** A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.
5. **Criminal Law: Constitutional Law: Due Process: Presumptions: Proof.** A presumption that relieves the State of its burden of proof beyond a reasonable doubt on any essential element of a crime violates a defendant's due process rights and is constitutionally impermissible.
6. **Jury Instructions: Evidence: Proof.** When a trial court instructs a jury on an inference regarding a specific fact or set of facts, the instruction must specifically include a statement explaining to the jury that it may regard the basic facts as sufficient evidence of the inferred fact, but that it is not required to do so. And the instruction must explain that the existence of the inferred fact must, on all the evidence, be proved beyond a reasonable doubt.
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
8. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.