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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.

9. ____: ____: ____. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
10. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
11. **Jury Instructions: Appeal and Error.** Although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.
12. **Expert Witnesses.** The weight and credibility of an expert's testimony are a question for the trier of fact.
13. **Rules of Evidence.** Under Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901 (Reissue 2008), the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
14. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901 (Reissue 2008).

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

MCCORMACK, J.

I. NATURE OF CASE

Trevelle J. Taylor was convicted in Douglas County District Court of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to serve a term of life imprisonment on the murder conviction and a consecutive term of 10 years' imprisonment on the weapon conviction. Taylor appeals. For the following reasons, we reverse, and remand for a new trial.

II. BACKGROUND

Justin Gaines was shot and killed outside his residence on September 19, 2009. The gunshot entered Gaines' back and fatally penetrated his lungs and heart. Taylor was arrested nine blocks from the scene of the shooting. He was tried before a jury and convicted of first degree murder and use of a deadly weapon to commit a felony. The following evidence was adduced at trial:

In the early afternoon on September 19, 2009, Gaines was driving near his residence on Curtis Avenue in Omaha, when he noticed his friend, Catrice Bryson, standing near her car, which was parked in his driveway. Gaines parked his car in the driveway behind Bryson's and spoke with Bryson through his open driver's-side window while he remained in his car. Gaines asked Bryson to write down her telephone number, and she walked to her car to retrieve a pen. Bryson then heard numerous gunshots before she was able to return to Gaines' car. She observed two men shooting guns at Gaines, who remained seated in his car. Bryson retreated toward the residence and heard Gaines yell that he had been shot in the back. Bryson then observed the two men run from the scene in opposite directions.

Bryson described the two suspects she witnessed at the scene. She described the first suspect as an African-American male, "[s]kinny with a brush cut in a brown shirt with orange on it," and holding a gun. Bryson described the second suspect as an African-American male, light complected with shoulder-length braids, wearing a white T-shirt with a basketball jersey, and also holding a gun.

At the scene of the crime, near the end of the driveway where Gaines' car was parked, the police collected 16 spent shell casings from a 9-mm handgun. Local residents told police that they heard the sounds of two different guns. Police also eventually recovered a 9-mm handgun near the area of the shooting. A neighbor told police that the day of the shooting, he heard the gunshots and witnessed a black male run through the area where the 9-mm handgun was found.

At trial, several local residents testified as to what they witnessed on September 19, 2009. One such witness testified that,

prior to the shooting, she was standing on her porch when she witnessed a black male jog past her house wearing a white T-shirt and baggy denim shorts and that the man had long braids and a goatee. The man proceeded, alone, toward 45th Street and Curtis Avenue. The witness went inside her home and then heard a series of gunshots coming from the area near Gaines' residence. The witness identified a photograph of Joshua Nolan as the man she saw jogging past her house.

Another such witness testified that she heard the gunshots from her residence near 44th Street and Curtis Avenue. She went outside when she heard the shots, and then witnessed a black male running east on Curtis Avenue, then north through the yards of homes across the street from her. She described the man as wearing a brown T-shirt and having a "brush cut" hairstyle.

A third such witness also testified that she witnessed a black male running east on Curtis Avenue, and through her yard. She testified that the man was wearing a brown T-shirt and blue shorts.

A fourth witness testified that she was driving home at the time of the shooting. She witnessed a man run past her car and huddle behind some bushes. The man was wearing a tan shirt and blue shorts, and she overheard him speaking on a cellular telephone, telling someone to "come get [him]." The witness identified Taylor as the man she saw that afternoon.

Officer Joel Strominger was on duty on the afternoon that Gaines was shot. Strominger heard a broadcast regarding the shooting which described the suspects' vehicle as a small, white four-door car without hubcaps. Strominger observed a parked white vehicle matching this description in the area of 40th Street and Redick Avenue. A black male was sitting in the driver's seat, and a black male wearing a white T-shirt and black shorts was standing outside the car, holding what appeared to be a brown T-shirt. Strominger then observed the driver make a U-turn and drive west on Redick Avenue, while the individual outside the car walked east on Redick Avenue. Strominger followed the car, ran a license plate check and determined the car was stolen. He then stopped the car, which was being driven by Joshua Kercheval.

Officer Jarvis Duncan had also responded to the broadcast regarding the shooting, and on his patrol of the area, he came upon a black male running north on 37th Street near Redick Avenue. Duncan and his partner witnessed the individual throw a brown shirt to the ground. Duncan and his partner ordered him to stop, arrested him, and took his cellular telephone into possession. The individual was later identified as Taylor. Strominger identified Taylor as the man he observed standing outside of the car driven by Kercheval. Taylor was transported to the Omaha Police Department's headquarters, where his hands and arms were swabbed for gunshot residue. Police also seized the brown T-shirt Duncan and his partner observed Taylor throw to the ground. Bryson identified the shirt seized as the one that was worn by one of the shooters.

Nolan was stopped by police for a traffic violation 8 days after the homicide. The car Nolan was driving was registered in his name. Nolan was in possession of a .44-caliber Smith & Wesson revolver, with a laser sight, which was hidden in his waistband. Nolan was arrested, and his car was impounded and searched by police. The search produced four spent 9-mm shell casings.

Kercheval testified at trial. He stated that on the morning of the shooting, he was at his home when Taylor and Nolan arrived in a white car. Kercheval had never seen the car before, and the three agreed to ride around for a while with Kercheval driving. They drove to the area of 45th Street and Curtis Avenue, and Kercheval noticed a man sitting in a parked car talking to a woman in a driveway. Taylor told him to stop the car and said, "There's the weedman." Kercheval pulled over and parked near 45th and Vernon Streets.

Kercheval testified that he remained in the car at all times, but that Taylor got out of the car on 44th Street and that Nolan got out of the car after it was parked on 45th Street. Kercheval then heard a series of gunshots, and he started to leave when he noticed Nolan running up the street. Nolan entered the car, and the two men drove east toward 42d Street. Nolan then jumped out of the car, and Kercheval made a U-turn and was then stopped by Strominger. Kercheval did not see Taylor between the time Taylor exited the car and when the police

brought Taylor to where Strominger had stopped Kercheval in the car.

Kercheval was in custody during his testimony, which he gave only after his arrest on a bench warrant for failure to appear when subpoenaed to testify earlier in the trial. Kercheval stated that he received a telephone call from Taylor the Friday prior to the scheduled trial date. During that telephone call, Taylor told Kercheval not to come to court, and Kercheval testified that he subsequently failed to appear because he felt threatened. The telephone call from Taylor to Kercheval was recorded by a system at the jail. A recording of the call was received into evidence and played for the jury. During the call, Taylor stated, among other things: "leave this shit alone"; "don't let me go out like this"; "if I don't come home, man, this shit is gonna go places where it don't even need to go, man"; and "make sure you stay out [of] the way." Prior to receiving the telephone call, Kercheval had told the prosecutor on two separate occasions that he would appear and testify.

The firearm and toolmark examiner employed by the Omaha Police Department, Daniel Bredow, examined the 9-mm handgun found near the scene of the crime. Bredow determined that 14 of the 16 9-mm shell casings found at the scene were fired from that gun. The other two casings were consistent with that weapon, but did not provide conclusive results because of damage to the casings. Bredow also determined that two of the four 9-mm casings found in Nolan's vehicle were fired from the 9-mm gun found near the scene. Additionally, Bredow examined the spent bullet retrieved from Gaines' body at the hospital and determined that it was fired from a .44-caliber weapon. Bredow could not determine whether it came from the weapon found on Nolan because of damage to the bullet.

The State also called Preston Landell as a witness. Landell is a customer operations coordinator for a cellular telephone company. Landell testified that he was familiar with how that company, during its course of business, recorded and kept records of cellular telephone calls. Over Taylor's objection, Landell was allowed to testify that, based on the call records of the telephone seized from Taylor and the telephone found in Nolan's car, there were a number of contacts between Taylor's telephone and Nolan's telephone on September 19,

2009, between 11 a.m. and 2 p.m. The State offered a computer printout of a spreadsheet Landall obtained, after receiving a subpoena from the Omaha Police Department for Taylor's call records for September 19 and 20, by inputting the target number for Taylor's telephone. Taylor objected to the admission of the printout on the ground of insufficient foundation pursuant to Neb. Evid. R. 901[1] and argued that Landell had not provided sufficient information regarding how the information contained in the spreadsheet was gathered, its accuracy, and how it is maintained.

The district court overruled Taylor's foundational objection on the basis of this court's opinion in *State v. Robinson*,[2] and stated, "[T]he records have sufficient — the foundation has been laid as to the trustworthiness of the business records, and . . . there is no evidence that would go to the untrustworthiness of the records themselves as testified to by . . . Landell."

Finally, the State called Allison Murtha, a forensic scientist employed by a "materials analysis company" with a forensics department which analyzes gunshot residue and other trace evidence. Murtha had examined the swabs taken from Taylor to test for gunshot residue. Taylor objected to Murtha's entire testimony on the ground of Neb. Evid. R. 403.[3] The objection was overruled, and Murtha's expert testimony was admitted.

Murtha testified that gunshot residue leaves traces of three elements, lead, antimony, and barium; that all three elements together form gunshot residue; and that when a gun is fired, particles of any of the three elements may fuse together. Murtha stated that if analysis produces particles composed of only one or two of the three elements, she could not definitively conclude that they came from the discharge of a firearm.

The testing instrument utilized by Murtha did not yield particle results containing all three components comprised by gunshot residue. However, upon performing a manual examination of the particles, Murtha identified a particle which

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[1] See Neb. Rev. Stat. § 27-901 (Reissue 2008).

[2] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[3] See Neb. Rev. Stat. § 27-403 (Reissue 2008).

was composed of all three gunshot residue components. The particle was found on the back of Taylor's left hand. In Murtha's opinion, the presence of the particle indicated that Taylor either "discharged a firearm," "was in proximity when a firearm was discharged," or "came into contact with an area or an environment that contained gunshot residue." However, Murtha was unable to form a conclusive opinion as to whether Taylor fired a gun.

Prior to submitting the case to the jury, the court instructed the jury on the material elements of first degree murder and its lesser-included offenses of second degree murder and manslaughter in jury instruction No. 4. Taylor objected to the step instruction included in instruction No. 4 because it did not conform to NJI2d Crim. 3.1. Taylor argued that the instruction required the jury to "acquit first" when considering the sequential order of first degree murder and its lesser-included offenses. The court overruled Taylor's objection.

Instruction No. 4 included three sections, each of which spelled out the material elements for the three grades of homicide. Each section of the instruction then stated that if the jury found the evidence beyond a reasonable doubt that each of the material elements set out in that section was true, the jury should find Taylor guilty of that crime. The first section went on to state: "If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in this section . . . , it is your duty to find [Taylor] not guilty of the crime of murder in the first degree." The second and third sections contained similar directives concerning second degree murder and manslaughter respectively, and the first two sections then directed the jury to "proceed to consider" the specified lesser-included offense in that event.

The court also instructed the jury on the definition of premeditation in jury instruction No. 8, which stated: "'Premeditated' is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act." Taylor objected to jury instruction No. 8 on the ground that it did not conform to the statutory

definition of premeditation under Neb. Rev. Stat. § 28-302 (Reissue 2008). The court overruled Taylor's objection on the ground that the instruction conformed to the Nebraska pattern jury instruction at NJI2d Crim. 4.0.

The district court also gave jury instruction No. 9 over Taylor's objection. That instruction provided:

> You have heard evidence regarding [Taylor's] alleged attempt to prevent [Kercheval] from testifying in this case. A defendant's attempt to prevent a state's witness from testifying may be evidence of the defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crimes charged. Such evidence may be considered by you in determining whether the [S]tate has proved the elements of each of the crimes charged beyond a reasonable doubt.

The jury found Taylor guilty of murder in the first degree and use of a deadly weapon to commit a felony. Taylor was sentenced to life imprisonment on the murder conviction and a consecutive term of 10 years' imprisonment on the weapon conviction. Taylor appeals.

III. ASSIGNMENTS OF ERROR

Taylor assigns, renumbered and restated, that the district court erred in (1) giving jury instruction No. 9, regarding an inference of guilt; (2) giving jury instruction No. 4, a step instruction regarding the lesser-included offenses; (3) giving jury instruction No. 8, regarding the definition of premeditation; (4) receiving expert opinion testimony regarding the presence of gunshot residue on Taylor's hands, in violation of rule 403; and (5) admitting cellular telephone records purporting to prove contacts between Taylor and his codefendant Nolan, on the basis of insufficient foundation.

IV. STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[4]

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[4] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[2] 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.[5] 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.[6]

[3] The exercise of judicial discretion is implicit in the determinations of relevancy under rule 403, and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.[7]

[4] 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. We review a trial court's ruling on authentication for abuse of discretion.[8]

V. ANALYSIS

1. Jury Instructions

Taylor assigns as error the giving of jury instructions Nos. 4, 8, and 9. Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[9]

(a) Inference of Guilt Based on Taylor's Alleged Attempt to Prevent State's Witness From Testifying

The district court gave jury instruction No. 9 over Taylor's objection. The instruction provided:

> You have heard evidence regarding [Taylor's] alleged attempt to prevent [Kercheval] from testifying in this

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[5] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[6] *Id.*

[7] See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[8] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[9] *State v. Miller, supra* note 4.

> case. A defendant's attempt to prevent a state's witness from testifying may be evidence of the defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crimes charged. Such evidence may be considered by you in determining whether the [S]tate has proved the elements of each of the crimes charged beyond a reasonable doubt.

Taylor argues that because the instruction did not explain to the jury that it had the option of not drawing the specified inference, it created an improper presumption of guilt.

The State argues that *State v. Thorpe*[10] supports the propriety of instruction No. 9. An instruction nearly identical to instruction No. 9 was given to the jury in *Thorpe*. However, on appeal, the defendant argued that the evidence adduced at trial did not sufficiently establish that he either attempted to intimidate or intimidated a witness. The defendant argued that the jury instruction should not have been given, because the issue of conscious guilt was not properly before the jury. The defendant in *Thorpe* did not propose any additions or corrections to the instruction and only argued that it should not be included in the jury instructions. Taylor, in contrast, argues that instruction No. 9 created an improper presumption or inference in favor of the State. *Thorpe* neither addresses this issue nor expressly approves of the language contained in instruction No. 9, and it is therefore not controlling.

The U.S. Supreme Court has determined that jury instructions which create mandatory presumptions are improper, but that those which create merely permissive presumptions are allowed.[11] In *Sandstrom v. Montana*,[12] an appeal from a prosecution for deliberate homicide, the Court held that because the jury, which was instructed that the law presumes a person intends the ordinary consequences of his voluntary acts, might have interpreted the presumption as conclusive or as shifting

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[10] *State v. Thorpe, supra* note 2.

[11] See *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

[12] *Id.*

the burden of persuasion, and because either interpretation would have violated the 14th Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt, the instruction was unconstitutional.

[5] In Nebraska, instructions as to presumptions in criminal cases must also conform to the requirements of Neb. Evid. R. 303(3),[13] which states:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Here, the challenged instruction is based on a common-law inference rather than a presumption. However, we have previously determined that references to "presumptions" in rule 303 necessarily include "inferences" in criminal cases as well.[14] Although frequent reference is made to "presumptions" in criminal cases, 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.[15]

[6] In *State v. Parks*,[16] a theft-by-receiving case, we interpreted the propriety of an instruction which provided, "'[P]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.'" We reversed the conviction based on that instruction. We held that when a

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[13] See Neb. Rev. Stat. § 27-303(3) (Reissue 2008).

[14] *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

[15] *Id.*

[16] *Id.* at 209, 511 N.W.2d at 778.

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.[17] Failure to meet these requirements constitutes reversible error.[18]

In *Parks*, the jury might have interpreted the instruction as conclusive that the State had proved one element of the crime charged. But here in Taylor's case, in the context of the "conscious guilt" doctrine, the instruction allowed the jury to presume that the defendant was guilty of the crimes charged. Here, the district court included the requirement that the inferred fact must be proved beyond a reasonable doubt, but the instruction failed to specify that the jury was not required to make the inference of guilt. Rule 303(3) is couched in mandatory terms. The instruction, as given in Taylor's case, failed to inform the jury that it was not required to draw the inference of guilt. This omission in the court's instruction No. 9 is fatal to the constitutional validity of that instruction.[19] Accordingly, the district court's failure to comply with the requirements of rule 303(3) is a ground for reversal of Taylor's convictions.

[7] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Taylor's convictions. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[20] 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.[21] We find that the witness testimony

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[17] See *State v. Parks, supra* note 14.

[18] *Id.*

[19] See *id.*

[20] See, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Parks, supra* note 14.

[21] *State v. McCulloch, supra* note 20.

and physical evidence linking Taylor to the crime, and the circumstantial evidence against Taylor, were sufficient to sustain the verdict. We therefore reverse the convictions and remand the cause for a new trial. Although our determination resolves this appeal, we address Taylor's remaining assignments of error because they are likely to recur on remand.

(b) Definition of Premeditation

The court instructed the jury on the definition of premeditation in jury instruction No. 8, which stated: "'Premeditated' is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act."

Taylor objected to jury instruction No. 8 on the ground that it did not conform to the statutory definition of premeditation under § 28-302. The court overruled Taylor's objection on the ground that the instruction conformed to the Nebraska pattern jury instruction at NJI2d Crim. 4.0.

The definition of "premeditation" in jury instruction No. 8 is nearly identical to the definition provided in NJI2d Crim. 4.0. However, § 28-302(3) provides: "Premeditation shall mean a design formed to do something before it is done." Thus, NJI2d Crim. 4.0 includes the statutory definition of premeditation contained in § 28-302(3), but adds the sentence "The time needed for premeditation may be so short as to be instantaneous provided that the intent to (act) is formed before the act and not simultaneously with the act." This explanation has apparently been added to further specify the meaning of "before" as it is used in § 28-302(3).

[8,9] This court has consistently determined that 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.[22] And we

[22] *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007). See, also, *State v. Robinson, supra* note 2; *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995).

have specifically stated: "The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed."[23] Jury instruction No. 8 conformed to our interpretation of premeditation as it is used in § 28-302(3). Accordingly, the district court did not err in giving instruction No. 8 on premeditation.

(c) Step Instruction

The court instructed the jury on the material elements of first degree murder and its lesser-included offenses of second degree murder and manslaughter in jury instruction No. 4. Taylor objected to the step instruction included in instruction No. 4 because it did not conform to NJI2d Crim. 3.1. Taylor argued that the instruction required the jury to "acquit first" when considering the sequential order of first degree murder and its lesser-included offenses. The court overruled Taylor's objection.

Taylor argues that the step instruction given erroneously required the jury to acquit Taylor of the greater charge and that this is not in conformity with our law because Nebraska is not an "acquit first" jurisdiction. Taylor also asserts that the instruction was given in error because it does not conform to the pattern instruction found at NJI2d Crim. 3.1.

[10,11] Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.[24] But although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.[25] NJI2d

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[23] *State v. McGhee, supra* note 22, 274 Neb. at 667, 742 N.W.2d at 504. See, also, *State v. Robinson, supra* note 2; *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002); *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999); *State v. Hansen, supra* note 22.

[24] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

[25] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

Crim. 3.1 includes a listing of the offenses which the jury is to consider and the elements of each offense. It then instructs the jury:

> You must separately consider in the following order the crimes of (here insert crimes charged beginning with the greatest and listing included crimes in sequence). For the (here insert greatest crime) you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of (here insert greatest crime) and [stop]. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, the (here insert first lesser included). You must proceed in this fashion to consider each of the crimes in sequence until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.

In *State v. Goodwin*,[26] we concluded that NJI2d Crim. 3.1 provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, and we encouraged the trial courts to utilize the current pattern instruction in circumstances where a step instruction on lesser-included homicide offenses is warranted. However, we did not find error in the court's use of a step instruction based on NJI Crim. 14.06.

Instruction No. 4 included three sections, each of which spelled out the material elements for one of the three grades of homicide. Each section of the instruction then stated that if the jury found the evidence beyond a reasonable doubt that each of the material elements set out in that section was true, the jury should find Taylor guilty of that crime. The first section went on to state: "If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in this section . . . , it is your duty to find [Taylor] not guilty of the crime of murder in the first degree." The second and third sections contained similar directives concerning second degree murder and manslaughter respectively, and the first two sections then directed the jury to

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[26] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

"proceed to consider" the specified lesser-included offense in that event. The State argues that instruction No. 4 conforms to our decisions in *State v. Bormann*[27] and *State v. Goodwin*.[28] The district court in *Bormann* gave a step instruction nearly identical to the one given below. While we agree that NJI2d Crim. 3.1 provides a clearer explanation of the jury's consideration of lesser-included offenses, we have previously determined that so-called acquittal first step instructions are not constitutionally deficient.[29]

The step instruction given in this case did not prevent the jury from considering Taylor's theory of defense; nor was his counsel restricted from arguing that Taylor did not have the intent to kill and should therefore be found guilty of the lesser offense of manslaughter. Further, Taylor fails to argue that he was prejudiced in any manner by the step instruction given. He instead rests his argument on the instruction's failure to conform to NJI2d Crim. 3.1. We determine that Taylor was not prejudiced by jury instruction No. 4. However, as we have previously noted, NJI2d Crim. 3.1 provides a clearer instruction, and we once again urge trial courts to use the pattern jury instruction in the future. And on remand, any step jury instruction given should conform to NJI2d Crim. 3.1.

2. Expert Testimony of Gunshot Residue

Taylor argues that the district court abused its discretion in allowing the State to present Murtha's testimony, over Taylor's rule 403 objection, that one particle of gunshot residue was found on a swab of Taylor's hands. Taylor argues that because jurors place elevated trustworthiness on expert testimony, the risk of unfair prejudice and jury confusion outweighed any probative value the evidence might have had. In other words, Taylor maintains that the gunshot residue tests had minimal probative value, but were likely given significant weight by the jury due to the expert testimony which accompanied the results.

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

[28] *State v. Goodwin, supra* note 26.

[29] *State v. Bormann, supra* note 27.

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.[30] 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.[31]

The exercise of judicial discretion is implicit in determinations of relevancy under rule 403, and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.[32] Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[12] Taylor's arguments on appeal largely focus on the weight that the gunshot residue evidence should be given. The weight and credibility of an expert's testimony are a question for the trier of fact.[33] Taylor had ample opportunity to cross-examine Murtha and to present argument to the jury that her testimony was unreliable. Taylor was not unfairly prejudiced by the admission of the evidence, and we cannot say that the district court abused its discretion in admitting Murtha's testimony. Taylor's arguments to the contrary are without merit.

3. Authentication of Cellular Telephone Records

Finally, Taylor argues that the cellular telephone records received by the district court were erroneously admitted, due to a lack of foundation. Taylor bases his foundational argument on the requirement of authentication provided by rule 901 of the Nebraska Evidence Rules. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.

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[30] *State v. Baker, supra* note 5.

[31] *Id.*

[32] *State v. Iromuanya, supra* note 7.

[33] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

We review a trial court's ruling on authentication for abuse of discretion.[34]

[13,14] Rule 901(1) states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901 does not impose a high hurdle for authentication or identification. A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[35] If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1).[36]

Taylor is incorrect in suggesting that Landell lacked the knowledge required to lay foundation adequate to support the authentication of the cellular telephone records. And again, Taylor had the opportunity to cross-examine Landell regarding the process by which the records were created and maintained, yet there is nothing in the record to suggest that the exhibits presented in this case were not trustworthy, as such records are presumed to be when sufficient foundation for the business records exception to the rule against hearsay is laid. The foundation of trustworthiness required by the business records exception is sufficient to satisfy the authentication requirement of rule 901.

Landell, a customer operations coordinator for a cellular telephone company, testified that his duties included keeping records for that company, including "caller-detail records." Landell testified that he was familiar with how the company, during the course of its business, created and kept records of cellular telephone calls. This process involved little more than the recording of information about a call on a hard drive of the company's computer servers. The telephone records made and saved included the number of the caller, the destination of

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[34] *State v. Epp, supra* note 8.

[35] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[36] *Id.*

the caller's number, where the call came from, and the time and length of the call. Landell further testified that the computer servers where the records are stored are serviced and tested by the company on a regular basis to make sure they are accurate. We determine that Landell's testimony provided sufficient authentication to support the admission of the cellular telephone records. Taylor's arguments to the contrary are without merit.

VI. CONCLUSION

For the foregoing reasons, the district court committed reversible error in giving jury instruction No. 9. Accordingly, we reverse, and remand the cause for a new trial. On remand, any step jury instruction given should conform to NJI2d Crim. 3.1, as discussed above.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE INTEREST OF THOMAS M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. THOMAS M., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

803 N.W.2d 46

Filed September 16, 2011. No. S-10-819.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
4. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
5. **Moot Question: Appeal and Error.** Under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.