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county board appealed from is based.[11] Here, TERC should have exercised its authority to make a determination pursuant to § 49-1201 of whether the return was timely mailed and therefore filed, based upon all of the evidence. We reverse, and remand with directions to the Court of Appeals to reverse the order of TERC and to remand the cause with directions to review all the evidence in the record before it and determine whether the return was filed in accordance with § 49-1201.

CONCLUSION

The Board applied the wrong law when it decided Midwest's appeal. TERC erred on the record when it failed to analyze the effects of this and when it failed to recognize that the record before it contained evidence not presented to the Board. Accordingly, we reverse the judgment of the Court of Appeals and remand the cause with directions to reverse the order of TERC and remand the cause with directions to TERC to determine whether the return was timely mailed and filed pursuant to § 49-1201.

REVERSED AND REMANDED WITH DIRECTIONS.

[11] § 77-5016(8).

STATE OF NEBRASKA, APPELLEE, V.
FRANCIS L. SEBERGER, APPELLANT.
815 N.W.2d 910

Filed July 13, 2012. No. S-10-1207.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews factual findings of the trial court for clear error.
3 **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.

5. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.
7. **Criminal Law: Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Francis L. Seberger, pro se.

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

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

HEAVICAN, C.J.

I. INTRODUCTION

Francis L. Seberger was convicted of first degree murder in 1998. His conviction was affirmed by this court in March 2010. In June 2010, Seberger filed a motion for postconviction relief. That motion was denied without an evidentiary hearing. Seberger appeals.

II. FACTUAL BACKGROUND

A full recitation of the facts surrounding Seberger's conviction for first degree murder can be found in this court's opinion in *State v. Seberger*.[1] As such, only a brief recitation of the underlying facts will be noted here.

Seberger and his wife were estranged. On May 31, 1997, she called the 911 emergency dispatch service to report that

[1] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

someone was trying to break into her residence. Shortly thereafter, her neighbor called to report a fire at that residence. Seberger's wife died from injuries sustained in the fire.

In the investigation that followed, Seberger was arrested and eventually charged with first degree murder and arson. He was convicted on the murder charge, but acquitted of arson. A capital sentencing hearing was held, after which Seberger was sentenced to life imprisonment. Seberger filed no direct appeal initially, but he subsequently filed a postconviction motion seeking a direct appeal. That relief was granted, and Seberger's direct appeal was filed with this court in 2009.

In his appeal, Seberger alleged that the district court erred in failing to make a determination as to the voluntariness of statements made by Seberger in the days following the fire and that he was denied effective assistance of counsel when his trial counsel (1) advised him to waive his right to a jury trial, (2) advised him not to testify at trial, and (3) failed to offer evidence that his wife sold oil-based candles which could have been the source of ignition of the fire.

We affirmed the district court's decision. We found no merit to Seberger's arguments regarding the voluntariness of his statements. We concluded that the record was insufficient to evaluate his claims of ineffective assistance of counsel.

Shortly after we issued our opinion, Seberger, acting pro se, filed a second motion for postconviction relief. In that motion, he raised Sixth Amendment concerns regarding his trial and appellate court representation. In its response to Seberger's motion, the State acknowledged that Seberger might be entitled to an evidentiary hearing with regard to whether he was properly advised as to his right to testify, but otherwise argued that the motion alleged only conclusions of law, not fact, and that thus the claims were insufficient.

The district court denied Seberger's motion in its entirety. In so doing, it first addressed Seberger's contention that appellate counsel was ineffective for failing to raise those allegations regarding the ineffectiveness of trial counsel which Seberger had raised in his first motion for postconviction relief. The district court concluded that Seberger's appellate

counsel was not ineffective for failing to raise all the issues Seberger suggested simply because he wished counsel to do so.

The district court then noted that all allegations of ineffective assistance of trial counsel were procedurally barred. The court discussed the allegations as related to ineffectiveness of appellate counsel and noted:

> Having concluded that [Seberger's] appellate counsel were reasonable in restricting their claims to those they selected to advance on appeal, this Court likewise finds no egregious error or oversight on the part of [Seberger's] trial counsel that was overlooked by his appellate counsel and/or the Nebraska Supreme Court. The case files and records do not support [Seberger's] claims. Furthermore, his trial counsel were entitled to some degree of latitude in their strategy of defending the case. This Court does not find anything upon its review to overcome the presumption defense counsel acted as reasonable and competent attorneys in their representation of [Seberger].

As such, the district court denied Seberger's postconviction motion without an evidentiary hearing. Seberger appeals.

III. ASSIGNMENTS OF ERROR

Seberger assigns that the district court erred in (1) failing to rule on his motion to amend his motion for postconviction relief, (2) failing to find that he received ineffective assistance of trial counsel, (3) failing to find that he received ineffective assistance of appellate counsel, and (4) denying his motion for postconviction relief without an evidentiary hearing.

IV. STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[2] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews factual findings of the trial court for clear error.[3]

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[2] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[3] See *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

V. ANALYSIS

1. Motion to Amend

[3] In his first assignment of error, Seberger argues that the district court erred by not ruling on his pending motion for leave to amend his motion for postconviction relief. This motion to amend does not appear in the record before us. It is incumbent upon an appellant to supply a record which supports his or her appeal.[4] And in this case, Seberger failed to do so.

Seberger notes in his brief that he placed the motion in question in the prison mail system. But Nebraska does not have a prison delivery rule,[5] and the fact that Seberger allegedly placed this motion to amend in the mail does not cause the motion to automatically be filed with the district court.

Seberger's first assignment of error is without merit.

2. Ineffectiveness of Trial Counsel

Before we address Seberger's remaining assignments of error, we note that while Seberger's brief contains many arguments, we will address only those that were alleged in his postconviction motion.[6]

[4] In his second assignment of error, Seberger argues that the district court erred in failing to find that his trial counsel was ineffective. But, as was noted by the district court, any claims of ineffective assistance of trial counsel are procedurally barred. A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.[7] And in this case, Seberger was represented by different counsel on appeal than he was at trial. Thus, any allegations of ineffective assistance of trial counsel should have been raised in Seberger's direct appeal. Seberger's second assignment of error is without merit.

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[4] *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).

[5] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

[6] See *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

[7] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

3. Ineffectiveness of Appellate Counsel

In his third and fourth assignments of error, Seberger contends that his appellate counsel was ineffective in various particulars and that the district court erred in not granting him an evidentiary hearing on those allegations. This case presents, in part, a layered ineffectiveness claim in which Seberger alleges, in part, the ineffectiveness of appellate counsel in failing to raise certain claims of ineffective assistance of trial counsel.

[5,6] A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[8] However, if the motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.[9]

(a) Failure to Raise Certain Issues on Appeal

Seberger's first claim is that his appellate counsel was ineffective in that he failed to raise on appeal certain issues which Seberger believed should have been raised. The district court rejected this contention, finding that counsel was not ineffective simply for failing to raise every issue presented to him by Seberger. We agree. In order to prove that appellate counsel was ineffective, Seberger must specifically allege how appellate counsel's failure to raise these issues violated Seberger's constitutional rights. He failed to do so, and this argument is without merit.

(b) Sufficiency of Evidence

Seberger next argues that his appellate counsel erred in failing to raise on appeal that the evidence was insufficient to support his conviction. The records and files in this case plainly do not support this conclusion—the evidence as presented was clearly sufficient to support Seberger's conviction. The

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[8] *State v. Iromuanya, supra* note 2.

[9] *Id.*

record included Seberger's admissions to spraying the victim with gasoline, as well as eyewitnesses placing Seberger at the victim's home at the time of the fire. This argument is without merit.

(c) Directed Verdict

In his postconviction motion, Seberger also contended that his appellate counsel erred in failing to raise the ineffectiveness of trial counsel in not properly moving for a directed verdict at the close of the State's evidence. The record in this case shows that trial counsel did, in fact, move that the case against Seberger be dismissed, both at the close of the State's evidence and after the defense rested. To the extent that Seberger does not believe that counsel's motion was sufficient, he does not further explain such reasoning in his postconviction motion.

[7] We also note that in a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence.[10] But the defendant may challenge the sufficiency of the evidence for the conviction.[11] Because Seberger presented a defense, he waived any right to raise on appeal the denial of the motion to dismiss. And as we have noted above, the record does not support any argument that the evidence was insufficient to sustain his conviction. Seberger is not entitled to relief on these grounds.

(d) Admission of Audiotape

Seberger next alleges that appellate counsel erred in failing to raise the ineffectiveness of trial counsel for not objecting to the admission of "[t]he audio tape," and further erred by failing to raise on appeal the error of the district court in admitting such audiotape into evidence.[12] In his postconviction motion, Seberger contended generally that this audiotape

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[10] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[11] *Id.*

[12] Brief for appellant at 21.

was "inaudible"; did not "reveal anything that could be used against [him], due to its poor and paltry condition"; was "highly prejudicial"; and lacked "probative value, because it existed unlawfully." Seberger appears to concede in that motion that his counsel objected to the admission of this audiotape, but did not do so "in a fashion whereas [sic] the court would have thought long and hard of the admissions of this said tape."

We reject Seberger's allegations regarding the audiotape for several reasons. Seberger does not identify in his motion which audiotape he objects to. But our review of the record shows that for each audiotape offered into evidence by the State, Seberger's counsel objected to its admission at trial.

We are not persuaded by Seberger's assertion that his trial counsel did not object in a sufficiently vehement and persuasive manner. The level of trial counsel's perceived vehemence, vigor, or persuasiveness is not relevant to an ineffective assistance of counsel claim. Rather, we are concerned simply with whether the proper objections were made.

We also note that Seberger fails to allege with any specificity how the audiotape was "highly prejudicial" or how it could be both prejudicial and "inaudible." And Seberger fails to explain how the audiotape "existed unlawfully."

Seberger's motion either alleges only conclusions of fact or law or is not supported by the records and files in this case, and as such, he is not entitled to relief.

(e) Testimony of Victim's Treating Physicians

Seberger next contends that his appellate counsel was ineffective by failing to raise errors relating to the admission of the testimony and curriculum vitae of the victim's treating physicians David Voight, Chester Paul, Paul Gobbo, and John Rudersdorf. Seberger appears to contend both that appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness and also that appellate counsel erred in failing to separately raise these issues on appeal. Though most of his allegations are general in nature, Seberger makes more specific allegations with respect to the testimony of Voight and Gobbo.

Seberger contended in his postconviction motion that Voight's testimony was highly prejudicial and was inadmissible and also that trial counsel erred by not objecting to this testimony or by raising only "paltry" objections which should have been further raised on appeal.

But Seberger does not explain in what way this testimony was prejudicial, and we therefore conclude that Seberger's motion alleges only conclusions of law. The records and files in this case do not support Seberger's allegation that his counsel did not properly object; the record shows that Seberger's counsel filed a motion in limine to exclude Voight's testimony and objected often during Voight's testimony. As noted above, the fact that Seberger finds these objections to be "paltry" does not affect our analysis.

With respect to Gobbo, Sebeger asserts that Gobbo's testimony was inconsistent in that Gobbo first testified that the victim's cause of death could have been the fire, but later testified that her cause of death could also have been pneumonia. A review of the record refutes that allegation—Gobbo testified that in his opinion, the victim's cause of death was pneumonia caused by her burns.

With respect to Seberger's more general contention that the testimony of Paul and Rudersdorf, as well as all curriculum vitae, was prejudicial, we note that Seberger does not explain how this evidence was prejudicial.

We conclude that either Seberger has alleged conclusions of law or the records and files do not support his allegations, and he is not entitled to relief.

(f) Photographs of Victim

Seberger also alleges that his appellate counsel was ineffective by failing to raise errors relating to the admission of photographs of the victim into evidence. Seberger again contends that his appellate counsel erred both in failing to raise on direct appeal the admission of the photographs and in failing to raise trial counsel's ineffectiveness for failing to object to the photographs. Seberger contends generally that the photographs were more prejudicial than probative.

A review of the record shows that trial counsel filed a motion in limine regarding these photographs and objected to the introduction of the photographs at trial. And we have reviewed the photographs and conclude that they are necessary to an understanding of the medical testimony regarding the severity of the victim's injuries. As such, the records and files in this case show that Seberger is also not entitled to relief on these grounds.

(g) Admission of Other Evidentiary Items

In his postconviction motion, Seberger also generally argued that

> [t]he evidence submitted, offered, and admitted in this criminal matter (i.e. audio tape, photographs, testimony from witnesses, Death Certificate of victim, the curriculum vitae, lab report, map, photos of tangible items, diagrams, book of matches, gas cap and nozzle, VHS tape, autopsy report, beer bottle, CPU, paper bag, billfold, fire extinguisher, and medical report, etc.) was either not objected to, or not challenged by counsels during introduction.

(We note that some of these items are raised elsewhere in his motion and may be addressed separately within this opinion.)

Seberger does not explain on what grounds any or all of these pieces of evidence were inadmissible. As such, his motion asserts only conclusions of law, and he is not entitled to relief.

(h) Testimony of Law Enforcement

Seberger alleges that several members of law enforcement who testified made statements that were either coerced or concocted and that the evidence given by these witnesses was conflicting. Seberger argues that his appellate counsel erred by failing to raise trial counsel's lack of objection to the testimony of these individuals.

Though Seberger makes specific reference to particular law enforcement personnel in his motion, he fails to allege which of their statements or testimony was false or concocted and further fails to explain how the evidence given by these

individuals was conflicting. As such, Seberger has alleged only conclusions of law, which are insufficient to entitle him to relief.

In addition to his general allegations, Seberger specifically takes issue with the testimony of an investigator with Nebraska's State Fire Marshal's office. Seberger complains that the State asked the fire investigator leading questions and was allowed to offer the investigator's opinion testimony. In addition, Seberger argued in his postconviction motion that the investigator gave inconsistent statements throughout his testimony. Seberger also contends that this testimony was hearsay because the State failed to show that it was "not hearsay" under Neb. Rev. Stat. § 27-801(4) (Reissue 2008).

As with his more general allegations concerning law enforcement testimony, Seberger fails to allege which statements made by the investigator were the result of leading questions, which testimony was opinion testimony, why that opinion testimony was in error, and what statements made by the investigator were inconsistent. As to his hearsay argument, Seberger misapprehends the definition of hearsay statements as opposed to those that are "not hearsay" under § 27-801(4). In sum, Seberger again alleges only conclusions of law, which are insufficient to entitle him to postconviction relief.

(i) Testimony of Other Witnesses

Seberger also alleges that the testimony given by other witnesses was variously outside the scope of the criminal matter, irrelevant, prejudicial, filled with redundant questioning, speculative, or hearsay and that appellate counsel erred by failing to assign on appeal trial counsel's failure to object to this evidence. But in each instance, Seberger fails to allege the testimony or statements to which he objected. So Seberger again alleged only conclusions of law, which are insufficient to entitle him to relief.

(j) Vehicle Stop and Seizure

Seberger argues that his appellate counsel erred in failing to allege trial counsel's ineffectiveness in failing to file a motion to suppress the seizure of his person following an illegal traffic stop. But a review of the record contradicts Seberger's

assertion that the stop was illegal. The officer who effected the stop on Seberger testified that he was dispatched to the victim's residence on the report of a burglary in progress. While en route, a second dispatch reported a fire at the residence. The officer testified that as he approached the residence, he saw flames emanating from the first floor of the residence and further observed a vehicle backing out of the driveway of the residence. When the vehicle was stopped, the driver was identified as Seberger. The records and files in this case clearly establish that there was probable cause to support the stop of Seberger's vehicle and show that Seberger is not entitled to relief on this allegation.

(k) Prosecutorial Misconduct

Seberger alleges that appellate counsel was ineffective for failing to raise his trial counsel's ineffectiveness in not objecting to the misconduct of the prosecutor during closing arguments. In particular, Seberger complains that

> [r]emarks like, "kudos to the defendant who at 10:35 p.m. thought it might be wise to take her back to court," "intentionally doing an act without just cause," and "he must have smelled gasoline on her," were highly prejudicial and egregious in nature because it imparted untrustworthiness from the bench trial and proceedings held during arguments.[13]

Seberger compares these statements to the ones made in *State v. Barfield*.[14] He noted in his postconviction motion that this court was "not having it" in *Barfield* and should also not now "condone this prejudicial and egregious act."

We have reviewed the closing arguments in this case. They do not approach the concerns noted by this court in *Barfield*, in which we recognized that "'[h]yperbole in closing arguments is hardly rare, and juries should be given credit for the ability to filter out oratorical flourishes.'"[15] We went on in *Barfield* to

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[13] *Id.* at 31-32.

[14] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[15] *Id.* at 513, 723 N.W.2d at 313-14.

condemn the closing arguments of the prosecution, which not only involved extreme hyperbole with respect to the defendant, but also called all defense attorneys, including the defendant's counsel, liars. We noted:

> [T]he remarks made by the prosecutor, especially the prosecutor's statement to the effect that defense lawyers are liars, are of a very serious nature. In addition, the prosecutor's unacceptable remarks do not reflect a single, isolated instance, but were numerous. Moreover, because the disparaging remark as to defense attorneys was made during rebuttal, defense counsel had no opportunity to respond to and mitigate the last impression left with the jury before deliberations: that defense counsel, like all defense lawyers, was a liar.[16]

Conversely, this case presents, at most, mild hyperbole used by the prosecution in making its rebuttal. And we note, too, that unlike the case in *Barfield*, which was tried to a jury, Seberger's case was tried to the bench. We will presume that the trial court was able to disregard any hyperbole and focus on the evidence presented on the issue on Seberger's guilt. The records and files show that Seberger is not entitled to relief as to the prosecution's closing arguments.

(l) Intoxication Defense

Seberger alleged in his postconviction motion that his appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not "mount[ing] a vigorous defense" on the issue of Seberger's intoxication. But the record shows that trial counsel asked questions relating to Seberger's level of intoxication and addressed the issue in his closing argument. Also lending support to the conclusion that trial counsel addressed this sufficiently is the specific finding made by the trial court that Seberger had been drinking alcohol on the evening in question. Moreover, the record shows that during sentencing, the three-judge panel noted that intoxication was a mitigating factor for the imposition of the death penalty. As we stated earlier, to the extent Seberger argues that his counsel was not

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[16] *Id*. at 515, 723 N.W.2d at 315.

vigorous enough in presenting that defense, we reject this contention. The records and files show that the intoxication defense was adequately raised and that Seberger is not entitled to relief on that basis.

(m) Discovery Violation

Seberger also asserted in his postconviction motion that "[t]he prosecuting attorney obviously violated the discovery rules and order of the court by failing to provide the defense with a copy of each one of the named above [sic] officers[']s investigative and police reports prior to their testimony" and that such violated his due process rights under the 14th Amendment to the U.S. Constitution. Seberger argued that these reports could have been used to impeach the officers' testimony and that the failure to provide the reports means that all of this testimony was inadmissible and should have been stricken. Seberger further alleged that his trial counsel should have known the reports had not been provided and that appellate counsel erred in not raising the trial court's error and the prosecutor's misconduct on appeal.

To the extent Seberger alleges that any failure of the State to provide the investigative reports of any officer would have resulted in the inadmissibility of that officer's testimony, he is incorrect. Consistent with the 14th Amendment, a prosecutor must fail to turn over evidence "favorable to an accused"[17] before a due process violation is found to have occurred.

And in this case, Seberger has failed to allege any facts which would indicate what information was in those reports that might be favorable to him, let alone allege what information might be included which could be used to impeach the testimony of these officers. As before, Seberger alleges conclusions of law. Given the absence of more specific allegations as to what these reports might include, we must conclude that Seberger is simply fishing for evidence which he hopes might aid him in obtaining postconviction relief. This he cannot do. Seberger is not entitled to relief on these grounds.

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[17] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(n) Right to Testify

Finally, Seberger alleged in his postconviction motion that his appellate counsel erred in failing to raise trial counsel's failure "to provide objectively reasonable advice to [Seberger] so that he could make a knowing, intelligent, and voluntary waiver of the right to testify in his own behalf." Seberger further averred that had he received such advice, he would have testified in his own behalf, and that this testimony would have established his innocence. In particular, Seberger contended that he would have testified "that he did not threatened [sic] the victim; that he did not take part in any derogatory tactics inducive [sic] of threatening overtones; and that he did not pose a threat to the victim in any shape, form or fashion."

We note that Seberger claimed in his motion that his appellate counsel failed to assign and preserve this issue on direct appeal. But a review of Seberger's direct appeal shows that appellate counsel did raise this issue, among other claims of ineffective assistance of counsel. This court declined to reach the issue on direct appeal, concluding that the record was insufficient to analyze it. Seberger alleged again in his postconviction motion that he was not advised of this right and that if he had been, he would have testified.

This court recently decided *State v. Iromuanya*,[18] which presented a similar procedural posture—the defendant claimed in his postconviction motion that trial counsel was ineffective in failing to advise him whether he should testify, and that motion for relief was subsequently denied without an evidentiary hearing. In that case, we concluded that the denial was proper because a review of the record affirmatively showed that the defendant had been advised, in that instance by the district court, of his right to testify in his own behalf; the record further showed the defendant had waived that right.

But in this case, we do not have such a record—there is no indication on the record before us whether Seberger was properly advised of and waived his right to testify in his own behalf. We noted that we lacked such a record on direct appeal,

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[18] *State v. Iromuanya, supra* note 2.

and because there was no evidentiary hearing granted in this case, we still lack such a record.

Based upon his allegations, we conclude that Seberger has adequately pled facts which, if true, would have been a violation of his constitutional right to testify in his own behalf. As such, the district court erred when it failed to grant Sebeger an evidentiary hearing on this issue.

VI. CONCLUSION

The district court erred in denying Seberger an evidentiary hearing on his allegation that he was not properly advised of his right to testify. We reverse the decision of the district court on this point and remand the cause for an evidentiary hearing on this single allegation. In all other respects, the decision of the district court is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RAYSHAWN C. ABRAM, APPELLANT.
815 N.W.2d 897

Filed July 13, 2012. No. S-11-057.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Jurisdiction: Courts: Appeal and Error.** After a party perfects an appeal to an appellate court, the lower courts are generally divested of subject matter jurisdiction over that case.
6. ____: ____: ____. The mere filing of a petition for certiorari does not automatically stay proceedings in a lower court and does not divest a trial court of jurisdiction.