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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.

7. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Constitutional Law: Self-Incrimination: Due Process.** In order to protect the defendant's right against self-incrimination, the 5th Amendment to the U.S. Constitution as applicable to the states by the 14th Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.
9. **Trial: Words and Phrases: Appeal and Error.** Structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal. They are distinguished from trial errors, which generally occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.
10. **Constitutional Law: Appeal and Error.** The U.S. Supreme Court has limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.
11. **Constitutional Law: Courts: Appeal and Error.** Constitutional error is subject to automatic reversal only in those limited instances where a court has determined that the error is structural.
12. **Constitutional Law: Jury Instructions: Appeal and Error.** Most constitutional errors, including constitutional errors in the giving of instructions, can be harmless.
13. **Jury Instructions: Appeal and Error.** Harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings.
14. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **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.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for a new trial.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

CONNOLLY, WRIGHT, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and PIRTLE, Judges.

MILLER-LERMAN, J.

NATURE OF CASE

Rayshawn C. Abram appeals his convictions for attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness. Regarding his jurisdictional challenge, we reject Abram's claim that the district court for Douglas County was divested of jurisdiction when Abram filed a petition for writ of certiorari part way through the proceedings. Regarding the substance of his appeal, Abram claims, inter alia, that the district court erred when it gave the jury a written instruction stating that the jury must consider Abram's refusal to testify as an admission of guilt. Although we reject Abram's argument that the giving of this instruction was structural error, we conclude that it was error and that it was not harmless; we therefore reverse Abram's convictions and remand the cause for a new trial.

STATEMENT OF FACTS

The charges against Abram arise from an incident in which Sarah Schramm was shot. The State's case focused on Abram's alleged role before, during, and after the shooting. The State's theory did not assert that Abram was the shooter.

Schramm had been dating Abram's brother, Tieres Abram, when Tieres committed suicide in 2007. Members of Tieres' family blamed Schramm for his death. On June 23, 2008, Abram's and Tieres' cousin, Jerrell Abram, encountered Schramm at Tieres' gravesite. Jerrell called his brother, Jamaal Abram, who told Jerrell to take Schramm to another location. Jerrell forced Schramm to come with him and told her he was taking her to see Tieres' mother, Denise Smith. After driving Schramm around over several hours, Jerrell brought her to a location where they met Jamaal. Schramm was shot several times but survived and was able to get help. Schramm and Jerrell testified that Jamaal shot Schramm.

Jamaal was convicted of attempted first degree murder, use of a weapon to commit a felony, and criminal conspiracy.

His convictions and sentences were affirmed by the Nebraska Court of Appeals in a memorandum opinion. *State v. Abram*, No. A-10-219, 2010 WL 5384184 (Neb. App. Dec. 21, 2010) (selected for posting to court Web site). Abram was also charged in connection with the shooting of Schramm. The charges against Abram included attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

At Abram's trial, Schramm testified that while Jerrell was driving her around on June 23, 2008, he questioned her about Tieres' death. During the drive, Jerrell made and received numerous telephone calls in which it appeared to Schramm that he was being told where to take her. When they reached the final destination, she saw a parked vehicle that she recognized as one Abram had been driving about 1 month earlier when he had stopped her and confronted her about Tieres' death. Schramm did not testify that she saw Abram in the vehicle; instead, she saw Jamaal walk out from among some trees. Jamaal and Jerrell pulled her out of the car. Jamaal held a gun to her back, walked her away from the car, and began firing shots. She fell to the ground after the first shot, heard a few more shots, and then heard people running and vehicles starting and quickly leaving.

Jerrell testified at Abram's trial that on June 23, 2008, he went to visit Tieres' grave with his cousin Sharie Colbert and two of her friends. Jerrell saw Schramm there and told her she should not be there. Jerrell called Jamaal in an attempt to reach their aunt, Smith, who was Tieres' mother, because he thought Schramm should meet with Smith to talk about Tieres' death. Jamaal told Jerrell he would call him back. Jerrell then forced Schramm to get into his car with the purpose of taking her to see Smith. Jerrell gave Colbert the keys for Schramm's car, and Colbert and her friends took Schramm's car away.

Jerrell drove around with Schramm, and while they were driving, he had various telephone calls with Jamaal, trying to determine where to take Schramm to meet with Smith. As Jerrell was parked waiting at a location near Smith's house, he received a call from Abram, who told him to take Schramm to another location where he would see Abram's vehicle.

When Jerrell reached the location, he saw Abram's vehicle. He then saw Jamaal walk out from among some trees, approach Schramm, and take her out of his vehicle. Jerrell heard Jamaal ask Schramm what happened to Tieres, and then he saw Jamaal shoot Schramm.

After the shooting, Jamaal ran to Abram's vehicle and got into the back seat. Abram's vehicle left, and Jerrell followed it. Abram's vehicle stopped, and Jamaal jumped out and threw the gun into a sewer. They continued on to Jerrell and Jamaal's mother's house, where Jerrell saw Abram in the driver's seat of his vehicle. Jerrell and Jamaal went to the backyard to burn their clothes. When they returned to the vehicles, Jerrell saw Abram come out of Jerrell and Jamaal's mother's house. They all got into Abram's vehicle, where a friend of Abram's was sitting in the front passenger seat. As they drove around, Abram told the passengers not to say anything about what had happened.

The next day, Jerrell learned that Schramm had survived the shooting. Jerrell testified that Abram arranged for Jamaal to leave Omaha and go to Atlanta, Georgia, where he was arrested on July 3, 2008. After Jamaal was arrested, there was a warrant issued for Jerrell's arrest. Abram helped Jerrell to hide out by giving him car rides, a telephone, and video games to pass the time. Abram arranged a meeting with Jerrell, Colbert, and Colbert's two friends who were with Jerrell and Colbert at the grave. Abram told all of them not to say anything about the night of the shooting. Abram also told Jerrell he should burn the car he was driving that night; Jerrell did not, but he had the car cleaned at a detail shop to remove any indication that Schramm had been inside the car. Jerrell was arrested in February 2009. He reached a plea agreement with the State, pursuant to which he testified against Jamaal and Abram.

Prior to Abram's trial, he moved to continue the preliminary hearing on the basis that he had filed a petition for writ of certiorari with the U.S. Supreme Court to review an earlier ruling by the district court. Abram argued that the court did not retain jurisdiction while the petition to the U.S. Supreme Court was pending. After determining that the filing of a petition

for certiorari does not operate as a stay, the court denied the motion to continue the preliminary hearing.

A jury trial was conducted. During the jury instruction conference, neither party objected to the proposed jury instruction No. 17, which in written form stated: "The Defendant has an absolute right not to testify. The fact that the Defendant did not testify *must be* considered by you as an admission of guilt and must not influence your verdict in any way." (Emphasis supplied.) Before reading the instructions to the jury, the court informed the jurors that six copies of the written instructions would be given to them during deliberations and that they would each be given a copy if they wanted. The court then read the instructions to the jury. According to the record, the court read instruction No. 17 as follows: "The Defendant has an absolute right not to testify. The fact that the Defendant did not testify must *not* be considered by you as an admission of guilt and must not influence your verdict in any way." (Emphasis supplied).

The jury found Abram guilty of all charged counts—attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness. The court sentenced Abram to consecutive sentences of imprisonment for 40 to 50 years on the attempted murder conviction, 40 to 50 years on the weapon conviction, and 20 to 30 years on the criminal conspiracy conviction. The court sentenced Abram to imprisonment for 1 to 5 years on the conviction for tampering with a witness and ordered the sentence to be served concurrently with the sentence for criminal conspiracy.

Abram appeals his convictions.

ASSIGNMENTS OF ERROR

Abram claims that the district court erred (1) when it denied his motion to continue the preliminary hearing and rejected his argument that the filing of a petition for writ of certiorari to the U.S. Supreme Court divested the court of jurisdiction and operated as a stay and (2) when it gave the jury the written instruction stating that it must consider his failure to testify as an admission of guilt. Because of our resolution of these assignments of error, we do not reach Abram's remaining

assignments of error regarding jury selection, evidentiary rulings, and effective assistance of trial counsel.

STANDARDS OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012). We independently review questions of law decided by a lower court. *Id.*

[3,4] 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. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). 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. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

ANALYSIS

Abram's Filing of a Petition for Writ of Certiorari to the U.S. Supreme Court Did Not Divest the District Court of Jurisdiction.

Abram claims that because he had filed a petition for writ of certiorari to the U.S. Supreme Court, the district court lost jurisdiction and the district court erred when it denied his motion to continue the preliminary hearing on that basis. We consider this assignment of error first, because the district court's continuing jurisdiction and our appellate jurisdiction are effectively challenged by this assignment of error. However, we conclude that Abram's filing of the petition for certiorari did not divest the district court of jurisdiction and that therefore the court did not err when it denied the motion to continue.

In ruling on the motion to continue, the court cited the Nebraska Court of Appeals' unpublished opinion in *In re Interest of Nicholas C.*, No. A-01-958, 2002 WL 31002490 (Neb. App. Aug. 6, 2002) (not designated for permanent publication), for the proposition that while the actual granting of a writ of certiorari by the U.S. Supreme Court may operate as a stay, the mere filing of a petition for writ of certiorari

does not operate as a stay. We agree with the reasoning of the Court of Appeals and adopt the reasoning in that unpublished opinion.

[5] We have held that after a party perfects an appeal to an appellate court, the lower courts are generally divested of subject matter jurisdiction over that case. *Russell v. Kerry, Inc.*, 278 Neb. 981, 775 N.W.2d 420 (2009). Based on this proposition of law, Abram argues that his petition for certiorari to the U.S. Supreme Court divested the district court of jurisdiction. However, Abram does not cite any authority to the effect that filing a petition for writ of certiorari constitutes "perfecting an appeal." To the contrary, authority from other courts and the rules of the Nebraska appellate courts and of the U.S. Supreme Court indicate that it does not.

One state appellate court has held that "while the actual *granting* of a writ of certiorari by the United States Supreme Court operates as a stay, the mere *filing* of a petition for certiorari does not." *Ligon v. Bartis*, 254 Ga. App. 154, 561 S.E.2d 831, 833 (2002) (emphasis in original). The Court of Appeals for the Eighth Circuit has stated that neither the filing nor the granting of a petition for certiorari operates as a stay. *McCurry v. Allen*, 688 F.2d 581 (8th Cir. 1982). In this case, the U.S. Supreme Court did not grant Abram's petition for certiorari and therefore we need not determine whether the granting of certiorari would divest the state district court of jurisdiction. The only issue before us is whether Abram's filing of a petition for writ of certiorari divested the district court of jurisdiction.

Our resolution of this issue is informed by the procedural rules of the Nebraska appellate courts and of the U.S. Supreme Court which indicate that the filing of a petition for certiorari does not automatically stay proceedings in the state court. Nebraska court rules of appellate practice provide a procedure for a party to obtain a stay of the mandate issued by a Nebraska appellate court during the pendency of the party's attempted appeal to the U.S. Supreme Court. See Neb. Ct. R. App. P. § 2-114(A)(2). The rule requires the party to apply for a stay within 7 days from the date of the Nebraska appellate court's disposition of the case and requires a written showing

that a federal question is involved. Similarly, the U.S. Supreme Court rules provide that a party may apply to the U.S. Supreme Court to stay enforcement of the judgment being appealed and that the party must comply with certain procedures, including a requirement that the party has first requested a stay in the court below. See Sup. Ct. R. 23. Furthermore, the U.S. Supreme Court rules provide that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" which "will be granted only for compelling reasons." Sup. Ct. R. 10. With these rules in mind, we have reviewed the record and find nothing to indicate that Abram identified a compelling federal question and explicitly sought a "stay" of state court proceedings while his petition for certiorari was being considered by the U.S. Supreme Court.

[6] Given these rules and the stated unlikelihood that certiorari will be granted, we conclude that 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. We therefore reject Abram's claim that the district court erred when it denied his motion to continue on the basis that he had filed a petition for writ of certiorari.

The Court Committed Reversible Error When It Gave the Jury an Erroneous Written Instruction Regarding the Import of Abram's Decision Not to Testify in His Defense.

Abram next claims that the district court erred when it gave the jury a written instruction stating that it must consider his failure to testify as an admission of guilt. We reject Abram's argument that the error was structural error and instead determine that it was error subject to harmless error review. As explained below, we conclude that the error was not harmless and that it requires reversal of Abram's convictions.

[7] Abram concedes that he did not object to the written instruction at trial but urges us to review the instruction as plain error. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the

integrity, reputation, and fairness of the judicial process. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). The error in the written instruction is plainly evident from the record. As we discuss below, the error prejudicially affects Abram's substantial constitutional right against self-incrimination and is not harmless. It therefore would result in damage to the integrity, reputation, and fairness of the judicial process to leave the error uncorrected. We therefore review the challenged instruction.

[8] The challenged instruction stated in part that the fact that Abram did not testify *must be* considered by the jury as an admission of guilt. This statement is an incorrect statement of the law. In order to protect the defendant's right against self-incrimination, the 5th Amendment to the U.S. Constitution as applicable to the states by the 14th Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore clear that an instruction requiring the jury to consider a defendant's failure to testify as an admission of guilt is an error of constitutional magnitude.

[9] However, we must determine whether, as Abram urges, the error is structural error requiring automatic reversal or whether, as the State urges, the error is subject to harmless error review. We have said that structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal. *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009). They are distinguished from trial errors, which generally occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

[10,11] We have stated:

> The Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of

> members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.

State v. Bjorklund, 258 Neb. 432, 504, 604 N.W.2d 169, 225 (2000) (citing *Arizona v. Fulminante, supra*), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). Constitutional error is subject to automatic reversal only in those limited instances where a court has determined that the error is structural. *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009). The fact that the error in this case was a constitutional error does not in itself mean that it was structural error.

[12] The U.S. Supreme Court has recognized that most constitutional errors, including constitutional errors in the giving of instructions, can be harmless. See *State v. Payan, supra* (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). See, also, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In *Neder*, the Court determined that "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" and that such instructional error was not structural but was subject to harmless error review. 527 U.S. at 9 (emphasis omitted). In *Chapman v. California, supra*, the prosecutor commented on the defendants' failure to testify and the trial court charged the jury that it could draw adverse inferences from their failure to testify. The Court in *Chapman* applied a harmless error analysis to this constitutional error. See, also, *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (finding prosecutor's reference to defendants' failure to testify to be harmless error).

Against this framework distinguishing between structural and nonstructural constitutional errors, Abram argues that the erroneous instruction in this case is similar to a constitutionally deficient reasonable doubt instruction that the U.S. Supreme Court determined to be structural error in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The Court in *Sullivan* reasoned that because of the deficient instruction, there had been no jury verdict of guilty beyond

a reasonable doubt, and that therefore harmless error review considering whether the verdict could have been rendered in the absence of the error was utterly meaningless. Because there was no proper verdict, "[t]here [was] no *object*, so to speak, upon which harmless-error scrutiny can operate." 508 U.S. at 280 (emphasis in original). Abram argues that the erroneous instruction in this case deprived him of a proper jury verdict and that it cannot be subjected to harmless error review. We do not agree.

[13] The U.S. Supreme Court has said that harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings. *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008). In addition to the examples recited above, the Court has found certain instructional errors to be properly subject to harmless error review. See, *Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (jury instruction imposing mandatory presumption in violation of due process rights subject to harmless error review); *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (failure to instruct on presumption of innocence subject to harmless error review). We conclude that the erroneous instruction in this case did not vitiate the jury's verdicts in the way a constitutionally deficient reasonable doubt instruction would do. The reasonable doubt instruction in *Sullivan v. Louisiana, supra*, vitiated the entire verdict, because the verdict was presumably based on an erroneous standard of proof. In the present case, the written instruction erroneously instructed the jury how it must consider Abram's failure to testify. But the jury was still instructed that it must reach its verdicts based on the evidence and that it must find Abram guilty beyond a reasonable doubt in order to convict. We conclude that the error in this case did not affect the framework within which the trial proceeded or vitiate the entire verdicts in the manner which occurred in *Sullivan*. We conclude that the error in this case is not structural error requiring automatic reversal and that instead it is subject to harmless error review.

[14] We have stated that harmless error review looks to the basis on which the trier of fact actually rested its verdict; the

inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012). We conclude that we cannot say that the jury's verdicts in this case were surely unattributable to the erroneous written instruction.

We have said that in reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). We have also said that an instruction will not be held erroneous simply because of a typographical error which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. *State v. Swiney*, 179 Neb. 230, 137 N.W.2d 808 (1965).

The State asserts that the erroneous instruction in this case was harmless error. The State contends that when the portion of jury instruction No. 17 at issue is read with the rest of the instruction and other instructions, it is clear the jury was not misled or confused, and that the jury would understand there is a typographical error. The State adds that the instructions as a whole correctly state the law and are not misleading.

The State submits that the jury was adequately instructed that Abram had a right not to testify, because jury instruction No. 14 stated, "Any person has the right to invoke his/her right to remain silent as provided in the Fifth Amendment of the United States Constitution," and the first part of jury instruction No. 17 stated, "The Defendant has an absolute right not to testify." The State further notes that after the written instruction No. 17 erroneously stated, "The fact that the Defendant did not testify *must be* considered by you as an admission of guilt," the instruction continues, "and must not influence your verdict in any way." (Emphasis supplied.) The State emphasizes that the court's spoken instruction stated correctly, "The fact that the Defendant did not testify *must not be* considered by

you as an admission of guilt . . . .” (Emphasis supplied.) The State argues that considering the totality of the instructions, it was clear to the jury that Abram had a right not to testify, and that his decision to exercise that right should not influence the jury's verdicts.

Regarding the typographical error, the State argues it would have been clear to the jury that the written form of instruction No. 17 contained a typographical error and that the word “not” had been inadvertently omitted. The State's argument finds some support in this court's decision in *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977), where this court concluded that the inadvertent substitution of the word “able” for “unable” in an instruction was not reversible error. In *Fleming Realty & Ins., Inc.*, however, it was clear from the instruction itself and other instructions that the jury would not have been confused or misled as to the applicable law, and the error occurred in a civil case, where the constitutional right against self-incrimination was not at issue.

In evaluating the State's argument that the error was harmless when considered in the context of the totality of the instructions, we believe there are important considerations which outweigh this argument. In this regard, we note that although the spoken instruction was correct, the erroneous written instruction was given to the jury for its use during deliberations. We believe under these circumstances that the jury would resolve the confusion and inconsistency between a fleeting oral instruction and a tangible written instruction in favor of the latter.

With regard to evidence, we have noted the danger that a jury will give undue emphasis to written testimonial evidence to which it has access in the jury room during deliberations. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). See, also, *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000) (discussing tape-recorded telephone conversation made available to jury during deliberation). Although instructions are not evidence and although it is not improper for the court to give the jury a written copy of instructions, these cases support the proposition that if there is an inconsistency between oral and written instructions, the jury will more likely follow the

written instruction because it has been given more emphasis by being made available during deliberations. Contrary to the State's suggestion, we will not presume in this case that the jury detected a typographical error and supplied the missing language in the challenged instruction.

We recently concluded in *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011), that where a jury instruction was an incorrect statement of the law, and where one instruction effectively negated another instruction and the two provisions could not be read harmoniously, prejudicial error occurred and required reversal. The same reasoning and result are warranted in this case.

If taken at face value, the challenged instruction would require the jury to consider Abram to have admitted guilt because he did not testify. The risk and corresponding prejudice due to a misunderstanding of the applicable law must be considered in light of the constitutional principles at issue. The most obvious constitutional right at issue is the criminal defendant's Fifth Amendment right against self-incrimination. His or her exercise of that right resulting in his or her silence is not to be considered as evidence of guilt. *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). In addition, we believe that the Sixth Amendment's command to afford jury trials in serious criminal cases is also implicated. See *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The U.S. Supreme Court has noted that a trial judge is prohibited from directing a verdict for the prosecution in a criminal trial by jury, *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), and further stated that "a trial judge is prohibited from . . . directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). Although the challenged instruction did not direct the jury to convict Abram, the erroneous written instruction, to the effect that it must consider his failure to testify as an admission of guilt, had the tendency to remove the fact finding regarding guilt from the jury in this criminal case in a manner

incompatible with robust exercise of the right to jury trial afforded by the Sixth Amendment.

In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the U.S. Supreme Court applied harmless error analysis to a case in which the prosecutor commented on the defendants' failure to testify and the trial court charged the jury that it could draw adverse inferences from their failure to testify. The Court concluded that the error was not harmless, because

> the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of [defendants] to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence [defendants] had served as irrefutable witnesses against themselves.

386 U.S. at 25. We recognize that the present case may be distinguished from *Chapman* in that the jury was not "continuously and repeatedly" told that Abram's silence could be taken as an admission of guilt. However, the erroneous instruction was written and was sent to the jury, thus giving it more weight than a correct oral instruction. Furthermore, the erroneous instruction in this case went further than the court's instruction in *Chapman* which merely stated that the jury could consider the defendants' silence as an admission of guilt; the challenged instruction in this case stated in part: "The fact that the Defendant did not testify *must* be considered by you as an admission of, guilt . . . ." (Emphasis supplied.) Furthermore, the erroneous instruction could not be harmonized with correct instructions, leading to jury confusion. See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

In light of the important constitutional safeguards at issue, we determine that the risk that the jury at a minimum was confused by the instruction and at worst thought it was required to consider Abram as having admitted guilt prevents us from concluding that the error was harmless. We cannot say that the jury's verdict on any of the charges was "surely unattributable" to the improper written instruction advising the jury that Abram admitted guilt when he chose not to testify. We

therefore conclude that the error is prejudicial and requires reversal of Abram's convictions for attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

Abram May Be Retried on Remand.

[15] Having concluded that the erroneous written instruction was reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Abram's convictions. If it was not, then double jeopardy forbids a remand for a new trial. See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012). But 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. *Id.*

After reviewing the record, we conclude that the evidence presented at trial, including Schramm's and Jerrell's testimony recounted above and the testimony of other witnesses, was sufficient to support the verdicts against Abram. We therefore conclude that double jeopardy does not preclude a remand for a new trial and that Abram may be retried on all the charges—attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

We Need Not Consider Abram's Remaining Assignments of Error.

Because we have reversed Abram's convictions, we need not reach his remaining assignments of error. Abram assigned error to issues related to jury selection, evidentiary rulings, and effective assistance of trial counsel. These issues either are not likely to recur on remand or must be evaluated in the context of a particular trial, and therefore review of the court's rulings in this trial would not necessarily determine how the court should rule in a new trial. We therefore do not consider Abram's remaining assignments of error.

CONCLUSION

The filing of Abram's petition for writ of certiorari during the pendency of this action did not divest the district court of

jurisdiction, and the district court did not err when it denied the motion to continue. However, we conclude that the district court did err when it gave a written instruction stating that the jury must consider Abram's refusal to testify as an admission of guilt. Although such error is not structural error, we conclude that the error was not harmless and that it requires reversal of Abram's convictions. Because there was sufficient evidence to support the convictions, we remand the cause for a new trial on the charges of attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EDDIE R. KIBBEE, APPELLANT.
815 N.W.2d 872

Filed July 13, 2012. No. S-11-361.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
5. **Constitutional Law.** Under both the federal Constitution, U.S. Const. art. I, § 10, and the state Constitution, Neb. Const. art. I, § 16, no ex post facto law may be passed.
6. **Constitutional Law: Statutes: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.